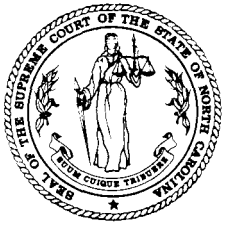
NORTH CAROLINA REPORTS

VOLUME 327

SUPREME COURT OF NORTH CAROLINA



26 JULY 1990

5 DECEMBER 1990

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1991

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327 N.C.

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THE SUPREME COURT
OF
NORTH CAROLINA

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	JAMES A. BEATY, JR.	Winston-Salem
	WILLIAM Z. WOOD, JR.[10]	Winston-Salem
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	LESTER P. MARTIN, JR.	Mocksville
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DARIUS B. HERRING, JR.	Fayetteville

1. Elected to a new position and sworn in 1 January 1991.
2. Elected to a new position and sworn in 1 January 1991.
3. Elected and sworn in 16 December 1990 to replace Leon H. Henderson, Jr.
4. Elected and sworn in 1 January 1991 to replace Howard E. Manning, Jr.
5. Elected to a new position and sworn in 1 January 1991.
6. Elected and sworn in 1 January 1991 to replace Darius B. Herring, Jr.
7. Elected to a new position and sworn in 1 January 1991.
8. Elected to a new position and sworn in 1 January 1991.
9. Elected to a new position and sworn in 1 January 1991.
10. Elected and sworn in 1 January to replace James J. Booker.
11. Elected to a new position and sworn in 1 January 1991.
12. Elected and sworn in 1 January 1991 to replace Sam A. Wilson, III.
13. Elected and sworn in 1 January 1991.
14. Elected and sworn in 1 January 1991 to replace Raymond L. Warren.
15. Elected to a new position and sworn in 1 January 1991.

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	JAMES F. AMMONS, JR.	Fayetteville
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	WILLIAM Y. MANSON	Durham
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	SPENCER B. ENNIS	Burlington
	ERNEST J. HARVIEL	Burlington
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	STANLEY PEELE	Chapel Hill
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	J. STANLEY CARMICAL	Lumberton
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	CLARENCE W. CARTER	King
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	William B. Reingold	Winston-Salem
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	Margaret L. Sharpe	Winston-Salem
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	Michael E. Helms	Wilkesboro
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	Roy Alexander Lyerly	Banner Elk
	Charles Philip Ginn	Boone
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	Ronald E. Bogle	Hickory
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	Nancy L. Einstein	Lenoir
	Robert E. Hodges	Morganton
	Robert M. Brady[22]	Lenoir
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	L. Stanley Brown	Charlotte

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	WILLIAM H. SCARBOROUGH	Charlotte
	RESA L. HARRIS	Charlotte
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	MARILYN R. BISSELL	Charlotte
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	ROBERT S. CILLEY	Brevard
	D. FRED COATS[29]	Nebo
30	JOHN J. SNOW (Chief)	Murphy
	DANNY E. DAVIS	Waynesville
	STEVEN J. BRYANT	Bryson City

1. Appointed and sworn in 3 December 1990 as Chief Judge to replace John T. Chaffin who retired 30 November 1990.
2. Elected and sworn in 3 December 1990.
3. Appointed and sworn in 11 January 1991 to replace Wilton R. Duke, Jr. who took office on Superior Court 1 January 1991.
4. Elected to a new position and sworn in 3 December 1990.
5. Elected to a new position and sworn in 3 December 1990.
6. Elected and sworn in 3 December 1990.
7. Elected to a new position and sworn in 3 December 1990.
8. Elected to a new position and sworn in 3 December 1990.
9. Elected to a new position and sworn in 3 December 1990.
10. Elected to a new position and sworn in 3 December 1990.
11. Appointed and sworn in 1 January 1991 as Chief Judge to replace William C. Gore, Jr. who took office on Superior Court 1 January 1991.

12. Elected and sworn in 2 January 1991.
13. Elected and sworn in 1 October 1989 as Chief Judge.
14. Appointed and sworn in 3 December 1990 as Chief Judge to replace Peter M. McHugh who took office on Superior Court 1 January 1991.
15. Elected and sworn in 3 December 1990.
16. Elected to a new position and sworn in 3 December 1990.
17. Elected to a new position and sworn in 3 December 1990.
18. Elected and sworn in 3 December 1990.
19. Elected to a new position and sworn in 3 December 1990.
20. Elected and sworn in 3 December 1990.
21. Elected to a new position and sworn in 3 December 1990.
22. Elected to a new position and sworn in 3 December 1990.
23. Elected to a new position and sworn in 3 December 1990.
24. Appointed and sworn in 25 January 1991 to replace Robert P. Johnston who took office on Superior Court 1 January 1991.
25. Elected to a new position and sworn in 3 December 1990.
26. Elected to a new position and sworn in 3 December 1990.
27. Elected and sworn in 3 December 1990 to replace Robert L. Harrell who retired 30 November 1990.
28. Appointed and sworn in 1 January 1991 as Chief Judge to replace Loto Greenlee-Caviness who took office on Superior Court 1 January 1991.
29. Appointed and sworn in 16 January 1991.

ATTORNEY GENERAL OF NORTH CAROLINA

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Deputy Attorney General for Training and Standards
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JOHN H. WATTERS
TERESA L. WHITE
THOMAS B. WOOD
THOMAS D. ZWEIGART

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29	Alan C. Leonard	Rutherfordton
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16B	ANGUS B. THOMPSON	Lumberton
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Given over my hand and seal of the Board of Law Examiners this the 7th day of September, 1990.

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

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. BOBBY RAY BROWN

No. 661A85

(Filed 26 July 1990)

1. Jury § 6.2 (NCI3d) — murder — jury selection — objection to form of question

There was no prejudice or abuse of discretion during jury selection in a murder prosecution where the trial court sustained an objection to defendant's question to venirepersons as to whether they were comfortable with the fact that it might be necessary for him to question police procedure, but the objection was sustained to the form of the question and defendant soon asked the same question in slightly different form.

Am Jur 2d, Jury §§ 136 et seq.

2. Jury § 7.11 (NCI3d) — murder — jury selection — feelings about death penalty — excusal for cause

There was no error during jury selection for a murder prosecution in the excusal of six prospective jurors for cause due to their feelings about the death penalty where the prospective jurors all agreed that they would automatically vote

against the imposition of the death penalty regardless of the circumstances, all of the prospective jurors declared their position unequivocally and defendant made no showing that rehabilitative questioning would have elicited different answers.

Am Jur 2d, Jury §§ 165, 202, 289.

3. **Criminal Law § 1318 (NCI4th)— murder—jury selection—requested instruction on bifurcated procedure—denied**

There was no abuse of discretion during jury selection in a murder prosecution from the trial court's refusal to give a requested preliminary instruction regarding the bifurcated procedures in capital trials where the court chose instead to give the pattern jury instruction for that situation.

Am Jur 2d, Trial § 601.

4. **Jury § 6 (NCI3d)— murder—jury selection—individual voir dire and sequestration denied—no error**

There was no error in a murder prosection in denying defendant's motion for individual voir dire and sequestration of jurors.

Am Jur 2d, Jury §§ 196, 197.

5. **Criminal Law § 162 (NCI3d)— murder—cross-examination about rumors—objection to relevancy properly denied—no further objection**

There was no error in a murder prosecution in allowing the prosecutor to cross-examine a defense witness with regard to rumors concerning defendant's guilt where defendant objected only once, that objection was based on relevancy, the evidence was clearly relevant because it related to a matter elicited on direct examination, no objection was made on hearsay grounds, and similar evidence was later admitted without objection.

Am Jur 2d, Witnesses § 492.

6. **Criminal Law § 460 (NCI4th)— murder—prosecutor's argument—inferences arising from rumor**

The trial court did not err in a murder prosecution by allowing the prosecutor to argue inferences arising from testimony about rumors in the community where the testimony was elicited by defendant on direct examination and defendant

neither raised an objection on hearsay grounds at trial nor asked for an instruction limiting the jury's consideration of the evidence to impeachment purposes. The prosecutor's remarks were based upon facts in evidence and the reasonable inferences to be drawn therefrom.

Am Jur 2d, Trial §§ 218 et seq.

7. **Criminal Law § 468 (NCI4th)— murder—prosecutor's arguments**

There was no gross error requiring that a guilty verdict be set aside in a murder prosecution where the prosecutor implied during his closing argument that defense counsel was attempting to obscure the truth from the jury, that an accomplice who had testified for the State had not gained an untoward advantage by virtue of his plea arrangement, that the accomplice had been terrorized prior to trial even though there was no evidence in the record to that effect, and that defendant's alibi witnesses had motives to lie to protect him.

Am Jur 2d, Trial §§ 218 et seq.

8. **Criminal Law § 82.1 (NCI3d); Constitutional Law § 40 (NCI3d)— statements overheard at jailhouse telephone—admissible**

There was no error in a murder prosecution from admitting an SBI agent's statement concerning defendant's telephone call from jail because defendant's statement was not made to his attorney, the statement was not made in confidence in that defendant spoke in the presence of the agent from a telephone located by the elevator inside the county jail, and defendant's constitutional right to counsel was not implicated.

Am Jur 2d, Homicide §§ 337 et seq.

9. **Homicide § 25 (NCI3d)— murder—instruction on intent to kill omitted—no error**

There was no plain error in a first degree murder prosecution from the omission of the portion of the pattern jury instruction which states that defendant formed the intent to kill over some period of time, however short, before he acted where the defense was total innocence, as presented by several alibi witnesses, and not that defendant shot the victim in an unpremeditated manner. The evidence presented no issue as to defendant's state of mind or the existence of a calculated

plan to kill the victim, but called for a determination of the credibility of the witnesses. The jury's verdict of guilty of first degree murder and conspiracy to murder demonstrates its belief that the State's witness testified truthfully regarding the existence of a premeditated plan to kill the victim; additional instructions on the element of premeditation would have had no effect on the verdict.

Am Jur 2d, Homicide § 501.

10. **Homicide §§ 23.1, 25.2 (NCI3d)— murder—instructions—proximate cause and premeditation and deliberation—no error**

There was no plain error in a murder prosecution in the court's instruction on proximate cause and premeditation and deliberation as distinguished between the acts of defendant and those of an accomplice where the jury charge, when viewed as a whole, was replete with instructions directing the jury's consideration to defendant's acts alone.

Am Jur 2d, Homicide § 501.

11. **Criminal Law § 793 (NCI4th)— murder—failure to give acting in concert instruction—no error**

There was no error in a murder prosecution from the trial court's failure to instruct on acting in concert even though the prosecutor argued acting in concert to the jury because the absence of an acting in concert instruction could only have benefitted defendant.

Am Jur 2d, Homicide §§ 482, 496.

12. **Criminal Law § 959 (NCI4th)— murder—recanted testimony—motion for appropriate relief denied**

The trial court did not err in a murder prosecution by denying defendant's motion for appropriate relief on the basis of recanted testimony where the trial court concluded that it was not reasonably well satisfied that the trial testimony was false; the evidence did not compel a ruling in defendant's favor; the evidence supported the trial court's finding that the events which led to the State's witness's inconsistent statements and trial testimony were in substance before the jury which returned the guilty verdict; defendant's argument that the jury's belief of the trial testimony was irrelevant was rejected in the context of this case; and the findings of

fact upon which the denial of the motion for appropriate relief was based were supported by the evidence.

Am Jur 2d, Homicide § 558.

13. Criminal Law § 959 (NCI4th)— murder—motion for appropriate relief—withheld statements—denied

The trial court did not err in a murder prosecution by denying defendant's motion to amend his motion for appropriate relief to assert as an additional ground the State's alleged withholding from defense counsel of statements by a witness where the proffered evidence bore remotely, if at all, on defendant's guilt. Moreover, the statements were admitted at the post-conviction hearing so that the judge could consider how the statements reflected on the recanted testimony issue, precisely the relief sought by defendant.

Am Jur 2d, Homicide § 558.

14. Criminal Law § 951 (NCI4th)— murder—motion for appropriate relief—introduction of letter by witness—no error

There was no prejudice in a motion for appropriate relief following a murder conviction in allowing cross-examination of a State's witness regarding a letter allegedly written by the witness admitting guilt where the court stated in its order denying the motion that it had not considered any evidence elicited by the State about the letter.

Am Jur 2d, Homicide § 558.

15. Criminal Law § 1352 (NCI4th)— murder—sentencing—mitigating circumstance—unanimity requirement

A death sentence was set aside and remanded for a new hearing under the *McKoy* harmless error analysis where there was evidence to support at least some of the mitigating circumstances submitted, yet the jury found none of the circumstances.

Am Jur 2d, Criminal Law § 628.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing the sentence of death entered by *Wood, J.*, at the 23 September 1985 Criminal Session of Superior Court, ROCKINGHAM County. Heard in the Supreme Court 13 February 1990.

Lacy H. Thornburg, Attorney General, by William N. Farrell, Jr., Special Deputy Attorney General, for the State.

Kenneth S. Broun and J. Anthony Penry for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of murder in the first degree and conspiracy to commit murder. The jury recommended the death sentence for the murder. The trial court sentenced accordingly, and imposed a sentence of ten years imprisonment for the conspiracy conviction. We find no error in the guilt-innocence phase of the trial on either charge. Because we find prejudicial error in the sentencing phase on the murder charge, we remand for a new capital sentencing hearing.

Richard Lee Hopper, known as Ricky, was the State's principal witness at trial. He was twenty-one years old at the time of trial and had known defendant for approximately eight years. Defendant had worked for Hopper's father. After Hopper's father died when Hopper was thirteen, Hopper began spending most of his free time at the farm where defendant lived, and Hopper looked up to defendant almost as a father. Hopper quit school during the tenth grade.

Hopper testified that on 1 August 1981 he was at the farm with defendant. Defendant asked Hopper if he wanted to make some money and Hopper responded that he did. Defendant then said a man "had to be done away with" and Hopper could make $1,500. Hopper was scared, but the money "sounded tremendously good." He saw defendant next on 3 August at the farm. Defendant asked if Hopper thought he could go through with it, and he said he could. Hopper testified: "I asked why he had to be killed and he said that he was going to testify in a federal grand jury in Roanoke, Virginia, against some powerful people." Defendant assured Hopper he would get $1,500 and told him that Wayne Tilley was the person they were supposed to kill. Defendant said Lindley Tate would pay them for killing Tilley.

On 4 August 1981 Hopper borrowed his mother's car because his own car and defendant's car had loud engines and would be easy to identify. He met defendant at the farm. Defendant told Hopper they would leave a few minutes after 9:00 p.m. Defendant loaded a double-barreled sawed-off shotgun. Hopper drove his

mother's car to Tilley's home with defendant sitting in the passenger seat. As they approached Tilley's home, Tilley was standing by his mailbox. When they were about six to eight feet from Tilley, defendant fired the first shot from the window of the passenger side of the car. Tilley fell to his knees. Hopper had stopped the car when defendant fired the first shot. When he saw that Tilley did not fall, Hopper was scared Tilley was still alive, so he jumped out of the car with the shotgun, leaned across the trunk of the car, and shot him. Hopper testified he did not see anyone else around, but did see a bright-colored compact car sitting across the street from Tilley's house. Hopper drove away and rode around for approximately twenty minutes, then dropped defendant off at the farm. Hopper asked defendant about an alibi, and defendant said that his was taken care of. Hopper went to his mother's house at around 9:30 p.m. He then went to the Cook Block, a section of town where the young people hang out, and stayed there until about 2:00 a.m. Defendant paid Hopper $1,500 on 5 August 1981 in the living room of defendant's home. Hopper testified that he was supposed to drive only and had not planned to shoot Tilley.

In 1984 Hopper began living with Michelle Tuttle, her sister Bamby, and defendant. Michelle was sentenced to jail for shoplifting in March 1985. She gave Hopper a message from a detective who wanted to talk to Hopper about the Tilley case. He spoke to the district attorney, who told him that if he was not the "trigger man," and if he would testify truthfully, he would be granted immunity for his actions in connection with the Tilley murder and could go into the federal witness protection program. Hopper said he needed more time to think. At the time he had no charges pending against him. In May 1985, while in custody on charges relating to a stolen truck, he gave a statement to Detective Page implicating defendant and himself in the Tilley murder. In this statement Hopper stated that he was driving defendant's van rather than his mother's car at the time of the murder, and that defendant fired both shots.

Hopper testified that on the Friday before trial the district attorney told him the details were not working out and he thought Hopper was holding back on him. Hopper then admitted to firing the second shot. Hopper testified that it was his understanding that in exchange for testifying truthfully in defendant's murder trial, he would be prosecuted for murder and conspiracy to commit murder but the district attorney would recommend a suspended

sentence and probation. Hopper was not going into the federal witness relocation program, but would receive money to help him relocate. The money he received would help defray his expenses, but he was not "mak[ing] a profit out of this." While waiting for defendant's trial, the FBI and SBI had assisted Hopper and his family by providing a place for them to stay and buying food for them. Hopper estimated that the agencies spent $75-$125 per week for these expenses.

On cross-examination, Hopper testified that he was charged with uttering a forged instrument in 1985. That charge was still pending at the time of trial. In May 1985 Hopper was also charged with unauthorized use of a motor vehicle, larceny, and breaking and entering; all these charges were also still pending at the time of trial. Hopper gave his first statement to Detective Page after these charges had been filed against him. In that statement, Hopper stated that he and defendant drove around in Virginia for over an hour after shooting Tilley before returning to the farm, and that he spent the night at the farm after the murder rather than going back to his mother's house. Hopper stated that his direction of travel was north toward Virginia on Friendly Road. Detective Page then read into the record Hopper's statement made 16 May 1985, when he was arrested on charges relating to a stolen truck.

Thomas J. Barrington, Special Agent with the FBI, testified that the murder victim, Clarence Wayne Tilley, came to the SBI in 1979 to offer information about drug trafficking in Rockingham County, North Carolina and Wise County, Virginia. Tilley provided information to agents in both the SBI and FBI until his death in 1981, when he was preparing to testify before a federal grand jury.

Robert Craig, an FBI agent, testified that in June 1981 a reporter obtained a copy of a search warrant affidavit written by Agent Craig and based upon information given by Tilley. The court had ordered the affidavit sealed to protect the confidentiality of Tilley and other informers, but the affidavit was left in a file drawer and discovered by the newspaper reporter. The reporter then wrote a story based on the information in the affidavit, so that if one knew the background of the information, it was possible to guess the source. The newspaper story was published approximately six weeks before Tilley's death. Tilley received threatening telephone calls prior to his death. Tilley had been offered protection under the federal witness protection program but did not want to relocate.

Agent Craig testified further that Ricky Hopper had been offered protection under the federal witness protection program in connection with his testimony at trial. It was Craig's understanding that Hopper would not go to jail and would receive an allowance until he got established in a new area. Hopper had not entered the witness protection program officially, but had received assistance from the FBI, including money for living expenses, to relocate on his own.

Samuel S. Page, a detective with the Rockingham County Sheriff's Department, testified that in the spring of 1985 he had a conversation with Michelle Tuttle, who later married Ricky Hopper. Detective Page told Ms. Tuttle that if Ricky had information about the Tilley murder, he might be able to get into the witness protection program. Detective Page met with Ricky Hopper several times and encouraged him to make a statement. Hopper did make a statement in May 1985. On cross-examination, Detective Page agreed that Ms. Tuttle had been in jail during the spring of 1985, and during the time that she was giving Hopper messages her sentence was modified to weekend incarceration so that she could take care of her young child.

Terry Johnson, an SBI agent, served defendant with a warrant on 29 August 1981 in connection with the Tilley murder. Agent Johnson took defendant to the county jail for questioning. From there, defendant used a telephone located near the elevator to make a telephone call. Johnson observed defendant dial a number and say, "Listen, get in touch with Benny, that goddamn Ricky Hopper has done run his mouth."

Agent Johnson also read into the record a statement made by Ricky Hopper on 23 May 1985. In this statement, Hopper maintained that defendant fired both shots. As Hopper and defendant drove from the murder scene, they headed toward Virginia but went straight to the farm, where they both went to bed. Hopper stated he never saw the sawed-off shotgun again after the murder. In his previous statement, he said he saw it for the last time the next morning when he got up to cook breakfast.

Agent Johnson then testified that he and other investigators got together with the district attorney before the trial and decided Hopper was not being truthful. They confronted Hopper and told him "he better get his heart right, that I did not believe completely his original statement and now was the time." Johnson did not

tell him what discrepancies existed between other witnesses' stories and his own. Hopper wept and admitted he used his mother's car in the killing. Johnson stated that was not the only problem, then asked him if he had killed Tilley. Hopper admitted that he had fired one of the shots, then gave a statement which comported with his testimony at trial. At the time Hopper admitted killing Tilley, he had no assurance that a suspended sentence would be recommended, as he knew the offer of immunity depended on his not being the "triggerman." Johnson then read into the record Hopper's statement taken 20 September 1985.

Patricia Carter lived across the street from Tilley prior to his death. She testified that on 4 August 1981 at 9:00 p.m. she left her home to go to her grandmother's house down the street. As she left, she saw a small blue car parked on the side of the road across the street from the Tilley residence. When she returned home around 9:30 p.m., Tilley had been shot and an ambulance was at the scene. She did not notice whether the small blue car was still parked across the street.

Debra Craig testified that on 4 August 1981 she was visiting her in-laws' home half a block from the Tilley residence on the opposite side of the street. As she arrived, she saw a car parked across the street from the Tilley home. Its headlights were on, and it was sitting still. As she pulled into the driveway she heard a loud noise, then another. Recognizing the second noise to be a gunshot, she ran into the carport and waited until the car drove away. As it went under the street light she saw that it was of medium size and a light color. Ms. Craig also saw a car parked on the same side of the street as the Tilley house.

Nancy Sasserman lived in the house next to the Tilley home. On 4 August 1981 she was looking out a window when she saw a car pull up across the street, cut off its headlights, and put on its parking lights. It was turning dark outside but was not yet totally dark. The car sat for a minute or two, then Ms. Sasserman heard a man's voice and saw a gun blast come from the front of the car, almost over the wheel. Seconds later another gun blast came from the back of the car. She heard a single car door shut. The car drove off "like nothing had happened." Ms. Sasserman ran outside and found Wayne Tilley lying in the road, shot. Ms. Sasserman was later recalled as a witness by defendant to establish

that the car from which the shots were fired was travelling south toward Aiken Road.

Dr. Anthony Macri, an expert in pathology, performed an autopsy on the victim's body. He found two sets of wounds, one on the left side of the abdomen and the other on the right side of the chest. Each set of wounds consisted of multiple entry wounds or holes. Inside the body Dr. Macri found extensive organ injury and shotgun pellets. A bruised area was present on the left forearm, bearing the imprint of shotgun wadding. Dr. Marci testified that either of the gunshot wounds would have been fatal. He estimated that the victim lived less than a minute after being shot.

Reid Boyd testified for the defense. He stated he had been charged with the murder of Wayne Tilley, but all charges were dropped by the State. At one time Boyd had confessed to participation in the murder, but this was a false confession given under intense pressure by state and federal agents. One agent had "roughed him up" in a motel room, pushing him against a wall and striking him twice. He stated that Agent Johnson informed him of the pertinent details of the case in an effort to persuade him to implicate defendant and Ricky Hopper. On cross-examination, Boyd acknowledged that he had initially lied about his participation in the murder. He agreed that everything he knew about the murder came through rumors and hearsay and was not necessarily true. Boyd had given a statement at one time implicating two males named Gary and Steve. Boyd stated they were driving a yellow Dodge van and invited Boyd to go riding around with them. The ride culminated in driving by Tilley's house and shooting him. Boyd repeatedly denied remembering the content of other statements given to the authorities, insisting they were all composed of lies and were based on the rumors heard around Eden concerning the Tilley murder. Boyd acknowledged that he eventually told police Gary and Steve were pseudonyms for Ricky Hopper and defendant, but stated that this was again based on rumor and not his personal knowledge. Boyd agreed that the original rumors were that defendant and Hopper had committed the murder.

Defendant presented alibi evidence. Mike Vaughn testified that he saw defendant on 4 August 1981 in Vaughn's home in Danville from 4:00 to 6:00 p.m. Vaughn and defendant then went together to Curtis Adkins' home in Callans, Virginia. At 8:00 p.m. the two, along with Jeff Pritchard, went to the home of some female friends

in Martinsville, Virginia, and stayed until after 10:00 p.m. When they left the last place, defendant was arrested for drunk driving. The citation was issued at 10:33 p.m. in Martinsville, Virginia. On cross-examination, Vaughn agreed that he was an alcoholic in 1981 as well as at the time of trial, and that he was drinking heavily on the night in question. In a prior sworn statement to a grand jury Vaughn had stated that he had passed out for several hours that evening.

Curtis Adkins testified that on 4 August 1981 defendant, Mike Vaughn, and Jeff Pritchard came to his home at around 6:00 p.m. and left at around 8:30 p.m. Darlene Barnes testified that defendant, Mike Vaughn, and Jerry Pritchard came to her home on 4 August 1981 at around 9:15 p.m. and stayed a little over an hour. Ms. Barnes sister, Priscilla Chilton, corroborated her sister's testimony.

Paul Ramsey testified that he spent from 5:00 to 9:00 p.m. with Ricky Hopper on 4 August 1981. Phillip Rieson testified that Ricky Hopper arrived at the Cook Block five or ten minutes after 9:00 p.m. on 4 August 1981. Ten or fifteen minutes after Hopper arrived, police cars went by on their way to the Tilley residence. On cross-examination, Rieson admitted that he did not know exactly what time Hopper arrived, and that the police cars could have been on their way to a different destination or could have been dispatched to the scene later than 9:15 p.m.

Doris Hopper, Ricky's mother, stated that Ricky came home before 9:25 p.m. on 4 August 1981 and asked her if she had heard about Wayne Tilley getting shot. Ricky said he was going down to Cook Block to see what he could find out about the shooting. Mrs. Hopper looked at her kitchen clock, which was accurate, and said, "It's 9:25, Ricky, it is too late for you to go out." She saw him in his bed asleep at 3:30 a.m. when she got up to deliver papers.

The jury found defendant guilty of conspiracy to commit murder and murder in the first degree. Following a capital sentencing hearing, the jury found the following aggravating circumstances: defendant had been convicted previously of a felony involving the use of violence to the person, the murder was committed for pecuniary gain, and the murder was committed to hinder the enforcement of the laws. The jury found none of the five mitigating circumstances submitted. Upon finding that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, the jury recommended a sentence of death.

On 22 May 1987 defendant filed a motion for appropriate relief with this Court, based on Hopper's recantation of his testimony implicating defendant and himself in the murder. Submitted with the motion as an exhibit was an affidavit signed by Hopper, dated 22 August 1986, in which Hopper affirmed that his trial testimony was false. On 16 October 1987 this Court entered an order allowing defendant's motion for appropriate relief for the limited purpose of directing the Superior Court, Rockingham County, to hold an evidentiary hearing to determine whether defendant was entitled to relief on the issue of recanted testimony pursuant to *State v. Britt*, 320 N.C. 705, 360 S.E.2d 660 (1987).

The matter was heard in Superior Court, Rockingham County, at the 15 February 1988 Criminal Session before Judge Griffin. Hopper testified that his trial testimony was false to the extent that he implicated defendant or himself in the murder of Wayne Tilley. He had no knowledge of defendant's participation in the killing. Hopper stated that he was motivated to render false testimony to avoid conviction on unrelated charges concerning a stolen truck, and that his girlfriend (later wife) Michelle pressured him to cooperate with the authorities. In addition to the funds he reported at trial, Hopper testified that while he was waiting to testify at defendant's trial, he and Michelle received free lodging and $250 to $300 per week for food and necessities. This was later reduced to $75 to $125 per week. After the trial, Hopper received a lump sum of $2,500 for relocation expenses. Michelle received a check for $5,000, which was a reward from the Governor's Office for her part in bringing evidence against defendant to light.

Hopper testified that on 20 September 1985 Agent Johnson and District Attorney Allen took him to an SBI office and told him that his earlier statement differed in several respects from the statements given by witnesses. According to Hopper, the district attorney told him what the discrepancies were, and allowed him to change his statement to cure the variations. Hopper stated that he did not change his testimony regarding the direction in which he drove the car because he thought this discrepancy would prevent defendant's conviction.

On 3 May 1988 Judge Griffin entered an order, including findings of fact and conclusions of law, denying defendant relief on the recanted testimony issue.

JURY SELECTION ISSUES

[1] Defendant first assigns error to the trial court's ruling on an objection made by the State during jury voir dire. The trial court sustained objection to defendant's question to the venirepersons whether they were comfortable with the fact that it might be necessary for him to question police procedure during the trial. Defendant argues that this ruling unduly restricted his efforts to exercise his peremptory and for-cause challenges intelligently. It appears, however, that the objection was sustained due to the form of the question. Defendant soon after asked the same question in slightly different form without objection when he asked, "Is there anybody on the jury panel that feels that I should not question the police procedures, if so raise your hand." Defendant has failed to show prejudice or an abuse of discretion on the part of the trial court. *See State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). This assignment of error is overruled.

[2] Defendant next contends that the trial court erred by excusing six prospective jurors for cause due to their feelings about the death penalty, without proper inquiry as to their ability to follow the law, and by not allowing defendant to question the prospective jurors. The standard for determining whether a potential juror may be excluded for cause because of his views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). The prospective jurors excluded in this case all agreed that they would automatically vote against the imposition of the death penalty regardless of the evidence, or that they would not return a capital verdict regardless of the circumstances. A statement by a prospective juror that she could never vote to impose the death penalty regardless of the evidence is, in effect, a refusal to perform one's duties as a juror in accordance with our capital sentencing statute, and is therefore sufficient to support excusal for cause under *Wainwright*. *State v. Brown*, 315 N.C. 40, 53, 337 S.E.2d 808, 819 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986). The trial court thus did not err in excusing these jurors for cause. *State v. Weeks*, 322 N.C. 152, 161, 367 S.E.2d 895, 901 (1988) (juror's indication that she could not, under any circumstances, vote to impose the death sentence sufficient to support excusal for cause under *Wainwright* standard);

State v. Wilson, 313 N.C. 516, 527, 330 S.E.2d 450, 458 (1985) (all prospective jurors challenged for cause due to beliefs regarding capital punishment stated that they would not vote to return a death sentence under any circumstances).

Defendant also complains that the trial court erred in refusing to allow him to conduct rehabilitative questioning before excusing jurors for cause due to their views on capital punishment. "The regulation of the manner and extent of inquiry by counsel at the voir dire rests largely in the trial judge's discretion." *State v. Reese*, 319 N.C. 110, 120, 353 S.E.2d 352, 358 (1987).

> "When challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow the defendant to question the juror challenged."

Id. at 120-21, 353 S.E.2d at 358 (quoting *State v. Oliver*, 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1981) (citations omitted)). Defendant has made no showing that rehabilitative questioning would have elicited different answers from the prospective jurors. We have scrutinized the statements of these individuals. Four of the jurors declared their unqualified opposition to capital punishment, regardless of the circumstances. Two individuals stated that while they were not generally opposed to capital punishment and regarded it as a necessary law, they personally could not vote to impose a death sentence, regardless of the evidence. All the prospective jurors declared their positions unequivocally. The trial court did not abuse its discretion in refusing to allow further questioning of these individuals. *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990) (rehabilitative questioning not required when prospective juror has expressed unequivocal opposition to death penalty). This assignment of error is overruled.

[3] Defendant next assigns error to the trial court's refusal to give a requested preliminary instruction to the jury venire regarding the bifurcated procedures employed in capital trials, choosing instead to give the pattern jury instruction for this situation. The requested instruction is identical to the one requested in *State v. Artis*, in which we wrote:

> Given the danger of distraction and prejudice and the desirability of uniform jury instructions for all trials, despite the unique features of each, we find no abuse of the trial court's discretion in relying upon the appropriate pattern jury instructions to inform the jury on voir dire [of the bifurcated nature of first-degree murder trials.]

State v. Artis, 325 N.C. 278, 295, 384 S.E.2d 470, 479 (1989), *judgment vacated on other grounds*, --- U.S. ---, 108 L. Ed. 2d 604 (1990). For the reasons stated in *Artis*, we find no abuse of discretion.

[4] Defendant assigns error to the trial court's denial of his motion for individual voir dire and sequestration of jurors during voir dire, but acknowledges that this Court has consistently denied relief on this basis. *See, e.g., State v. Reese*, 319 N.C. at 119-20, 353 S.E.2d at 357. Neither defendant nor the record in this case suggests that the trial court abused its discretion in denying this motion. We decline to reconsider our previous holdings on this issue, and accordingly we overrule this assignment of error.

GUILT PHASE ISSUES

[5] Defendant argues that the trial court erred in allowing the prosecutor to cross-examine a defense witness, Reid Boyd, with regard to rumors concerning defendant's guilt. Boyd testified that he had given law enforcement officials several false statements relating to his knowledge of the Tilley murder. Boyd at various times confessed to committing the murder himself, stated that he witnessed the commission of the murder by two men named Gary and Steve, and implicated defendant and Ricky Hopper in the murder. On direct examination, Boyd stated that he had no personal knowledge of the crime, and that the statements he made were based on "rumors and hearsay." On cross-examination, the prosecutor pursued this theme, eliciting Boyd's statement, "I knew something but not that it was true, just what I heard." The prosecutor then embarked on a line of questioning directed at establishing that Boyd spent time on the Cook Block, and that the rumors he heard were circulated on Cook Block after the murder. Defendant objected to this line of questioning at the beginning of the cross-examination on the basis of relevancy. The trial court overruled the objection. The cross-examination continued at length, with Boyd reiterating several times that his earlier statements to authorities were grounded in rumor and not based on his personal knowledge of the crime. The prosecutor persisted in returning to

Boyd's statement that the rumor on Cook Block was that defendant and Hopper murdered Tilley, culminating in the following exchange:

> Q. And you had originally heard it was Bobby Brown and Ricky Hopper that did the killing?
>
> A. Yes, sir.
>
> Q. That is what you began hearing in your circle of friends over there?
>
> A. That was the rumors, I never talked to anyone about it, but just heard about it, they were talking about it but I never got into the conversation.
>
> Q. But that is what you heard and that is what you meant when you said that you knew something about the killing?
>
> A. What I had heard.
>
> Q. Brown and Hopper did it?
>
> A. That is what I had heard.
>
> Q. That was a week or two weeks after the killing?
>
> A. Yes, sir.

Defendant argues that evidence that rumors were circulating after the murder that defendant and Ricky Hopper committed the murder constituted inadmissible hearsay because it was offered for the truth of the matter asserted.

We note initially that defendant objected only once to the admission of evidence as to what Boyd had heard via rumor, and that objection was based on relevancy grounds. The evidence was clearly relevant because it related to a matter elicited on direct examination. 1 Brandis on North Carolina Evidence § 42 (1988). No objection was made on hearsay grounds, and similar evidence was later admitted without objection. Although defendant argues that further objection would have been fruitless, we disagree. A timely objection made on proper grounds may well have drawn a different ruling as the prosecutor persisted in cross-examining the witness regarding this matter. The trial court ruled properly on the objection on relevancy grounds; any benefit of the prior objection was lost by the failure to renew the objection, and defendant is deemed to have waived his right to assign error to the prior admission of the evidence. *State v. Shamsid-Deen*, 324 N.C.

437, 445, 379 S.E.2d 842, 847 (1989). Defendant does not argue that admission of the evidence constituted plain error, and such an argument could not prevail in light of defendant's solicitation of Boyd's initial statement that his prior untrue statements to authorities were based on "rumor and hearsay."

[6] In a related assignment of error, defendant contends that the trial court erred in allowing the prosecutor to argue inferences arising from this evidence in his closing argument. The prosecutor argued that "the word was out" in 1981 regarding who committed the murder of Wayne Tilley. He argued in part:

> Right there, the defendant's very first witness, way back in 1981, tells you that he did not have anything to do with that murder that caused everybody to get arrested. He based his story on rumors and hearsay from the Cook Block where Ricky Hopper hung around, according to the other evidence he gave us. Ricky Hopper did not tell the authorities in 1981 what happened. The story, the story got in 1981 came through the mouth of Reid Boyd from the rumors and hearsay that he picked up in the Cook Block. I submit to you that the truth was out in 1981. It came from the wrong mouth.

Defendant notified the court prior to closing arguments: "I don't want the District Attorney arguing gossip and hearsay in the community as he elicited from cross-examining Reid Boyd." The trial court declined to rule on the matter in advance of arguments. During argument, defendant twice objected to this line of argument, and the trial court twice overruled his objections.

During a closing argument an attorney may not make arguments on the basis of matters outside the record, but may, based on "his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." N.C.G.S. § 15A-1230 (1988). "[A]rgument of counsel must be left largely to the control and discretion of the presiding judge and . . . counsel must be allowed wide latitude in the argument of hotly contested cases." *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975). In the instant case, the prosecutor's arguments represented legitimate inferences from the evidence. Boyd testified that his false statements made to the authorities were based on what he had heard of the circumstances of the murder through rumors and hearsay. This assertion was elicited by defendant on direct examination. Defendant neither raised an objection on hearsay grounds at trial nor asked for an instruction

limiting the jury's consideration of the evidence to impeachment purposes. The prosecutor's remarks were based upon "the facts in evidence and [the] reasonable inferences to be drawn therefrom." *Id.* This assignment of error is overruled.

[7] Defendant next objects to a series of statements made by the prosecutor during closing argument, none of which he objected to at trial. The prosecutor twice implied that defense counsel was attempting to obscure the truth from the jury. Referring to a statement the prosecution sought to introduce into evidence but which the trial court ruled inadmissible, the prosecutor stated:

> [A]nd the defendant did not want to hear that statement and under the rules of evidence you were not allowed to hear it at that time. Just like the wool they are trying to pull over your eyes about Bob Craig and that van. Trying to obscure the truth, trying to keep you from your duty and your role in this case as fact finders.

Soon thereafter, while discussing the meaning of "beyond a reasonable doubt," the prosecutor added:

> It does mean that you have the obligation to search out and find the truth and according to the standards that the Judge gives you, and that the truth has been obscured from you just as when I tried to ask Mrs. Sasserman about the earlier statement but lo and behold the defendant put Mrs. Sasserman on and the rules changed.

These remarks stood uncorrected at trial because of defendant's failure to object in a timely fashion. The remarks, while improper in that they equate an adverse ruling regarding the admission of certain evidence with an effort on defendant's part to obscure the truth, are not of the magnitude or character to require that the verdict be set aside. Improprieties during closing arguments, left unchallenged by defendant, must be gross indeed for this Court to hold that the trial court abused its discretion in not recognizing and correcting *ex mero motu* the comments regarded by defendant as offensive only on appeal. *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979).

Defendant next complains that the prosecutor argued matters outside the evidence when he argued that Ricky Hopper had not gained an untoward advantage by virtue of his plea arrangement. The prosecutor argued to the jury:

> [W]hat kind of deal has he got, look at it, since May he has been hiding, running, been protected, been terrorized, taken his wife, taken himself, and he had torn himself away from his city, his roots, and everything that he ever had and has not been able to work or do anything except wait for this trial.

Defendant maintains that the record is devoid of evidence that Hopper had been terrorized prior to trial, and that such an unsupported suggestion prejudiced defendant, because the jury no doubt inferred that defendant was responsible for terrorizing Hopper. While Hopper did not testify that he had been terrorized prior to trial, he did state that his plans to testify had resulted in a major disruption in his life and that of his family, and that he did not wish to relocate far away from his community. The prosecutor's isolated comment that Hopper had been terrorized, when examined in context, does not present an inference so grossly improper or so removed from the scope of the evidence that a new trial is required.

Defendant's final complaint relating to the prosecutor's closing argument stems from a suggestion that his alibi witnesses had motives to lie to protect him. The prosecutor argued, "[Y]ou saw through Ricky Hopper what Bobby Brown can do with folks that live at the farm, make them do anything that he wants to, anything he want [sic] them to, including, I submit to you, giving him an alibi." This comment was a permissible invitation to the jurors to scrutinize the testimony of the alibi witnesses for bias. It was not improper, and was far from grossly improper, especially in light of Hopper's testimony that defendant stated on the night of the murder that his alibi was "taken care of." These assignments of error are overruled.

[8] Defendant next assigns error to the trial court's admission, over objection, of Agent Johnson's statement that defendant made a telephone call from jail in which defendant said, "Listen, get in touch with Benny, that goddamn Ricky Hopper has done run his mouth." Defendant asserts that admission of this statement violated his attorney-client privilege and right to counsel under the state and federal constitutions.

Defendant's assertions have no merit. First, the attorney-client privilege covers only confidential communications made by the client to his attorney. *State v. Van Landingham*, 283 N.C. 589, 601, 197 S.E.2d 539, 547 (1973). Defendant's statement was not made to

his attorney. The most obvious interpretation of the statement is that defendant was asking a third person to get in touch with his lawyer, whose name was "Benny." Defendant testified during the sentencing hearing that the telephone call was in fact made to his mother. In addition, the statement was not made in confidence, as defendant spoke in the presence of Agent Johnson from a telephone located by the elevator in the county jail. "Communications between attorney and client are not privileged where made in the presence of a third person, not the agent of either party." *Id.* at 602, 197 S.E.2d at 547 (quoting 97 C.J.S. *Witnesses* § 290 (1957)). Defendant's statement, made in the presence of a third party to one who was not his attorney, lies outside the protection offered by the attorney-client privilege.

Neither did admission of defendant's statement violate his state or federal constitutional right to counsel. Although defendant characterizes Agent Johnson's knowledge of defendant's statement as occasioned by "surreptitious eavesdropping," the record does not support this description. Agent Johnson was with defendant when defendant placed the call from a telephone located by the elevator in a public building. The call was placed, not to defendant's attorney, but to his mother. The constitutional right to counsel is not implicated under these circumstances.

[9] Defendant next assigns error to the trial court's charge to the jury. In defining the elements of first-degree murder, the trial court omitted the portion of North Carolina Pattern Instruction—Criminal 206.10 which states that defendant formed the intent to kill "over some period of time, however short, before he acted." Because defendant did not object or except to this omission at trial, we must determine whether the oversight amounted to plain error. We are unpersuaded that absent the error the jury would have reached a different verdict, and thus that the incomplete instruction constituted plain error. *See State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). The State's evidence tended to show a contract between defendant and Lindley Tate for the murder of Wayne Tilley. Ricky Hopper testified that defendant first solicited his help with the murder on 1 August 1981. On 4 August 1981, defendant told Hopper they would leave shortly before 9:00 p.m. because Tilley always checked his mailbox at approximately 9:15 p.m. before going to work. Defendant loaded a double-barreled sawed-off shotgun and brought it with him in the car to ride to Tilley's home. Defendant told Hopper, the driver, to slow his speed as

they approached the Tilley home, and if other people were around, to drive on by. Defendant proceeded to shoot the victim outside his home as planned. At trial defendant did not attempt to establish that he shot Tilley in an unpremeditated manner. Rather, his defense, presented by the testimony of several alibi witnesses, was total innocence. Under these facts, the failure to elucidate the meaning of premeditation did not constitute plain error. The evidence presented no issue as to defendant's state of mind or the existence of a calculated plan to kill Tilley, but called for a determination as to the credibility of the State's witnesses versus that of defendant's alibi witnesses. The jury's verdict demonstrates its belief that Ricky Hopper testified truthfully regarding the existence of a premeditated plan, and execution of said plan, to kill Wayne Tilley. The jury's conviction of defendant on the charge of conspiracy to commit murder further demonstrates its belief that defendant planned the crime in advance of its execution, and convinces us that additional instructions on the element of premeditation would have had no effect on the jury's verdict. *See State v. Dixon*, 321 N.C. 111, 114, 361 S.E.2d 562, 564 (1987) (no plain error in charge on premeditation and deliberation). This assignment of error is overruled.

[10] Defendant assigns error to the trial court's instruction to the jury on proximate cause and premeditation and deliberation. He complains of the italicized passages in the following instructions:

> [T]he State must prove that *the shooting* was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which Clarence Wayne Tilley's death would not have occurred.
>
> * * *
>
> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as the lack of provocation by the victim, the conduct of the defendant before, during, and after the killing, declarations of the defendant, *use of grossly excessive force. Brutal or vicious circumstances of the killing. The manner in which or the means by which the killing was done.*

Defendant argues that these instructions failed to distinguish between the acts of defendant and those of Ricky Hopper, and thus

could have allowed the jury to convict defendant on the basis of Hopper's acts rather than his own. Again, because defendant did not object or except at trial, appellate review is confined to plain error analysis.[1] When viewed in context, it is clear that these instructions do not rise to the level of plain error. The jury charge, when viewed as a whole, is replete with instructions directing the jury's consideration to defendant's acts alone. A few examples suffice:

> Now I charge for you to find the defendant guilty of first degree murder the State must prove five things beyond a reasonable doubt. First, that *the defendant* intentionally and with malice killed the victim . . . . Third, that *the defendant* intended to kill the victim. . . . Fourth, that *the defendant* acted with premeditation, that is that *he* formed the intent to kill the victim; and fifth, that *the defendant* acted with deliberation . . . .

(Emphases added.) The jury received satisfactory instructions, viewed contextually, directing its attention to the acts of defendant alone. This assignment of error is overruled.

[11] Defendant also assigns error to the trial court's failure to instruct on an acting in concert theory. Such an instruction was not requested at trial.[2] Defendant argues that because the prosecutor pursued an acting in concert theory in his closing argument, the jury was left uninformed as to how to apply the doctrine. The portion of the argument to which defendant refers, and which occasioned no objection at trial, is as follows:

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1. Although defendant contends in his brief that he specifically requested an instruction requiring the jury to find that defendant's own acts were the cause of Tilley's death, and that defendant personally acted with premeditation and deliberation, no such request appears in the record. At the charge conference, the trial court scrupulously detailed the instructions it intended to give and invited additions or corrections by counsel. None were offered. Following the jury charge, before the jury began deliberations, the trial court again asked for counsel's corrections, and none were offered. Defendant cites to a page in the record which is headed "Statement of Omitted Instructions." Nothing in the record substantiates that these instructions were submitted to the trial court prior to its charge to the jury; indeed, it appears that these "omitted instructions" were the product of hindsight and were inserted during the compilation of the record. Accordingly, this assignment of error is subject to the plain error rule.

2. Defendant asserts in his brief that he specifically requested an acting in concert instruction. Our careful examination of the record reveals no such request before, during, or after the charge conference.

> The doctor told you . . . that there are two buck shots, like Ricky said, and that he had massive internal injuries. Massive. Either one of which would have caused instant death, if you have any doubt in your minds which of the two shots killed Wayne Tilley. It does not matter. Two persons acting in concert under the laws of North Carolina would both be equally guilty but if you ever get in your mind there is any lesser degree of involvement in who killed him the doctor cleared that up. He said either one of them would have killed him, but the law of North Carolina makes all equally guilty either way.

The prosecutor did argue an acting in concert theory to the jury. However, the absence of an acting in concert instruction could only have inured to defendant's benefit. Had the trial court instructed the jury in accordance with the North Carolina Pattern Instruction on acting in concert—that if two persons act together with a common purpose to commit a crime, each is responsible for the acts of the other—defendant could have been convicted of murder on the basis of Ricky Hopper's acts. *See* N.C.P.I. Criminal 202.10. This is the very defect of which defendant complained in his preceding assignment of error. As discussed above, the charge provided ample direction to the jury to consider only defendant's acts when determining his guilt or innocence on the murder charge.

Assuming error, no plain error exists because the evidence led inexorably to one of two conclusions: that defendant was in Virginia when Tilley was killed, and thus could not be guilty, or that both defendant and Hopper fired fatal shots at the victim. The jury having fulfilled its role as fact finder and made the determination that defendant fired one of two fatal shots at the victim, we see no probable impact on the jury's verdict by the absence of an acting in concert instruction. *See State v. Walker*, 316 N.C. at 39, 340 S.E.2d at 83.

ISSUES RELATING TO DEFENDANT'S MOTION FOR APPROPRIATE RELIEF

[12] Defendant contends that Judge Griffin erred in denying his motion for appropriate relief, arguing that he misapplied the law relating to recanted testimony, placed unwarranted weight upon the jury's verdict, and entered numerous findings of fact unsupported by the evidence. We first address the court's application of the law relating to recanted testimony.

A defendant may be allowed a new trial on the basis of recanted testimony if:

1) the court is reasonably well satisfied that the testimony given by a material witness is false, and

2) there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial.

State v. Britt, 320 N.C. 705, 715, 360 S.E.2d 660, 665 (1987). *See* Annot. "New Trial—Recantation," 88 A.L.R.4th 1031 (1990). The order includes conclusions of law stating, "Without the testimony of Ricky Hopper at the defendant's trial, the State would have been unable to obtain a conviction," and "the Court is not reasonably well satisfied that the trial testimony of Ricky Hopper was false." The hearing judge thus denied defendant's request for a new trial on the basis of the first prong of the *Britt* test.

Defendant argues that the evidence compelled a contrary finding. He cites cases in which a recantation by a pivotal witness necessitated a new trial. We find these cases distinguishable.

In *State v. Ellers*, 234 N.C. 42, 65 S.E.2d 503 (1951), the witness requested permission to return to the stand after the verdict but before the sentences were imposed. This was allowed, and the witness repudiated his testimony implicating the defendant in the crime of receiving stolen property. The trial court nevertheless denied defendant's motion to set aside the verdict, and this Court reversed the judgment and ordered a new trial. The recantation in *Ellers* took place before the trial court entered the sentence. Hopper's recantation here, by contrast, occurred approximately a year after trial and followed a brush with the law which resulted in the revocation of his parole. The cases thus are distinguishable, and *Ellers* did not require the granting of defendant's motion.

The remaining cases cited by defendant are rape cases from other jurisdictions, in which the victim recanted her testimony after trial. *See, e.g., Commonwealth v. Mosteller*, 446 Pa. 83, 284 A.2d 786 (1971). These cases are entirely distinguishable because the recanting witness was the victim of the crime, rather than a cofelon as here. A recantation by a convicted codefendant involving a confession of perjury is "exceedingly unreliable." *State v. Shelton*, 21 N.C. App. 662, 665, 205 S.E.2d 316, 318, *cert. denied*, 285 N.C. 667, 207 S.E.2d 760 (1974).

We disagree with defendant's contention that the evidence compelled a ruling in his favor. Among the conclusions of law made by the hearing judge are the following, which support his ultimate conclusion that he was not reasonably well satisfied that Hopper's trial testimony was false:

> 3. Hopper's implication of himself in the actual shooting of Tilley is powerfully compelling on the question of his trial credibility.
>
> 5. There was no reason, except conscience, for Ricky Hopper to implicate himself or Brown in the Tilley murder, as he was well aware that the State had no case against either of them unless he told the State what happened.
>
> 6. There were, in fact, substantial and compelling reasons for Hopper not to testify at the defendant's trial, unless his testimony was true.
>
> 7. There now exist substantial and compelling reasons for Hopper to recant his trial testimony, reasons which do not affect the truthfulness or credibility of that witness.

As to defendant's argument that the court erred by placing unwarranted weight upon the jury's verdict, which credited Hopper's testimony, we note that the hearing judge made the following conclusion of law: "2. The jury had a full and fair opportunity to hear and weigh the discrepancies in Hopper's various statements, the reasons for those discrepancies, and to consider and weigh the credibility of Hopper's testimony at trial." Defendant argues both that the jury did not have a full opportunity to weigh Hopper's credibility, and that the jury's decision to credit Hopper's testimony is not a relevant factor under the *Britt* analysis. It is true that Hopper testified to additional information at the hearing regarding the circumstances surrounding his several pretrial statements. This information pertained to the pressure brought to bear upon Hopper by his wife, Michelle, the amount of money expended by the SBI and FBI to maintain Hopper and his family before defendant's trial and to relocate them after the trial, and alleged suggestions made to Hopper by the district attorney regarding how Hopper should change his statement to conform to those of other witnesses. The hearing judge found as a fact that "[t]he events which led to Hopper's inconsistent statements and his trial testimony were in substance before the jury which returned and [sic] guilty verdicts

against Bobby Ray Brown," and "[a]lthough Hopper testified at trial he had no formal plea agreement, the facts of Hopper's understanding with State about his relocation, the payments which had been made therefore [sic] and which were to be made were in substance before the jury." These findings of fact are supported by the evidence, and thus are binding on appeal. *State v. Baker*, 312 N.C. 34, 40, 320 S.E.2d 670, 675 (1984); *State v. Stevens*, 305 N.C. 712, 719-20, 291 S.E.2d 585, 591 (1982).

As to defendant's argument that the jury's belief of Hopper's trial testimony is irrelevant to the *Britt* inquiry, we disagree in the context presented by this case. The hearing judge's consideration of the jury's belief of Hopper was limited to his determination whether the additional information tending to show Hopper's bias impacted on defendant's request for a new trial. Because most, if not all, of the details of Hopper's arrangements with the State were before the jury, the hearing judge properly considered and rejected defendant's arguments that the additional information tended to discredit Hopper's trial testimony, thus bolstering his recantation of his trial testimony.

Defendant contends that the denial of his motion was based upon findings of fact, thirteen of which were unsupported by the evidence. We have carefully reviewed the findings, the record, the transcripts, and defendant's arguments, and we hold that the findings were supported by the evidence. Findings of fact made on a motion for appropriate relief are binding on appeal if supported by the evidence, even though the evidence may be conflicting. *State v. Baker*, 312 N.C. at 40, 320 S.E.2d at 675; *State v. Stevens*, 305 N.C. at 719-20, 291 S.E.2d at 591. The assignments of error relating to this issue are overruled.

[13] Defendant next assigns error to the hearing judge's denial of his motion to amend the motion for appropriate relief. By this motion defendant sought to assert, as an additional ground for the hearing judge's consideration of whether defendant was entitled to a new trial, the State's alleged withholding from defense counsel of a statement made by Sharon Tobin. The hearing judge denied the motion to amend on the basis of N.C.G.S. § 15A-1418(a)[3] and

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3. The statute provides in part: "When a case is in the appellate division for review, a motion for appropriate relief based upon grounds set out in G.S. 15A-1415 must be made in the appellate division." N.C.G.S. § 15A-1418(a) (1988).

on the basis of the language in this Court's order allowing defendant's original motion for appropriate relief "for the limited purpose of . . . hold[ing] an evidentiary hearing on the recanted testimony issue . . . ." Following the hearing on the issue of Hopper's recanted testimony, during which the judge denied defendant's motion to amend, defendant filed a second amended motion for appropriate relief with this Court based on the statements of Sharon Tobin and an additional witness, Tamara Smith. This Court denied the motion and defendant does not assign error to that order.

The allegedly exculpatory evidence proffered by defendant at the hearing consisted of statements given to law enforcement officers by Sharon Tobin, who told officers she witnessed the shooting. Defendant makes much of Ms. Tobin's statement that the car from which the shots were fired drove off facing south toward Aiken Road, rather than north toward Friendly Road as Hopper testified at trial. Ms. Tobin's statement corroborated that of Nancy Sasserman, who testified at trial that the vehicle from which the shots were fired was headed south. However, we disagree with defendant's premise that this evidence tended to exonerate him. The materiality of nondisclosed evidence " 'hinges on two factors: (1) the strength of the evidence itself vis-a-vis the issue of guilt and (2) the magnitude of the evidence of guilt which the convicting jury heard.' " *State v. Artis*, 325 N.C. at 333, 384 S.E.2d at 502 (quoting *State v. McDowell*, 310 N.C. 61, 71, 310 S.E.2d 301, 308 (1984), *vacated on other grounds sub nom. McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988)). We consider the proffered evidence to bear only remotely, if at all, on the issue of defendant's guilt. No evidence suggests that defendant and Hopper were at the murder scene travelling north, while an unknown vehicle travelling south propelled the murderer away from the victim. The evidence suggests either that defendant and Hopper committed the murder, or that defendant was in Virginia at the time of the killing. Regarding the magnitude of the evidence of defendant's guilt, the jury heard eyewitness testimony by Hopper that defendant planned and executed a contract killing. We do not believe there is a reasonable possibility that pretrial disclosure of the corroborative evidence disputing the direction in which the escape vehicle travelled would have affected the outcome of the trial. *Id.* The moving party bears the burden of proving by a preponderance of the evidence every fact essential to support his motion. "Giving imaginative reign to what the [additional evidence] might imply is far from bearing this burden." *Id.* at 334, 384 S.E.2d at 502.

In addition, Judge Griffin permitted defendant to offer Ms. Tobin's statements into evidence at the post-conviction hearing so he could consider how the statements reflected on the recanted testimony issue. Defendant asserts in his brief that the interests of justice required that Ms. Tobin's statement be considered together with the issue of Hopper's recanted testimony. It appears that this precise relief was afforded defendant at the hearing. This assignment of error is overruled.

[14] Finally, defendant contends that the hearing judge erred in allowing cross-examination of Hopper regarding a letter allegedly written by Hopper to his wife admitting his guilt in the Tilley murder. Hopper denied writing the letter and stated that his wife could have written it. In his order denying the motion for appropriate relief, Judge Griffin wrote: "The Court has not considered any evidence elicited by the State about a letter allegedly written by Ricky Hopper to Michelle Hopper, nor has such evidence had any influence on the Findings or Conclusions rendered herein." Defendant accordingly can demonstrate no prejudice resulting from the introduction of this evidence. This assignment of error is overruled.

SENTENCING PHASE

[15] Following a capital sentencing hearing, the jury found three aggravating circumstances—prior conviction of a violent felony, commission for pecuniary gain, and commission to hinder law enforcement—but rejected all five mitigating circumstances submitted. A requirement that the jurors unanimously find the existence of mitigating circumstances was incorporated in both the trial court's verbal instructions to the jury and on the written issue sheet submitted for the jury's use during sentencing deliberations. Defendant assigns error to the trial court's having required that the jurors find the existence of mitigating circumstances unanimously, citing *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384 (1988). We have previously resolved this issue, as a matter of state law, contrary to defendant's position. *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), *overruled on other grounds*, *State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). We reconsidered our position in light of *Mills v. Maryland* in *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *death sentence vacated, case remanded*, 494 U.S. ---, 108 L. Ed. 2d 369 (1990), and reaffirmed the position

that "[o]ur capital-sentencing procedure . . . provides a proper balance between individualized sentencing and guided discretion and therefore . . . conforms with federal constitutional requirements." 323 N.C. at 43, 372 S.E.2d at 35. In *McKoy v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 369 (1990), the United States Supreme Court disagreed with our conclusion that certain differences between the Maryland and North Carolina capital sentencing statutes distinguished *Mills* from *McKoy*, stating that "North Carolina's unanimity requirement impermissibly limits jurors' consideration of mitigating evidence and hence is contrary to our decision in *Mills*." *McKoy v. North Carolina*, 494 U.S. at ---, 108 L. Ed. 2d at 381.

In *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990), we concluded that harmless error analysis is applicable to cases containing *McKoy* error. In the present case, however, we are unable to conclude that submission of the unanimity instruction was harmless beyond a reasonable doubt. Defendant submitted the following five mitigating circumstances to the sentencing jury: whether defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired; whether the defendant is a person of limited intellect and education and whether this has mitigating value; whether the defendant suffered a blow to the head at age thirteen which caused him to suffer brain damage and whether this has mitigating value; whether defendant was convicted by the testimony of an accomplice and whether this has mitigating value; and any other circumstance(s) arising from the evidence which the jury deems to have mitigating value. There was evidence to support at least some of the mitigating circumstances submitted, yet the jury found none of the circumstances. Because we cannot conclude that the unanimity requirement did not affect at least one juror's vote and thus the jury's sentencing recommendation, we set aside the sentence of death and remand for a new capital sentencing hearing. We thus need not address defendant's remaining sentencing phase assignments of error.

We conclude that defendant received a fair trial, free from prejudicial error, and that his motion for appropriate relief was properly denied. Because we find prejudicial error in the capital sentencing phase under the United States Supreme Court's decision in *McKoy v. North Carolina*, we remand to the Superior Court, Rockingham County, for a new sentencing hearing on the first-degree murder conviction.

First-degree murder: Guilt Phase, no error; remanded for new capital sentencing proceeding.

Conspiracy to commit murder: No error.

STATE OF NORTH CAROLINA v. DOCK McKOY, JR., A/K/A DOCK McCOY, A/K/A DOCK McKAY, A/K/A PAUL McCOY

No. 585A85

(Filed 26 July 1990)

1. **Criminal Law §§ 1325, 1352 (NCI4th)— McKoy decision—unanimity on mitigating circumstances invalidated—capital sentencing statute still in effect**

The decision of *McKoy v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 369 (1990), did not invalidate the North Carolina capital sentencing statute, N.C.G.S. § 15A-2000, but invalidated only our jury instructions requiring unanimity on mitigating circumstances in a capital sentencing proceeding. Because the invalidated instructions amount only to trial error and do not arise from any deficiency inherent in the statute itself, the statute remains constitutional and in full force and effect.

Am Jur 2d, Criminal Law §§ 609, 628.

2. **Criminal Law § 1369 (NCI4th)— McKoy error—death sentence invalidated—life sentence not automatic**

A defendant whose death sentence was vacated by the U.S. Supreme Court because of unconstitutional instructions requiring unanimity on mitigating circumstances was not entitled to be resentenced to life imprisonment as a matter of law under prior North Carolina cases. Nor was imposition of a life sentence required under N.C.G.S. § 15A-2000(d)(2) on the ground that the death penalty was imposed under the influence of an "arbitrary factor" since the unanimity instructions were unconstitutional because of their *potential* for producing an arbitrary result, and there was no showing that the potential for arbitrariness, that is, one or more holdout jurors, was actually realized or that the death sentence resulted from this kind of arbitrariness.

Am Jur 2d, Criminal Law §§ 609, 628.

3. Criminal Law §§ 1325, 1352 (NCI4th)— McKoy error—harmless error analysis

A *McKoy* error in a capital sentencing proceeding is subject to harmless error analysis. Since the error is one of federal constitutional dimension, the State has the burden to demonstrate its harmlessness beyond a reasonable doubt. N.C.G.S. § 15A-1443(b).

Am Jur 2d, Appeal and Error § 779.

4. Criminal Law §§ 1325, 1352 (NCI4th)— death penalty—McKoy error—State's failure to show harmlessness—new sentencing hearing

The State failed to demonstrate that a *McKoy* error in a capital sentencing proceeding was harmless beyond a reasonable doubt where the jury, in recommending a sentence of death, failed to find unanimously several proposed mitigating circumstances supported by substantial evidence, and it does not appear beyond a reasonable doubt that there would not have been a different result in the sentence had each juror been allowed to consider such of these circumstances as each found to exist, and the evidence supporting them, in the final weighing process. Therefore, defendant is entitled to a new sentencing hearing at which the question of his punishment will be determined anew.

Am Jur 2d, Appeal and Error § 779.

Justice FRYE concurring.

Justice MARTIN concurring.

ON remand from the Supreme Court of the United States for proceedings not inconsistent with its judgment vacating defendant's sentence of death in *McKoy v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 369 (1990). Heard in the Supreme Court 14 May 1990.

Lacy H. Thornburg, Attorney General, by Joan H. Byers, William N. Farrell, Jr., Steven F. Bryant, Special Deputy Attorneys General, and Barry S. McNeill, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, and Louis D. Bilionis for defendant-appellant.

EXUM, Chief Justice.

In *McKoy v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 369 (hereinafter "*McKoy*"), the United States Supreme Court declared unconstitutional under the eighth and fourteenth amendments of the federal Constitution North Carolina jury instructions directing that, in making the final determination of whether death or life imprisonment is imposed, no juror may consider any circumstance in mitigation of the offense unless the jury unanimously concludes that the circumstance has been proved. Reversing this Court's 5-2 decision to the contrary in *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988) (Exum, C.J., and Frye, J., dissenting), the United States Supreme Court remanded this case to us "for further proceedings not inconsistent" with its opinion. *Id.* at ---, 108 L. Ed. 2d at 381.

On remand defendant contends that as a result of *McKoy*, our capital sentencing statute, N.C.G.S. § 15A-2000, is no longer enforceable, and that neither he nor anyone else can be sentenced to death under it. He argues that this case and all others which have been tried under this statute must be remanded to our trial courts for the imposition of life imprisonment. Defendant says no one in North Carolina can be sentenced to death unless and until the legislature enacts a new capital sentencing statute which does not violate the principles of *McKoy*.

The State contends that *McKoy* does not invalidate our capital sentencing statute. The State says it merely declares unconstitutional a particular jury instruction devised by our trial judges and approved by this Court in *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), *overruled in part on other grounds, State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). The State argues the case is one only of trial error, entitling defendant, at most, to a new sentencing hearing.

We agree with the State's position that the erroneous instructions were trial error. We conclude that defendant is not entitled to be resentenced to life imprisonment as a matter of law, that the *McKoy* error is not harmless and that defendant is entitled to a new sentencing hearing at which the question of his punishment will be determined anew in a manner not inconsistent with this opinion or *McKoy*.

I.

Defendant was convicted of first degree murder at the 29 July 1985 Criminal Session of Superior Court, Stanly County. The jury recommended a sentence of death and the trial court entered judgment accordingly. Because *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988) (hereinafter "*McKoy I*"), adequately summarizes the evidence, we limit our discussion here to the basic facts and to evidence material to resentencing issues.

The State's evidence tends to show that on 22 December 1984, Lieutenant Robert Usery and Deputy Kress Horne of the Anson County Sheriff's Department had been dispatched to defendant's home because neighbors had complained about defendant's firing a gun. While defendant was in the house, the officers called to him to come out. Defendant refused and threatened to kill them. After other law enforcement officers arrived, defendant continued to speak to Deputy Horne from inside. Deputy Horne was standing behind the patrol car with his pistol drawn. Defendant fired a single shot, killing Deputy Horne.

Defendant's evidence tended to show that he was mentally and emotionally impaired and to support a defense of legal insanity. Defendant, who was wounded in the affray, was treated by a physician who testified at trial that defendant was intoxicated and had a blood alcohol content equivalent to .26 on the breathalyzer scale. Expert psychiatric testimony tended to show that defendant suffered from several mental disorders. Some were related to alcohol abuse and others to his borderline intellectual functioning. Defendant's IQ was 74. Dr. Robert Rollins, Clinical Director of the State's forensic psychiatry unit, testified that defendant had a personality disorder "characterized by denial, paranoid thinking, concrete thinking, impaired abstract thinking, impaired judgment, impaired insight, impaired perception, overreacting to things, poor interpersonal skills, defensiveness, ineffectiveness in functioning and antisocial behavior." Dr. Rollins gave his opinion that, "as a result of mental disorder McKoy was neither able to appreciate the quality of his actions or to distinguish between right and wrong" at the time of the offense. The sixty-five-year-old defendant's own testimony included a rambling and bizarre account of the occurrences on the day of the killing.

At the conclusion of the guilt phase, the jury convicted defendant of first degree murder.

During the penalty phase, the State presented evidence that defendant had pled guilty to second degree murder in 1952. Defendant subsequently recalled Dr. Rollins, who testified that defendant was under the influence of a mental or emotional disturbance at the time he shot Deputy Horne. Defendant also called a psychiatrist, Dr. Patricio Lara of Dorothea Dix Hospital. Dr. Lara diagnosed defendant as having an adjustment disorder, mixed disturbances of emotions and conduct, and as suffering from paranoid and narcissistic features. Dr. Lara was satisfied that defendant was suffering from significant psychological disorders which had existed for a number of years and were exacerbated when defendant was impaired by alcohol.

Following the penalty phase evidence, the trial court instructed the jury regarding its sentencing function. The verdict sheet contained a listing of the aggravating and mitigating circumstances submitted to the jury. This sheet and the trial judge's instructions required the jury to find each mitigating circumstance unanimously before it could consider that circumstance favorably to defendant. Both the instructions and the verdict sheet required the jury, after it had made its findings as to aggravating and mitigating circumstances, to then determine whether the mitigating circumstance(s) were insufficient to outweigh the aggravating circumstance(s), and, if so, whether the aggravating circumstance(s) were sufficiently substantial to justify the death penalty when considered with the mitigating circumstance(s). In making these final determinations, both the instructions and the verdict sheet advised the jury that it could consider only those aggravating and mitigating circumstance(s) which it unanimously found to exist. Both the instructions and the verdict sheet thus precluded any juror from considering any mitigating circumstance favorably to defendant in the final balancing processes unless all jurors had agreed that the circumstance existed. Thus, the instructions and the verdict sheet, in effect, also precluded any juror from considering any *evidence* tending to support a given mitigating circumstance in the final balancing processes unless all jurors agreed that the circumstance existed.

The jury found two aggravating circumstances unanimously and beyond a reasonable doubt: (1) Dock McKoy had been previously convicted of a felony involving violence to the person; and (2) the murder was committed against a deputy sheriff while engaged in the performance of his official duties.

The jury found unanimously and answered "yes" to the following mitigating circumstances:

[1]. The capacity of Dock McCoy to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

[2]. That Dock McCoy has borderline intellectual functioning with a I.Q. test score of 74.

The jury failed to find unanimously and answered "no" to the following mitigating circumstances submitted to it:

[1]. This murder was committed while Dock McCoy was under the influence of mental or emotional disturbance.

[2]. The age of Dock McCoy at the time of this murder is a mitigating circumstance.

[3]. That for several decades Dock McCoy has exhibited signs of mental or emotional disturbance or defect that went untreated.

[4]. That Dock McCoy's mental or emotional disturbance is aggravated by his poor physical health.

[5]. Dock McCoy's ability to remember the events of December the 22nd, 1984, is actually impaired.

[6]. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

The jury then found beyond a reasonable doubt that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, that the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty when considered with the mitigating circumstances that it found and that defendant should suffer the death penalty rather than life imprisonment.

The trial court entered judgment accordingly.

The following procedures then occurred: Defendant appealed to this Court, which heard oral arguments on 14 March 1988. On 6 June 1988, the United States Supreme Court decided *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384 (1988). *Mills* held that in capital cases unanimity instructions on mitigating circumstances, under a Maryland capital sentencing procedure similar but not

identical to ours, were unconstitutional under the eighth and fourteenth amendments. We ordered further briefing and arguments in this case to address whether *Mills* made unconstitutional the trial court's instructions to the jury on mitigating circumstances. After reargument on 22 August 1988 this Court distinguished *Mills* and concluded that the trial court's instructions here did not run afoul of *Mills*' holding. *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12. The United States Supreme Court ultimately reversed this decision, concluding that "North Carolina's unanimity requirement violates the Constitution by preventing the sentencer from considering all mitigating evidence." *McKoy*, 494 U.S. at ---, 108 L. Ed. 2d at 376. The United States Supreme Court vacated the death sentence and remanded the case to us for further proceedings not inconsistent with its opinion.

Defendant then filed a "Motion to Remand for the Imposition of Life Sentences or Motion to Permit Supplemental Briefing." We ordered the parties to file supplemental briefs "limited to the issues presented by the opinion of the Supreme Court of the United States remanding the case to this Court, and the issue of whether this Court can engage in a harmless error analysis on the issues presented and, if so, whether the error in this case, if any, was harmless." *State v. McKoy*, 326 N.C. 592, 592, 391 S.E.2d 815, 816 (1990). After the briefs were filed the Court heard oral arguments on 14 May 1990.

II.

[1] We are confident that *McKoy* did not invalidate North Carolina's capital sentencing statute or any part thereof. At most the decision invalidated only our jury instructions requiring unanimity on mitigating circumstances in a capital sentencing proceeding. Because the invalidated jury instructions amount only to trial error and do not arise from any deficiency inherent in the statute itself, the statute remains constitutional and in full force and effect. Defendant may be resentenced under it.

In *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), our first case addressing the permissibility of the unanimity jury instruction on mitigating circumstances, both the parties and the Court treated the question as one of trial error, if error at all, entitling the defendant at most to a new sentencing hearing. *See* Defendant Kirkley's Brief, at 111-18; State's Brief, at 29-32. We stated:

> First, we note that both the Constitution of North Carolina, Article I, Secs. 24 and 25, and [N.C.G.S.] § 15A-2000, the statute covering the sentencing process in capital cases, requires all verdicts of the jury to be unanimous. This Court has also held that a verdict of death in a capital case must be by unanimous vote of the twelve jurors. . . . We now hold that the jury must unanimously find that an aggravating circumstance exists before that circumstance may be considered by the jury in determining its sentence recommendation.
>
> Although it is a settled principle that all verdicts, including those within a sentencing procedure, must be unanimous, *there has never been a determination by this Court or our legislature on the issue of whether a jury must be unanimous in finding that a mitigating circumstance exists. Certainly consistency and fairness dictate that a jury unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing.* This is what the trial judge instructed the jury and in that part of his instruction we find no error.

308 N.C. at 218, 302 S.E.2d at 156-57 (emphasis added, citations omitted).

Although *Kirkley* discussed State statutory and constitutional requirements that verdicts must be unanimous, including verdicts under N.C.G.S. § 15A-2000 in capital cases, *Kirkley* did not hold that unanimity in finding mitigating circumstances is necessarily mandated either by N.C.G.S. § 15A-2000 or our constitution. Rather, as the highlighted portion of the passage shows, *Kirkley* upheld the unanimity jury instruction as a matter of appropriate trial procedure in the interest of "consistency and fairness." Indeed, *Kirkley* recognized that neither this Court nor the legislature had ever addressed this question. *Kirkley* regarded the unanimity requirement as a judicially imposed rule governing trial procedure and not a necessary product of the capital sentencing statute.[1]

Again in *McKoy I*, the Court treated the unanimity instruction as one of trial error, if error at all. Finding no error in the instruction, a majority of our Court in *McKoy I* stated: "Defendant next

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1. Dissenting in *Kirkley* on the unanimity instruction point, Exum, J. (now C.J.), concluded that the instruction was "error warranting a new sentencing hearing." *Kirkley*, 308 N.C. at 229, 302 S.E.2d at 163.

contends that the trial court's sentencing instructions were erroneous and unconstitutional because they required jury unanimity on the existence of a mitigating circumstance before that circumstance could be considered for the purpose of sentencing. We find no error." *McKoy I*, 323 N.C. at 30, 372 S.E.2d at 27.

Whether our decision in *Kirkley*, followed in *McKoy I*, approving the unanimity instructions is best viewed as a judicial interpretation of N.C.G.S. § 15A-2000 or a judicial application of the statute to a particular trial procedure, the statute remains on its face valid. So long as the statute remains facially valid it provides authority for imposing the death sentence on defendant. Only the Court's interpretation or application of the statute permitting the unanimity jury instructions must fall under *McKoy*. Only these instructions may no longer be given. The statute itself remains in effect.

Defendant contends the United States Supreme Court in *McKoy* treated the unanimity instruction as one arising from our "capital sentencing scheme." Therefore, defendant argues, *McKoy* in effect invalidates the entire scheme, including the statute. We do not equate, and we do not believe the Supreme Court intended to equate, the term "capital sentencing scheme" with our capital sentencing statute. Indeed, we find no reference in *McKoy* to the facial validity of our statute. The entire discussion centers on the challenged jury instructions, which became part of our capital sentencing scheme under this Court's decision in *Kirkley*. Moreover, whether these instructions are mandated by the statute itself or arise from some other legal source is a matter of state, not federal, law.

III.

[2] Defendant next argues that several precedents of this Court require remanding his case for the imposition of life imprisonment. He relies primarily on *State v. Hill*, 279 N.C. 371, 183 S.E.2d 97 (1971); *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973); *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976); and *State v. Davis*, 290 N.C. 511, 227 S.E.2d 97 (1976). We disagree for reasons which follow.

A brief review of the recent history of capital punishment in North Carolina is necessary for a proper understanding of these cases. Until 1969 North Carolina's death penalty statutes required

that unless the jury in its unlimited and unbridled discretion recommended life imprisonment the death penalty would be imposed for convictions of first degree murder, rape, first degree burglary and arson. N.C.G.S. §§ 14-17, -21, -52, -58 (1969). Under N.C.G.S. § 15-162.1 a defendant who pled guilty to a capital crime was sentenced to life imprisonment.

As several decisions of the United States Supreme Court effectually or actually invalidated various provisions of these statutes, our legislature and this Court responded accordingly.

United States v. Jackson, 390 U.S. 570, 20 L. Ed. 2d 138 (1968), and *Pope v. United States*, 392 U.S. 651, 20 L. Ed. 2d 1317 (1968), invalidated death penalty statutes with provisions like N.C.G.S. § 15-162.1; and the North Carolina legislature repealed N.C.G.S. § 15-162.1 effective 25 March 1969.

Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346 (1972), struck down as unconstitutional capital punishment statutes under which judges or juries could decide in their unbridled discretion whether to impose the death penalty. In the wake of *Furman* this Court concluded that the provisions of our death penalty statutes which permitted juries in their discretion to recommend life imprisonment were severable from the remaining portions of the statutes and that *Furman*, in effect, invalidated only these provisions, leaving the death sentences authorized by the statutes intact. *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19. Under *Waddell* the death penalty in North Carolina became mandatory upon conviction of a capital crime. *Waddell* was expressly made to apply only prospectively so that under it death sentences could be imposed only for capital offenses committed after the date of its decision, 18 January 1973.

Following *Waddell*, the North Carolina General Assembly rewrote all our capital sentencing statutes to make the death sentence mandatory for first degree murder and first degree rape and to make life imprisonment mandatory for arson and first degree burglary. 1973 N.C. Sess. Laws ch. 1201. The new mandatory death penalty statutes became effective for all first degree murders and first degree rapes committed on or after 8 April 1974. *Id. Woodson v. North Carolina*, 428 U.S. 280, 49 L. Ed. 2d 944 (1976), invalidated North Carolina's mandatory death penalty statutes. Following *Woodson*, the North Carolina General Assembly enacted our present

death penalty statute, N.C.G.S. § 15A-2000, which became effective and applied to all murders committed on or after 1 June 1977.

Having reviewed the history of North Carolina's more recent death penalty statutes, we now examine the particular cases upon which defendant relies.

The defendant in *Hill* was convicted of first degree murder committed on 7 October 1968 and sentenced to death under N.C.G.S. § 14-17. This Court found no error in the trial and judgment. *State v. Hill*, 276 N.C. 1, 170 S.E.2d 885 (1969). The United States Supreme Court "reversed" the judgment of death, citing *United States v. Jackson*, 390 U.S. 570, 20 L. Ed. 2d 138, and *Pope v. United States*, 392 U.S. 651, 20 L. Ed. 2d 1317, and remanded to this Court for further proceedings. *Hill v. North Carolina*, 403 U.S. 948, 29 L. Ed. 2d 860 (1971). Pursuant to the Supreme Court's mandate reversing the death sentence, this Court remanded to the superior court for imposition of life imprisonment. *State v. Hill*, 279 N.C. 371, 183 S.E.2d 97.

The defendant in *Waddell* was convicted of rape, then a capital offense, and sentenced to death under N.C.G.S. § 14-21, a statute invalidated by *Furman* and revived temporarily by *Waddell*. The Court remanded for the imposition of life imprisonment, recognizing that to apply its revival of the statute retroactively to defendant would violate the prohibition against *ex post facto* laws contained in article I, section 10 of the federal Constitution. *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19.

In *Covington* defendants were convicted of first degree murder and sentenced to death under our then mandatory death sentence statute, Chapter 1201 of the 1973 Session Laws. By the time this Court decided their appeal, the statute had been declared unconstitutional in *Woodson*. Noting the legislative provision prescribing life imprisonment in the event this Court or the United States Supreme Court determined the death sentence could not be constitutionally imposed under the statute, we remanded the case for the imposition of a sentence of life imprisonment. *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629.

The defendants in *Davis* were convicted of first degree murder and sentenced to death under N.C.G.S. § 14-17, as it had been interpreted in *Waddell* but before it was rewritten by the legislature. When *Davis* was decided, the North Carolina death penalty statute,

G.S. § 14-17, could not be saved as a mandatory statute, as *Waddell* had attempted to do, because of *Woodson*. Nor could it be saved as a discretionary statute because of *Furman*. The Court remanded the cases for the imposition of sentences of life imprisonment. *State v. Davis*, 290 N.C. 511, 227 S.E.2d 97.

Defendant argues that because in *Hill*, *Waddell*, *Covington* and *Davis* the capital cases were remanded for the imposition of life imprisonment, this case must be likewise remanded. This argument fails. In *Covington* and *Davis* the statutes which authorized defendants' death sentences had been invalidated by decisions of the United States Supreme Court. There remained no statutory authority for the imposition of any sentence other than life imprisonment. In *Hill* a majority of the Court determined that it was required to order the imposition of life imprisonment because the mandate of the United States Supreme Court had "reversed" the death sentence. In *Waddell* the Court attempted to save the statute by judicial interpretation but believed that retroactive application of the new interpretation to *Waddell* would violate the prohibition against *ex post facto* laws. Here, as we have already noted, our current statutory authority for the imposition of the death penalty remains in effect notwithstanding the United States Supreme Court decisions in *Mills* and *McKoy*. Unlike *Hill*, the United States Supreme Court has not reversed defendant's death sentence. It has merely vacated it and remanded to us for further proceedings.[2] Unlike *Waddell*, there are no *ex post facto* concerns.[3] Because of this extant statutory authority and the absence of *ex post facto* concerns, defendant remains subject to the death penalty pursuant to proceedings not inconsistent with *Mills* and *McKoy*.

Defendant also argues that we must impose a life sentence under N.C.G.S. § 15A-2000(d)(2), which provides in part:

> The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court . . . upon a finding that the sentence of death was

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2. See discussion, *infra*, in Part IV.

3. The changes in our death penalty proceedings wrought by *Mills* and *McKoy* are both procedural in nature and ameliorative. To apply them retroactively to defendant does not violate the prohibition against state *ex post facto* laws contained in Article I, § 10 of the federal Constitution. *Dobbert v. Florida*, 432 U.S. 282, 53 L. Ed. 2d 344 (1977).

> imposed under the influence of passion, prejudice, or any other arbitrary factor.

Defendant contends that his sentence was "imposed under the influence of . . . [an] arbitrary factor" by relying on this language in *McKoy*:

> [I]t would be "the height of arbitrariness to allow *or* require the imposition of the death penalty" where 1 juror was able to prevent the other 11 from giving effect to mitigating evidence.

McKoy v. North Carolina, 494 U.S. at ---, 108 L. Ed. 2d at 379 (quoting *Mills v. Maryland*, 486 U.S. at 374, 100 L. Ed. 2d at 393).

Adoption of defendant's argument would be a misapplication of our statute. The statute prohibits the imposition of the death penalty when this Court has concluded that it was actually imposed "under the influence of . . . [an] arbitrary factor." In that circumstance the statute requires the Court to set aside the death penalty and impose a sentence of life imprisonment. *McKoy* condemned the jury instructions here because of their *potential* for producing an arbitrary result. There has been no showing here that the potential for arbitrariness, that is, one or more holdout jurors, was actually realized or that the death sentence resulted from this kind of arbitrariness. There being no such showing, imposition of a life sentence is not required under N.C.G.S. § 15A-2000(d)(2).

Concluding, then, that the error committed here was trial error arising from the offending unanimity jury instructions, we apply N.C.G.S. § 15A-2000(d)(3), which provides that "[i]f the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article."

IV.

We turn now to the question of whether the *McKoy* error was harmless.

Defendant first contends that *McKoy* itself precludes a harmless error analysis. Because the United States Supreme Court said, "We therefore vacate petitioner's death sentence and remand for resentencing," *McKoy*, 494 U.S. at ---, 108 L. Ed. 2d at 376, defendant argues that the Court has already determined that the error

was not harmless and that defendant must at least be given a new sentencing hearing.

We disagree with this interpretation of *McKoy*. *McKoy*'s mandate to us reads:

> We therefore vacate the petitioner's death sentence and remand this case to the North Carolina Supreme Court for further proceedings not inconsistent with this opinion.

Id. at ---, 108 L. Ed. 2d at 381. Considering the two passages from *McKoy* together, we conclude the United States Supreme Court intended to remand the matter to us for such further proceedings as we deem appropriate so long as they are not inconsistent with *McKoy*. We do not think by its reference to resentencing that the Court intended to preclude our engaging in a harmless error analysis.

[3] Defendant argues, for reasons having to do with the fairly limitless circumstances a juror might consider mitigating, that a *McKoy* error can never be harmless. We recognize the constitutional importance of preserving the jury's ability to consider under proper instructions all evidence proffered by a capital defendant that could reasonably mitigate the sentence to something less than death under the United States Supreme Court's death penalty jurisprudence beginning with *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), and culminating most recently in *McKoy*. We recognize that because of this jurisprudence it would be a rare case in which a *McKoy* error could be deemed harmless. The error, moreover, is one of federal constitutional dimension, and the State has the burden to demonstrate its harmlessness beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). We are unwilling to say, however, that the State could never meet this burden,[4] and we think that, consistent with the federal Constitution, *McKoy* errors are subject to harmless error analysis. *Cf. Clemmons v. Mississippi*, --- U.S. ---, 108 L. Ed. 2d 725 (1990) (harmless error analysis approved when one of two aggravating circumstances found by the jury should not have been submitted).

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4. A case in which there was little or no mitigating evidence proffered, or in which the jury found the existence of all proposed mitigating circumstances but nonetheless imposed the death penalty, could be a candidate for successful argument that a *McKoy* error was harmless, but we save decision on this point until such a case arises.

[4] Applying that analysis here, we conclude the State has not demonstrated the *McKoy* error to be harmless beyond a reasonable doubt. The jury failed to find unanimously several proposed mitigating circumstances supported by substantial evidence. These were: (1) the murder was committed while defendant was under the influence of mental or emotional disturbance; (2) for several decades defendant had exhibited signs of a mental or emotional disturbance or defect that went untreated; (3) defendant's mental or emotional disturbance was aggravated by poor physical health; and (4) defendant's ability to remember the events on the day of the killing was actually impaired. Some, but not all, jurors may have found credible the evidence in support of some or all of these circumstances and that the nonstatutory circumstances had mitigating value. Had each juror been allowed to consider such of these circumstances as each found to exist, and the evidence supporting them, in the final weighing process, we cannot say beyond a reasonable doubt that there would not have been a different result in the sentence. *See* N.C.G.S. § 15A-1443.

For the reasons given we remand the case to the Superior Court, Stanly County, for a new sentencing hearing not inconsistent with this opinion or the opinion of the United States Supreme Court in *McKoy*.

Remanded for new sentencing hearing.

Justice FRYE concurring.

While I concur in the opinion of Chief Justice Exum, I do not abandon my dissent on the basis that this defendant did not receive a fair and impartial trial. My reasons with respect thereto are set forth in *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988) (Frye, J., Exum, C.J., and Martin, J., dissenting).

Justice MARTIN concurring.

While I concur in the opinion of Chief Justice Exum, I do not abandon my dissent concerning the voluntariness of the confession of McKoy. My reasons with respect thereto are set forth in *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988) (Martin, J., Exum, C.J., and Frye, J., dissenting).

IN RE GUESS

[327 N.C. 46 (1990)]

IN RE: GEORGE A. GUESS, M.D., RESPONDENT

No. 431PA89

(Filed 26 July 1990)

1. **Physicians, Surgeons, and Allied Professions § 6 (NCI3d) — medical license — revocation by Board of Medical Examiners — statute as valid exercise of police power**

The statute permitting the Board of Medical Examiners to suspend or revoke a physician's license to practice medicine for "unprofessional conduct" based on a deviation from "the standards of acceptable and prevailing medical practice," N.C.G.S. § 90-14(a)(6), is a valid exercise of the police power and does not require a finding that the deviation must pose an actual threat of harm to the public.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 76-78.

2. **Constitutional Law § 7.1 (NCI3d); Physicians, Surgeons, and Allied Professions § 6 (NCI3d) — medical license revocation — deviation from acceptable and prevailing standards — no unlawful delegation of legislative powers**

The statute permitting the Board of Medical Examiners to suspend or revoke a physician's license for unprofessional conduct based on a deviation from the "standards of acceptable and prevailing medical practice," N.C.G.S. § 90-14(a)(6), is sufficiently specific to provide the Board with the adequate guiding standards necessary to support the legislature's delegation of authority to the Board.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 76-78.

3. **Physicians, Surgeons, and Allied Professions § 6.2 (NCI3d) — practice of homeopathy — not acceptable and prevailing medical practice — revocation of medical license — sufficiency of evidence**

The evidence supported a decision by the Board of Medical Examiners to revoke the medical license of a physician who practiced homeopathy on the ground that the practice of homeopathy does not conform to "the standards of acceptable and prevailing medical practice" in North Carolina and thus constitutes unprofessional conduct prohibited by N.C.G.S. § 90-14(a)(6).

Am Jur 2d, Physicians, Surgeons, and Other Healers § 213.

4. **Physicians, Surgeons, and Allied Professions § 6.2 (NCI3d)—practice of homeopathy—applicable and prevailing medical standards—efficacy and use of homeopathy outside N.C. irrelevant**

Evidence concerning the efficacy of homeopathy and its use outside North Carolina was not relevant to the issue before the Board of Medical Examiners as to whether the practice of homeopathy meets "acceptable and prevailing standards of medical practice" in North Carolina.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 213.

5. **Physicians, Surgeons, and Allied Professions § 6 (NCI3d)—acceptable and prevailing medical standards—statute not unconstitutionally vague**

The statute permitting the revocation of a physician's medical license for unprofessional conduct based on acts which do not conform to "the standards of acceptable and prevailing medical practice" in North Carolina, N.C.G.S. § 90-14(a)(6), is not unconstitutionally vague.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 77.

6. **Physicians, Surgeons, and Allied Professions § 6 (NCI3d)—practice of homeopathy—revocation of medical license—no invasion of privacy rights**

A decision by the Board of Medical Examiners to revoke a physician's license because of his practice of homeopathy did not unconstitutionally invade his privacy rights or the privacy rights of his patients. Furthermore, the physician had no standing to raise his patients' privacy interests in this regard.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 116.

7. **Physicians, Surgeons, and Allied Professions § 6 (NCI3d)—practice of homeopathy—revocation of medical license—no exercise of monopoly**

The Board of Medical Examiners did not exercise unbridled and unconstitutional monopoly power by denying a physician the opportunity to practice homeopathy.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 116.

Justice FRYE dissenting.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 95 N.C. App. 435, 382 S.E.2d 459 (1989), affirming an order entered by *Farmer, J.*, on 20 May 1987 in Superior Court, WAKE County. Heard in the Supreme Court on 11 April 1990.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael E. Weddington and Susan M. Parker, for the complainant appellant Board of Medical Examiners of the State of North Carolina.

Manning, Fulton & Skinner, by Charles E. Nichols, Jr., for the respondent appellee George A. Guess, M.D.

MITCHELL, Justice.

At issue in this case is whether the Court of Appeals erred in affirming a Superior Court order which reversed and vacated a decision of the Board of Medical Examiners of the State of North Carolina conditionally revoking the respondent appellee's medical license. We conclude that the Court of Appeals did err in this regard, and we reverse its holding.

The facts of this case are essentially uncontested. The record evidence tends to show that Dr. George Albert Guess is a licensed physician practicing family medicine in Asheville. In his practice, Guess regularly administers homeopathic medical treatments to his patients. Homeopathy has been defined as:

> A system of therapy developed by Samuel Hahnermann on the theory that large doses of a certain drug given to a healthy person will produce certain conditions which, when occurring spontaneously as symptoms of a disease, are relieved by the same drug in small doses. This [is] . . . a sort of "fighting fire with fire" therapy.

Stedman's Medical Dictionary 654 (24th ed. 1982); *see* Schmidt's Attorneys' Dictionary of Medicine H-110 (1962). Homeopathy thus differs from what is referred to as the conventional or allopathic system of medical treatment. Allopathy "employ[s] remedies which affect the body in a way *opposite* from the effect of the disease

treated." Schmidt's Attorneys' Dictionary of Medicine A-147 (emphasis added); *see* Stedman's Medical Dictionary 44.

The Board of Medical Examiners of the State of North Carolina (herein Board) is a legislatively created body established "to properly regulate the practice of medicine and surgery." N.C.G.S. § 90-2 (1985). On 25 June 1985, the Board charged Dr. Guess with unprofessional conduct, pursuant to N.C.G.S. § 90-14(a)(6), specifically based upon his practice of homeopathy. In a subsequent Bill of Particulars, the Board alleged that in his practice of medicine, Guess utilized "so-called 'homeopathic medicines' prepared from substances including, but not limited to, moss, the night shade plant and various other animal, vegetable and mineral substances." The Board further alleged that the use of homeopathic medicines "departs from and does not conform to the standards of acceptable and prevailing medical practice in the State of North Carolina." *See* N.C.G.S. § 90-14(a)(6) (1985).

Following notice, a hearing was held by the Board on the charge against Dr. Guess. The hearing evidence chiefly consisted of testimony by a number of physicians. Several physicians licensed to practice in North Carolina testified that homeopathy was not an acceptable and prevailing system of medical practice in North Carolina. In fact, there was evidence indicating that Guess is the only homeopath openly practicing in the State. Guess presented evidence that homeopathy is a recognized system of practice in at least three other states and many foreign countries. There was no evidence that Guess' homeopathic treatment had ever harmed a patient, and there was anecdotal evidence that Guess' homeopathic remedies had provided relief to several patients who were apparently unable to obtain relief through allopathic medicine.

Following its hearing, the Board revoked Dr. Guess' license to practice medicine in North Carolina, based upon findings and conclusions that Guess' practice of homeopathy "departs from and does not conform to the standards of acceptable and prevailing medical practice in this State," thus constituting unprofessional conduct as defined and prohibited by N.C.G.S. § 90-14(a)(6). The Board, however, stayed the revocation of Guess' license for so long as he refrained from practicing homeopathy.

Guess appealed the Board's decision to the Superior Court, Wake County, pursuant to N.C.G.S. § 90-14.8. On 17 January 1986, the Superior Court stayed the Board's decision pending judicial

review. After review, the Superior Court entered an order on 20 May 1987 which reversed and vacated the Board's decision. The Superior Court found and concluded that Guess' substantial rights had been violated because the Board's findings, conclusions and decision were "not supported by competent, material and substantial evidence and [were] arbitrary and capricious."

The Board appealed the Superior Court's order to the Court of Appeals, which dismissed the appeal for lack of jurisdiction. *In re Guess*, 89 N.C. App. 711, 367 S.E.2d 11 (1988). This Court reversed that decision and remanded this case to the Court of Appeals for its determination of the issues raised by the appeal. *In re Guess*, 324 N.C. 105, 376 S.E.2d 8 (1989). On remand, the Court of Appeals rejected the Superior Court's reasoning to the effect that the Board's findings, conclusions and decision were not supported by competent evidence. *In re Guess*, 95 N.C. App. 435, 437, 382 S.E.2d 459, 461 (1989). The Court of Appeals, nonetheless, affirmed the Superior Court's order reversing the Board's decision,

> because the Board neither charged nor found that Dr. Guess' departures from approved and prevailing medical practice either endangered or harmed his patients or the public, and in our opinion the revocation of a physician's license to practice his profession in this state must be based upon conduct that is detrimental to the public; it cannot be based upon conduct that is merely different from that of other practitioners.

Id. at 437, 382 S.E.2d at 461. We granted the Board's Petition for Discretionary Review, and now reverse the Court of Appeals.

I.

The statute central to the resolution of this case provides in relevant part:

> § 90-14. Revocation, suspension, annulment or denial of license.
>
> (a) The Board shall have the power to deny, annul, suspend, or revoke a license . . . issued by the Board to any person who has been found by the Board to have committed any of the following acts or conduct, or for any of the following reasons:
>
> . . . .
>
> (6) Unprofessional conduct, including, but not limited to, *any departure* from, or the failure to conform to, the *standards*

> *of acceptable and prevailing medical practice*, or the ethics of the medical profession, *irrespective of whether or not a patient is injured thereby* . . . .

N.C.G.S. § 90-14 (1985) (emphases added). The Court of Appeals concluded that in exercising the police power, the legislature may properly act only to protect the public from harm. *In re Guess*, 95 N.C. App. at 437-38, 382 S.E.2d at 461. Therefore, the Court of Appeals reasoned that, in order to be a valid exercise of the police power, the statute must be construed as giving the Board authority to prohibit or punish the action of a physician only when it can be shown that *the particular action in question* poses a danger of harm to the patient or the public. *Id.* Specifically, the Court of Appeals held that:

> Before a physician's license to practice his profession in this state can be lawfully revoked under G.S. 90-14(a)(6) for practices contrary to acceptable and prevailing medical practice that *it must also appear that the deviation complained of posed some threat of harm to either the physician's patients or the public.*

Id. at 438, 382 S.E.2d at 462 (emphasis added).

The Board argues, and we agree, that the Court of Appeals erred in construing the statute to add a requirement that each particular practice prohibited by the statute must pose an actual threat of harm. Our analysis begins with a basic constitutional principle: the General Assembly, in exercising the state's police power, may legislate to protect the public health, safety and general welfare. *See, e.g., Treants Enterprises, Inc. v. Onslow County*, 320 N.C. 776, 360 S.E.2d 783 (1987); *Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970); *Shelby v. Power Co.*, 155 N.C. 196, 71 S.E. 218 (1911). When a statute is challenged as being beyond the scope of the police power, the statute will be upheld unless it has no rational relationship to such a legitimate public purpose. *See, e.g., In re Hospital*, 282 N.C. 542, 193 S.E.2d 729 (1973); *Surplus Stores, Inc. v. Hunter*, 257 N.C. 206, 125 S.E.2d 764 (1962); *Skinner v. Thomas*, 171 N.C. 98, 87 S.E. 976 (1916).

Turning to the subject of this case, regulation of the medical profession is plainly related to the legitimate public purpose of protecting the public health and safety. *See Board of Medical Examiners v. Gardner*, 201 N.C. 123, 127, 159 S.E. 8, 10 (1931). State

regulation of the medical profession has long been recognized as a legitimate exercise of the police power. As the Supreme Court of the United States has pointed out:

> The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure *or tend to secure* them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely . . . . The nature and extent of the qualifications required must depend primarily upon the judgments of the States as to their necessity. . . .
>
> Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend . . . . The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Everyone may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. . . . The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected.

Dent v. West Virginia, 129 U.S. 114, 122-23, 32 L. Ed. 623, 626 (1889) (emphasis added); *see also, e.g., Barsky v. Board of Regents*, 347 U.S. 442, 449, 98 L. Ed. 829, 838 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there.").

[1] The provision of the statute in question here is reasonably related to the public health. We conclude that the legislature, in enacting N.C.G.S. § 90-14(a)(6), reasonably believed that a general risk of endangering the public is *inherent* in *any* practices which

fail to conform to the standards of "acceptable and prevailing" medical practice in North Carolina. We further conclude that the legislative intent was to prohibit any practice departing from acceptable and prevailing medical standards without regard to whether the particular practice itself could be shown to endanger the public. Our conclusion is buttressed by the plain language of N.C.G.S. § 90-14(a)(6), which allows the Board to act against *any* departure from acceptable medical practice "irrespective of whether or not a patient is injured thereby." By authorizing the Board to prevent or punish *any* medical practice departing from acceptable and prevailing standards, irrespective of whether a patient is injured thereby, the statute works as a regulation which "tend[s] to secure" the public generally "against the consequences of ignorance and incapacity as well as of deception and fraud," even though it may not immediately have that direct effect in a particular case. *See Dent v. West Virginia*, 129 U.S. at 122, 32 L. Ed. at 626. Therefore, the statute is a valid exercise of the police power.

[2] We next address a related question, whether the statute, N.C.G.S. § 90-14(a)(6), properly delegates authority to the Board. We have previously recognized that the legislature may delegate certain authority, such as adjudicative and rule-making functions, to administrative bodies. *See Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E.2d 402 (1978); *Board of Medical Examiners v. Gardner*, 201 N.C. 123, 159 S.E. 8. However, the legislature may not give unfettered discretion to the administrative body, but must instead provide "adequate guiding standards to govern the exercise of the delegated powers." *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. at 697, 249 S.E.2d at 410 (citing cases). Regarding this level of guidance which the legislature must provide to administrative bodies, we have held that:

> When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.

Id. at 698, 249 S.E.2d at 411.

Certain aspects of regulating the medical profession plainly require expertise beyond that of a layman. Our legislature recognized that need for expertise when it created a Board of Medical Examiners composed of seven licensed physicians and one additional member. N.C.G.S. § 90-2 (1985). Examining the language of N.C.G.S. § 90-14(a)(6), we conclude that the legislature clearly wished to protect the public from "unprofessional conduct" by physicians, and gave as an example of such conduct that which does not conform to the "standards of acceptable and prevailing medical practice." The statutory phrase "standards of acceptable and prevailing medical practice" is sufficiently specific to provide the Board—comprised overwhelmingly of expert physicians—with the "adequate guiding standards" necessary to support the legislature's delegation of authority.

The statute in question is a valid regulation which generally tends to secure the public health, safety, and general welfare, and the legislature has permissibly delegated certain regulatory functions connected with that valid exercise of the police power to the Board. There is no requirement, however, that every action taken by the Board specifically identify or address a particular injury or danger to any individual or to the public. It is enough that the statute is a valid exercise of the police power for the public health and general welfare, so long as the Board's action is in compliance with the statute. The Court of Appeals thus erred in requiring a showing of potential harm from the particular practices engaged in by Dr. Guess as a prerequisite to Board action, and for that reason the Court of Appeals' decision is reversed.

II.

[3] Having determined that N.C.G.S. § 90-14(a)(6) does not require that an unacceptable practice by a physician pose a particular threat of public harm before the Board may take action against that physician, we next consider whether the Board's action in this case was otherwise within its statutory authority. We first must decide whether the Board's decision in this case was supported by "competent, material, and substantial evidence." N.C.G.S. § 90-14.10 (1985). Judicial review of a decision by the Board of Medical Examiners is made according to what is frequently referred to as the "any competent evidence" standard. *See In re Rodgers*, 297 N.C. 48, 64 n.4, 253 S.E.2d 912, 922 n.4 (1979). The Superior Court found that the Board's decision was not supported by "competent, material

and substantial" evidence. On this issue, however, we agree with the Court of Appeals:

> The Superior Court's findings and conclusions as to the Board's findings of fact have no basis, as the Board's principal findings of fact are not only supported by competent evidence, they are essentially undisputed. Dr. Guess himself testified that he frequently used homeopathic medicines in treating patients, several qualified North Carolina physicians testified that such use is contrary to the "standards of acceptable and prevailing medical practice" in this state, and no doctor testified otherwise; indeed, so far as the record indicates Dr. Guess is the only physician in North Carolina that administers homeopathic medicines to patients.

In re Guess, 95 N.C. App. 435, 437, 382 S.E.2d 459, 461 (1989).

[4] Findings by the Board of Medical Examiners, if supported by competent evidence, may not be disturbed by a reviewing court. Further, "[j]udicial review of a revocation of license by order of the Board does not authorize the reviewing court to substitute its discretion for that of the Board." *In re Wilkins*, 294 N.C. 528, 545, 242 S.E.2d 829, 839 (1978) (citations omitted), *criticized on other grounds by In re Guess*, 324 N.C. 105, 376 S.E.2d 8 (1989). Dr. Guess argues that the Board must show a specific risk of harm resulting from his homeopathic practices before it may interfere with them and that, since no such risk was shown, the Board's decision could not be based upon competent evidence. As we have already rejected his underlying premise, his argument here is likewise rejected. The Board's findings leading to its decision were based upon competent, material, and substantial evidence regarding what constitutes "acceptable and prevailing" standards of medical practice in North Carolina. No more was required. Guess' evidence concerning the efficacy of homeopathy and its use outside North Carolina simply was not relevant to the issue before the Board.

Dr. Guess also contends that the Board's decision was arbitrary and capricious and, therefore, must be reversed under N.C.G.S. § 90-14.10. He argues that the Board's arbitrariness is revealed in its "selective" application of the statute against him. He seems to contend that if the Board is to take valid action against him, it must also investigate and sanction every physician who is the "first" to utilize any "new" or "rediscovered" medical procedure. We disagree. The Board properly adhered to its statutory notice

and hearing requirements, and its decision was amply supported by uncontroverted competent, material and substantial evidence. We detect no evidence of arbitrariness or capriciousness.

Dr. Guess strenuously argues that many countries and at least three states recognize the legitimacy of homeopathy. While some physicians may value the homeopathic system of practice, it seems that others consider homeopathy an outmoded and ineffective system of practice. This conflict, however interesting, simply is irrelevant here in light of the uncontroverted evidence and the Board's findings and conclusion that homeopathy is not currently an "acceptable and prevailing" system of medical practice in North Carolina.

While questions as to the efficacy of homeopathy and whether its practice should be allowed in North Carolina may be open to valid debate among members of the medical profession, the courts are not the proper forum for that debate. The legislature may one day choose to recognize the homeopathic system of treatment, or homeopathy may evolve by proper experimentation and research to the point of being recognized by the medical profession as an acceptable and prevailing form of medical practice in our state; such choices, however, are not for the courts to make.

We stress that we do not intend for our opinion in this case to retard the ongoing research and development of the healing arts in any way. The Board argues, and we agree within our admittedly limited scope of medical knowledge, that preventing the practice of homeopathy will not restrict the development and acceptance of new and beneficial medical practices. Instead, the development and acceptance of such new practices simply must be achieved by "acceptable and prevailing" methods of medical research, experimentation, testing, and approval by the appropriate regulatory or professional bodies.

III.

[5] Dr. Guess also argues that N.C.G.S. § 90-14(a)(6) is unconstitutionally vague, because a reasonably intelligent doctor will not know whether he is engaging in unprofessional conduct each time he tries a new or different medical practice not widely used in North Carolina. *See In re Wilkins*, 294 N.C. 528, 548, 242 S.E.2d 829, 841 (1978), *criticized on other grounds by In re Guess*, 324 N.C. 105, 376 S.E.2d 8 (1989). We have previously held that the predecessor statute to the current N.C.G.S. § 90-14 was neither

vague nor overbroad. *Id.* at 546-49, 242 S.E.2d at 839-41. For reasons similar to those expressed in *Wilkins*, we conclude that any reasonably intelligent licensed physician will know when he is engaging in a practice which does not conform to "the standards of acceptable and prevailing medical practice" in North Carolina. Our conclusion is buttressed by the hearing testimony before the Board, where several doctors testified without hesitation that the practice of homeopathy does not conform to the standards of acceptable and prevailing medical practice in North Carolina.

IV.

[6] Dr. Guess next contends that the Board's decision unconstitutionally invades his and his patients' privacy rights, by invading Guess' right to select his method of practice and invading his patients' rights to their choice of treatments. We disagree on both points. Regarding Guess' ability to select his method of practice, "there is no right to practice medicine which is not subordinate to the police power of the states." *Lambert v. Yellowsley*, 272 U.S. 581, 596, 71 L. Ed. 422, 429 (1926) (citing cases). Further, the Board's decision does not deprive Guess of his privilege to practice medicine, it simply limits his methods of treating patients to those which conform to the acceptable and prevailing standards of medical practice in North Carolina. Regarding Guess' claim that the Board's decision invades his patients' right to select the treatment of their choice, we initially note that he has no standing to raise his patients' privacy interests in this regard. *See Stanley, Edwards, Henderson v. Dept. Conservation & Development*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (citing cases), *limited on other grounds by Madison Cablevision v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989). Further, we have recognized no fundamental right to receive unorthodox medical treatment, and we decline to do so now. *See State v. Howard*, 78 N.C. App. 262, 269, 337 S.E.2d 598, 603 (1985), *disc. rev. denied, appeal dismissed*, 316 N.C. 198, 341 S.E.2d 581 (1986).

V.

[7] Finally, Dr. Guess contends that by denying him the opportunity to practice homeopathy, the Board is exercising unbridled and unconstitutional monopoly power. We disagree. The Board's authority to regulate the practice of medicine creates no unconstitutional monopoly. *See State v. Call*, 121 N.C. 643, 646, 28 S.E. 517, 517 (1897); *State v. Howard*, 78 N.C. App. at 266, 337 S.E.2d at 601.

VI.

The order of the Board of Medical Examiners allowed Dr. Guess to continue practicing medicine so long as he refrained from practicing homeopathy and otherwise conformed to the standards of acceptable and prevailing medical practice in North Carolina. The Superior Court erred in reversing and vacating the Board's decision, and the Court of Appeals erred in its decision affirming the Superior Court. The decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals for its further remand to the Superior Court, Wake County, for proceedings consistent with this opinion.

Reversed and remanded.

Justice FRYE dissenting.

The underlying and essential question in this case is whether the Board may revoke a physician's license to practice medicine for "unprofessional conduct" under N.C.G.S. § 90-14(a)(6) based on a deviation from "the standards of acceptable and prevailing medical practice" without a finding that the deviation carries with it a potential for harm to the physician's patients or to the public. The Court of Appeals held that the Board may not do so. I agree and therefore dissent from the majority's holding to the contrary.

I believe that the majority has construed subsection (6) of N.C.G.S. § 90-14(a) in a manner inconsistent with its purpose and legislative intent. N.C.G.S. § 90-14(a) provides that the Board shall have the power to deny, annul, suspend, or revoke a physician's license to practice medicine in this State for any of some thirteen reasons. In addition to "unprofessional conduct," a license may be revoked for immoral or dishonest conduct; for producing or attempting to produce an abortion contrary to law; for making false statements to the Board; for being unable to practice medicine with reasonable skill and safety to patients by reason of illness, drunkenness, etc.; for conviction of a crime involving moral turpitude; for making false representations in order to obtain practice, money or anything of value; for advertising or publicly professing to treat human ailments under a system or school of treatment or practice other than that for which the person has been educated; for mental incompetency; for lack of professional competence to practice medicine with a reasonable degree of skill and safety for

patients; for promotion of the sale of drugs, etc., in such a manner as to exploit the patient for financial gain; upon suspension or revocation of a license to practice medicine in another state; or for failure to respond, within a reasonable period of time and in a reasonable manner, to inquiries from the Board concerning any matter affecting the license to practice medicine. Even a cursory review of subsection (6) shows that it is directed to protecting the health and safety of patients and the public. The common thread running through each of these reasons for revocation of a license is the threat or potential for harm to patients and the public.

Subsection (6) of N.C.G.S. § 90-14(a) provides that the Board shall have the power to deny, annul, suspend, or revoke a physician's license for:

> (6) unprofessional conduct, including, but not limited to, any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, or the committing of any act contrary to honesty, justice or good morals, whether the same is committed in the course of his practice or otherwise, and whether committed within or without North Carolina[.]

The majority treats the language "irrespective of whether or not a patient is injured thereby" as meaning irrespective of whether there is an injury or threat of injury caused by the deviation. I do not believe that the legislature so intended. Dr. Guess argues, and I agree, that this language gives the Board authority to act before injury occurs, but does not eliminate the public purpose requirement that the medical practice pose some threat or potential for harm to the public. The phrase "unprofessional conduct" connotes dishonorable or unethical behavior, *In re Wilkins*, 294 N.C. 528, 242 S.E.2d 829 (1978), and, in the context of the statute, means substandard medical practice that cannot be tolerated because of the risk of harm such treatment poses to the public. Subsection (6), like the remainder of section 90-14(a), was enacted for the purpose of regulating the medical profession to protect the public health and safety and not simply to prevent a doctor from being the first one in the State to use a particular medicine or form of healing.

A careful examination of the evidence presented before the Board shows that Dr. Guess' practice of homeopathy is not un-

professional conduct within the meaning of N.C.G.S. § 90-14(a)(6). All of the evidence tended to show that Dr. Guess is a highly qualified practicing physician who uses homeopathic medicines as a last resort when allopathic medicines are not successful. He takes 150 credits of continuing medical education approved by the American Medical Association every three years and from fifty to eighty hours of homeopathic continuing medical education each year. The homeopathic medications prescribed by him are listed in the Homeopathic Pharmacopoeia of the United States and are regulated by the United States Federal Food, Drug and Cosmetic Act. The homeopathic approach is often preferred, in Dr. Guess' words, "primarily because of its well documented safety." This is not a case of a quack beguiling the public with snake oil and drums, but a dedicated physician seeking to find new ways to relieve human suffering. The legislature could hardly have intended this practice to be considered "unprofessional conduct" so as to revoke a physician's license in the absence of some evidence of harm or potential harm to the patients or to the public. Nothing in the record before the Board or this Court justifies so broad a sweep in order to secure the public "against the consequences of ignorance and incapacity as well as of deception and fraud." *See Dent v. West Virginia*, 129 U.S. 114, 122, 32 L.Ed. 623, 626 (1889).

I also disagree with the majority's conclusion that Dr. Guess's evidence presented to the Board concerning the efficacy of homeopathy and its use outside North Carolina was not relevant to the issue before the Board. North Carolina does not and should not exist as an island to itself. The evidence that homeopathy is accepted in other states and in other countries of the world and that it has a beneficial rather than harmful effect certainly ought to be of some significance to the Board and to the citizens of this State concerned about the public health and safety. The majority rejects evidence of the legitimacy of homeopathy in other states and countries throughout the world as being irrelevant because homeopathy is not currently an acceptable and prevailing system of medical practice in North Carolina. This raises the legitimate question of how the acceptable and prevailing practice can be improved in North Carolina if we do not even consider what happens in other states and countries.

Lastly, I disagree with the majority's conclusion that Dr. Guess' remedy lay with the legislature. As I have stated earlier, N.C.G.S. § 90-14(a) is intended to protect the public from harmful or dangerous

practices. In light of this policy, I do not believe that the General Assembly would require a physician to undergo a possibly lengthy wait for legislative action while it is attending to other matters before allowing him to make non-dangerous, beneficial treatments available to members of the public who knowingly consent. Where there is no showing of danger, I do not believe specific legislative approval is a prerequisite to a physician engaging in a practice which is by all indications helpful when used wisely.

I vote to affirm the unanimous decision of the Court of Appeals.

IN RE THE ADOPTION OF DANIEL JAMES CLARK

No. 395A89

(Filed 26 July 1990)

Adoption § 13 (NCI4th)— statutorily required affidavit—rights of father

The trial court did not abuse its discretion in an adoption proceeding by not allowing the affidavit required by N.C.G.S. § 48-13, filed two years after the adoption petition, to relate back to the original adoption petition where the child was born out of wedlock; the father was unaware of the birth of the child; the adoption agency filed a petition to terminate the father's parental rights; notice of service by publication was published in a local newspaper and the order terminating parental rights was issued; the child was then placed with adoptive parents who filed a petition for adoption; and the petition for adoption included a copy of the termination order rather than the affidavit required by N.C.G.S. § 48-13. The affidavit provides the basis for the clerk to determine if the father is a necessary party to the proceeding and is therefore not a mere technicality; moreover, the termination order filed here was invalid because the service by publication was void since due diligence was not used to determine the father's address. Although the adoption agency subsequently filed an affidavit, the father would be prejudiced by any attempt to relate a filing back to a time when he had no notice of the birth of his child in that he could lose his parental rights after taking action to avoid that outcome by filing a petition

for legitimation after learning of the birth of his child. The father's consent is necessary for the adoption to proceed in this case. N.C.G.S. § 48-6(a)(3).

Am Jur 2d, Adoption §§ 26, 49, 55.

Justice WHICHARD dissenting.

Justices MITCHELL and WEBB join in the dissenting opinion.

APPEAL by respondent pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 95 N.C. App. 1, 381 S.E.2d 835 (1989), reversing the order of *Seay, J.*, entered in Superior Court, FORSYTH County, on 16 May 1988. Heard in the Supreme Court 12 March 1990.

Wilson, DeGraw, Johnson & Ruthledge, by Daniel S. Johnson and David F. Tamer, for appellant.

Roy G. Hall, Jr. for appellee.

FRYE, Justice.

The issues in this case are whether the Court of Appeals erred in reversing the trial court's order: (1) dismissing the adoption proceeding involving Daniel James Clark; and (2) holding that the adoption proceeding cannot proceed without the consent of the biological father of the child. We find no error or abuse of discretion in the trial court's order dismissing the adoption petition without prejudice to its refiling and finding that Mr. Lampe's consent was necessary before the adoption proceeding could continue. We, therefore, reverse the Court of Appeals which held to the contrary.

The undisputed facts of this case are both heart rending and unique. They concern the efforts of the biological father of Daniel James Clark to assert his paternal rights and responsibilities over a period of more than six years of litigation during which time his child has been tentatively placed in an adoptive home, apparently unaware of his father's efforts to establish contact with him.

Daniel James Clark was born to Stephanie Ann Clark on 25 August 1983. Ms. Clark had been dating Christian Paul Lampe from October 1982 until April 1983. During this period they had sexual relations, and Ms. Clark told Mr. Lampe that she was using some form of contraceptive when she was in actuality not using

any form of birth control. In April 1983, Ms. Clark told Mr. Lampe that she did not want to see him again. At that time she knew that she was pregnant, but she did not tell Mr. Lampe. Ms. Clark carried the baby to full term without anyone in her family or Mr. Lampe's family ever being aware of the pregnancy.

After giving birth to the child, Ms. Clark contacted Family Services, Inc., which is a non-profit, child-placing agency, and told its representative that she wished to give the child up for adoption. On 31 August 1983, Ms. Clark executed and delivered to Family Services a "Parent's Release, Surrender and Consent to Adoption" in which she gave up rights to the child and consented to his adoption. Ms. Clark did this without ever telling Mr. Lampe about the birth. Before releasing her rights to the child, she told Family Services that Mr. Lampe was the father of the child. The record indicates that Family Services knew that the child's father was unaware of Ms. Clark's pregnancy or the birth of his child. During the pre-adoption interviews, Ms. Clark was evasive about Mr. Lampe's whereabouts and later gave Family Services an incorrect telephone number for him.

Armed with the knowledge that the father's name was Christian Paul Lampe and that he had at least recently lived in the Winston-Salem area, Family Services made only one unsuccessful attempt to contact Mr. Lampe by telephone. While the local telephone directory had two listings for "Lampe," Family Services called only one of them. This number had been disconnected, and Family Services made no attempt to call the second number which was that of Mr. Lampe's parents, the number and address which Mr. Lampe used as his permanent address while away at college. The record reflects that Family Services made no other attempt to contact Mr. Lampe prior to initiating a termination proceeding even though: (1) Mr. Lampe had a North Carolina driver's license since 1982 listing his parents' home address as his permanent address; (2) Mr. Lampe paid personal property taxes in Forsyth County listing his parents' home address as his permanent address; and (3) Mr. Lampe was registered to vote in Forsyth County again listing his parents' address as his permanent home address. Family Services did not consult any of these public records in an attempt to locate Mr. Lampe but instead relied on the incomplete and inaccurate information which Ms. Clark provided.

On 1 December 1983, Family Services filed a petition to terminate Mr. Lampe's parental rights. This petition was based on N.C.G.S. § 7A-289.32(6) which sets out when parental rights of the father of a child born out of wedlock may be terminated. Claiming that it was unable to locate Mr. Lampe, Family Services requested a preliminary hearing pursuant to N.C.G.S. § 7A-289.26. On 8 December 1983, the trial judge concluded, "[t]he father of the above-named child, not having been served with notice due to his exact whereabouts being unknown, must be served with notice by publication." A notice of service by publication was published in a local newspaper. An order terminating Mr. Lampe's parental rights was issued on 18 January 1984. The child was then placed with the adoptive parents who filed a petition for adoption on 16 February 1984. With the petition for adoption, the adoptive parents filed a copy of the termination order rather than the affidavit required by N.C.G.S. § 48-13.

While it had told the trial judge during the termination proceeding that it was unable to locate Mr. Lampe, Family Services sent him a letter at his parents' address on 27 March 1984, after the termination order was entered and after the adoption petition was filed. This letter asked Mr. Lampe to contact the agency in order to provide information about his background and family medical history. Upon receipt of this letter in early April, Mr. Lampe immediately called Family Services and found out for the first time that Ms. Clark had a child in August 1983, that she had given the child up for adoption, and that she had named him as the father of the child. On 2 May 1984, Mr. Lampe filed a motion to set aside the termination order on the grounds that service upon him by publication was invalid because Family Services failed to use due diligence in attempting to locate him. On 14 June 1984, the district court set aside the termination order issued 18 January 1984 on the grounds that Family Services did not exercise a diligent effort at the time of the preliminary hearing to locate Mr. Lampe. The Court of Appeals affirmed the district court's order, and this Court denied discretionary review. *In re Clark*, 76 N.C. App. 83, 332 S.E.2d 196, *disc. rev. denied*, 314 N.C. 665, 335 S.E.2d 322 (1985).

After he filed the motion to set aside the termination order, Mr. Lampe, on 4 May 1984, filed a special proceeding to legitimate the child and, on 23 July 1984, filed a motion for a restraining order prohibiting the clerk of superior court from proceeding with

the adoption proceedings. The restraining order was issued on 29 August 1984.

After this Court denied discretionary review of the Court of Appeals' decision affirming the setting aside of the termination order, Family Services voluntarily dismissed the petition for the termination order and filed a motion on 24 October 1985 to dismiss the restraining order which had prevented the adoption from proceeding. This motion was granted on 12 December 1985, and the order dismissing the restraining order further instructed the clerk of superior court to cause notice to be issued and served on Mr. Lampe, pursuant to N.C.G.S. § 48-6(a)(3), to show cause as to why his consent to the adoption of the child was necessary or required. This notice was filed on 4 February 1986. Included with this notice was a copy of an affidavit by the Director of Family Services. The affidavit, dated 2 January 1986, stated that prior to the filing of the adoption petition on 16 February 1984, Mr. Lampe had taken none of the steps enumerated in N.C.G.S. § 48-6(a)(3) which would make his consent necessary. The affidavit made no reference to the legitimation proceeding instituted by Mr. Lampe on 4 May 1984.

The assistant clerk of the superior court held a hearing on this matter and allowed Mr. Lampe to offer evidence as to why his consent was necessary before the adoption could proceed. On 9 June 1986, the assistant clerk filed an order which, based on findings of fact and conclusions of law, ordered among other things:

> 1. The consent of Christian Paul Lampe to the adoption of Daniel James Clark by the adoptive parents is not and shall not be necessary nor required; and
>
> 2. The adoption proceeding for the adoption of Daniel James Clark shall proceed without the consent of Christian Paul Lampe
>
> . . . .

Mr. Lampe gave notice of appeal from this order on 13 June 1986. A *de novo* hearing was begun in the superior court on 27 January 1988. The trial judge made findings of fact and conclusions of law and issued an order on 16 May 1988. This order provided:

> 1. That the adoption petition is hereby dismissed without prejudice as to its refiling.
>
> 2. That the consent of the biological father is necessary before the adoption of the minor child, Daniel James Clark, may continue.

Family Services and the adoptive parents appealed from this order to the Court of Appeals. The Court of Appeals reversed the order of the trial judge and remanded the case to the superior court. *In re Adoption of Clark*, 95 N.C. App. 1, 381 S.E.2d 835 (1989). Mr. Lampe appealed to this Court as a matter of right based on the dissenting opinion in the Court of Appeals.

In his dissenting opinion, Judge Cozort said:

> The majority's opinion has the effect of overturning this Court's 1985 decision . . . . To allow the petitioners to go forward with the adoption, without the father's consent, makes meaningless our opinion overturning the termination order. In effect, we would allow the petitioners to terminate the father's rights through the adoption process.

Id. at 13, 381 S.E.2d at 841 (Cozort, J., dissenting).

In N.C.G.S. §§ 48-13 and 48-15 our statutes set out what is necessary for a valid adoption "proceeding" when the child is born out of wedlock. Section 48-15 provides a form to be used for the petition which must be filed. In addition to the filing of the petition, N.C.G.S. § 48-13 provides:

> No reference shall be made in any petition, interlocutory decree, or final order of adoption to the marital status of the biological parents of the child sought to be adopted, to their fitness for the care and custody of such child, nor shall any reference be made therein to any child being born out of wedlock.
>
> *In the case of a child born out of wedlock and not legitimated prior to the time of the signing of the consent, an affidavit setting forth such facts sufficient to show that only the consent required under G.S. 48-6 is necessary shall be filed with the petition for adoption.*

N.C.G.S. § 48-13 (1984) (emphasis added). Thus our statutes clearly provide that, in the case of a child born out of wedlock, both the petition set out in N.C.G.S. § 48-15 and an affidavit conforming to the requirements of N.C.G.S. § 48-13 must be filed before a valid adoption proceeding has been instituted.

In the present case, the evidence is undisputed that the petition for adoption was filed, but the termination order, rather than the affidavit required by statute, was filed with the petition. This termination order was invalid because the service by publication

was void since due diligence was not used to determine Mr. Lampe's address. *In re Clark*, 76 N.C. App. at 87-88, 332 S.E.2d at 199-200. Therefore, there was no valid adoption proceeding begun on 16 February 1984 since only the petition was filed, and the petition by itself is not enough.

Family Services and the adoptive parents argue that the filing of the affidavit is a mere technicality and the failure to file the affidavit by itself is not enough to keep this from being a valid adoption proceeding. We disagree. The statute provides that the petition shall make no reference to the status of the biological parents when the child has been born out of wedlock. N.C.G.S. § 48-13 (1984). The statute then goes on to provide that the information about whether the parent's consent is necessary must be included in an affidavit which *shall* be filed with the petition. *Id.* The purpose of the filing of this affidavit is to allow the clerk of superior court to determine whether the adoption proceeding is properly filed so as to meet the essential requirements of the adoption statutes. This affidavit provides the basis for the clerk to determine if the father is a necessary party to the proceeding. Therefore, failure to file this affidavit is not a mere technicality; it goes to the heart of a valid adoption proceeding.

Since this proceeding was not a valid adoption proceeding, Mr. Lampe's parental rights have not been cut off by the provisions of N.C.G.S. § 48-6(a)(3). This statute provides:

> In the case of a child born out of wedlock the consent of the putative father shall not be required unless prior to the filing of the adoption petition:
>
> a. Paternity has been judicially established or acknowledged by affidavit which has been filed in a central registry maintained by the Department of Human Resources; provided, the court shall inquire of the Department of Human Resources as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or
>
> b. The child has been legitimated either by marriage to the mother or in accordance with provisions of G.S. 49-10, a petition for legitimation has been filed; or
>
> c. The putative father has provided substantial support or consistent care with respect to the child and mother.

> Determination under G.S. 48-6(a)(3) that the adoption may proceed without the putative father's consent shall be made only after notice to him pursuant to G.S. 1A-1, Rule 4. This notice shall be titled in the biological name of the child.

N.C.G.S. § 48-6(a)(3) (1984). Mr. Lampe filed a special proceeding in the superior court on 4 May 1984 to legitimate the child. This legitimation proceeding was filed *before* a valid adoption proceeding was filed. Therefore, the provisions of N.C.G.S. § 48-6(a)(3) do not take effect to keep Mr. Lampe from being a necessary party to an adoption proceeding involving his son.

We thus come to the crucial question in this case: when a termination order, later held to be invalid for failure to use due diligence in ascertaining the putative father's address, is filed with an adoption petition in lieu of the affidavit required by N.C.G.S. § 48-13, may a subsequently filed affidavit relate back to the original filing date of the petition so as to cut off the rights of a putative father who filed a legitimation petition pursuant to N.C.G.S. § 49-10 before the affidavit was filed? The trial judge, in effect, gave a negative answer to the question, and the Court of Appeals reversed.

The Court of Appeals concluded that Family Services and the adoptive parents should be allowed under Rule 15 of the Rules of Civil Procedure to amend the adoption petition by filing the necessary affidavit. *In re Adoption of Clark*, 95 N.C. App. at 10, 381 S.E.2d at 840. Rule 15(a) provides that leave to amend "shall be freely given when justice so requires," N.C.G.S. § 1A-1, Rule 15(a) (1983), "unless some material prejudice to the other party is demonstrated." *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1982) (citing *Mangum v. Surles*, 281 N.C. 91, 187 S.E.2d 697 (1972)). The decision to permit or deny an amendment rests within the sound discretion of the trial judge and should not be disturbed on appeal absent a showing of an abuse of that discretion. *Mauney v. Morris*, 316 N.C. at 72, 340 S.E.2d at 400; *Henry v. Deen*, 310 N.C. 75, 310 S.E.2d 326 (1984).

Clearly, in this case where Mr. Lampe could lose his parental rights, and where he has taken action to avoid that very outcome by filing a petition for legitimation after he learned about the birth of his child, Mr. Lampe would be prejudiced by any attempt to relate a filing back to a time when he had no notice of this fact. Mr. Lampe took appropriate action to avoid losing his parental

rights after he found out about the child, and allowing the affidavit to relate back to the time when he did not know about the child would materially prejudice him. Under these circumstances, the trial judge did not abuse his discretion in not treating the affidavit, submitted two years after the adoption petition, as having been filed with the adoption petition.

Mr. Lampe argued in his brief that his due process and equal protection rights are violated by these adoption statutes which could allow a biological father to lose parental rights to a child when he did not know he had a child. However, since Mr. Lampe's consent is necessary for the adoption in this case to proceed, we need not address these constitutional issues.

For the reasons stated herein, the decision of the Court of Appeals is reversed, and the order of the trial court is reinstated.

Reversed.

Justice WHICHARD dissenting.

I am convinced that the majority in the Court of Appeals correctly held that the adoption proceeding was improperly dismissed and could have gone forward without the consent of the child's putative father. In holding that the trial court did not err in dismissing the adoption petition instead of allowing the affidavit required by N.C.G.S. § 48-13 to relate back to the date the petition was first filed with a copy of the termination order, the majority has mistaken evidence for pleadings, and it has ignored the strong expression of legislative intent set out in the statute. While the machinations of Family Services and of the child's mother to avoid meaningful notification of the putative father are not laudable, in view of the plain language and express purpose of the controlling statutory provisions, neither are they determinative. What ought to determine this case and others like it is the clear, simple, legislative purpose to put the rights and welfare of the adoptive child above the rights of his absent or incapable biological parent.

The statutory scheme for the transfer of parental responsibilities from biological to adoptive parents includes a means of terminating the rights and duties of the former in order to assure that the rights and duties of the latter will be exclusive with regard to the adoptive child. The legislative intent underlying this scheme reflects the following priorities:

> [T]he primary purpose of this chapter is to protect children from unnecessary separation from parents who might give them good homes and loving care, . . . and to protect them from interference, long after they have become properly adjusted in their adoptive homes[,] by biological parents who may have some legal claim because of a defect in the adoption procedure. . . . The secondary purpose of this Chapter is . . . to prevent later disturbance of [the adoptive parents'] relationship to the child by biological parents whose legal rights have not been fully protected.

N.C.G.S. § 48-1(1), (2) (1984). This provision concludes with guidance as to how the chapter is to be read and applied: "When the interests of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child; and to that end this Chapter should be liberally construed." N.C.G.S. § 48-1(3) (1984).[1]

At the time Family Services filed its adoption petition, the parental rights of the biological parents of an illegitimate child could be foreclosed in one of three general ways: by consent under N.C.G.S. § 48-7(a) or § 48-9(a)(1); by "termination" under Article 23 (now repealed) or Article 24B of Chapter 7A; or by adjudication of abandonment under Article 24B of Chapter 48. Family Services initially filed a copy of a termination order with its adoption petition on 16 February 1984. As the culmination of the action to terminate parental rights under Article 24B of Chapter 7A, the order established the facts that Family Services had complied in good faith with all pertinent provisions of the statute, including a preliminary hearing to ascertain whether notice was to be served by publication, court-sanctioned notice by publication, and an adjudicatory hearing prior to the issuance of the order itself on 18 January 1984. *See* N.C.G.S. §§ 7A-289.26(a), (d), 7A-289.30(a), (d), 7A-289.32(6), and 7A-289.33 (1989). The order specified as grounds for terminating the parental rights of the putative father that the father had "not done any of the acts listed in G.S. 7A-289.32(6)." In addition to the termination order, Family Services attached a consent form signed by the agency itself and a "Parent's Release, Surrender, and Consent" form signed by the child's mother, in compliance

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1. In holding that the adoption petition had been improperly filed and dismissing it without prejudice, the trial court erroneously stated that the adoption statute was to be strictly construed. The statute prescribes that it is to be liberally construed in favor of the child and in favor of the stability of the child in its adoptive home.

with N.C.G.S. §§ 48-7(b) and 48-9(a)(3). When an order terminating parental rights has been filed with the adoption petition, a licensed child-placing agency such as Family Services has the right to give written consent to the adoption of a child in its custody. N.C.G.S. §§ 48-5(f), 48-9(a)(3) (1984 & Cum. Supp. 1989). Such consent, filed with the petition for adoption, is sufficient for purposes of making such an agency a party to the adoption proceeding. N.C.G.S. § 48-9(a) (1984 & Cum. Supp. 1989).

Under the provisions of N.C.G.S. § 7A-289.32(6), the circumstances under which the parental rights of a putative father may be foreclosed are "virtually identical" to those under which an adoption may proceed without the consent of the putative father, in effect terminating his parental rights. *In re Adoption of Clark*, 95 N.C. App. 1, 7, 381 S.E.2d 835, 839 (1989). *See also* N.C.G.S. §§ 48-5 (1984 & Cum. Supp. 1989), 48-6(a)(3) (1984). Among the enumerated acts, the nonfeasance of which may result in the termination of a putative father's rights, is the circumstance whether he has "[l]egitimated the child pursuant to provisions of G.S. 49-10, or filed a petition for that specific purpose." N.C.G.S. § 7A-289.32(6)(b) (1989). *Cf.* N.C.G.S. § 48-6(a)(3) (1984) ("The child has been legitimated either by marriage to the mother or in accordance with provisions of G.S. 49-10, a petition for legitimation has been filed."). By filing a petition to legitimate Daniel James Clark on 4 May 1984, the putative father clearly intended belatedly to nullify such a finding in the termination order and to preclude any subsequent finding under N.C.G.S. § 48-6(a) that he had not performed any act that would have made his consent necessary to the child's adoption. The holding of the majority gives the putative father's belated filing the effect he desires because it affirms the trial court's decision not to allow the affidavit to be substituted for the termination order filed with the adoption petition. In this the majority misapplies the Rules of Civil Procedure and misconstrues the letter and spirit of the adoption statute.

Although the Rules of Civil Procedure generally apply to adoption proceedings, *see In re Adoption of Searle*, 74 N.C. App. 61, 64, 327 S.E.2d 315, 317 (1985), the termination order or affidavit required to obviate a putative father's consent to adoption is not, properly considered, a pleading. A pleading setting forth a claim for relief is "a short and plain statement of the claim sufficiently particular to give the parties and the court notice of the transactions, occurrences, or series of transactions or occurrences, intend-

ed to be proved." N.C.G.S. § 1A-1, Rule 8(a)(1) (1983 & Cum. Supp. 1989). Detailed fact pleading is neither required nor prohibited under our "notice theory" of pleading. *Sutton v. Duke*, 277 N.C. 94, 104-05, 176 S.E.2d 161, 167 (1970). However, the facts underlying a party's statement of its claim should not be confused with the pleading itself, particularly in a case such as this where the evidence underlying the particular averment, attached as a "consent form" to the petition for adoption, was identical in the termination order and the later affidavit.

Properly considered, the pleading involved is the allegation in the petition for adoption that "all necessary parties to this proceeding are properly before the court; and there has been full compliance with the law in regard to the Consent to Adoption filed with this Petition . . . ." The affidavit is not a pleading, but statutorily required evidence supporting the foregoing allegation. The majority thus goes astray in viewing introduction of the affidavit as an amendment to pleadings, which is discretionary with the trial court.

In general, "all relevant evidence is admissible." N.C.G.S. § 8C-1, Rule 402 (1988). The only issue before the trial court here was whether the putative father's consent to the adoption was required. Thus, an affidavit averring that the putative father had performed none of the acts set forth in N.C.G.S. § 7A-289.32(6) that would make his consent to the adoption necessary was clearly relevant and admissible. Ordinarily, a court order terminating the putative father's parental rights for failure to perform any of the acts set forth in N.C.G.S. § 7A-289.32(6) would constitute even more persuasive evidence than a mere affidavit to the same effect. Thus, in attaching the termination order to the petition for adoption, rather than an affidavit, petitioners were offering the evidence required by the statute, but in a more persuasive form.

The termination order, while ruled invalid on procedural grounds, was not invalidated as to its evidentiary substance, to wit, that the putative father had failed to perform in any of the ways necessary to require his consent to the adoption. The affidavit and the contents of the termination order were evidentiary underpinnings to the same averment in the petition for adoption and consent form accompanying it: that the putative father had taken none of the steps described by statute *prior to the filing of either the termination or the adoption petition* that would indicate an

interest in the child or in the corporeal consequences of his amorous liaison. The substance of the averment did not vary from one document (the termination order) to its proffered substitute (the affidavit): the latter was merely evidence in an admissible form (the affidavit) substituted for the same evidence in a form rendered inadmissible by the invalidation of the termination order. Admitting the substituted evidence in no way would have altered the legal status of the proceeding. The adoption petition, filed on 16 January 1984, was still before the court, as was the consent form signed by the agency in accordance with N.C.G.S. § 48-9(a)(3). The affidavit simply repeated for the record the reason the father's consent was not required: that prior to the filing of the adoption petition, he had not taken any of the steps enumerated in N.C.G.S. § 48-6(a)(3). This evidence was relevant and admissible, and in dismissing the adoption petition for improper filing where the same admissible, relevant evidence in a form different from the invalidated order was before the court, the trial court "truly exalt[ed] form over substance." *Power Co. v. Winebarger*, 300 N.C. 57, 68, 265 S.E.2d 227, 234 (1980). In light of the clear legislative mandate that the adoption statutes are to be construed liberally in favor of the child and its stability in its adoptive home, N.C.G.S. § 48-1, I would hold that it erred in doing so.

The legislature has expressly stated that in adoption proceedings under Chapter 48, the child's interests are to take precedence over the conflicting interests of an adult and the intervention of a biological parent in the child's relationship with his adoptive parents is to be prevented, even when the legal rights of that biological parent may "not have been fully protected." N.C.G.S. § 48-1(1), (2) (1984). The majority's view that relation back of the affidavit was precluded by potential prejudice to the putative father inaccurately characterizes evidence supporting averments as to parental consent as pleadings and exalts form over substance in allowing the exclusion of relevant and admissible evidence. More important, it ignores the stated purpose of the adoption statute, which clearly favors the child's interests over those of his putative parent and promotes the stability of the child in his adoptive home. The child in this case approaches his seventh birthday ignorant of the efforts of his putative father to sever the child's lifelong bond with his adoptive parents and to assume custody. The result reached by the majority does not place the child's interests over the conflicting interests of his biological parent and undermines the stability of

the child in his adoptive home, contrary to clear legislative intent. "[T]he primary purpose of [the adoption statute] is to protect children . . . from interference, long after they have become properly adjusted in their adoptive homes[,] by biological parents who may have some legal claim because of a defect in the adoption procedure." N.C.G.S. § 48-1(1), (2) (1984).

For the foregoing reasons, I respectfully dissent.

Justices MITCHELL and WEBB join in this dissenting opinion.

STATE OF NORTH CAROLINA v. ANTHONY GEORGE SHOOK

No. 249A88

(Filed 26 July 1990)

1. **Criminal Law § 106.4 (NCI3d)— noncapital case—confession—proof of corpus delicti unnecessary—independent evidence of trustworthiness**

Where the State relies upon a confession to obtain a conviction in a noncapital case, it is not necessary that there be independent proof tending to establish the corpus delicti of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime.

Am Jur 2d, Homicide § 530.

2. **Criminal Law § 106.4 (NCI3d)— confession—independent evidence of trustworthiness**

Defendant's confession in which he stated that he improperly mixed the victim's medication with the intent to cause her death was supported by sufficient independent evidence of its trustworthiness to be admissible in this murder trial where the State presented evidence tending to show that, although the victim was extremely ill, she remained in a relatively stable condition with her blood pressure at a reasonable level if she received intravenous infusions of the prescribed doses of norepinephrine or epinephrine; at the time of the victim's death, the solution she was receiving intravenously contained

no norepinephrine; when the victim did not respond to the solution labeled as containing norepinephrine, she was switched to a different solution labeled as containing epinephrine; however, that solution was not effective since it only contained one-tenth of the prescribed amount of the epinephrine indicated on the label; each solution had been prepared and labeled by the defendant, a nurse; and the uncontroverted cause of the victim's death was the removal of pharmacological support and the resulting drop in her blood pressure.

Am Jur 2d, Homicide § 530.

3. Homicide § 30.3 (NCI3d)— first degree murder—instruction on involuntary manslaughter not required

In a prosecution of a nurse for first degree murder of a hospital patient who died as a result of having her life-sustaining medication withheld, there was insufficient evidence that defendant negligently and unintentionally withheld medication from the victim so as to require the trial court to instruct the jury on the lesser included offense of involuntary manslaughter where defendant simply testified at trial that he had not prepared the victim's medication or done anything else wrong, either intentionally or unintentionally; and defendant indicated in a pretrial statement to SBI agents that he knowingly withheld the victim's medication with the intent to cause her death, but that he did so "spontaneously."

Am Jur 2d, Homicide § 511.

4. Criminal Law § 50.2 (NCI3d)— witness's perception of defendant's state of mind—admissible nonexpert opinion

In a prosecution of a nurse for first degree murder of a hospital patient by withholding the patient's life-sustaining medication, testimony by the victim's husband that "[i]t seemed like [defendant's] attitude toward me was like he was wanting me to give up on her" was admissible under N.C.G.S. § 8C-1, Rule 701 since the testimony went not to defendant's intent but simply related the witness's perception as to defendant's state of mind and the effect it had on the witness, and the testimony was helpful to the jury in explaining the witness's testimony as to why he subsequently asked the hospital not to assign defendant to care for his wife.

Am Jur 2d, Homicide § 282.

Justice WEBB concurring.

APPEAL of right pursuant to N.C.G.S. § 7A-27 from judgment entered by *DeRamus, J.*, in the Superior Court, FORSYTH County, on 25 February 1988, sentencing the defendant to life imprisonment for murder in the first degree. Heard in the Supreme Court on 13 December 1989.

Lacy H. Thornburg, Attorney General, by William N. Farrell, Jr., Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for the defendant-appellant.

MITCHELL, Justice.

The defendant was tried in a noncapital trial upon a true bill of indictment charging him with the murder of Peggy Lou Epley. The trial court submitted and instructed the jury on possible verdicts finding the defendant guilty of first-degree murder or not guilty. The jury found the defendant guilty of first-degree murder on the theory that the killing was premeditated and deliberate. The District Attorney having announced that there was no evidence of aggravating circumstances, the trial court sentenced the defendant to life in prison.

The State's evidence at trial tended to show that Peggy Epley was placed in the intensive care unit of the North Carolina Baptist Hospital in Winston-Salem due to renal failure. She was moved in and out of the intensive care unit five times prior to her death. During October 1986, Peggy Epley's life was maintained by a ventilator, dialysis, and intravenous infusions of blood pressure medication.

On 8 October 1986, the defendant, a registered nurse, specifically asked to care for Peggy Epley during his shift. Having been advised of the patient's condition by Nurse Scott, the defendant stated, "[w]ell, you know, one of these days her blood pressure is going to drop and she's not coming back." During the early morning of 9 October 1986, the patient's blood pressure began to drop. The defendant managed to raise her blood pressure by increasing the rate of infusion of norepinephrine, a blood pressure medication. She remained stable until 6:00 a.m. At this time, the defendant

prepared and administered a new bottle of norepinephrine. The defendant also prepared a backup solution of epinephrine, to be used if the patient failed to respond to the norepinephrine. Meanwhile, the patient's blood pressure remained stable.

The defendant was relieved around 7:00 a.m. by Nurse Bryant. The defendant informed Nurse Bryant about Epley's condition. He also informed Nurse Bryant that he had prepared a new infusion of norepinephrine which was being administered to the patient at that time. Further, he pointed out that he had mixed a backup solution of epinephrine which was ready for use if there was a problem. Having been relieved, the defendant then left the hospital.

Around 8:15 a.m. on 9 October 1986, Epley's blood pressure dropped. Her blood pressure continued to drop despite increased rates of infusion of the norepinephrine solution which the defendant had mixed. Since Epley did not respond to the norepinephrine solution, she was switched to the backup solution containing epinephrine. As with the norepinephrine, the patient did not respond to the infusion of epinephrine which the defendant had mixed. Eventually, the patient died due to a loss of blood pressure.

Suspecting that something was wrong with the norepinephrine and epinephrine solutions prepared by the defendant, state authorities sent samples of the solutions and the tubings used to administer them to the Federal Bureau of Investigation for analysis. Analysis revealed that the norepinephrine solution prepared by the defendant contained no trace of the medication. Analysis also revealed a discrepancy concerning the epinephrine solution prepared by the defendant. Although the defendant had written on the label that the epinephrine solution contained the prescribed amount of the drug, the FBI analysis revealed that the solution only contained one-tenth of the amount of the drug indicated on the label. The Chief Medical Examiner testified that the immediate cause of Peggy Epley's death was the removal of such pharmacological support and the resulting drop in her blood pressure.

On 26 August 1987, State Bureau of Investigation agents David Barnes and J. T. Readling contacted the defendant in Charlotte, North Carolina at the Emergency Medical Services Substation. During the interview, the defendant discussed his care for Peggy Epley on the morning that she died. In response to the defendant's statements, agent Barnes stated that he believed that the defendant intentionally withheld Epley's blood pressure medication by

mixing the solutions without the prescribed drugs. At one point during the interview, the defendant agreed with the agent's theory and stated that his decision to use the improperly mixed medication had been "spontaneous." He further stated that he had wanted Epley to finish dying. Thereafter, the defendant ended the interview.

At trial, the defendant testified on his own behalf. He testified that he had done everything within his power to care for Epley, despite the fact that her grim condition had discouraged him. He denied ever mixing Epley's blood pressure medications improperly. Even though the labels on the solution bottles bore his signature, he testified that some unknown person had mixed the solutions.

Dr. Kenneth Brassfield, a doctor of pharmacology, testified that norepinephrine and epinephrine break down rather quickly after being mixed in a solution. He further testified that subsequent tests run on the solutions would indicate a lower amount of the medication than originally mixed and that there is a lack of scientific data concerning the reliability of the tests. Therefore, Dr. Brassfield did not trust the FBI's analysis of the blood pressure solutions used on Epley.

Additional evidence and other matters relevant to the defendant's specific assignments of error are discussed at other points in this opinion.

By an assignment of error, the defendant contends that the trial court committed reversible error by admitting evidence of incriminating statements he made to two SBI agents. At trial, SBI agent David Barnes testified as follows:

> At that time Mr. Shook said that he drew blood gases throughout the morning to determine what Mrs. Epley's oxygen content was; and that while he was gone to the lab to get these results, he had asked either the charge nurse or some other nurse to watch Mrs. Epley while he went.
>
> . . .
>
> And [he] stated that he had asked someone to mix the new drips but could not recall who he had asked. And further stated that he was busy getting the crash cart ready and that when the unknown person or person he couldn't recall had mixed the drips and handed them to him already mixed

that he then put labels on the bottles and hung those bottles that he signed.

. . .

At this point in the interview I stopped him and told him that the evidence that I had in my possession and the interviews that I had conducted along with the other investigators showed me that what he was telling me was not true. And I then stated to him the theory . . . that Mr. Shook did, in fact, mix these drips and—but without the prescribed medications in them; and the reason that this was done, in the opinion of the investigators based on the investigation, was to allow Mrs. Epley to pass away or to die.

Mr. Shook at that time dropped his head much like this, looked in a downward fashion. He was sitting on a counter in the kitchen at the time and stated, "what's going to happen to me if I say yes?"

I told him that I would make the people who had a need to know this information aware of it. And . . . Mr. Shook stated that he helped her out. Mr. Shook stated that he knew how hard it is to let go of a loved one and that Mr. Epley did not want to let Mrs. Epley go. Mr. Shook further stated that he has always in the past been able to foresee a patient's needs and had never done anything like this before. Mr. Shook stated that he did not put any epinephrine in the drip, but thought he had asked someone to mix the [norepinephrine] and thought the [norepinephrine] was in the drip.

I stopped him again and stated that he had just told me that he helped Mrs. Epley pass away and that it would make no sense then to maintain that he placed life-sustaining fluid in that [norepinephrine] drip. And he—agreed with that. Mr. Shook stated it had become difficult for him to go into Mrs. Epley's room each day and that he felt that Mrs. Epley would expire or pass away within the next several days. And he said that he, quote, I—he said, I quote, "I just wanted her to finish dying." Mr. Shook stated that it was a spontaneous decision to hang the improperly mixed drips. He said that he was aware of what would happen if the epinephrine drip contained no epinephrine, that Mrs. Epley would die or pass away. Then he stated that he wanted to see how she would do without

> the epinephrine and that he had her down to almost no epinephrine . . . that morning.
>
> I asked Mr. Shook if he knew of any crime that had been committed. He stated he wasn't sure any crime had been committed.

The defendant argues that the trial court improperly admitted evidence of his confession because there was no independent evidence that a criminal act had been committed. We disagree.

[1, 2] In noncapital cases, such as this, where the State relies upon a confession to obtain a conviction, it is not necessary "that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime." *State v. Parker*, 315 N.C. 222, 236, 337 S.E.2d 487, 495 (1985). In this case, the State introduced substantial independent evidence tending to establish the trustworthiness of the defendant's confession. Although the victim was extremely ill, the evidence tended to show that she remained in a relatively stable condition with her blood pressure at a reasonable level if she received intravenous infusions of the prescribed doses of norepinephrine or epinephrine. At the time of the victim's death, the solution she was receiving intravenously contained no norepinephrine. When the victim did not respond to the solution labeled as containing norepinephrine, she was switched to a different solution labeled as containing epinephrine. However, that solution was not effective since it only contained one-tenth of the prescribed amount of epinephrine indicated on the label. Each solution had been prepared and labeled by the defendant. This evidence closely parallels the defendant's confession and tends to establish its trustworthiness.

Further, the uncontroverted cause of the victim's death was the removal of pharmacological support and resulting drop in her blood pressure. This too tends to corroborate those parts of the defendant's confession in which he stated that he improperly mixed the victim's medication and negates the possibility that the defendant confessed to a crime which had not been committed. We conclude that the defendant's confession was supported by sufficient independent evidence of its trustworthiness to be admissible. This assignment of error is without merit.

[3] By another assignment of error, the defendant contends that the trial court committed reversible error in failing to instruct the jury on the lesser included offense of involuntary manslaughter. The trial court submitted two possible verdicts for the jury to consider: guilty of first-degree murder and not guilty. The defendant argues that the evidence also required an instruction on and submission of a possible verdict finding him guilty of involuntary manslaughter. We disagree.

While involuntary manslaughter is a lesser included offense of first-degree murder, the trial court was not required to submit a verdict on that lesser included offense unless it was supported by evidence. *See State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983). If, however, there was any evidence introduced tending to support the lesser included offense of involuntary manslaughter, then it was the trial court's duty to submit a possible verdict for that offense after appropriate instructions. *Id.* Upon a review of the record, we conclude that the evidence presented at trial would not have supported a verdict finding the defendant guilty of involuntary manslaughter. Therefore, the trial court did not err by failing to submit a possible verdict on that offense to the jury.

The evidence tended to show that the victim died as a result of having her life-sustaining medications withheld. The defendant argues that the evidence at trial would have supported a reasonable finding by the jury that he negligently mixed the victim's medication solutions improperly. At trial, however, the defendant simply testified to the effect that he had not prepared the victim's medication or done anything else wrong, either intentionally or unintentionally. In his pre-trial statement to the SBI agents, on the other hand, he indicated that he knowingly withheld the victim's medication with the intent to cause her death, but that he did so "spontaneously." We find no evidence in the record or transcript sufficient to support a reasonable finding by the jury that the defendant negligently and unintentionally withheld the medication from the victim. Therefore, the evidence would not have supported a verdict finding the defendant guilty of involuntary manslaughter, and the trial court did not err in failing to submit such a possible verdict to the jury. This assignment of error is without merit.

[4] By another assignment of error, the defendant argues that the trial court improperly overruled his objection to highly prejudicial opinion testimony. During the State's direct examination of

Gerald Epley, the victim's husband, the following exchange took place:

Q. Did there come a time when she was moved back to intensive care that you had occasion to become acquainted with the defendant?

A. Yes.

Q. And will you point out the defendant to us, please?

A. Right there in the middle.

Q. Mr. Shook?

A. Right.

Q. And how did you come in contact with Mr. Shook?

A. I went up one night to see how my wife was doing.

Q. And what happened?

A. Well, she wasn't doing to [sic] good. He said she—her blood pressure was going—had been going down.

Q. Now, this is the defendant that's talking directly to you; is that right?

A. Right.

Q. All right. Go ahead and tell us what he said.

A. Well, I was really concerned about my wife. I was there mostly just to check in on her. He was trying to impress it was a severe condition and had I talked to the doctor about it.

Q. All right.

A. And he kept impressing on me how bad a condition it was. And I did ask him could a condition like that be cleared up. As far as I know, he never answered me on that. And he did pull out doctor—the doctor's notes and—

Q. The chart itself?

A. Right.

Q. All right. And what did he—what did he do with it?

A. And he said, "In Dr. Hamilton's notes here he says the situation is grim."

Q. Grim?

A. Right.

Q. And then what happened after that? What did you say to him?

A. Well, I just told him I hadn't give up on her, she was a good mother, a good wife, she never did complain and she wanted to get better.

Q. Did you indicate to him in any way that you would hope your wife would die or anything like that?

A. No, in no way, shape or form.

Q. You gave him no indication that you wanted them to withhold any life support system?

A. No, indeed not.

Q. Did you even have any discussion about that?

A. No, indeed not.

Q. He didn't even suggest that to you, did he?

A. No, he didn't suggest it, huh-uh. It seemed—well—

Q. Go ahead.

A. It seemed like his attitude toward me was like he was wanting me to give up on her.

[Objection by defense counsel overruled.]

The defendant, citing *State v. Sanders*, 295 N.C. 361, 245 S.E.2d 674 (1978), *cert. denied*, 454 U.S. 973, 70 L. Ed. 2d 392 (1981), contends that Gerald Epley's testimony constituted inadmissible evidence of his opinion as to another person's intention on a particular occasion. We disagree.

Epley's testimony satisfied the requirements of N.C.G.S. § 8C-1, Rule 701 in that it was both rationally based on his perception and helpful to the jury. The questioned testimony went not to the defendant's intent, but simply related the witness' perception as to the defendant's state of mind and the effect it had on the

witness. Such testimony was helpful in explaining the witness' testimony concerning why he subsequently asked the hospital not to assign the defendant to care for his wife. We conclude, therefore, that the testimony was properly admitted under Rule 701. *State v. McElroy*, 326 N.C. 752, 392 S.E.2d 67 (1990).

The defendant received a fair trial free of prejudicial error.

No error.

Justice WEBB concurring.

I concur in the result reached by the majority. I write this concurring opinion because I do not believe we have properly treated the issue of proof necessary to make a confession admissible. I believe this Court went off the track in *State v. Brown*, 308 N.C. 181, 301 S.E.2d 89 (1983), in holding that a confession should not be admitted unless the State offers proof aliunde the confession that the crime was committed. It is time to return to the rule which was in effect before *Brown*.

I believe that prior to *Brown* the rule for making confessions admissible was well established in the following cases: *State v. Green*, 295 N.C. 244, 244 S.E.2d 369 (1978); *State v. Thompson*, 287 N.C. 303, 214 S.E.2d 742, *death sentence vacated*, 428 U.S. 908, 49 L.Ed.2d 1213 (1976); *State v. Jenerett*, 281 N.C. 81, 187 S.E.2d 735 (1972); *State v. Whittemore*, 255 N.C. 583, 122 S.E.2d 396 (1961), and *State v. Macon*, 6 N.C. App. 245, 170 S.E.2d 144 (1969), *aff'd*, 276 N.C. 466, 173 S.E.2d 286 (1970). In *Thompson*, Chief Justice Branch stated the rule as follows:

> Defendant correctly contends that his conviction cannot be sustained upon a naked extrajudicial confession. However, it is equally well settled that if the State offers into evidence sufficient extrinsic corroborative circumstances as will, when taken in connection with an accused's confession, show that the crime was committed and that the accused was the perpetrator, the case should be submitted to the jury.

State v. Thompson, 287 N.C. at 324, 214 S.E.2d at 755. The defendant in *Thompson* had been convicted of murder. The evidence which Chief Justice Branch held corroborated the defendant's confession was that the defendant was found in an automobile similar to the one belonging to the deceased, the defendant had a large sum

of money, the defendant had an opportunity to steal the pistol which was shown to have fired the fatal bullets, the defendant had in his possession a pistol which was the same color as the one which fired the bullets into the deceased's body, and his girlfriend saw some empty shells in the possession of the defendant. This was not evidence aliunde the confession sufficient to prove the murder had been committed.

In *Whittemore*, the defendant was tried for a crime against nature and carnal knowledge of a virtuous girl. A penetration is necessary for a person to be convicted of either crime. The State's witness did not testify that there was a penetration so that there was not proof that a crime had been committed. We said this was not enough to convict the defendant of either crime. The defendant confessed, however, and we held that the testimony of the State's witness and the confession was enough to sustain the conviction. Justice Rodman, writing for the Court, said:

> "A conviction cannot be had on the extrajudicial confession of the defendant, unless corroborated by proof *aliunde* of the *corpus delicti*. Full, direct, and positive evidence, however, of the *corpus delicti* is not indispensable. A confession will be sufficient if there be such extrinsic corroborative circumstances, as will, *when taken in connection with the confession*, establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt."

State v. Whittemore, 255 N.C. at 589, 122 S.E.2d at 401 (quoting *Masse v. United States*, 210 F.2d 418, 420 (5th Cir. 1954)).

Justice Dan Moore in *Jenerett* quoted *Whittemore* with approval. In *Macon*, the defendant was convicted of second degree murder. The State's evidence showed that the skeleton of the victim was found with a bullet hole through her skull. This evidence was held to be sufficient proof of the corpus delicti to make the defendant's confession admissible. We affirmed this holding. The fact that there was a bullet hole through the victim's skull did not prove she was murdered. It could have just as easily been inferred that it was an accident or that it was a suicide. I believe *Macon* contains a square holding that it is not necessary to prove a crime has been committed in order to make a confession admissible. In that case Judge Parker, writing for the Court of Appeals said:

> To establish a *prima facie* showing of the *corpus delicti* the prosecution need not eliminate all inferences tending to show a non-criminal cause of death. "Rather, a foundation (for the introduction of a confession) may be laid by the introduction of evidence which creates a reasonable inference that the death could have been caused by a criminal agency . . . even in the presence of an equally plausible non-criminal explanation of the event (citing cases)."

State v. Macon, 6 N.C. App. at 253, 170 S.E.2d at 149.

I have discussed these cases at some length in order to show that prior to *Brown* we had a simple and good rule on the admissibility of confessions. That rule was that if there was evidence independent of the confession which, taken with the confession showed a crime had been committed and that the defendant did it, the confession should be admitted. There was no reason to change this rule as was done in *Brown*. Confessions can be good evidence and should not be restricted by an arbitrary rule.

Following *Brown* the problems caused by that case began to surface. In *State v. Franklin*, 308 N.C. 682, 304 S.E.2d 579 (1983), no problem arose because the commission of the crime could be proved independently of the confession. In *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985), we changed the rule in non-capital cases and said, "it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime." *Id.* at 236, 337 S.E.2d at 495. I believe this is a very difficult test to apply.

In *State v. Trexler*, 316 N.C. 528, 342 S.E.2d 878 (1986), the defendant was convicted of driving while impaired. The evidence was that a Mr. Hall was awakened at 2:30 a.m. by a loud noise outside his home. He looked out his window and saw an automobile lying upside down in the road. He also saw someone leaving the vehicle. A highway patrolman came to the scene and the defendant told him he had been driving the automobile. The chemical analysis revealed that defendant's blood alcohol content was .14. The Court of Appeals held that *Brown* required the case to be dismissed because there was not evidence aliunde the confession that there had been a crime committed.

We reversed the Court of Appeals in *Trexler*. In doing so I believe we demonstrated how difficult it is to apply the rule as now stated. At one point we said:

> It is well established in this jurisdiction that a naked, uncorroborated, extrajudicial confession is not sufficient to support a criminal conviction. Our application of the *corpus delicti* rule before our decision in *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985), required that there be corroborative evidence, independent of defendant's confession, which tended to prove the commission of the charged crime.

State v. Trexler, 316 N.C. at 531, 342 S.E.2d at 880.

Later in the opinion in *Trexler* we said that the pre-*Parker* rule has not been abandoned but that *Parker* expanded the type of corroboration which may be sufficient. We said:

> The pre-*Parker* rule is still fully applicable in cases in which there is some *evidence aliunde* the confession which, when considered with the confession, will tend to support a finding that the crime charged occurred. The rule does not require that the *evidence aliunde* the confession prove any element of the crime. The *corpus delicti* rule only requires *evidence aliunde* the confession which, when considered with the confession, supports the confession and permits a reasonable inference that the crime occurred. 30 Am. Jur. 2d *Evidence* § 1142 (1967). The independent evidence must touch or be concerned with the *corpus delicti*. *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487.

State v. Trexler, 316 N.C. at 532, 342 S.E.2d at 880-81. If this be the test we have returned to the rule of *Thompson* with the added requirement of *Parker* that the independent evidence be concerned with the corpus delicti. We apparently used this revised *Thompson* test in *Trexler* when we said, "[w]e need not rely upon the *Parker* rule for here there is *evidence aliunde* defendant's confession touching on the *corpus delicti* which when considered with other evidence tends to support a finding that the charged crime occurred." *State v. Trexler*, 316 N.C. at 533, 342 S.E.2d at 881. Although we used the pre-*Brown* test in *Trexler*, we said we were using the *Brown* test.

In *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986), we again faced the question of the sufficiency of corroborating evidence to support a confession. The defendant was convicted of first degree

murder, kidnapping and rape. In that case the victim's body was found on a road several miles from her automobile. There were fifty-five separate stab wounds in the body. A forensic odontologist testified that the defendant's teeth matched bite marks on the victim's breast. There was sperm in the victim's vagina. The defendant contended on appeal that his confession to kidnapping and rape did not support a conviction as to either crime because there was not proof of a corpus delicti in either case. We recognized *Brown* as being the controlling authority, but then said, "[t]he pre-*Parker* rule is still fully applicable in cases in which there is some *evidence aliunde* the confession which, when considered with the confession, will tend to support a finding that the crime charged occurred." *State v. Johnson*, 317 N.C. at 373, 346 S.E.2d at 612 (quoting *State v. Trexler*, 316 N.C. 528, 532, 342 S.E.2d 878, 880 (1986)). As we have seen, this is the *Thompson* rule and not the *Brown* rule.

The evidence in *Johnson* which we said established the corpus delicti for the kidnapping charge was that the victim's body was found miles from her home and her car, that bloodstains were found on the defendant's car and clothing and bruises were found on her face. The evidence which we said established the corpus delicti for the rape charge was the stab wounds, a bruise on the victim's face and bite marks on her left breast and thigh, bloodstain patterns in the defendant's car, the victim's torn clothes which left her body exposed from her neck to her ankles and semen in her vagina. If the *Thompson* test is used this evidence should be sufficient to establish the corpus delicti for both charges. If the *Brown* test is used it is more difficult and I do not believe it can be done on the kidnapping charge.

I have discussed the cases at some length because I believe they demonstrate that *Brown* has given us a rule which is confusing and difficult to apply. Some of our cases treat confessions as if they should be suspect evidence and subject to artificial rules before admission. I believe the opposite is true. Unless the evidence shows a confession is coerced I do not see how we could have better evidence. I would have a simple rule, such as the one stated in *Thompson*.

It is for these reasons that I concur in the result.

STATE OF NORTH CAROLINA v. RONALD CRAIG PENNINGTON

No. 477PA89

(Filed 26 July 1990)

1. **Searches and Seizures § 19 (NCI3d)— defendant indicted for felonies—authority of deputy clerk to issue search warrant**

The titles to N.C.G.S. §§ 7A-180 and -181 referring to the functions of clerks of superior court and assistant and deputy clerks "in district court matters" were not intended by the legislature to limit the authority of superior court clerks to issue search warrants within their operative counties exclusively to criminal matters to be tried in the district court. Therefore, a deputy clerk of superior court had jurisdiction to issue a search warrant to obtain samples of defendant's blood for laboratory analysis after defendant had been indicted for felonies which would be tried in the superior court.

Am Jur 2d, Searches and Seizures §§ 71, 105.

2. **Criminal Law § 50 (NCI3d)— new scientific method of proof—reliability**

A new scientific method of proof is admissible at trial if the method is sufficiently reliable.

Am Jur 2d, Evidence § 818.

3. **Criminal Law § 50 (NCI3d)— *reliability of scientific procedure***

Reliability of a scientific procedure is usually established by expert testimony, and the acceptance of experts within the field is one index, though not the exclusive index, of reliability. Indices of reliability include the expert's use of established techniques, the expert's professional background in the field, the use of visual aids for the jury so that the jury is not asked to sacrifice its independence by accepting the scientific hypotheses on faith, and independent research conducted by the expert.

Am Jur 2d, Evidence § 822.

4. **Criminal Law § 55.1 (NCI3d)— *admissibility of DNA profiling tests***

Expert testimony established the reliability of DNA profiling tests conducted by a commercial clinical laboratory so

that results of the profiling tests, which compared DNA molecules extracted from defendant's blood with DNA molecules extracted from a stain on a bedspread taken from the crime scene, were admissible in this prosecution for first degree rape, first degree sexual offense, and other crimes.

Am Jur 2d, Evidence §§ 829, 1104, 1147.

ON discretionary review prior to determination by the Court of Appeals pursuant to N.C.G.S. § 7A-31(b) of a judgment imposing two consecutive sentences of life imprisonment upon convictions of first-degree rape and first-degree sexual offense and consecutive sentences of fifty years for first-degree arson, twenty years for assault with a deadly weapon with intent to kill inflicting serious injury, and three years for felonious breaking and entering, entered by *Cornelius, J.*, at the 1 May 1989 Criminal Session of Superior Court, FORSYTH County. Heard in the Supreme Court 17 May 1990.

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

David F. Tamer for defendant-appellant.

WHICHARD, Justice.

Defendant argues two assignments of error relating to his convictions for first-degree rape, first-degree sexual offense, first-degree arson, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious breaking and entering. For the reasons stated below, we conclude that defendant received a fair trial free of error.

The victim testified that defendant came to the front door of her home on the afternoon of 13 July 1988 and asked if she knew of any available jobs or homes to rent. Defendant asked to come in the house to use the telephone, but the victim refused. Defendant spoke to the victim through the closed screen door for approximately twenty minutes. She eventually wrote down his name and telephone number and agreed to call him if she heard of any jobs. Her husband came home soon after defendant left, and she told him about the incident because defendant's persistence worried her. She described defendant's appearance on 13 July 1988 as different from his appearance at trial, in that on 13 July 1988 his hair was longer and more "scraggly" and his beard was fuller.

He wore no shirt, and she could see a tattoo on his back which said "Rock."

The next morning the victim was sitting in her living room watching television when she heard defendant's voice call out, "Hey, it's me," from the vicinity of her front door. The victim spoke briefly with defendant through her screen door before defendant burst through the door and began choking her. Defendant stated, "I've done this before and I'm not going back to jail this time." The victim offered defendant money, but he laughed and replied, "I don't want your money. I want you." Defendant proceeded to beat the victim with his fists and a hammer and pushed her into a bedroom. He tore off her clothes, threatened to kill her, and forced her to submit to vaginal intercourse four times while he kept his hands around her throat. Defendant performed cunnilingus on the victim, then attempted anal intercourse. When he was unable to insert his penis into the victim's anus, he picked up the hammer and struck the victim in the head. She lost consciousness briefly and awoke to find defendant engaged in anal intercourse with her. After he finished he dragged her by her hair down the hall to the master bedroom and threw her against the bed frame. The victim again lost consciousness and awoke to see defendant pulling up his pants and fastening them. He picked up the hammer and hit her in the head with it hard "like he was hammering a nail into a piece of wood." After losing and regaining consciousness again, the victim discovered defendant was beating and scraping her legs with the hammer. The victim began calling defendant "Tim," hoping that he would leave if he thought she could not identify him, but defendant angrily insisted that his name was Ronnie Pennington. Defendant opened his wallet and showed the victim a computer-generated document bearing the name "Ronald Pennington." He struck the victim in the head with the hammer several more times, then pulled the drapes off the windows and set them on fire. As the victim lay on the floor watching, defendant yelled at her not to look at him, then inflicted more blows on her head and legs with the hammer. The victim lost consciousness and did not awaken for five days.

The victim's husband testified that on 14 July 1988 he called his wife at 12:30 p.m., as he did every day. When the telephone remained busy for half an hour he became concerned and left work. Arriving home at approximately 1:20 p.m., he found his house filled

with smoke and his wife naked, bleeding, and unconscious on the bedroom floor.

Dr. Timothy Garner, a neurosurgeon, testified that the victim suffered two depressed skull fractures and lost a large amount of blood from multiple scalp lacerations. Brain matter was visible outside her skull prior to surgery. Dr. Garner performed two craniotomies to repair the victim's skull fractures and remove dead brain tissue. Her vision was permanently affected by damage to the right parietal region of the brain. Despite what Dr. Garner called a miraculous recovery, the victim remained on medication to prevent brain seizures at the time of trial.

Dr. Richard Weaver, an ophthalmologist, testified that the victim suffered a left-sided visual field defect as a result of her injuries. This defect results in a lack of awareness of objects on the left side of the visual field. Dr. Weaver testified, "It's like you hold your hand behind where you can see, it's not black, but you just have no awareness that your hand is there."

Recovery of physical evidence from the crime scene proved difficult because of the smoke and soot occasioned by the fire. Detective H.E. Warren of the Forsyth County Sheriff's Department testified that he found a hammer, identified by the victim as the weapon defendant used to assault her, in the woods near the victim's home. The State's fingerprint expert identified a latent print matching defendant's left little finger on a strip of metal found a few feet from the hammer. In addition, the expert testified that a latent palm print found on the front door molding of the victim's home matched that of defendant. Detective Warren testified that a photograph of defendant's back taken on 17 July 1988 accurately portrayed defendant's tattoo. The photograph showed the words "Rock" and "Ron" along with a musical symbol and a star.

Samples collected from the victim revealed the presence of spermatozoa in her vagina and rectum. A stain taken from the bedspread on the bed upon which defendant raped the victim also revealed the presence of spermatozoa. Tests conducted on the vaginal swab and the bedspread showed that the sources of the specimens were of blood type A secretor. Blood samples from the victim and defendant revealed that both are type A secretors. The expert serologist defined a secretor as an individual who secretes characteristics identifying his blood type into his body fluids.

The trial court conducted a lengthy voir dire hearing on the admissibility of evidence of deoxyribonucleic acid (DNA) analysis conducted by Cellmark Diagnostics, Inc. (Cellmark), a commercial clinical laboratory located in Germantown, Maryland. It concluded that the proffered evidence was reliable and based on established scientific methods generally accepted within the fields of microbiology and molecular biology, and allowed admission of evidence pertaining to the DNA analysis.

Dr. George Herrin, a staff scientist at Cellmark and an expert in the field of molecular biology specializing in the identification of DNA, testified that on 18 November 1988 the State Bureau of Investigation submitted to Cellmark a vaginal swab and a cutting from a bedspread. Cellmark also received blood samples from defendant, the victim, and the victim's husband. The samples remained within Dr. Herrin's custody until their return to the Forsyth County Sheriff's Department.

Dr. Herrin explained to the jury that DNA is the chemical which encodes all genetic information. DNA is located in the nucleus of all nucleated cells in the human body, remains constant throughout a person's life, and is identical in each cell—*i.e.*, the DNA extracted from a man's blood cells is identical to the DNA extracted from his sperm cells. Each person's DNA is unique, with the exception of that of identical twins.

Dr. Herrin testified, in summary, that DNA is composed of two strands made of chains of chemical bases called nucleotides. Each nucleotide is one of four chemicals which compose a four-letter organic alphabet. The strands are very long, containing billions of nucleotides which can be arranged in any order along the strand. The order of the nucleotides determines certain characteristics which will be expressed in an individual's physical or mental traits. Each sequence of nucleotides which encodes for a specific characteristic is a gene, and can be thought of as one word using the four-letter alphabet. The two strands are joined together and twisted into a shape referred to as a double helix, which can be envisioned schematically as a twisted ladder. The order of the nucleotides on the opposing strand is complementary in that certain nucleotides always pair with one another. It is possible to separate the two strands of DNA, and they will rejoin in the original manner because of the specific ways nucleotides pair with one another.

The type of DNA analysis performed by Cellmark is called restriction fragment length polymorphism, or RFLP. Thompson and Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 Va. L. Rev. 45, 48-49 (1989) [hereinafter Thompson and Ford].[1] RFLP analysis is also known as DNA fingerprinting or profiling,[2] and can be performed on any biological sample from which DNA can be extracted. The biological material is first separated from other cells or, if dried on a surface such as cloth, washed from the cloth. Chemicals are used to open the cells, releasing the DNA into a solution, after which it is purified. Because of the long length of DNA molecules, the molecule is cut into fragments of more workable length using restriction enzymes, which search out certain sequences in the nucleotide alphabet and cut the chains at those specified points. Because the order of the nucleotides differs from person to person, the length of these fragments will differ among individuals as well.

During the next step the DNA fragments are sorted according to length. A gel is prepared with wells or holes in one end, into which the scientist injects the DNA solution. An electric current is applied, which draws the negatively-charged DNA through the gel. The smaller fragments move faster than the longer ones, resulting in the DNA fragments being arrayed across the gel according to their lengths. The DNA fragments are removed from the gel and blotted onto a white nylon membrane, which serves as a more permanent surface, using a procedure called "Southern transfer." Chemicals are used to unwind the double-stranded DNA molecules so that single strands of the nucleotide bases are affixed to the nylon membrane.

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1. Both Cellmark and Lifecodes Corporation (Lifecodes) perform RFLP analysis. Lifecodes is a commercial clinical laboratory located in Valhalla, New York. A third commercial laboratory, Cetus Corporation of Emeryville, California, also performs DNA analysis, but uses a markedly different technique than that employed by Lifecodes and Cellmark. Thompson and Ford, 75 Va. L. Rev. at 48-50. At the time of this trial, only these three commercial laboratories and the FBI laboratory at Quantico, Virginia performed DNA analysis on forensic samples. For detailed descriptions of RFLP analysis, see Thompson and Ford, 75 Va. L. Rev. at 64-76, and Note, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 Stan. L. Rev. 465, 472-74 (1990) [hereinafter Note].

2. The Ad Hoc Committee on Individual Identification by DNA Analysis, a group formed by the American Society of Human Genetics, prefers the term "DNA profile" to "DNA fingerprint." *Individual Identification by DNA Analysis: Points to Consider*, 46 Am. J. Hum. Genet. 631, 631 (1990).

Radioactive probes are then used to search for specific sequences of nucleotides along the chain. The probe is a relatively short single-stranded piece of DNA that has been tagged with radioactivity so that it can be traced. Because of the specific way nucleotides pair up when the DNA is in its double-stranded form, the probes can search for specific complementary sequences in the nucleotide chains and lock onto them. The excess probe solution is washed away, then the membrane is exposed to x-ray film, producing a pattern of black bands on the x-ray film corresponding to where the DNA probe bound to the membrane. The pattern is inspected by scientists at Cellmark to determine whether the banding pattern of the forensic sample matches that of the submitted known samples.

Dr. Herrin testified that he performed the described procedures on the vaginal swab and bedspread cutting submitted in the present case. The process did not yield a readable result from the vaginal swab. The bedspread cutting yielded a banding pattern which matched that obtained from the blood of defendant. Using four single-locus probes combined in a solution, defendant's blood analysis revealed six bands. Five of these bands matched the banding pattern yielded from the bedspread cutting. Dr. Herrin opined that the top band was missing from the bedspread cutting due to partial degradation of the DNA sample. Dr. Herrin testified that in his opinion the DNA on the bedspread cutting came from defendant. Statistically, the banding pattern of the bedspread cutting would occur randomly in one of twenty-four million Caucasians. This statistic is based on the assumption that each probe is independent of all other probes—that the nucleotide sequence which each seeks occurs randomly and independently of the nucleotide sequences sought by the other probes used. Experimental data indicates that the probes used by Cellmark are independent of one another.

On cross-examination Dr. Herrin agreed that Cellmark erred by misidentifying as a match one sample out of forty-nine submitted in a proficiency test conducted by the California Association of Crime Lab Directors. The error occurred when a label rubbed off a tube and the sample was incorrectly recombined with a sample from a different source. In response to the error Cellmark purchased a large centrifuge to eliminate the need to split and recombine samples. Other than human error of this type or deliberate tampering, Dr. Herrin opined that there was no way to obtain

a false match. Technical difficulties would lead to no result or a false negative rather than a false positive.

Defendant presented evidence tending to impeach the victim's identification of defendant as her assailant. Dr. Frank Wood, a neuropsychologist at Bowman Gray School of Medicine, testified that he had examined the victim on two occasions in the six weeks following the assault. Her performance on tests of verbal reasoning was completely normal, but her performance on the tests measuring nonverbal performance was extremely low compared to her verbal abilities. In Dr. Wood's opinion, her brain injuries had severely impaired her visual memory and thus her ability to recognize all but the most familiar faces. In addition, defendant's girlfriend, Patricia Norman, testified that defendant was with her on 14 July 1988 until 11:20 a.m., when she left for work.

[1] Defendant first assigns error to the trial court's denial of his motion to suppress evidence obtained pursuant to a search warrant issued 15 November 1988 by the deputy clerk of Superior Court, Forsyth County. Law enforcement officers procured the warrant for the purpose of obtaining samples of defendant's blood for laboratory analysis. Defendant argues that the clerk of superior court was without jurisdiction to issue the warrant.

N.C.G.S. § 15A-243 provides:

> (a) A search warrant valid throughout the State may be issued by:
>
> (1) A Justice of the Supreme Court.
>
> (2) A judge of the Court of Appeals.
>
> (3) A judge of the superior court.
>
> (b) Other search warrants may be issued by:
>
> (1) A judge of the district court as provided in G.S. 7A-291.
>
> (2) *A clerk as provided in G.S. 7A-180 and 7A-181.*
>
> (3) A magistrate as provided in G.S. 7A-273.

N.C.G.S. § 15A-243 (1988) (emphasis added). N.C.G.S. § 7A-180(5) authorizes superior court clerks to issue search warrants "valid throughout the county of the issuing clerk." N.C.G.S. § 7A-180(5) (1989). N.C.G.S. § 7A-181 confers upon deputy clerks of superior court "the same powers as the clerk of superior court with respect

to the issuance of warrants . . . ." N.C.G.S. § 7A-181(2) (1989). But for the titles of sections 7A-180 and -181, the deputy clerk's authority to issue a search warrant within Forsyth County would be unimpeachable. However, N.C.G.S. § 7A-180 is entitled "Functions of clerk of superior court *in district court matters*." (Emphasis added.) N.C.G.S. § 7A-181 bears the title "Functions of assistant and deputy clerks of superior court *in district court matters*." (Emphasis added.) These titles appear in the enacting legislation. 1965 N.C. Sess. Laws ch. 310, § 1. Defendant argues that these titles restrict the jurisdiction of clerks in issuing warrants to district court matters. Because indictments had been returned against him, defendant argues that jurisdiction over all matters relating to his trial rested with the Superior Court, Forsyth County, at the time the warrant was issued.

We disagree with defendant's premise that the issuance of a search warrant in a felony case is within the exclusive jurisdiction of the superior court and thus is not a "district court matter" within the meaning of the titles of N.C.G.S. §§ 7A-180 and -181. The issuance of a search warrant is neither a district court matter nor a superior court matter, but pertains to pretrial investigation which need not—indeed, often cannot at that point—be classified according to the court where the defendant may eventually be tried. Prior to a search for evidence, it will often be impossible to know with what crimes a suspect may eventually be charged, and thus the appropriate division for trial.

The titles to N.C.G.S. §§ 7A-180 and -181 are mainly of historical importance. Chapter 7A of the General Statutes was enacted "to implement Article IV of the Constitution of North Carolina and promote the just and prompt disposition of litigation by . . . (3) [c]reating the district court division of the General Court of Justice . . . [and] (5) [p]roviding for the organization, jurisdiction and procedures necessary for the operation of the district court division . . . ." N.C.G.S. § 7A-2 (1989). The primary purpose of Article IV of the Constitution of North Carolina, as amended in 1962, "was to establish 'a unified judicial system.' " *State v. Matthews*, 270 N.C. 35, 42, 153 S.E.2d 791, 797 (1967) (quoting N.C. Const. art. IV, § 2). In prescribing the organization and procedure of the newly created district court division, we do not believe the General Assembly intended to limit the authority of superior court clerks to issue search warrants within their operative counties exclusively

to criminal matters to be tried in district court. This assignment of error is overruled.

Defendant filed a motion in limine seeking to prohibit the prosecutor from introducing into evidence any results obtained from the DNA profile testing performed by Cellmark. Following a lengthy voir dire, the trial court denied the motion and overruled defendant's objection to the evidence. Defendant assigns error to this ruling, arguing that DNA profiling is insufficiently reliable to justify its admission into evidence.

[2, 3] A new scientific method of proof is admissible at trial if the method is sufficiently reliable. *State v. Bullard*, 312 N.C. 129, 148, 322 S.E.2d 370, 381 (1984); 1 Brandis on North Carolina Evidence, § 86, at 385 (1988). Reliability of a scientific procedure is usually established by expert testimony, and the acceptance of experts within the field is one index, though not the exclusive index, of reliability. *See State v. Bullard*, 312 N.C. at 147, 322 S.E.2d at 380; *State v. Peoples*, 311 N.C. 515, 532, 319 S.E.2d 177, 187 (1984). Thus we do not adhere exclusively to the formula, enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and followed in many jurisdictions, that the method of proof "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014. Believing that the inquiry underlying the *Frye* formula is one of the reliability of the scientific method rather than its popularity within a scientific community, we have focused on the following indices of reliability: the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked "to sacrifice its independence by accepting [the] scientific hypotheses on faith," and independent research conducted by the expert. *State v. Bullard*, 312 N.C. at 150-51, 322 S.E.2d at 382.

[4] The trial court heard testimony from three expert witnesses for the State and one expert for defendant during the voir dire hearing. Michael DeGuglielmo, a forensic serologist with the State Bureau of Investigation, had visited Cellmark and observed its laboratory procedures. He testified that the DNA profiling procedure used at Cellmark is reliable and is generally accepted within the scientific community. He testified further that if contaminants are present in a forensic sample, the sample is either unaffected or degraded so that it yields an unreadable result.

Wesley Kloos, professor of genetics and microbiology at North Carolina State University, testified that he had been working with techniques aimed at isolating and extracting DNA for twenty-two years. He testified that the individual steps used in DNA profiling, as performed by Cellmark, have been accepted within the scientific community. Specifically, he stated that methods for extracting DNA from cells were developed in the 1950s, restriction enzymes have been used since the 1970s, and the "Southern transfer" technique was described in 1975. DNA probing has been performed for the last fifteen years, though the specific probes and techniques used by Cellmark were described in 1985.

Dr. George Herrin testified that he had been employed as a staff scientist at Cellmark for a year and a half. He testified to essentially the same matters reflected in the summary of his subsequent testimony before the jury, set forth above. In addition, he discussed the quality control procedures followed by Cellmark. A lab accession number is assigned to each sample received and is checked at each step of the procedure. One scientist ordinarily works on a sample from start to finish, then analyzes the match between known and unknown samples. A second scientist makes a completely independent assessment of the match. To date, scientists at Cellmark have never disagreed about the existence of a match. Defendant's known sample and the sample obtained from the bedspread matched on five of six bands. The top band did not match due to partial degradation of DNA obtained from the bedspread sample, as verified by quality control procedures. The vaginal swab submitted contained sufficient DNA for analysis, but the restriction enzymes did not cut the DNA into fragments. Therefore, no results were obtained from that sample.

Defendant's expert witness, J. Stoerker, an assistant professor of microbiology at the University of North Carolina at Charlotte, suggested that a different DNA analysis technique, the polymer chain reaction test employed by another commercial laboratory, would yield results "less equivocal" than those obtained in the present case. Dr. Stoerker agreed that the process used by Cellmark was reliable within limits but that he had had "very little time to make an analysis with regard to controls and various other things that I normally would make in interpreting data."

Based on the foregoing testimony, the trial court concluded that "the test sample in this case is reliable and that it is based

on scientifically established scientific methods which have a general acceptance within the field of microbiology and molecular biology." We agree. The expert testimony was uncontradicted that the method of proof in question, DNA profiling, uses established techniques considered reliable within the scientific community. Dr. Herrin, who conducted the DNA profiling analysis in this case and testified before the jury, earned a Ph.D. in biochemistry with a specialty in molecular biology, which he defined as the study of DNA, from Rice University in 1985. He then completed two and one-half years of post-doctoral research in molecular biology at Texas A & M University before joining Cellmark as a senior staff scientist. In his year and one-half at Cellmark, he had conducted DNA profile testing on over one hundred samples and supervised the performance of testing on other samples. Dr. Herrin had published over a dozen articles and abstracts in the field of molecular biology.

Dr. Herrin made every attempt to explain the DNA profiling process in simple language and used several visual aids to assist the jury in understanding the structure of DNA and the DNA profiling process. He displayed the radiograph of the test results to the jury during his testimony. Thus, the jury was not asked "to sacrifice its independence by accepting [the] scientific hypotheses on faith," *State v. Bullard*, 312 N.C. at 151, 322 S.E.2d at 382, but had a basis for evaluating the expert testimony. We agree with the trial court that the expert testimony in this case established the reliability of the DNA profiling process, and we thus hold that the evidence of the DNA profile testing results was properly admitted.

We note that appellate courts in other jurisdictions have reached the same conclusion and result. *Andrews v. State*, 533 So.2d 841 (Fla. Dist. Ct. App. 1988), *review denied*, 542 So.2d 1332 (Fla. 1989); *State v. Ford*, --- S.C. ---, 392 S.E.2d 781 (1990); *Glover v. State*, 787 S.W.2d 544 (Tex. Ct. App. 1990); *Spencer v. Commonwealth*, 238 Va. 275, 384 S.E.2d 775 (1989), *cert. denied*, --- U.S. ---, 107 L. Ed. 2d 775 (1990); *State v. Woodall*, 385 S.E.2d 253 (W.Va. 1989) (evidence of DNA test held inadmissible under the particular facts, but court noted that reliability of those tests is now generally accepted and such evidence is generally admissible).

We are aware of criticism by commentators that the type of DNA analysis employed by Cellmark is not infallible, particularly

in a forensic setting. *See* Thompson and Ford, *passim*; Note, *passim*. While we hold that evidence of DNA profile testing is generally admissible and was admissible in the present case, this should not be interpreted to mean that DNA test results should always be admitted into evidence.

> The admissibility of any such evidence remains subject to attack. Issues pertaining to relevancy or prejudice may be raised. For example, expert testimony may be presented to impeach the particular procedures used in a specific test or the reliability of the results obtained. *See, e.g., People v. Castro*, 144 Misc.2d 956, 545 N.Y.S.2d 985 (1989). In addition, traditional challenges to the admissibility of evidence such as the contamination of the sample or chain of custody questions may be presented. These issues relate to the weight of the evidence. The evidence may be found to be so tainted that it is totally unreliable and, therefore, must be excluded.

State v. Ford, --- S.C. at ---, 392 S.E.2d at 784. *See also State v. Schwartz*, 447 N.W.2d 422, 428 (Minn. 1989) (DNA typing using RFLP analysis admissible if performed in accordance with appropriate laboratory standards and controls; expert testimony in this case established that Cellmark had not met minimum guidelines).

No error.

IN THE MATTER OF THE ESTATE OF VIDA P. FRANCIS, DECEASED

No. 342PA89

(Filed 26 July 1990)

Wills § 61 (NCI3d)— dissent by spouse—value of estate—bank accounts and real property

A surviving spouse received the same property that he would have received had his wife died without making a will, was not disinherited by the will, and could not dissent from the will where there were no children or other lineal descendants or parents; the estate included joint bank accounts with right of survivorship to decedent's sister, decedent's personal

property, and real property owned by the decedent and her husband as tenants by the entireties; the will directed that all funds in the savings accounts be divided equally among certain named relatives; and the remainder of the estate was left to her husband. Neither joint bank accounts with right of survivorship established pursuant to N.C.G.S. § 41-2.1 nor real property held as tenants by the entirety are included in the net estate for purposes of determining the right to dissent. Real property owned by the entireties is included in the value of the property passing to the surviving spouse outside the will as a result of the death of the testator. N.C.G.S. § 30-1.

Am Jur 2d, Descent and Distribution § 34; Wills §§ 864, 907.

Justice WEBB dissenting.

ON discretionary review upon petition filed by petitioner Iva P. Marshall, pursuant to N.C.G.S. § 7A-31 from a decision of the Court of Appeals, 94 N.C. App. 744, 381 S.E.2d 484 (1989), remanding the judgment of *Mills, J.*, entered 2 November 1988 in Superior Court, SURRY County. Heard in the Supreme Court 10 April 1990.

Johnson, Bell & Francisco, by George Francisco, for petitioner-appellee.

V. Talmage Hiatt for appellants.

FRYE, Justice.

The issues in this case are (1) whether a deceased spouse's joint bank accounts with right of survivorship with a non-spouse, established pursuant to N.C.G.S. § 41-2.1(a), should be included in the computation of the decedent's net estate for determining a surviving spouse's right to dissent from the deceased spouse's will; and (2) whether property owned as tenants by the entirety should be included in the decedent's net estate and in the computation of the value of property passing outside the will to the surviving spouse as a result of the death of the testator-spouse. A proper resolution of these issues determines the ultimate issue of the right of the surviving husband to dissent from his deceased wife's will.

The Clerk of Superior Court, Surry County, adjudged that the surviving spouse was entitled to dissent and by virtue of the dissent was entitled to one-half the decedent's net estate which,

according to the clerk, included: 1) joint bank accounts with right of survivorship to decedent's sister; 2) decedent's personal property; and 3) real property owned by the decedent and her husband as tenants by the entirety. The trial court adopted the clerk's findings of fact, made conclusions of law, and affirmed the clerk's order.

On appeal, the Court of Appeals, in its initial opinion, concluded that for public policy reasons the joint bank accounts with right of survivorship with decedent's sister were correctly included in computing decedent's net estate. The court also concluded that, for purposes of the dissent statute, the value of real property owned by the entireties should not be included in the decedent's net estate or in the value of property passing outside the will as a result of the death of the testatrix. Decedent's sister's petition for discretionary review was allowed by this Court on 7 December 1989.

The Court of Appeals revised its opinion after the petition was allowed in this Court but prior to the case being published in the bound volume of the reporter. As corrected, the published opinion held that the value of real property owned by the entireties is included in the computation of property passing outside the will pursuant to N.C.G.S. § 30-1(b)(4). The Court of Appeals did not alter its conclusion that the unwithdrawn funds in the joint bank accounts with right of survivorship were properly included in the computation of the value of the net estate. Nor did the court alter its initial conclusion that property owned by the entireties should not be included in the net estate for purposes of the dissent statute. The Court of Appeals remanded the case to the superior court for disposition in accordance with the opinion.

We conclude that the surviving spouse was not entitled to dissent from his deceased spouse's will and that neither the joint bank accounts with right of survivorship, nor the real property owned by the entireties, are to be included in the decedent's net estate for purposes of determining the right to dissent. We further conclude that the Court of Appeals correctly held, in its published opinion, that property owned by the entireties should be included in the computation of property passing outside the will to the surviving spouse as a result of the death of the testator-spouse.

Vida P. Francis died testate on 13 September 1987, survived by her spouse, C.A. Francis, leaving no children or other lineal

descendants or parents. The will was probated in common form, and letters testamentary were issued to decedent's sister, appellant Iva P. Marshall, on 2 October 1987. The will directed that all the funds in her savings accounts with three Mt. Airy banking institutions be divided equally among certain named relatives, including her sister, Iva P. Marshall. The remainder of the estate was left to decedent's husband, C.A. Francis.

Ms. Marshall, as executrix, filed the 90-day inventory on 6 January 1988 listing the following property: one-half the value of four joint bank accounts—$46,274.48; cash on hand at death—$45.38; household and kitchen furnishings—$1,023.50; medicare check—$5.20; refund of Blue Cross/Blue Shield of North Carolina premium—$29.10; and one-half the value of real property held as tenants by entirety—$14,399.

On 20 January 1988, C.A. Francis, surviving spouse, filed a petition dissenting from the will and claiming "the properties to which he is entitled under Chapter 30 of the General Statutes of North Carolina."

On 18 July 1988, the clerk of superior court made findings of fact and conclusions of law and adjudged that Mr. Francis had a right under the law of North Carolina to dissent from the will. Ms. Marshall excepted to the following findings of fact made by the clerk of superior court:

> 3. The value of the decedent's net estate is at least $123,281.64 less family allowances, costs of administration and all lawful claims against the estate, and the value of the properties passing to the surviving spouse outside the Will and in accordance with the provisions of the Will does not exceed $14,399.00;
>
> 4. The value of the properties passing to the surviving spouse outside the Will and the provisions for his benefit under the Will amount to less than one-half of the deceased spouse's net estate;
>
> . . . .
>
> 6. The value of the assets are as follows:
>
> (a) Joint bank accounts with the right of survivorship payable to Iva P. Marshall $92,548.96

(b) Cash on hand at death	45.38
(c) Medicare check	5.20
(d) Blue Cross Blue Shield of North Carolina refund of premium	29.10
(e) Personal property of Vida P. Francis located in the house as appraised by Dick Lawson	2,055.00
(f) Value of real property owned as tenants by the entirety	28,798.00

The clerk also adjudged that Mr. Francis was entitled to an additional monetary award equal to one-half the net estate of his deceased spouse, to be calculated upon the filing of the Final Report in the estate. From the clerk's order, Ms. Marshall, individually, and as executrix, appealed to the superior court.

On 2 November 1988, the superior court affirmed the clerk's order, and Ms. Marshall appealed to the Court of Appeals. The Court of Appeals agreed with the conclusion that Mr. Francis was entitled to dissent from the will but remanded the case for the clerk to recompute the value of the property. Under the Court of Appeals' opinion, upon remand, the clerk would: 1) exclude the entireties property from the value of the net estate; 2) include the entireties property in the value of the property passing to Mr. Francis outside the will; and 3) include the value of the joint bank accounts with right of survivorship in the net estate. For the reasons indicated herein, we hold that Mr. Francis is not entitled to dissent from his deceased spouse's will. We agree with the Court of Appeals' conclusions one and two, but disagree as to number three.

The legislature has created a two-step process to be used when a surviving spouse attempts to dissent from his deceased spouse's will. *See* N.C.G.S. §§ 30-1 and 30-3 (1984); *see also Phillips v. Phillips*, 296 N.C. 590, 252 S.E.2d 761 (1979). The first step is to determine if the surviving spouse has a right to dissent, and the second step is to determine the consequences of the dissent. *Phillips v. Phillips*, 296 N.C. 590, 252 S.E.2d 761.

We first consider Mr. Francis' right to dissent. If he has no right to dissent, it is unnecessary to determine the consequences

of the dissent. The right of a surviving spouse to dissent from a will is provided in N.C.G.S. § 30-1. Section 30-1(a) provides:

> (a) A spouse may dissent from his deceased spouse's will in those cases where the aggregate value of the provisions under the will for the benefit of the surviving spouse, when added to the value of the property or interests in property passing in any manner outside the will to the surviving spouse as a result of the death of the testator:
>
> (1) Is less than the intestate share of such spouse, or
>
> (2) Is less than one-half of the deceased spouse's net estate in those cases where the deceased spouse is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent, or
>
> (3) Is less than the one-half of the amount provided by the Intestate Succession Act in those cases where the surviving spouse is a second or successive spouse and the testator has surviving him lineal descendants by a former marriage and there are no lineal descendants surviving him by the second or successive marriage.

N.C.G.S. § 30-1(a) (1984); *see also Phillips v. Phillips*, 296 N.C. 590, 252 S.E.2d 761.

Under subsection (1) of N.C.G.S. § 30-1(a), a spouse may dissent from his deceased spouse's will if the aggregate value of the provisions for his benefit under the will, when added to the value of property or interests in property passing in any manner to him outside the will as a result of the death of his spouse, is less than his intestate share. Mr. Francis' intestate share is all the real and personal property of his deceased spouse, since she was not survived by any lineal descendants or a parent. When the intestate is not survived by children or any lineal descendant of deceased children or by a parent, the intestate share of the surviving spouse is "all the real property" and "all of the personal property." N.C.G.S. § 29-14 (1984). The intestate share does not include the value of any property received by the surviving spouse as a tenant by the entirety or from joint accounts with right of survivorship. *In re Estate of Connor*, 5 N.C. App. 228, 232, 168 S.E.2d 245, 248 (1969). Nor is the year's allowance for the surviving spouse under the provisions of N.C.G.S. § 30-15 a part of the "intestate

share" passing to a surviving spouse under the Intestate Succession Act. *Id.* at 234, 168 S.E.2d at 250.

Under the will Mr. Francis received all of his deceased wife's personal property,[1] and outside the will[2] he received, as a result of her death, the real property owned by the entireties which was all the real property. In effect, as a result of the death of his spouse, Mr. Francis received his entire intestate share plus the entireties property (in addition to the spouse's year's allowance) and therefore he has no right to dissent under N.C.G.S. § 30-1(a)(1). Stated differently, Mr. Francis received everything that he would have received had his wife died without a will.

Subsection (3) of N.C.G.S. § 30-1(a) is clearly inapplicable to the instant case since the decedent left no surviving lineal descendants.

Under subsection (2) of N.C.G.S. § 30-1(a), Mr. Francis is entitled to dissent from his deceased spouse's will if he can demonstrate that the aggregate value of the provisions for his benefit under the will, when added to the value of property or interests passing to him in any manner outside the will as a result of the death of his spouse, is less than one-half his deceased spouse's net estate. Net estate is defined as "the estate of a decedent, exclusive of family allowances, costs of administration, and all lawful claims against the estate." N.C.G.S. § 29-2(5) (1984).

The statutory scheme for determining a deceased spouse's net estate, like the statutory scheme for determining a spouse's intestate share, contemplates that the surviving spouse's right of dissent is established by a mathematical computation. *See Taylor v. Taylor*, 301 N.C. 357, 271 S.E.2d 506 (1980); *Phillips v. Phillips*, 296 N.C. 590, 252 S.E.2d 761. If A equals the aggregate value

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1. The will devised the residue of the estate, which included all the personal property, to Mr. Francis. Although the will purported to devise the funds in enumerated deposit accounts to named legatees, these accounts were joint bank accounts with right of survivorship established pursuant to N.C.G.S. § 41-2.1(a), and, pursuant to N.C.G.S. § 41-2.1(b)(3) and (4), these funds, upon the death of the decedent, were not a part of the personal assets of the estate, and were not available for distribution to her heirs or devisees. N.C.G.S. § 28A-15-10(a) (1984).

2. The will purported to devise to Mr. Francis, as a part of the residuary estate, the testator's interest in the real property owned by the entirety, but this interest passed to Mr. Francis as surviving tenant by the entirety and not as devisee under the will. *Davis v. Bass*, 188 N.C. 200, 203, 124 S.E. 566, 567 (1924).

of the provisions under the will for the benefit of the surviving spouse and B equals the value of the property or interests in property passing in any manner outside the will to the surviving spouse as a result of the death of the testator and C equals the net estate of the decedent, then the surviving spouse is entitled, under N.C.G.S. § 30-1(a)(2), to dissent from his wife's will if A plus B is less than one-half of C; that is, if A + B < ½(C). *See Phillips v. Phillips*, 296 N.C. 590, 252 S.E.2d 761.

Applying the equation to the instant case, A equals $2,134.68, the aggregate value of decedent's personal property which includes the cash on hand—$45.38, the value of the personal property of Mrs. Francis located in the house—$2,055, the medicare check—$5.20, and refund from the insurance premium—$29.10; B equals $28,798, the value of the real property owned by the couple as tenants by the entireties[3]; and C equals the net estate of the decedent which is the estate of the decedent less family allowances, costs of administration, and lawful claims against the estate.

The estate of a decedent includes all of the property owned by the decedent which she may direct to her legatees and devisees under a will and which would pass to her heirs and next of kin under the laws of intestacy if she died without a will. *See* N.C.G.S. § 29-2(2) (1984) (Estate means "all the property of a decedent" and includes by illustration, not by limitation, two types of property—an estate for the life of another and future interests in property not terminable by the death of the owner); Uniform Probate Code § 1-201(11) (1983) ("Estate includes the property of the decedent . . . as it exists from time to time during administration"); and Black's Law Dictionary 491 (5th ed. 1979) (Estate is "the total property of whatever kind that is owned by a decedent prior to the distribution of that property in accordance with the terms of a will, or, when there is no will, by the laws of inheritance in the state").

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3. The value of the entireties property is included in this computation because N.C.G.S. § 30-1(b)(4) provides that property passing to the surviving spouse as the result of the death of the testator includes real property owned by the decedent and surviving spouse as tenants by the entirety, except to the extent the surviving spouse contributed to its purchase price. As the Court of Appeals indicated in its published opinion, there is no evidence that the surviving spouse contributed to the purchase price of the real property. *In re Estate of Francis*, 94 N.C. App. 744, 749, 381 S.E.2d 484, 487 (1989).

The real estate, which was held by the decedent and her spouse as an estate by the entireties, passes to the surviving spouse upon the death of the other spouse by operation of law based upon the grant or instrument conveying the property to the unity of husband and wife. *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924). It is not part of the estate to be devised by the testator's will and does not pass to the heirs by virtue of the laws of intestacy. *See id.* Likewise, the funds held in the joint accounts with right of survivorship, established pursuant to N.C.G.S. § 41-2.1, pass to the surviving joint tenant by virtue of the contract authorized by the statute and subject to the specific exceptions listed in the statute. *See* N.C.G.S. § 41-2.1(b)(3) (1984). Upon the death of the co-tenant, the funds pass to the surviving joint tenant, the sister in this case, pursuant to the statutorily authorized written agreement and not by the terms of the decedent's will or the laws of intestacy. Thus, neither the real estate held by the entireties nor the funds held in the joint accounts with right of survivorship established pursuant to N.C.G.S. § 41-2.1 are a part of the deceased spouse's estate as that term is defined in N.C.G.S. § 29-2(2) and cannot be a part of the deceased spouse's net estate within the meaning of subsection (2) of N.C.G.S. § 30-1(a) as that term is defined in N.C.G.S. § 29-2(5). The deceased spouse's net estate in this case therefore consists only of her personal property which has been valued at $2,134.68.

Returning to the equation, A equals $2,134.68, B equals $28,798, and C equals $2,134.68; thus $2,134.68 (A) plus $28,798 (B) is greater than one-half of $2,134.68 (C). The surviving spouse has a right to dissent only if A plus B is less than one-half of C, which it is not. In the instant case, since the aggregate value of the property passing to Mr. Francis under the will, when added to the value of the property and interests in property passing to him outside the will, is greater than one-half of his deceased's spouse's net estate, he has no right to dissent from her will under subsection (2) of N.C.G.S. § 30-1(a).

We note that the decedent's sister, as executrix, listed one-half of the funds in the survivorship accounts on the 90-day inventory. Counsel for the executrix indicates that this was done in order to comply with N.C.G.S. § 41-2.1(b)(3) and (4), which make up to a specific portion of such funds subject to the payment of specifically enumerated obligations to the extent that funds in the decedent's estate are not available to pay such obligations. N.C.G.S. § 41-2.1(b)(3)

and (4) (1984). The executrix argues, and we agree, that listing the accounts for this purpose on the 90-day inventory does not make the funds a part of the net estate for purposes of determining the right to dissent.

These funds are acquired by the personal representative of the estate solely for the purpose of satisfying certain specified obligations if there are no estate funds to pay them and these funds are not available for distribution to heirs or devisees. N.C.G.S. § 28A-15.10(a) (1984). These funds may be used by the personal representative only to the extent that they are needed to satisfy the surviving spouse's year's allowance, decedent's funeral expenses, cost of administering the decedent's estate, claims of the creditors of the decedent, and governmental rights. N.C.G.S. § 41-2.1(b)(3) (1984). The net estate, by definition, is "exclusive of family allowances, costs of administration, and all lawful claims against the estate." N.C.G.S. § 29-2(5) (1984). Thus, even if such funds were to be treated as a part of the estate because of their availability to pay specified obligations pursuant to N.C.G.S. § 41-2.1(b)(3), they would be excluded from the net estate pursuant to N.C.G.S. § 29-2(5). Read *in pari materia*, both the dissent statute and the joint account with right of survivorship statute seem to contemplate that funds not otherwise a part of a decedent's estate do not become a part of the net estate solely because of their availability to satisfy certain specified and enumerated obligations of the decedent.

Our conclusion that funds held by a testator-spouse in joint tenancy with right of survivorship with a third party established pursuant to N.C.G.S. § 41-2(a) do not become a part of the testator-spouse's net estate for purposes of the dissent statute is consistent with the following cases decided by this Court and the Court of Appeals, some of which relate to joint accounts with right of survivorship created by contract prior to the statutory authorization of such accounts: *Phillips v. Phillips*, 296 N.C. 590, 605, 252 S.E.2d 761, 771 (noting that net estate includes "only probate assets"); *Wilson County v. Wooten*, 251 N.C. 667, 111 S.E.2d 875 (1960) (Joint tenancy with right of survivorship created by contract—funds pass, upon death of one joint tenant, to the survivor, and not to the executrix of the estate of decedent); *Bowling v. Bowling*, 243 N.C. 515, 91 S.E.2d 176 (1956) (Joint bank accounts with written contract providing for right of survivorship—funds pass to surviving spouse individually as surviving joint tenant and not to her as administratrix of husband's estate or as guardian of their children);

Threatte v. Threatte, 59 N.C. App. 292, 296 S.E.2d 521, *disc. rev. improvidently granted*, 308 N.C. 384, 302 S.E.2d 226 (1983) (Signature card on certificate of deposit containing survivorship language in compliance with N.C.G.S. § 41-2.1(a) permitted disposition of funds upon death of plaintiff's son to plaintiff individually rather than to plaintiff as administrator of son's estate, thus depriving son's widow of any rights to such funds); *In re Estate of Connor*, 5 N.C. App. 228, 168 S.E.2d 245 (Joint accounts with right of survivorship are not a part of the intestate share of a surviving spouse under the Intestate Succession Act).

The surviving spouse contends that the term "net estate" as used in the dissent statute should be construed to include the unwithdrawn funds in a joint account with right of survivorship established pursuant to N.C.G.S. § 41-2.1 because to do otherwise would permit the deceased spouse to effectively disinherit her surviving husband. We reject this contention since the General Assembly has spoken clearly and specifically as to how such accounts are to be handled. When the section of a statute "dealing with a specific matter is clear and understandable on its face, it requires no construction." *Phillips v. Phillips*, 296 N.C. 590, 596, 252 S.E.2d 761, 765 (quoting *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969)).

We note, however, that the surviving spouse in the instant case has received the same property that he would have received had his wife died without making a will. Therefore, he is not disinherited by the will.

The surviving spouse argues that the Court of Appeals correctly included the joint accounts with right of survivorship established pursuant to N.C.G.S. § 41-2.1 in the net estate for purposes of the dissent statute because the accounts here are similar to the funds in the trust account held includable in the net estate in determining the right to dissent in the case of *Moore v. Jones*, 44 N.C. App. 578, 261 S.E.2d 289 (1980). In the instant case, the Court of Appeals rested its decision on public policy grounds, as did the court in *Moore*.

Reliance upon the Court of Appeals' decision in *Moore v. Jones* is misplaced. In *Moore* the testator, without the knowledge of his wife, established an inter vivos trust with the net income payable to himself for life and the assets to be distributed upon his death to certain named beneficiaries. *Id.* He retained the right to withdraw

assets from the trust, to change beneficiaries and to modify, amend, add to or revoke the trust agreement. *Id.* The Court of Appeals held that the trust was ineffective insofar as it impaired the surviving spouse's statutory right to dissent from her husband's will. Specifically, the court held that

> where, as here, the settlor retains up to the instant of his death powers over the trust assets so extensive that in a real sense he had the same rights therein after creating the trust as he had before its creation, such assets should be considered part of his estate insofar as the statutory rights granted the settlor's surviving spouse by Art. 1 of G.S. Ch. 30 are concerned.

Id. at 583, 261 S.E.2d at 292.

We decline to extend the rationale of *Moore* to bank accounts with right of survivorship created pursuant to N.C.G.S. § 41-2.1. When the legislature has shown its awareness of a potential problem by enacting an elaborate scheme for resolving it and has spoken clearly as to how the problem is to be resolved, the courts should not ordinarily interfere with the legislative resolution. A careful reading of N.C.G.S. § 41-2.1 shows no legislative intent, express or implied, to make these bank accounts a part of the decedent's net estate for purposes of determining the surviving spouse's right to dissent. By express language in the statute, upon the death of any party to the account, the survivor or survivors become the sole owners of the entire unwithdrawn deposit subject only to the claims specifically enumerated in N.C.G.S. § 41-2.1(b)(3) (1984).[4] These claims are:

a. The allowance of the year's allowance to the surviving spouse of the deceased;

b. The funeral expenses of the deceased;

c. The cost of administering the estate of the deceased;

---

4. It should be noted that funds from the survivorship account established pursuant to N.C.G.S. § 41-2.1 may be used to pay the obligations listed in subsections (a), (b), (c), (d), and (e) of subsection (b)(3) only if there are no assets of the estate sufficient to pay those obligations. If there are only two joint tenants, then immediately upon the death of one of them, one-half of the funds becomes the sole property of the survivor and the remaining one-half is the sole property of the survivor subject only to the enumerated obligations to the extent other personal assets of the estate are not available to satisfy such obligations. N.C.G.S. § 41-2.1(b)(3) and (4) (1984).

d. The claims of the creditors of the deceased; and

e. Governmental rights.

Id.

Nothing in the dissent statute suggests that the unwithdrawn deposits of such accounts should be included in the net estate of the decedent. To do so would require an expansive interpretation of the dissent statute and a nullification of N.C.G.S. § 41-2.1(b)(3) as it applies to joint accounts with right of survivorship when the surviving joint tenant is one other than the surviving spouse. Both N.C.G.S. § 41-2.1 and the dissent statute are legislative expressions of the public policy of the State and, at least in the absence of a constitutional challenge, no part of the joint account with right of survivorship statute should be nullified by an expansive interpretation of the dissent statute.

We conclude that neither joint bank accounts with right of survivorship established pursuant to N.C.G.S. § 41-2.1 nor real property held as tenants by the entirety are included in the net estate for purposes of determining the right to dissent. We further conclude that real property owned by the entireties is included in the value of the property passing to the surviving spouse outside the will as a result of the death of the testator.

We reverse the Court of Appeals' decision that Mr. Francis is entitled to dissent from his deceased spouse's will. This case is remanded to that court with directions that it be returned to the Superior Court, Surry County, for further proceedings consistent with this opinion.

Reversed and remanded.

Justice WEBB dissenting.

I dissent for the reasons stated by Judge Lewis in his opinion for the Court of Appeals, 94 N.C. App. 744, 381 S.E.2d 484 (1989).

STATE OF NORTH CAROLINA v. ROBERT GRAVETTE

No. 99PA90

(Filed 26 July 1990)

1. **Arrest and Bail § 140 (NCI4th)— murder—defendant incompetent to stand trial—not eligible for involuntary commitment—pretrial release**

A judge of the superior court did not have statutory authority to compel the Division of Adult Probation and Parole, without its consent, to supervise the conditional release of a pretrial murder detainee who has not been tried or convicted because of his lack of capacity to proceed to trial and who is not eligible for involuntary commitment. N.C.G.S. § 15-205 and Article 2 of Chapter 15A do not apply because the defendant has not been convicted of a crime and the offenses with which he is charged do not qualify for deferred prosecution; N.C.G.S. § 15A-534 and N.C.G.S. § 15A-1004 require the agreement of the person or organization in whose custody the defendant would be placed; N.C.G.S. § 122C-271(a)(1) is not applicable because defendant is not on outpatient commitment; and N.C.G.S. § 122C-277(b) merely mandates a hearing and contains no authority for the actions taken in this case.

Am Jur 2d, Bail and Recognizance § 99.

2. **Arrest and Bail § 140 (NCI4th)— murder—defendant incompetent to stand trial—not eligible for involuntary commitment—pretrial release**

The trial court lacked the inherent authority to order the Division of Adult Probation and Parole to provide services not specified by statute in supervising a murder defendant who was incompetent to stand trial but ineligible for involuntary commitment where the DAPP did not consent to such supervision. In order for the court's power to be inherent, it must be reasonably necessary for the exercise of its proper function and jurisdiction in the administration of justice and is not granted or denied to it by the Constitution or by a constitutionally enacted statute.

Am Jur 2d, Courts §§ 78, 79.

STATE v. GRAVETTE

[327 N.C. 114 (1990)]

ON the State's petition, filed 13 March 1990 by its Division of Adult Probation and Parole (hereinafter "DAPP") for writ of mandamus or, alternatively, for writ of prohibition to vacate or void the modified order of *Herring, J.*, entered 5 March 1990, requiring DAPP, without its consent, to provide certain supervision of defendant. On 5 April 1990, this Court denied a petition by the State on behalf of DAPP for a temporary stay and supersedeas and, in the exercise of its supervisory power over the trial courts, ordered accelerated briefing and oral argument on defendant's petition. The matter was heard in the Supreme Court on 17 May 1990,[1] and the Court elected to treat the petition as a petition for writ of certiorari and allowed it for the purposes of review.

Lacy H. Thornburg, Attorney General, by Jane R. Garvey, Associate Attorney General, and Sylvia Thibaut, Assistant Attorney General, for the State-appellant.

J. Kirk Osborn for defendant-appellee.

MEYER, Justice.

Defendant stands charged with two counts of first-degree murder and is currently a pretrial detainee in the Orange County jail in custody of the sheriff of that county. As will later appear in some detail, defendant has several times been evaluated for competency to proceed to trial as well as to determine whether he was mentally ill and whether he was a danger to himself or others. Judge Herring, in the order appealed from, found that defendant was not competent to stand trial and that defendant was not subject to inpatient involuntary commitment. Judge Herring granted defendant's motion for conditional pretrial release. The conditions required that defendant be released to the custody of his former wife and, citing the inherent power of the court, further required that DAPP supervise defendant's release by making weekly observations of him and his compliance with the conditions of his probation, reporting any noncompliance and making monthly written reports to the court. The Durham office of DAPP notified the court that it was not able to consent to such supervision, citing lack of statutory authority to supervise pretrial detainees, workload conditions, and

1. Subsequent to the oral arguments, defendant filed a motion for clarification of the record for the purpose of correcting a misstatement made during the argument. We have noted the correction.

potential liability, and filed the petitions hereinabove referred to. We find no statutory or inherent authority of the court which authorizes a judge of the superior court to order DAPP to supervise the conditional probation of a pretrial detainee, and we therefore vacate Judge Herring's modified order of 5 March 1990.

The pertinent facts upon which our review of Judge Herring's order arose are as follows: On 1 February 1987, defendant was charged with two counts of first-degree murder for killings which occurred on that date. Two days later, on motion of defendant's counsel, defendant was sent to Dorothea Dix Hospital pursuant to N.C.G.S. § 15A-1002 for an evaluation of his competency to stand trial. Later in the same calendar year, on 16 December 1987, defendant was again sent to Dix Hospital for another examination for the same purpose. Subsequently, about three months later, after hearing testimony and arguments of counsel, Judge F. Gordon Battle entered an order declaring defendant incompetent to proceed to trial; ordering that involuntary commitment proceedings be commenced in the district court; and providing that if defendant was not committed or was released from a hospital, he was to be returned to the custody of the Sheriff of Orange County.

On 1 June 1987, the Orange County grand jury returned bills of indictment charging defendant with two counts of first-degree murder for the same alleged offenses.

As a result of the involuntary commitment hearing in the district court, defendant was involuntarily committed to John Umstead Hospital on 23 March 1988 and was released from that hospital on 5 July 1988, having been found to be mentally ill but not dangerous to himself or others. Defendant was returned to the custody of the Sheriff of Orange County, and on 7 July 1988, defendant's counsel made a motion and again obtained an order committing defendant to Dix Hospital to determine defendant's capacity to proceed. It was again found that defendant lacked the capacity to proceed to trial, and defendant was again returned to the custody of the Orange County jail. On 7 December 1988, Judge Robert L. Farmer again ordered defendant returned to Dix Hospital for another evaluation of his capacity to proceed to trial. On 3 January 1989, defendant was again discharged and returned to custody in the Orange County jail with a finding for the third time that defendant lacked the capacity to proceed to trial.

Within a month of this third finding, defendant was, on 12 January 1989, again committed to Dix Hospital for an evaluation as to whether he was mentally ill and whether he was dangerous to himself or others. On 9 February 1989, defendant was again found not dangerous to himself or others and was returned to the Orange County jail.

On 7 April 1989, Judge B. Craig Ellis entered an order upon defendant's motion for conditional release, placing him in the custody of his former wife and ordering supervision by the Durham County office of DAPP. This order was stayed following notification by defendant's former wife that she could not assume custody of defendant at that time.

On 8 June 1989, defendant again moved for conditional release, which was denied. Defendant appealed from the denial of that order to the Court of Appeals. That appeal is still pending.

On or about 12 January 1990, Judge Lowry Betts of the Orange County District Court held an involuntary commitment hearing, found that defendant was mentally ill, and committed defendant to outpatient treatment under chapter 122C of the General Statutes.

On 19 January 1990, defendant made another application for conditional release before Judge D.B. Herring. This application was granted, and defendant was again placed in the custody of his former wife. In addition, the Durham office of DAPP was ordered to supervise defendant as a pretrial detainee and to make written reports to the court as to the matters specified therein. The Court of Appeals was notified by defendant of his success in obtaining conditional release approximately one month later. The initial order by Judge Herring was recited as having been taken pursuant to N.C.G.S. § 15A-1004(b), which requires that the person or persons into whose custody defendant is placed under that provision must consent to such placement. Shortly thereafter, the Durham office of DAPP notified the court that it was not able to consent to such supervision, citing lack of statutory authority to supervise pretrial detainees, regular workload considerations, and potential liability for any such voluntary undertaking. As a result of this notification, on 5 March 1990, Judge Herring modified the original order, deleting the reference to specific statutory authority but continuing the original mandate to the Durham office of DAPP. He cited as authority for this order the inherent power of the court.

As recited in Judge Herring's order, it is unlikely that defendant will ever become competent to stand trial. The court further found that the District Attorney of Orange County had expressed no interest in dismissing the case pursuant to N.C.G.S. § 15A-1004. Judge Herring declined to dismiss the case pursuant to N.C.G.S. § 15A-1008(1) upon a finding that outpatient involuntary commitment would not provide the necessary supervision of the defendant due to potential alcohol consumption and failure to take stabilizing medication.

We find it unnecessary to publish here Judge Herring's thorough and lengthy modified order but will quote or characterize those portions of it necessary to our analysis of its contents.

The modified order makes findings that "unless the Court takes some action in this matter, defendant will remain indefinitely in a crowded Orange County jail," that the defendant's former wife is willing to assume twenty-four-hour supervision of defendant, that defendant has adequate income, and that DAPP "can assist in carrying out the Court's order by assigning a probation/parole officer to inquire, investigate, and observe the defendant's status while he's in the custody of [his former wife] and to file reports with the Court as may be desired."

As a result, the Durham office of DAPP was ordered, *inter alia*:

> a) To make weekly routine observations of the defendant, with or without notice, at the residence of [his former wife] . . . , with reference to the requirements of Paragraphs "First" through "Eighth" [the supervision provided by her; defendant's access to alcohol, firearms, and motor vehicles; his outpatient treatment and the taking of ordered medications; and defendant's whereabouts] as above set out;
>
> b) To report immediately, by the quickest means, to be followed by written report to the Orange County Clerk of any non-compliance with the requirements of Paragraphs "First" through "Eighth", or any other condition that may be a danger to others;
>
> c) To make monthly written reports of defendant's status to the Court not later than the 10th day of each consecutive calendar month beginning in April, 1990, to be mailed to the Orange County Clerk of Superior Court[.]

[1] It is with this last quoted portion of the order that DAPP takes issue. Thus, the question presented is whether a judge of the superior court has either statutory or inherent authority to compel DAPP, without its consent, to supervise the conditional release of a pretrial detainee who has not been tried or convicted because of his lack of capacity to proceed to trial. We conclude that he does not.

Judge Herring recites as consideration for the order at issue here "Section 205 of Chapter 15, Articles 23 and 56 of Chapter 15A; and Part 7, Article 5 of Chapter 122C."

N.C.G.S. § 15-205 sets forth the duties and powers of a probation officer in "all cases referred to him for investigation by the judges of the courts or by the Secretary of Correction." N.C.G.S. § 15-205 (1983). While this language might appear to support the order entered, it is clear from the remaining provisions that DAPP is so empowered only in cases in which the defendant has been or is to be *sentenced* following a judgment of conviction or plea of guilty. Article 20, in which this provision is found, is entitled "Suspension of Sentence and Probation." N.C.G.S. § 15-205 itself continues with repeated references to *probation*, which is a particular circumstance of actual or anticipated sentencing or formal deferred prosecution. Thus, this provision refers only to the power to investigate on behalf of the court the advisability of placing the defendant on probation.

Article 82 of chapter 15A (N.C.G.S. §§ 15A-1341 to -1347 (1988 and Cum. Supp. 1989)), entitled "Probation," makes it manifest that this form of supervision is available only upon conviction of crime. N.C.G.S. § 15A-1341 states in pertinent part:

> *A person who has been convicted* of any non-capital criminal offense not punishable by a minimum term of life imprisonment or a minimum term without benefit of probation may be placed on probation as provided by this Article. *A person who has been charged with a criminal offense not punishable by a term of imprisonment greater than 10 years* may be placed on probation as provided in this Article on motion of the defendant and the prosecutor if the court finds each of the following facts:
>
> (1) *Prosecution has been deferred* by the prosecutor pursuant to written agreement with the defendant, with

the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(2) Each known victim of the crime has been notified of the motion for probation by subpoena or certified mail and has been given an opportunity to be heard.

(3) The defendant has not been convicted of any felony or of any misdemeanor involving moral turpitude.

(4) The defendant has not previously been placed on probation and so states under oath.

(5) The defendant is unlikely to commit another offense punishable by a term of imprisonment greater than 30 days.

N.C.G.S. § 15A-1341(a) (1988) (emphasis added). Clearly, this provision does not apply to the situation *sub judice*, as the defendant has not been convicted of a crime and the offenses with which he is charged do not qualify for deferred prosecution.

Article 23 of chapter 15A was apparently cited to in error, as it is inapposite. It relates entirely to the processing by the police of a defendant following arrest. It is likely that the trial judge intended to refer to article 26. N.C.G.S. § 15A-534 of article 26 does permit the court to place a pretrial detainee "in the custody of a designated person or organization *agreeing* to supervise him." N.C.G.S. § 15A-534(a)(3) (Cum. Supp. 1989) (emphasis added). The order in question places custody with the former wife, not DAPP, and while defendant's former wife has agreed to supervise defendant, DAPP has not and has specifically declined to do so. Had the Durham DAPP office agreed to this placement, the State readily concedes that the order in question in this case would have been lawful. Pretrial release is entirely a creature of statute; as such, the authorizing statute must be followed.

Article 56 of chapter 15A is entitled "Incapacity to Proceed" and includes N.C.G.S. § 15A-1004, which is the specific provision dealing with defendant's situation, that is, one who is incompetent to stand trial and yet not subject to involuntary commitment. That statute also provides that the defendant may be placed "in the custody of a designated person or organization *agreeing* to supervise him." N.C.G.S. § 15A-1004(b) (1988) (emphasis added). This statute was the articulated statutory foundation of Judge Herring's

original order. The Durham probation office declined to undertake such supervision. In its brief filed with this Court, the State notes that it was not mere recalcitrance which motivated the Durham probation office to decline this undertaking. The order in question mandates an even higher level of supervision and reporting than is normally undertaken in most probation cases. In addition to that office's concerns with respect to its workload, it was apprehensive as to the potential for civil liability were it to engage in such a voluntary undertaking in the absence of statutory authority and given the background and implicit potential for harm to others in this particular case. After the Durham office of DAPP declined to undertake the duties assigned to it in the order, the order was modified to articulate the "inherent power" of the court.

Finally, part 7, article 5 of chapter 122C (N.C.G.S. §§ 122C-261 to -277 (1989)) deals with involuntary commitment only. The defendant has repeatedly been found not subject to such commitment, therefore those statutes likewise provide no authority for Judge Herring's order. N.C.G.S. § 122C-271 does make provision for outpatient commitment if it is found

> by clear, cogent, and convincing evidence that the respondent is mentally ill; that he is capable of surviving safely in the community with available supervision from family, friends, or others; that based on respondent's treatment history, the respondent is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness as defined in G.S. 122C-3(11); and that the respondent's current mental status or the nature of his illness limits or negates his ability to make an informed decision to seek voluntarily or comply with recommended treatment, it may order outpatient commitment for a period not in excess of 90 days.

N.C.G.S. § 122C-271(a)(1) (1989).

While this provision may facially appear applicable to defendant, the only reference to a possible outpatient commitment that is apparent on the documents available to the State at this time is the abortive attempt of District Court Judge Betts to place defendant on that status on 12 January 1990. That order was made subject to Judge Battle's order of 22 March 1988 ordering involuntary commitment proceedings. It is not clear from the record why defendant did not remain on outpatient commitment.

It is clear, however, that defendant is not on outpatient commitment at this time. Otherwise, there would have been no need to order the Durham County Mental Health Center to supervise defendant "as if defendant were involuntarily committed for outpatient treatment."

N.C.G.S. § 122C-277(b) is the specific provision setting forth the procedure for dealing with one such as defendant initially committed for violent crime and found incapable of proceeding and not committed as an inpatient. It merely mandates a hearing pursuant to the above provision and contains no authority for the actions taken in this case.

None of the statutes referred to in the order provide any specific authority for the order as entered nor do any of them imply such authority. The only powers implied or reasonably inferred from a statute are those essential to effectuate its terms. As noted by Judge Mallard, quoting Black's Law Dictionary 1334 (rev. 4th ed. 1968):

> "Implied powers are such as are necessary to make available and carry into effect those powers which are expressly granted or conferred, and which must therefore be presumed to have been within the intention of the constitutional or legislative grant."

Mallard, *Inherent Power of the Courts of North Carolina*, 10 Wake Forest L. Rev. 1, 12 (1974). "[T]he power a court possesses only by virtue of a statutory grant is not an inherent power." 20 Am. Jur. 2d *Courts* § 78 (1965); *see also Beard v. N.C. State Bar*, 320 N.C. 126, 357 S.E.2d 694 (1987). It does not appear that the applicability of chapter 35A of the General Statutes (entitled "Incompetency and Guardianship") to the defendant's situation was ever explored.

[2] We now turn to the question of the inherent authority of a judge of the superior court to enter the order in question. By entering its amended order to rely upon the inherent power of the court, the trial court essentially conceded that the existing statutes did not provide authority for the portion of the order in question.

As an alternative to the statutory grounds discussed above, the court predicated its order on "the exercise of its inherent power." In support of this position, the court recited in its order:

> And the Court having no arm or agency of its own to assist in insuring its orders are complied with or to insure public safety in this unusual situation, the Court finds that *in the exercise of its inherent power and authority* in the interest of justice and public safety, it is necessary and reasonable to order a state agency to assist in the carrying out of its order and that the North Carolina Adult Probation and Parole offices are peculiarly equipped and trained to perform their [sic] requirements contemplated by this order . . . .

(Emphasis added.)

Section 1 of article II of the North Carolina Constitution vests the legislative power of the state in the General Assembly. It is the function of that body, exercising the police power of the state, to "legislate for the protection of the public health, safety, morals and general welfare of the people." *Martin v. Housing Corp.*, 277 N.C. 29, 45, 175 S.E.2d 665, 674 (1970). As discussed above, that body has provided for pretrial assignment of a defendant to DAPP only upon deferred prosecution, N.C.G.S. § 15A-1341 (1988), and upon the *agreement* to assume supervision of the person, N.C.G.S. § 15A-534(a)(3) (1988).

However inadequate this provision may be to meet the perceived needs of the defendant, for good or ill, it is not the prerogative of the superior court to amend it.

We are advertent to the dilemma in which the trial court found itself. The record before the court indicated that defendant would probably never be competent to stand trial, nor was he subject to inpatient care. Yet, he had been found to be functionally impaired; and, unless supervision, treatment, and medication could be maintained, he was subject to future violence perhaps as serious as the crimes with which he was charged. The trial court no doubt felt that it had no alternative but to fashion an appropriate remedy to do justice to the defendant and to protect the public. In effect, the trial court crafted a new form of pretrial release.

In a number of cases in recent years involving juvenile matters, our trial judges have found themselves in a similar dilemma because of the lack of statutory commitment and treatment alternatives. In those cases, the judges attempted to craft alternatives predicated on either the implied or inherent power of the court. In each such case, the judge was found to have erred.

In *In re Swindell*, 326 N.C. 473, 390 S.E.2d 134 (1990), the trial court ordered treatment and rehabilitation for a sexually abusive juvenile delinquent. This Court held that "the courts must make do with what is currently provided by the General Assembly." *Id.* at 475, 390 S.E.2d at 136. In *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982), the county department of social services was ordered to create a foster home for a juvenile lacking the capacity to stand trial. This Court reversed, holding that "[w]hile matters implied by the language of statutes must be given effect to the same extent as matters specifically expressed, the court may not, under the guise of judicial interpretation, interpolate provisions which are lacking." *Id.* at 574, 290 S.E.2d at 693 (citations omitted). In *In re Brownlee*, 301 N.C. 532, 272 S.E.2d 861 (1981), a juvenile delinquent was ordered to be placed in a Texas treatment program. This Court was "unable to conclude that the General Assembly intended to vest [the trial judge] with the authority which he sought to exercise in this case." *Id.* at 555, 272 S.E.2d at 875. In *In re Jackson*, 84 N.C. App. 167, 352 S.E.2d 449 (1987), a school board was ordered to present a plan to meet the needs of a juvenile expelled from school. The Court of Appeals conceded that there was an "overwhelming lack of reasonable alternatives for effective placement" but held that "[h]owever regrettable the existence of this void, a court may not overcome it by fiat." *Id.* at 176-77, 352 S.E.2d at 455.

As in the juvenile cases, we find no inherent authority of the superior court to order DAPP to provide services not specified and, at least by implication, intentionally omitted from the grant of authority to DAPP in N.C.G.S. § 15A-534(a)(3). "[T]he inherent powers of a court do not increase its jurisdiction but are limited to such powers as are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction." *Hopkins v. Barnhardt*, 223 N.C. 617, 619-20, 27 S.E.2d 644, 646 (1943). In order for a court's power to be inherent, "it must be such as is reasonably necessary for the exercise of its proper function and jurisdiction in the administration of justice and such as is not granted or denied to it by the Constitution or by a constitutionally enacted statute." Mallard, *Inherent Power of the Courts of North Carolina*, 10 Wake Forest L. Rev. 1, 13 (1974).

As laudable as its objective was, the trial court simply lacked the authority to impose the supervisory functions in question upon DAPP. The order of Herring, J., entered 5 March 1990, requiring

DAPP, without its consent, to provide supervision of defendant while in custody of his former wife is vacated. The case is remanded to the Superior Court, Orange County, for further proceedings not inconsistent with this opinion.

Vacated and remanded.

SOFRAN CORPORATION, A DELAWARE CORPORATION; THEODORE ALLEN DUNFORD; CLARICE F. DUNFORD; WALTER M. FORBES, SR.; ALEANE D. FORBES; JOSEPH COOPER TEASDALE; CLARA COX TEASDALE; ROBERT LEE KABLER; CYNTHIA INEZ KABLER; CARL W. RUMLEY; EMILY K. RUMLEY; W. E. LAYTON; BESSIE M. LAYTON; INDEPENDENT FAITH MISSION, A NON-PROFIT RELIGIOUS CORPORATION; ROBERT HORACE SWIGGETT, JR.; BOBBY S. MCGUIRE; DORIS S. KERR; PAUL F. LACKEY; ROSEMARIE LACKEY, PLAINTIFFS-APPELLANTS v. THE CITY OF GREENSBORO, A POLITICAL SUBDIVISION OF THE STATE OF NORTH CAROLINA, DEFENDANT-APPELLEE

No. 531PA89

(Filed 26 July 1990)

1. **Municipal Corporations § 30.7 (NCI3d)— zoning ordinance— referendum petition—time for filing**

The thirty-day period after "adoption" of a zoning ordinance for filing a referendum petition began on the date of the initial adoption of the ordinance rather than on the date the city council reconsidered the ordinance and took another vote thereon.

Am Jur 2d, Zoning and Planning §§ 47 et seq.

2. **Municipal Corporations § 30.21 (NCI3d)— rezoning ordinance— vote to confirm—additional notice and hearing not required**

Additional notice and hearing were not necessary to the validity of a city council's vote to reconsider and to "confirm" a rezoning ordinance initially adopted the previous month.

Am Jur 2d, Zoning and Planning §§ 47 et seq.

3. **Municipal Corporations § 30.7 (NCI3d)— repeal of rezoning ordinance—notice and hearing**

A vote to repeal a rezoning ordinance, whether taken in response to a referendum petition or upon the city council's

own motion, must be preceded by notice and hearing in addition to that preceding the initial adoption of the rezoning ordinance.

Am Jur 2d, Zoning and Planning §§ 47 et seq.

ON discretionary review prior to determination by the Court of Appeals pursuant to N.C.G.S. § 7A-31 of an order entered by *Britt, J.*, at the 5 September 1989 Session of Superior Court, GUILFORD County, granting summary judgment for defendant City of Greensboro. Heard in the Supreme Court 9 April 1990.

Michael B. Brough & Associates, by Frayda S. Bluestein and Michael B. Brough, for plaintiff-appellants.

Jesse L. Warren and A. Terry Wood for defendant-appellee.

WHICHARD, Justice.

This appeal arises from the reconsideration by the Greensboro City Council on 1 May 1989 of a zoning ordinance originally approved and adopted on 17 April 1989. Subsequently, petitions were filed calling for the repeal of the ordinance or a referendum thereon, a form of challenge to ordinances authorized by the Greensboro City Charter. We hold that because the referendum petition was not filed within the time limitations mandated by the charter, the City Council was not compelled to consider repeal of the zoning ordinance, the target of the petitioners' protest. Further, the Council's reconsideration and resulting repeal of the ordinance was without legal effect because of the Council's failure to follow notice and hearing provisions mandated by the General Statutes.

City councils are authorized by and within the provisions of Article 19 of the General Statutes to "provide for the manner in which zoning regulations and restrictions and the boundaries of zoning districts shall be determined, established and enforced, and from time to time amended, supplemented or changed." N.C.G.S. § 160A-384 (1987). *See also* N.C.G.S. § 160A-385 (1987) ("Zoning regulations and restrictions and zone boundaries may from time to time be amended, supplemented, changed, modified or repealed."). The General Statutes also state certain requisites for protest petitions by property owners who will be affected by a zoning change and authorize municipalities to prescribe formal and substantial requirements for such petitions. *See* N.C.G.S. §§ 160A-385, -386 (1987).

In accord with this statutory authorization to fashion procedures for the initiation, amendment, and repeal of zoning ordinances, the Greensboro City Charter grants referendum powers to the voters of that city to initiate, to compel reconsideration of, or to recall municipal ordinances. The charter restricts this power, excluding ordinances of a financial and budgetary nature from its reach; but zoning ordinances notably are not among such exclusions. *See* 1959 N.C. Sess. Laws ch. 1137, § 2.71(a)(2), (b)(2). Voters' referendum power specifically includes "power . . . to require reconsideration by the Council of any adopted ordinance . . . . If the council fails to repeal an ordinance which it has been required to reconsider, the voters shall have power to approve or reject that ordinance at the polls." 1959 N.C. Sess. Laws ch. 1137, § 2.71(b)(1). Voters seeking such a referendum must file a petition that meets these requisites:

> Any referendum petition must be filed with the city clerk within 30 days after adoption by the council of the ordinance concerned and must be signed by qualified voters of the city equal in number to at least 25% of the qualified voters of the city who voted at the last preceding election for city council members.

1959 N.C. Sess. Laws ch. 1137, § 2.71(b)(3). The Greensboro City Charter mandates in addition that upon the filing of a referendum petition with the City Clerk, the ordinance to which the petition is directed be immediately suspended. The suspension lifts only when a final determination is made that the petition concerned is insufficient, the petitioners withdraw their petition, or the Council reconsiders the ordinance and repeals it without modification. 1959 N.C. Sess. Laws ch. 1137, § 2.74.

Absent the impetus of a referendum petition, ordinances may be reconsidered by the City Council upon the motion of its own members. *See* Greensboro, N.C., Code § 2-21(a) (1989). The Greensboro Code provides that a motion for reconsideration of any matter previously acted upon must be "made and acted upon no later than the day of the second regular meeting following the meeting at which such matter was previously considered." *Id.* (The Greensboro City Council is required by ordinance to meet on the first and third Monday of each month and on each Thursday preceding the first and third Monday. Greensboro, N.C., Code § 2-16 (1989)).

Plaintiff Sofran Corporation holds options to purchase or lease property owned by the other plaintiffs. In their complaint plaintiffs alleged that on 17 April 1989 the Greensboro City Council adopted an ordinance rezoning this approximately eighteen-acre tract of land from industrial and residential designations to a commercial designation in anticipation of the construction of a shopping center on the site. The ordinance was published on 20 April 1989 and stated on its face that it was to be effective upon publication. Defendant Greensboro averred in its answer that it had complied with all statutory notice, public hearing, and procedural requirements before the 17 April 1989 hearing. On 15 May 1989 the City Council reconsidered the matter, then voted in favor of a zoning ordinance identical to that adopted on 17 April 1989. A stamped notation on the ordinance dated 20 April 1989 indicated that "the ordinance was adopted by the City Council of the City of Greensboro on the 17th day of April 1989 [to] become effective immediately upon its publication." This was crossed out. Beside it an identical stamp was affixed, but the date of adoption was inscribed as 15 May 1989 rather than 17 April 1989. Beneath the second stamp was this annotation: "Confirmation of adoption of ordinance initially approved by City Council on 4-17-89."

On 14 June 1989 petitions were filed whose signatories sought repeal of the rezoning ordinance that had been adopted initially on 17 April 1989 and reconsidered on 15 May 1989. Plaintiffs contended in their pleadings that the petitions, filed fifty-eight days after the 17 April adoption date, had been filed too late; defendant Greensboro, on the other hand, considered the petitions timely filed because they had been filed within thirty days after the City Council's 15 May 1989 reconsideration vote.

On 17 July 1989 the City Clerk certified that the petitions satisfied the requirements of the City Charter. Thus compelled by the voters' referendum power to repeal or sustain the zoning ordinance, the City Council voted on 7 August 1989 to repeal the ordinance. Although the City Council had opened its 15 May meeting to the public for comment, such comment had been restricted to new information on issues of traffic and safety. The record does not reflect that new notice was given or that a further public hearing was held with reference to the 7 August 1989 vote to repeal.

The material facts in this case are not disputed by the parties, as was indicated in motions for summary judgment filed by both

plaintiffs and defendant. The controversy is rather as to the legal significance of those facts. *Blades v. City of Raleigh*, 280 N.C. 531, 545, 187 S.E.2d 35, 43 (1972). Specifically, this Court is presented with the initial question whether the relevant date for purposes of the time for filing a referendum petition is the date of the initial adoption of a zoning ordinance or the date following reconsideration that the City Council chooses "finally [to] dispose of the matter by taking another vote thereon." Greensboro, N.C., Code § 2-21(a) (1989). The second, more critical question is whether a vote to repeal an ordinance taken in response to such petition must be preceded by notice and hearing in addition to that preceding the initial adoption of the rezoning ordinance.

[1] The provisions of the Greensboro City Charter plainly posit that "[a]ny referendum petition must be filed with the City Clerk within 30 days after *adoption* by the council of the ordinance concerned." 1959 N.C. Sess. Laws ch. 1137, § 2.71(b)(3) (emphasis added). Even though the stamp twice affixed by the clerk below the zoning ordinance text indicated that the ordinance had been twice "adopted"—first on 17 April 1989, then on 15 May 1989—the clerk's handwritten annotation that the second vote merely "confirmed" the first establishes that the relevant date for purposes of filing a referendum petition on time was the initial, earlier date of adoption. Moreover, the language of an ordinance, like that of a statute, "must be read not textually, but contextually, and with reference to the matters dealt with, the objects and purposes sought to be accomplished, and in a sense which harmonizes with the subject matter." *Greensboro v. Smith*, 241 N.C. 363, 366, 85 S.E.2d 292, 295 (1955). The patent purpose of designating a thirty-day period dating from the "adoption" of an ordinance is to give opponents of the ordinance a reasonable period to garner signatures, yet to allow planning for and development of the newly zoned territory to go forward as expeditiously as possible. Assuming for purposes of this appeal that the referendum powers of initiative, reconsideration, and recall granted by the Greensboro City Charter apply to zoning ordinances, we hold that the petitioners failed to file their referendum petition within the time constraints imposed upon them by the City Charter.

The City Council appears to have reconsidered the rezoning ordinance in August not upon its own motion[1] but in response to the invalid referendum petition. As such, its reconsideration on that date was improper. However, even if the second reconsideration had been upon the City Council's own motion, a more significant impediment to the Council's subsequent vote to repeal is apparent. Although the City Council had allowed limited public comment at the 15 May 1989 meeting at which the ordinance was first reconsidered, then confirmed, no notice was given or hearing held prior to the second reconsideration (that which resulted in the vote to repeal the ordinance). Notice of a public hearing preceding the adoption or amending of any ordinance is mandated by N.C.G.S. § 160A-364 (1987).

> The manifest intention of the General Assembly was that a public hearing be conducted at which those who opposed and those who favored adoption of the ordinance would have a fair opportunity to present their respective views. The requirement that such a public hearing be conducted is mandatory.

Orange County v. Heath, 278 N.C. 688, 693, 180 S.E.2d 810, 813 (1971) (quoting *Freeland v. Orange County*, 273 N.C. 452, 456, 160 S.E.2d 282, 286 (1968)). "The statute is explicit. Notice with an opportunity to be heard must be given before the zoning ordinance can be modified. An ordinance adopted without notice as required by the statute can have no validity." *Walker v. Elkin*, 254 N.C. 85, 87, 118 S.E.2d 1, 2 (1961).

[2] The general requirement of notice and public hearing prior to the adoption or amending of a zoning ordinance is subject to modification depending upon the substantiality of the change to be made following reconsideration.

> Ordinarily, if the ordinance or amendment as finally adopted contains alterations substantially different (amounting to a new proposal) from those originally advertised and heard, there must be additional notice and opportunity for additional hearing. However, no further notice or hearing is required after

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1. The record does not include minutes for regular City Council meetings preceding the August reconsideration nor any other indication whether the rezoning amendment was "previously considered" for purposes of reconsideration on the Council's own motion in accordance with the city ordinance. *See* Greensboro, N.C., Code § 2-21(a) (1989).

> a properly advertised and properly conducted public hearing when the alteration of the initial proposal is insubstantial. . . . Moreover, additional notice and public hearing ordinarily will not be required when the initial notice is broad enough to indicate the possibility of substantial change and substantial changes are made of the same fundamental character as contained in the notice, such changes resulting from objections, debate and discussion at the properly noticed initial hearing.

Heaton v. City of Charlotte, 277 N.C. 506, 518, 178 S.E.2d 352, 359-60 (1971). When reconsideration is followed by a vote to confirm an ordinance previously adopted or by a vote to make insubstantial modifications in the adopted ordinance, further notice and hearing are not called for: residents are already apprised of its text and effect and the Council has had the benefit of hearing the public's viewpoints. *See id.* at 518-19, 178 S.E.2d at 359. Thus, additional notice and hearing were not necessary to the validity of the City Council's 15 May vote to reconsider and to "confirm" the rezoning ordinance initially adopted on 17 April 1989.

[3] However, when reconsideration of an ordinance, even upon the Council's own motion, is followed by substantial amendments or by its rescission or repeal, it must be preceded by notice and hearing. *Orange County v. Heath*, 278 N.C. at 693, 180 S.E.2d at 813. In this case the City Council's failure to give notice of a second public hearing preliminary to its vote to repeal the ordinance was fatal to that vote, and the repeal was consequently without legal effect. *See Heaton v. City of Charlotte*, 277 N.C. 506, 178 S.E.2d 352 (zoning ordinance not adopted in accordance with the enabling statutes is invalid and ineffective).

As the parties perceive no dispute as to the material facts, and as none is disclosed by the record, this case was appropriate for summary judgment. *See Blades v. City of Raleigh*, 280 N.C. at 544, 187 S.E.2d at 43. We hold, however, that plaintiffs rather than defendant were entitled to judgment as a matter of law and that the trial court erred in entering summary judgment for defendant. Accordingly, we reverse the summary judgment for defendant and remand to the Superior Court, Guilford County, for entry of summary judgment for plaintiffs.

Reversed and remanded.

IN RE GOLIA-PALADIN

[327 N.C. 132 (1990)]

IN THE MATTER OF: DAVID GOLIA-PALADIN, APPELLANT, APPLICANT TO THE NORTH CAROLINA BAR BY COMITY TO THE BOARD OF LAW EXAMINERS

(BOARD OF LAW EXAMINERS, APPELLEE)

No. 190A89

(Filed 26 July 1990)

1. **Attorneys at Law § 9 (NCI4th)— admission to N. C. Bar by comity—denial of withdrawal of application after hearing**

The Board of Law Examiners did not err in refusing to permit appellant to withdraw his application for admission to the North Carolina bar by comity after the close of all the evidence at the hearing.

Am Jur 2d, Attorneys at Law § 22.

2. **Attorneys at Law § 10 (NCI4th)— denial of admission to N. C. Bar by comity**

The Board of Law Examiners properly denied appellant's application for admission to the North Carolina bar by comity on the ground that he failed to show that he was actively and substantially engaged in the practice of law in New York for four out of the six years immediately preceding the filing of his application where the applicant failed to report any income from the practice of law during four of those years, and during times that the applicant was purportedly practicing law out of his home, he had no secretary, no separate business checking account, and no trust account.

Am Jur 2d, Attorneys at Law § 22.

ON appeal of right pursuant to Section .1405 of the Rules Governing Admission to the Practice of Law in the State of North Carolina from an order of *Bailey, J.*, entered 16 December 1988 in Superior Court, WAKE County, which affirmed the 10 December 1986 order of the Board of Law Examiners denying the applicant's application for admission to the North Carolina bar by comity. Heard in the Supreme Court 13 December 1989.

Loflin & Loflin, by Thomas F. Loflin, III, for the appellant David Golia-Paladin.

Lacy H. Thornburg, Attorney General, by John F. Maddrey, Assistant Attorney General, for the appellee The Board of Law Examiners of the State of North Carolina.

MARTIN, Justice.

David Golia-Paladin, the appellant, raises several issues on this appeal, but we find it necessary to discuss only two in this opinion. We conclude that the superior court properly affirmed the order of the Board of Law Examiners denying appellant's application for admission to the North Carolina bar by comity.

The evidence in brief showed that applicant was graduated from Tulane School of Law in 1973. In 1975, he sat for the California bar examination, passing the multi-state and ethics parts of the exam but failing the written part. He has never been licensed to practice law in California. After failing the New York bar examination twice, applicant was successful the third time and became, and is now, a member of the bar of the State of New York in November of 1978.

Applicant worked for West Publishing Company until the summer of 1979 and that summer worked as a ranger at the Fire Island National Seashore. In the fall of 1979, he began practicing law with an office in his home at Mineola, New York. He did not have a secretary, office telephone, a trust account or a business checking account separate and apart from his personal account. He continued to practice until the spring of 1980 when he went to Alaska to work as a park ranger. He returned to Mineola in October of 1980, practicing as before. From May 1981 to March 1982, applicant worked as a prosecutor of misdemeanor charges before the magistrate in Sequoia and Yosemite National Parks in California. In the spring of 1982, the applicant returned to Mineola and resumed the practice of law as before. For most of 1982 applicant's practice was limited to unpaid volunteer work for indigent defendants. In 1983, he became qualified for appointment as paid counsel for indigents. His practice in this fashion continued until July 1985, although he began to appear in the criminal courts in Manhattan.

Of the six income tax returns offered by the applicant, only the years 1983 and 1984 showed any income from his practice. Income for the other years was listed as wages and salaries.

[1] After the close of all the evidence at the hearing, applicant sought to withdraw his application. Although there was debate as to whether he positively moved to withdraw his application,

the Board considered it as a motion to withdraw the application and denied it.

We first address the issue of whether the Board erred in denying the applicant's motion to withdraw his application. Applicant first argues that he wanted to withdraw the application before the hearing began. The transcript does not support his argument. It shows that applicant was only interested in knowing whether the time he spent as a prosecutor in the national parks would count as "practice of law" under the comity requirements. The record prior to the commencement of the testimony contains nothing indicating applicant's desire to withdraw the application. The applicant is a member of the bar of New York; surely he could have plainly moved to withdraw his application if he had so desired. We find no merit in this argument.

After the completion of all the evidence, applicant raised the question of whether the Board would count the time he "practiced out in California," and that if not, he wanted to withdraw his application. He further stated he wanted to resubmit his application without going through the application process again. Board Chairman Michaux responded that the Board would have to decide whether applicant had sufficient time in practice and whether he could withdraw his application after the completion of the hearing. Applicant then stated, "[I]n any event, if you're not going to consider that as time includable, then I would want to withdraw."

At best, applicant's request to withdraw was conditioned on the Board's decision as to whether it would include the time he spent with the Park Service in California to satisfy the practice requirement, and also whether he could reapply without going through the whole application procedure again. The Board denied applicant's request to withdraw his application, and the superior court held that the Board did not abuse its discretion in so doing. We affirm the superior court. It is evident that the applicant only wanted to withdraw his application if the Board decided against him with respect to the use of his "California practice" to satisfy the length of practice requirement. The Board gave full consideration to applicant's requests before denying them. Guided by the whole record test, we cannot say as a matter of law that the Board abused its discretion.

[2] Next, applicant contends that the Board erred in holding that he had not carried the burden of proof to show he had actively

and substantially practiced law in the State of New York for four out of the six years next preceding the filing of his application. We disagree. This is an essential requirement for admission to the bar of this state by comity. Section .0502(3) of the Rules Governing Admission to the Practice of Law in the State of North Carolina, promulgated pursuant to N.C.G.S. § 84-14 (1985).

Not only must applicant show the length of time he practiced law, he must further show that his practice was both active and substantial. The Board found the following facts among others: Applicant was admitted to the bar of the State of New York in 1978. From December 1976 to July 1979, applicant was employed by West Publishing Company as an editor which did not require a law license. From June 1979 through September 1979, he was employed as a park ranger which also did not require a law license. From October 1979 to May 1980, applicant engaged in the practice of law out of his home in Mineola, New York. He had no secretary during this period of time. He had no separate trust or business account and ran his business and private finances through his personal checkbook. His 1980 income tax return listed only wages, salary and tips as income for the year 1980 in the amount of $4,390. From May 1980 until September 1980, applicant worked as a park ranger in Alaska. This work did not constitute the practice of law. In October 1980, applicant returned to New York and again practiced law from an office within his home until April 1981. During this time, he again had no secretary, no separate business checking account, and no trust account. His income, according to his 1981 tax return, was listed as wages, salary and tips of $9,692. From April 1981 through March 1982, applicant worked in Sequoia and Yosemite National Parks in California as a representative of the Park Service in the magistrate's court to prosecute violations which occurred in the parks. In April 1982, applicant returned to New York again to practice in Mineola. During this period he worked as a volunteer in the representation of indigent criminal defendants. Again, he practiced law out of his home without a secretary and without trust accounts or a separate business account. His income reported on his 1982 income tax return was listed as wages, salary and tips of $5,531. In 1983, according to his tax return, he received $7,752 in earned income and in 1984, $5,915.

Based upon the evidence before it, the Board found that applicant had failed to show that he was actively and substantially

engaged in the practice of law in New York for four out of the six years immediately preceding the filing of his application.

Applying the whole record test, we find that there is substantial evidence in the record to support the facts found by the Board and that these findings support the Board's conclusions. *See In re Legg*, 325 N.C. 658, 386 S.E.2d 174 (1989). While the amount of the applicant's income from his law practice is not solely dispositive of the issue of the substantiality of his practice, it is relevant in the determination of this issue. The crucial factors supporting the Board's findings were the applicant's lack of proper business accounts and records. No professional bank account was maintained. He had no trust account and the physical facilities supporting his practice were at best meager. The applicant's failure to report any income from the practice of law during the years 1979, 1980, 1981 and 1982 amply supports the Board's conclusion with respect to the applicant's failure to show that he had engaged in an active and substantial practice of the law during these years. Having concluded that the applicant failed to satisfy the Board of his compliance with this requirement, the Board had a duty to deny the application. *Baker v. Varser*, 240 N.C. 260, 82 S.E.2d 90 (1954). We hold that the superior court correctly affirmed the holding of the Board that the applicant had failed to prove that he had engaged in the active and substantial practice of law for the requisite time period.

Based upon the foregoing holdings, we do not find it necessary to decide the remaining issues presented by this appeal. The above discussed holdings are sufficient to support the order of the Board denying applicant's application for admission by comity to the bar of the State of North Carolina. We therefore affirm the judgment of the Superior Court of Wake County.

Affirmed.

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

BRASWELL v. BRASWELL

No. 225A90

Case below: 98 N.C. App. 231

Petition by defendant (Ralph L. Tyson) for discretionary review pursuant to G.S. 7A-31 allowed 26 July 1990.

CENTRAL CAROLINA NISSAN, INC. v. STURGIS

No. 271P90

Case below: 98 N.C. App. 253

Petition by plaintiff (J. Douglas Moretz) for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

CHEEK v. POOLE

No. 220P90

Case below: 98 N.C. App. 158

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

CORUM v. UNIVERSITY OF NORTH CAROLINA

No. 163PA90

Case below: 97 N.C. App. 527

Motion by defendants to dismiss appeal for failure to comply with the Rules of Appellate Procedure denied 26 July 1990. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 26 July 1990. Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 26 July 1990. Petition by defendants for writ of supersedeas allowed 26 July 1990.

DONALDSON v. CHARLOTTE MEM. HOSP. & MEDICAL CENTER

No. 58P90

Case below: 96 N.C. App. 663

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

ECKERT v. WILLHOIT

No. 207P90

Case below: 98 N.C. App. 340

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

ELECTRIC SUPPLY CO. v. SWAIN ELECTRICAL CO.

No. 181PA90

Case below: 97 N.C. App. 479

Petition by defendants (Construction Co. and Venture I) for discretionary review pursuant to G.S. 7A-31 allowed 26 July 1990.

GRANTHAM v. CHERRY HOSPITAL

No. 196P90

Case below: 98 N.C. App. 34

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

HALL v. PARKER

No. 208P90

Case below: 98 N.C. App. 339

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

HINTON v. BULLOCK

No. 239P90

Case below: 98 N.C. App. 340

Petition by defendant (Shirley L. Bullock) for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

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

IN RE BRITT

No. 343P90

Case below: 99 N.C. App. 360

Petition by Michael Ray Britt for writ of supersedeas denied 31 July 1990.

IN RE FORECLOSURE OF STEWART

No. 198PA90

Case below: 98 N.C. App. 154

Petition by respondents for discretionary review pursuant to G.S. 7A-31 allowed 26 July 1990.

IN RE JACKSON PAPER MFG. CO.

No. 221P90

Case below: 98 N.C. App. 339

Petitions by Jackson County and by Jackson Paper Mfg. Co. for discretionary review pursuant to G.S. 7A-31 denied 16 July 1990.

IVES v. REAL-VENTURE, INC.

No. 160P90

Case below: 97 N.C. App. 391

Petition by third-party defendants for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

J. M. WESTALL & CO. v.
WINDSWEPT VIEW OF ASHEVILLE

No. 84P90

Case below: 97 N.C. App. 71

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

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

JOHNSON v. CITY OF RALEIGH

No. 195P90

Case below: 98 N.C. App. 147

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

JOHNSON v. NATURAL RESOURCES AND COMMUNITY DEVELOPMENT

No. 229P90

Case below: 98 N.C. App. 334

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

LYNN v. OVERLOOK DEVELOPMENT

No. 204PA90

Case below: 98 N.C. App. 75

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 26 July 1990.

McFETTERS v. McFETTERS

No. 214P90

Case below: 98 N.C. App. 187

Petition by defendants (McDaris and Rice) for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

MALONE v. JONES

No. 296P90

Case below: 98 N.C. App. 698

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

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

MOUNTAIN FED. LAND BANK v.
FIRST UNION NAT. BANK

No. 183P90

Case below: 98 N.C. App. 195

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

NICHOLS v. LAKE TOXAWAY CO.

No. 227P90

Case below: 98 N.C. App. 313

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

POTTER v. HOMESTEAD PRESERVATION ASSN.

No. 146A90

Case below: 97 N.C. App. 454

Petition by defendants for writ of supersedeas allowed 26 July 1990. Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 26 July 1990.

PRUITT v. PITT COUNTY SCHOOLS

No. 243P90

Case below: 98 N.C. App. 515

Petition by defendant (State Board of Education) for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

SIKES v. SIKES

No. 282A90

Case below: 98 N.C. App. 610

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed as to attorney's fee issue, otherwise denied 26 July 1990.

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

STATE v. ARNOLD

No. 245A90

Case below: 98 N.C. App. 518

Petition by Attorney General for temporary stay allowed 26 June 1990.

STATE v. BULLARD

No. 149P90

Case below: 97 N.C. App. 496

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

STATE v. CINEMA BLUE OF CHARLOTTE

No. 267P90

Case below: 98 N.C. App. 628

Petition by defendants for temporary stay allowed 26 June 1990 pending decision on petition for discretionary review. Temporary stay dissolved 26 July 1990. Notice of appeal by defendants pursuant to G.S. 7A-30 dismissed 26 July 1990. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

STATE v. GARVICK

No. 291A90

Case below: 98 N.C. App. 556

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 26 July 1990. Motion by Attorney General to dismiss appeal (except issue presented in dissent) for lack of significant public interest allowed 26 July 1990.

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

STATE v. GARY

No. 190P90

Case below: 98 N.C. App. 155

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

STATE v. NOBLES

No. 342P90

Case below: 99 N.C. App. 473

Petition by Attorney General for writ of supersedeas and temporary stay denied 26 July 1990.

STATE v. RICHARDSON

No. 353P90

Case below: 99 N.C. App. 496

Petition by Attorney General for writ of supersedeas and temporary stay denied 6 August 1990.

STATE v. SUMMERLIN

No. 215P90

Case below: 98 N.C. App. 167

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

STATE v. TORRES

No. 316A90

Case below: 99 N.C. App. 364

Petition by defendant for temporary stay allowed 26 July 1990 on condition that extant appearance bond remain in effect.

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

STATE v. VANCE

No. 202PA90

Case below: 98 N.C. App. 105

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed, review limited to the "year and a day rule" issue, 26 July 1990.

STATE v. WILLIAMS

No. 219P90

Case below: 98 N.C. App. 274

Temporary stay dissolved 26 July 1990. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

STIMPSON HOSIERY MILLS v. PAM TRADING CORPORATION

No. 280P90

Case below: 98 N.C. App. 543

Petition by plaintiff for writ of supersedeas and temporary stay denied 10 July 1990. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 July 1990.

SUNAMERICA FINANCIAL CORP. v. BONHAM

No. 200PA90

Case below: 98 N.C. App. 156

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 26 July 1990.

TALIAN v. CITY OF CHARLOTTE

No. 233A90

Case below: 98 N.C. App. 281

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 26 July 1990.

THOMPSON-ARTHUR PAVING CO. v.
N. C. DEPT. OF TRANSPORTATION

No. 72P90

Case below: 97 N.C. App. 92

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

WAKE COUNTY ex rel. SMITH v. MANN

No. 344P90

Case below: 99 N.C. App. 363

Petition by defendant for writ of supersedeas and temporary stay denied 31 July 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 31 July 1990.

WEATHERLY v. DEPT. OF CRIME CONTROL
& PUBLIC SAFETY

No. 76P90

Case below: 96 N.C. App. 681

Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 26 July 1990. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

WEBSTER v. POWELL

No. 258A90

Case below: 98 N.C. App. 432

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 26 July 1990.

WILKINS v. AMERICAN MOTORISTS INS. CO.

No. 98P90

Case below: 97 N.C. App. 266

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 26 July 1990.

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

PETITIONS TO REHEAR

BECKWITH v. LLEWELLYN

No. 243A89

Case below: 326 N.C. 569

Petition by defendants to rehear denied 26 July 1990 without prejudice to defendants' right to seek summary judgment on grounds other than collateral estoppel.

CITY OF KANNAPOLIS v. CITY OF CONCORD

No. 460A89

Case below: 326 N.C. 512

Petition by defendant to rehear denied 26 July 1990.

FISHER v. MELTON

No. 480A89

Case below: 326 N.C. 797

Petition by defendant (Lillie P. Melton) to rehear denied 26 July 1990.

STATE OF NORTH CAROLINA v. NORRIS CARLTON TAYLOR

No. 299PA88

(Filed 26 July 1990)

1. **Criminal Law § 82.1 (NCI3d)— allegation of ineffective assistance of counsel—attorney-client privilege—work product privilege—limited waiver**

By alleging in his motion for appropriate relief that his court-appointed attorney, the Public Defender, rendered ineffective assistance of counsel during the trial and direct appeal of these cases, defendant waived the benefits of both the attorney-client privilege and the work product privilege, but *only* with respect to matters relevant to his allegations of ineffective assistance of counsel.

Am Jur 2d, Criminal Law §§ 984, 985, 987.

2. **Criminal Law § 98 (NCI4th)— post-trial motion—power of court to compel disclosure of relevant facts—ineffective assistance of counsel—disclosure of Public Defender's files ordered**

The judiciary must and does have the inherent power to compel disclosure of relevant facts regarding a post-trial motion and may order such disclosure prior to a hearing on that motion; therefore, it was within the inherent authority of the superior court to order disclosure of the Public Defender's files prior to a hearing on defendant's motion for appropriate relief based on alleged ineffective assistance of counsel.

Am Jur 2d, Criminal Law §§ 984, 985, 987.

3. **Constitutional Law § 31 (NCI3d)— expert witness on North Carolina appellate practice—no appointment for indigent—no error**

The trial court did not err in denying defendant's motion for funds to employ an expert witness on North Carolina appellate practice to testify in support of his claim that he received ineffective assistance of counsel on his direct appeal of these cases, where the trial court appointed additional counsel to represent defendant in this matter who had already, by filing a brief on behalf of defendant in these cases and by presenting this issue for defendant in the amended motion

for appropriate relief, demonstrated that he possessed a thorough knowledge of the standards and intricacies of North Carolina appellate practice, and defendant therefore failed to show that he would be deprived of a fair hearing and ruling on his motion for appropriate relief without the assistance of the expert requested or that there was a reasonable likelihood that such an expert would materially assist him in the preparation or presentation of his claim of ineffective assistance of counsel during the direct appeal.

Am Jur 2d, Criminal Law §§ 955, 1006.

Justice MEYER dissenting in part.

ON certiorari to review an order filed in the Superior Court, CUMBERLAND County, by *Hobgood (Robert H.), J.*, on 20 June 1988. Heard in the Supreme Court on 14 November 1989.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, for the State.

James R. Glover for the defendant-appellant.

MITCHELL, Justice.

The issues before this Court for review on certiorari concern an order and various motions related to a post-trial motion for appropriate relief filed by the defendant in the Superior Court, Cumberland County. Those issues include: (1) the extent to which the defendant, by alleging ineffective assistance of counsel, waived the rights of confidentiality arising from his relationship with counsel who represented him during the trial and direct appeal of these cases; (2) the extent of the Superior Court's authority, prior to a hearing on the defendant's post-trial motion, to require that the defendant disclose such otherwise confidential information; and (3) whether the indigent defendant is entitled to funds to employ an expert witness on North Carolina appellate practice to testify in support of his claim that he received ineffective assistance of counsel on his direct appeal of these cases.

The Cumberland County Grand Jury returned a true bill of indictment on 5 September 1978 charging the defendant with the armed robbery and first-degree murder of Mildred Murchison. On 5 March 1979, the Cumberland County grand jury returned a true bill of indictment charging the defendant with the kidnapping and

armed robbery of Malcolm Biles and with assault with a deadly weapon with intent to kill inflicting serious injury upon Biles. The defendant was found to be indigent, and the Public Defender for the Twelfth Judicial District, Ms. Mary Ann Tally, was appointed to represent him at the trial of these cases.

The cases against the defendant were joined for trial on motion of the State. The defendant's motion for a change of venue of the trial to New Hanover County was allowed, and the cases were tried at the 28 May 1979 Special Criminal Session of Superior Court, New Hanover County. On 10 July 1979, the jury returned verdicts finding the defendant guilty of all of the charges against him. On 30 July 1979, at the conclusion of a separate sentencing proceeding, the same jury recommended, and the trial court entered, judgment sentencing the defendant to death for the first-degree murder of Mildred Murchison. As the first-degree murder conviction was based upon the theory of felony murder during the armed robbery of Murchison, that armed robbery conviction merged with the murder conviction. Therefore, the judgment on that armed robbery conviction was arrested. The trial court sentenced the defendant to terms of imprisonment on the remaining convictions.

The defendant gave notice of appeal in open court, and Public Defender Tally was appointed to represent him on appeal. The defendant, represented by Public Defender Tally, perfected his appeal to this Court which ordered a new trial on the kidnapping conviction but found no error as to the other convictions and sentences, including the sentence of death in the first-degree murder case. *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981). A review of the evidence at trial is included in this Court's opinion and decision resolving the issues raised on direct appeal and need not be repeated here. *See id.* The Supreme Court of the United States denied petitions for writ of certiorari, *Taylor v. North Carolina*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983), and for rehearing, *Taylor v. North Carolina*, 463 U.S. 1249, 77 L. Ed. 2d 1456 (1983), filed on the defendant's behalf by Public Defender Tally.

On 13 February 1984, Public Defender Tally filed a motion for appropriate relief on the defendant's behalf seeking a new trial or, alternatively, a new sentencing proceeding. The parties agree that on 14 June 1984 an order was entered in the Superior Court, Cumberland County, appointing the Office of the Appellate Defender as additional counsel and ordering that office to review all of the

proceedings in these cases to determine whether an additional or supplemental motion for appropriate relief should be filed alleging ineffective assistance of counsel during the trial and the direct appeal of these cases. From the record, it appears that nothing further transpired until two years later when, on 1 July 1986, the Superior Court, Cumberland County, entered an order appointing the defendant's current counsel, Mr. James R. Glover, as additional counsel to represent the defendant. That order directed Mr. Glover to review all of the proceedings in these cases including pretrial motions, the actual trial of the cases, the direct appeal to this Court and the petitions which had been filed on the defendant's behalf with the Supreme Court of the United States. The order also directed that Mr. Glover "determine whether or not an additional or supplemental Motion for Appropriate Relief should be filed alleging that the Defendant did not receive effective assistance of counsel either in the trial or appellate stage of these proceedings." The order further directed Mr. Glover to consult with the defendant concerning these matters and indicated that it was "the intent of the Court that the question of ineffective assistance of counsel be raised at this time [if it] is going to be raised at all." Acting pursuant to this order of 1 July 1986, Mr. Glover conducted the required review and, on 23 November 1987, filed an amended motion for appropriate relief on behalf of the defendant contending, *inter alia*, that the defendant's counsel had given him ineffective assistance of counsel, both in preparing and presenting his defense at trial and in preparing and presenting his case before this Court on direct appeal. The State filed its response on 18 December 1987.

On 28 April 1988, the State filed a motion in Superior Court, Cumberland County, asserting that it would be "inappropriate for Ms. Tally to continue to represent the defendant while he alleges that she was ineffective." By its motion, the State sought an order "removing Ms. Tally as counsel for the defendant and providing for access to her files on this defendant's case by counsel for the State." A hearing on this motion by the State was held in Superior Court, Cumberland County, on 31 May 1988. During the hearing, the defendant filed a memorandum of law opposing an order requiring Public Defender Tally to disclose all of her office's files relating to the defendant. The defendant also filed, *inter alia*, a motion for funds to hire an expert witness on North Carolina appellate practice to testify on his behalf at any later hearing on his amended

motion for appropriate relief. During the hearing, the court indicated that it would order Public Defender Tally to give the State access to her office's files relating to the defendant, would remove her as counsel and would deny the defendant's motion for funds for an expert witness. Counsel for the State was directed to draft an order to that effect. Upon receiving the proposed order, the defendant submitted formal objections and an affidavit of Public Defender Tally indicating that, in her opinion, portions of her files on the defendant were irrelevant to issues raised by the defendant's allegations that she had rendered ineffective assistance of counsel during his trial and appeal.

On 20 June 1988, the order which is now before us for review was filed in the Superior Court, Cumberland County, removing Public Defender Tally as counsel for the defendant. In this order, the Superior Court concluded that "Based upon the claim for ineffective assistance of counsel, it appears necessary to the Court that the State have access to the files of the Public Defender's Office relating to these cases." Therefore, the Superior Court ordered "that the Public Defender within ten days of the date of this order, and as necessary during the litigation of the motion for appropriate relief, and its amendments, provide . . . the State . . . access to . . . all files relating to these cases." Further, in this order, the Superior Court denied the defendant's motion for funds to employ an expert witness.

On 7 September 1988, this Court entered an order allowing the defendant's petition for a writ of certiorari to review those parts of the Superior Court's order (1) granting the State access to the Public Defender's files and (2) denying the defendant's motion for the appointment of an expert witness. On the same date, this Court entered an order allowing the defendant's petition for a writ of supersedeas.

I.

[1] By an assignment of error, the defendant contends that to the extent his allegations of ineffective assistance of counsel operated as a waiver of his rights of confidentiality arising under the attorney-client privilege and under the work product privilege, his waiver of confidentiality was limited to information relevant to his claims of ineffective assistance of counsel. Therefore, the defendant argues, the order of the Superior Court directing him to give the State "access to . . . all files relating to these cases" without any limitation

went beyond his waiver and violated the attorney-client privilege and the work product privilege and, thereby, exceeded the court's authority. We agree.

Attorney-client communications are privileged under proper circumstances. *State v. Tate*, 294 N.C. 189, 239 S.E.2d 821 (1978); *see generally* 1 Brandis on North Carolina Evidence § 62 (3d ed. 1988). A similar qualified privilege protects criminal defendants from disclosure of the work of attorneys produced on behalf of such defendants in connection with the investigation, preparation or defense of their cases. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977); N.C.G.S. § 15A-906 (1988). *See generally* 1 Brandis on North Carolina Evidence § 62. Both the attorney-client privilege and the work product privilege, however, are privileges belonging to the defendant and may be waived by him. *See State v. Hardy*, 293 N.C. at 126, 235 S.E.2d at 840-41 (work product privilege); *State v. Tate*, 294 N.C. at 193, 239 S.E.2d at 825 (attorney-client privilege).

By alleging in his amended motion for appropriate relief that his court-appointed attorney, the Public Defender, rendered ineffective assistance of counsel during the trial and direct appeal of these cases, the defendant waived the benefits of both the attorney-client privilege and the work product privilege, but *only* with respect to matters relevant to his allegations of ineffective assistance of counsel. *See Battle v. State*, 8 N.C. App. 192, 174 S.E.2d 299 (1970); *State v. White*, 1 N.C. App. 219, 161 S.E.2d 32 (1968). As Justice Meyer points out in dissent, the defendant's attack on the Public Defender's representation of him—particularly her representation of him at trial—was rather broad-ranging and extensive in nature. Therefore, we concede that the defendant made a fairly broad waiver of the privileges in question; but we nevertheless conclude that his waiver was not an unlimited waiver. As the order of the Superior Court directed the defendant to provide the State access to "all files relating to these cases" without limiting the ordered disclosure to matters relevant to issues raised by the defendant's allegations of ineffective assistance of counsel, the order of the Superior Court was overbroad and exceeded its authority.

II.

[2] By another assignment of error the defendant contends that the Superior Court was without authority to order the defendant or Public Defender Tally to give the State access to any files

prior to a hearing on the defendant's amended motion for appropriate relief. In support of this argument, the defendant points out that under N.C.G.S. § 15A-1411(b) a motion for appropriate relief is a motion in the original criminal action and not a new civil proceeding. He argues that except for very limited discovery provided by our discovery statutes, N.C.G.S. §§ 15A-901 to -910, neither party in a criminal case is entitled to have a potential witness compelled to disclose evidence prior to trial. The defendant seeks to equate a hearing on the merits of his post-trial motion for appropriate relief in this case to a jury trial, and argues that the Superior Court was without authority to order him to disclose anything prior to such a hearing on his motion, unless such order requiring disclosure was specifically authorized by our discovery statutes. We do not agree.

It is true that neither the State nor the defendant had a *right* of discovery in criminal cases under the common law. *State v. Goldberg*, 261 N.C. 181, 134 S.E.2d 334, *cert. denied*, 377 U.S. 978, 12 L. Ed. 2d 747 (1964). Presently, limited rights of discovery for the defendant and the State exist under the Constitution of the United States or by statute. *E.g.*, *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963) (constitutional requirement that State disclose certain information favorable to defendant prior to trial); N.C.G.S. §§ 15A-901 to -910 (1988) (statutory rights of discovery for defendant and State). Assuming *arguendo* that the State has no right to discovery on the facts before us, however, "the absence of discovery as a matter of right does not necessarily preclude the trial judge from ordering discovery in his discretion." *State v. Hardy*, 293 N.C. 105, 124, 235 S.E.2d 828, 840 (1977); *see* 23 Am. Jur. 2d *Depositions and Discovery* § 403 (1983) (courts' inherent power to order discovery to assure justice in criminal cases). Here, as in previous cases, "it is not necessary for us to reach the question of whether North Carolina trial judges have the inherent power to order pretrial discovery in the absence of a statute prohibiting discovery." *State v. Hardy*, 293 N.C. at 125, 235 S.E.2d at 840. Instead, we must decide whether, on the facts before us, the Superior Court had the inherent authority to order disclosure of facts relevant to the defendant's motion for appropriate relief, which was made after the trial and direct appeal of these cases.

We have previously held that our trial judges have inherent authority to order disclosure at trial of relevant facts, where it

is in the interest of justice to do so. In reaching our holding in this regard, we stated:

> At trial the major concern is the "search for truth" as it is revealed through the presentation and development of all relevant facts. To ensure that truth is ascertained and justice served, the judiciary must have the power to compel the disclosure of relevant facts, not otherwise privileged, within the framework of the rules of evidence.

Id. (citation omitted). The same reasoning leads us to conclude that our judiciary also must and does have the inherent power to compel disclosure of relevant facts regarding a post-trial motion and may order such disclosure prior to a hearing on such motion.

In the present case, the defendant concedes that the State may cause subpoenas to be issued, pursuant to N.C.G.S. § 15A-801, compelling Public Defender Tally and any of her assistants who may have relevant information to attend any hearing on his amended motion for appropriate relief for the purpose of testifying. Further, the State may cause a subpoena for the production of documentary evidence to be issued, pursuant to N.C.G.S. § 15A-802, requiring the production of the Public Defender's files and records concerning these cases at any such hearing on the defendant's motion. These facts simply add weight to our conclusion that it was within the inherent authority of the Superior Court to order disclosure of the Public Defender's files prior to a hearing on the defendant's motion for appropriate relief, but limited to matters as to which the defendant has waived the attorney-client privilege and work product privilege. On our remand of these cases, the Superior Court may reasonably conclude that ordering such disclosure prior to any hearing on the merits of the defendant's amended motion for appropriate relief will significantly assist in the search for truth. If so, the Superior Court has the inherent authority to order such disclosure in the interest of justice prior to any hearing.

As Public Defender Tally has been removed as counsel for the defendant and will be required to meet his allegations that she has rendered him ineffective assistance, she should not be required to determine which of the files and documents in her office must be disclosed to the State pursuant to any order of disclosure the Superior Court may enter. That obligation and responsibility in these cases should now fall to Mr. Glover, the defendant's

current appointed counsel, who must, of course, be given full access to all of the Public Defender's files concerning the defendant. He will be required to make the initial determination as to what documents and matters in those files must be disclosed to the State, should the Superior Court on our remand of these cases order disclosure prior to a hearing on the defendant's amended motion for appropriate relief.

Apparently anticipating just such a possibility, Mr. Glover has described in his brief before this Court the extent to which he contends the defendant has waived the attorney-client privilege and work product privilege by making specific allegations of ineffectiveness of counsel. He argues that the defendant has not waived the limited privileges of confidentiality as to certain parts of the files of the Public Defender, and he has undertaken to identify those parts of the files in some detail. Although the defendant's brief demonstrates commendable thoroughness in this respect, it is too early for such arguments to be considered by this Court. Should the Superior Court, upon our remand of these cases, enter an order requiring disclosure of parts of the Public Defender's files and counsel for the defendant and for the State disagree as to what parts of the files are governed by such an order, the Superior Court will be required to conduct an *in camera* inspection of those portions of the files as to which there is disagreement and determine whether they must be disclosed. *Cf. id.* at 128, 235 S.E.2d at 842 (*in camera* inspection and appropriate findings of fact required to determine if statement of material witness favorable to defense). If necessary, the Superior Court may order parts of the files sealed and placed in the record of the motion hearing for appellate review. *Id.*

III.

[3] By another assignment of error, the defendant argues that the Superior Court erred in denying his motion for funds to employ an expert witness on North Carolina appellate practice to testify in support of his claim that he received ineffective assistance of counsel on his direct appeal of these cases. We do not agree.

We need not consider here whether the indigent defendant has any constitutional right to the assistance of an expert at State expense during a post-conviction proceeding. *But cf., Murray v. Giarrantano*, 492 U.S. ---, 106 L. Ed. 2d 1 (1989) (no due process right to appointed counsel during post-conviction hearing); *Penn-*

sylvania v. Finley, 481 U.S. 551, 95 L. Ed. 2d 539 (1987) (same). Indigent defendants are entitled by statute to appointed counsel to represent them with regard to motions for appropriate relief. N.C.G.S. § 7A-451(a)(3) (1989). Further, N.C.G.S. § 7A-450(b) and § 7A-454 provide that indigent defendants are entitled to expert assistance at State expense in certain circumstances. The test for determining whether an indigent is entitled to the assistance of an expert at State expense is the same under these statutes as the test employed in cases in which similar assistance by an expert is sought as a matter of constitutional right at trial. *See State v. Moore*, 321 N.C. 327, 335-36, 364 S.E.2d 648, 652 (1988). An indigent defendant is entitled to such assistance at trial only if he makes a threshold showing of specific necessity for the assistance of the expert requested. *Id.* at 335, 364 S.E.2d at 652.

> In order to make a threshold showing of specific need for the expert sought, the defendant must demonstrate that: (1) he will be deprived of a fair trial [here deprived of a fair hearing on his motion for appropriate relief] without the expert assistance or (2) there is a reasonable likelihood that it will materially assist him in the preparation of his case.

Id. (citation omitted). We conclude that the defendant has failed to make such a threshold showing in these cases.

The defendant argues that the particular nature of his claim that he received ineffective assistance of counsel during his direct appeal reveals that an expert witness on North Carolina appellate practice will materially assist him in presenting this claim. He points out that a major portion of his claim that the Public Defender rendered him ineffective assistance on appeal relates to the manner in which the Public Defender presented and argued a number of matters that this Court concluded were error, but were either harmless error or waived. He asserts that this Court's decisions on those issues were based on erroneous statements of the facts, which resulted from the Public Defender's failure to include relevant parts of the transcript and from her inadequate presentation of facts surrounding particular issues. He contends that these problems were caused in part by the fact that the Public Defender presented sixty-two assignments of error on direct appeal, which he says were repetitious, inadequately explained or confusing. Therefore, the defendant specifically argues that:

> In a case raising this kind of claim of ineffective assistance, expert testimony as to the manner in which a reasonably effective lawyer should prepare a narrated record containing everything relevant to the assigned errors, the manner in which a reasonably effective lawyer should prepare a brief that presents both the claims of error and the potential significance of that error to the outcome of the trial, and the specific manner in which defendant's counsel failed to present his assigned errors in a manner which would allow this Court to understand their real significance and to rule on them with an accurate understanding of the trial court proceedings would be helpful to the resolution of this claim.

Based on such reasoning, the defendant argues that there is a reasonable likelihood that the assistance of the requested expert will materially assist him in preparing to present his motion for appropriate relief, and that he will be deprived of a fair hearing without the expert assistance. We do not agree.

Mr. Glover, the defendant's current counsel, has demonstrated in his brief on behalf of the defendant in these cases, as well as in his presentation of this issue for the defendant in the amended motion for appropriate relief, that he possesses a thorough knowledge of the standards and intricacies of North Carolina appellate practice. His arguments on behalf of the defendant concerning this assignment clearly demonstrate a high degree of expertise in presenting and explaining such issues and a thorough familiarity with the factual details of these cases, as well as complete familiarity with the manner in which those facts were presented and argued during the direct appeal. Further, we doubt that an expert witness would be of any real help to the Superior Court or this Court in deciding whether ineffectiveness of counsel on the direct appeal of these cases led this Court into either factual or legal error. This being so, we simply cannot conclude either that the defendant will be deprived of a fair hearing and ruling on his motion for appropriate relief without the assistance of the expert requested, or that there is a reasonable likelihood that such an expert would materially assist him in the preparation or presentation of his claim of ineffective assistance of counsel during the direct appeal. Therefore, we conclude that the trial court did not err in that part of its order denying the defendant's motion for the appointment of such an expert.

IV.

For the foregoing reasons, we conclude that the part of the Superior Court's order requiring that the State be given access to all of the files of the Public Defender's Office concerning these cases was overbroad, as it exceeded the scope of the defendant's waiver of his attorney-client privilege and work product privilege in connection with these cases; that part of the order of the Superior Court is vacated. We further conclude that the Superior Court did not err in that part of its order denying the defendant's motion for expert assistance at State expense, and we affirm that part of the order. These cases are remanded to the Superior Court, Cumberland County, for further proceedings consistent with this opinion.

Affirmed in part, vacated in part and remanded.

Justice MEYER dissenting in part.

The majority today holds that because the order of the superior court directed defendant to provide the State access to "all files relating to these cases" without limiting the ordered disclosure to matters relevant to issues raised by defendant's allegations of ineffective assistance of counsel, such order was overbroad and exceeded its authority. I respectfully dissent because I am convinced that when a defendant attacks his conviction on the ground of ineffective assistance of his counsel, the State is entitled to review that attorney's entire file in order to ascertain whether that counsel covered all reasonable bases and rendered effective assistance.

In this case, defendant contended he was denied a fair sentencing hearing due to the ineffectiveness of his counsel. His contentions regarded prior crimes committed by defendant many years before the murder and during the course of a crime spree leading up to the murder for which he was being tried. In particular, defendant alleged that his trial counsel (1) failed to investigate the other crimes, (2) failed to cross-examine witnesses to these crimes, and (3) offered no rebuttal evidence concerning these witnesses and crimes.

Defendant additionally set forth the following allegations of ineffective assistance with regard to his counsel's preparation of his appeal:

1. the failure to raise on direct appeal certain issues and claims set forth in the amended motion for appropriate relief;

2. the omission of certain portions of the events at trial from the record on appeal, in particular, the jury conference and the closing arguments during the penalty phase;

3. the failure to organize the sixty-two assignments of error in the brief on direct appeal, which resulted in a confusing presentation of the claims presented to the appellate court;

4. the failure to provide an adequate statement of the facts or to relate the arguments to the specific facts of the case;

5. the failure to argue specific prejudices to the defendant in the context of the assigned errors, in light of the evidence and events that occurred at trial; and

6. the failure to submit a record and brief adequate to give the court a full understanding of the significance of the errors assigned.

In *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), the United States Supreme Court enunciated the test to be utilized in determining whether a defendant has established that his counsel was ineffective. In order to prevail on such a claim, a defendant must prove (1) that his counsel's performance was defective, and (2) that the deficient performance prejudiced the defense. This test has been adopted in North Carolina. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). Because the test incorporates the element of prejudice, it is necessary to view the strategic decisions of counsel in the context of the entire trial. Counsel's performance must be judged "according to the circumstances of each case." *Whitley v. Bair*, 802 F.2d 1487, 1496 (4th Cir. 1986), *cert. denied*, 480 U.S. 951, 94 L. Ed. 2d 802 (1987). An attorney's actions are often based upon information from his client, and this information forms the basis of counsel's strategic choices. When a client gives his counsel reason to believe pursuing a certain line of investigation would be fruitless or harmful, counsel's failure to pursue this investigation may not later be challenged as unreasonable. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674; *Clanton v. Bair*, 826 F.2d 1354 (4th Cir. 1987), *cert. denied*, 484 U.S. 1036, 98 L. Ed. 2d 779 (1988). For these reasons, the State must know the extent of defense counsel's investigation in order to learn what she knew about defendant's alleged prior

crimes and whether there were tactical reasons for failing to investigate further. Counsel's alleged failure to investigate and her failure to raise certain issues on appeal were the result of strategic decisions which were not made in a vacuum. Access to counsel's work product is necessary for a proper understanding of defendant's allegations, and it can only be obtained in the proper context through a review of the entire file.

This Court has never addressed the extent of the waiver of the attorney-client privilege on an ineffective assistance motion before today. My review of the relevant decisions of the Court of Appeals and of decisions handed down in other jurisdictions, however, convinces me that when a client alleges incompetent or ineffective performance on the part of his counsel, such an allegation serves to abrogate the privilege previously existing between them.

The majority relies on the two decisions handed down by our Court of Appeals on this issue, *State v. Battle*, 8 N.C. App. 192, 174 S.E.2d 299 (1970), and *State v. White*, 1 N.C. App. 219, 161 S.E.2d 32 (1968), in making its assertion that the waiver of the attorney-client privilege in this situation is a limited waiver. My reading of these two cases, however, leads me to believe that these holdings were not intended to impose a limitation upon the waiver, but were rather an invitation for the attorney to disclose any and all information relevant to his defense, to the extent necessary to defend his rights. In a case such as the one at bar, where defendant is asserting a general failure of his counsel to perform a wide range of duties, it is necessary to review the entire file in order to permit counsel to defend against such a claim. I do not read *Battle* and *White* as decisions which limit this judge's ability to order such a result. In fact, the Court of Appeals held in *White* that "[i]n a determination by the court as to whether the confession or inculpatory statement of the defendant was a substantial factor in his decision to plead guilty, based upon recommendations by his attorney testified to by the defendant, the State is entitled to have the court consider *full disclosures* by defendant's attorney of conversations had between him and his client." *White*, 1 N.C. App. at 222-23, 161 S.E.2d at 34 (emphasis added).

Holdings in other jurisdictions, both on the federal and state levels, support this view. Particularly instructive is *Harris v. Comm.*, 688 S.W.2d 338 (Ky. Ct. App. 1984), *cert. denied*, 474 U.S. 842,

88 L. Ed. 2d 104 (1985), in which the Kentucky Court of Appeals held that when ineffective assistance of counsel is raised via a motion to vacate, set aside, or correct a sentence, the attorney-client privilege is lost. The court reasoned that only when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance. The court further held that all contact between a party and his counsel in his professional capacity must be deemed to be in anticipation of litigation or in furtherance of legal services being offered, thus eliminating the need for dividing the contact into privileged and nonprivileged categories.

In *Morris v. Kemp*, 809 F.2d 1499 (11th Cir.), *cert. denied*, 482 U.S. 907, 96 L. Ed. 2d 378 (1987), in which the defendant appealed the district court's denial of his petition for a writ of habeas corpus, the court held that defendant committed a procedural default in failing to pursue his ineffective assistance claim in his first state habeas proceeding and was therefore barred from bringing his habeas claim in federal court. The court noted in its holding that defendant's habeas counsel asserted during the first proceeding that he was not making an ineffective assistance of counsel claim "and thus had not effected a general waiver of the attorney-client privilege." *Id.* at 1501. The court went on to say that such a claim "*would have waived the [attorney-client] privilege entirely.*" *Id.* at 1502 (emphasis added).

The Fifth Circuit United States Court of Appeals discussed this issue at length in *United States v. Woodall*, 438 F.2d 1317 (5th Cir. 1970), *cert. denied*, 403 U.S. 933, 29 L. Ed. 2d 712 (1971). The defendant in that case sought to withdraw his guilty pleas on the basis that they were not intelligently made since he lacked knowledge of the sentencing consequences. Defendant had additionally filed an affidavit asserting that coercion existed which voided his plea changes by virtue of pre-plea advice he received from his original attorney. The court held that defendant had waived his right to claim privilege as to his entire conversation with the attorney. The court relied in part upon an early and often-cited opinion of the United States Supreme Court, *Hunt v. Blackburn*, 128 U.S. 464, 32 L. Ed. 488 (1888), which held that when one has entered upon such a line of defense, it constitutes a waiver of the right to bar the reception of evidence as privileged. In analyzing this issue, the court noted that waiver involves two basic elements:

> The first is subjective—Does the person holding the right to claim the privilege intend to waive it? The second element is objective—Is it fair and consistent with the assertion of the claim or defense being made to allow the privilege to be invoked? This objective determination should be based upon whether the position taken by the party goes so far into the matter covered by the privilege that fairness requires the privilege shall cease even when, subjectively, he never intended that result.

United States v. Woodall, 438 F.2d at 1324.

The effectiveness of counsel's representation in this case depends upon many aspects of the preparation of the trial and appeal. Without access to the entire file, the State cannot adequately determine whether the representation was ineffective. It does not seem logical to permit defendant to control access to his prior attorney's file, either directly or through a sympathetic defense attorney. The rule should be, as Judge Hobgood found it, that the State is entitled to access to the entire file upon a defendant's allegation of ineffectiveness. Because I believe that Judge Hobgood did not err in entering his order, I respectfully dissent.

STATE OF NORTH CAROLINA v. ROGER WAYNE FRANKLIN

No. 417A89

(Filed 26 July 1990)

1. Homicide § 21.4 (NCI3d)— first degree murder—defendant as perpetrator—sufficiency of evidence

Evidence that the first degree murder charged in the bill of indictment was committed and that defendant was the perpetrator was sufficient to be submitted to the jury where it tended to show that the victim's body was found at the edge of a path in a field "many weeks" after she died; her tank top was riddled with holes; defendant had the motive and opportunity to kill deceased, as she had allegedly stolen cocaine from him, making him angry, and the victim was last seen alive as she rode off with defendant in his car; defendant sold his car because he knew police would be looking for him

in that vehicle; he escaped to Daytona Beach, Florida; defendant told the victim's mother when he telephoned her that he would not be put on hold because he thought the phone was bugged or tapped and he wanted the mother to get the police off his back; and defendant boasted to a fellow inmate that he had killed a girl because she owed him money, had been questioned about it, and had gotten away with it.

Am Jur 2d, Evidence §§ 1124 et seq.

2. **Homicide § 21.5 (NCI3d)— body with marks of violence—inculpatory statements to cell mate—sufficiency of evidence of first degree murder**

When a body is found with marks of violence upon it, such evidence establishes corpus delicti, and evidence of corpus delicti coupled with the testimony of a cell mate relating inculpatory statements made by defendant is sufficient to support a conviction.

Am Jur 2d, Evidence §§ 1141, 1142.

3. **Homicide § 17.2 (NCI3d)— first degree murder—threats made prior to victim's disappearance—no class threat—admission of evidence prejudicial error**

The trial court in a first degree murder case committed prejudicial error in permitting a witness for the State to testify about threats made by defendant against an unidentified woman approximately three weeks before the victim's disappearance, since defendant's threat that he was going to kill a woman who stole cocaine from him was in no way tied to the victim in that the evidence showed that the victim stole cocaine from defendant only on 17 June, the morning she disappeared, while defendant made the threat to kill the girl three weeks before; furthermore, the threat in question was not admissible as a class threat because it was directed against a specific person.

Am Jur 2d, Evidence §§ 272, 363.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Hobgood, J.*, at the 24 April 1989 Criminal Session of Superior Court, FRANKLIN County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 16 May 1990.

Lacy H. Thornburg, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

Roger W. Smith and Melissa Hill for defendant-appellant.

MEYER, Justice.

Defendant brings forward seven assignments of error with regard to the guilt-innocence phase of his trial. We have performed an exhaustive review of the record, briefs, and oral arguments of the parties, and we conclude that the trial court committed prejudicial error in permitting a witness for the State to testify about threats made by the defendant against an unidentified woman approximately three weeks before the victim's disappearance that were not demonstrated to be directed against the victim. We hold that this error entitles defendant to a new trial.

On 14 March 1988, defendant was indicted for the first-degree murder of Jean Marie Sherman. Defendant's first trial ended in a mistrial after the jury expressed its inability to reach a unanimous verdict. The case came on for a second trial on 24 April 1989 before Judge Robert H. Hobgood and was tried noncapitally. At the close of the State's case, defendant moved to dismiss the charge of first-degree murder and all lesser included offenses. Judge Hobgood denied the motion. Defendant then offered evidence and renewed his motion to dismiss at the close of all of the evidence. Again, his motion was denied. Presented with the options of guilty of first-degree murder, guilty of second-degree murder, and not guilty, the jury returned a verdict finding defendant guilty of the first-degree murder of Jean Sherman.

The assignments of error brought forward by defendant require this Court to engage in an extensive review of the evidence introduced at trial. For that reason, we endeavor to set out that evidence in some detail.

The State's evidence tended to show the following: In the spring of 1986, the victim, Jean Sherman, lived in a mobile home located near the county line between Wake and Franklin Counties with her fiancé, Travis Kelly, and several members of his family. Around March of that year, Jean became pregnant with Travis' child. Travis' sister-in-law, Janet Kelly, testified that Jean and Travis were very excited about having a baby and that Jean never acted like she did not want to keep the child. In fact, Janet testified

that Jean "wanted that child worse than anything." Yet, on 29 May, Jean underwent an abortion. She told the social worker that her reasons for obtaining an abortion were financial.

Meanwhile, defendant was completing a seven-year sentence for controlled substance violations and was in the custody of the North Carolina Department of Correction. Defendant was released on parole on 14 March 1986 and was given a job at a construction site by a family acquaintance, McLester Turner. On 24 April 1986, defendant was arrested and charged with felonious possession of cocaine. He was released on bond on that same day and returned to Wake County district court on 20 May 1986, where he waived a probable cause hearing.

During the month of May, defendant performed some work for McLester Turner and was paid for those services on 22 May 1986. After this initial work, defendant worked a part of one additional day in May for Turner. Turner testified that defendant arrived for work that morning "highly agitated, angry, mad." Turner talked to defendant in Turner's truck, and defendant told Turner that he was "messed up" and that he wanted Turner to take him for a ride so that he would not be seen in that condition should his parole officer arrive. Turner testified that defendant "was ranting and raving about a b---- that ripped his dope and money off." He stated that he "was going to kill the b---- that ripped him off, he was going to rip her, blow her d---- brains out, cut her." Turner further testified that defendant stated that the woman either stole $300.00 in drugs and $800.00 in cash, or vice versa.

Later that day, a woman arrived at the job site to pick up defendant. She was driving a rust-colored Monte Carlo automobile. Turner asked defendant if this was the woman who had ripped him off. Defendant laughed and said, "no, this was not his fine b----, this was just a slut he was riding around with." Defendant got into the car with the woman and rode away with her. This was the last time defendant worked for Turner.

Turner was unable to recall the exact date upon which the threats were made, but by referring to defendant's last paycheck, he was able to narrow the date of the threat down to a five-day period in May—between the dates of 24 May and 29 May 1986. Turner testified that he paid defendant for this last day of work by check on 7 June 1986, and he presented the check stub which evidenced that fact. He further testified that defendant's last day

of work, the day of the threat, could have been as long as two weeks before 7 June and was at least a week and a half before 7 June.

The evidence presented does not clearly establish the date upon which defendant and the victim met. Janet Kelly testified that she did not know for sure when Jean and defendant started seeing each other, but to the best of her knowledge, Jean did not start seeing defendant until after her pregnancy was terminated on 29 May. Barbara Rose, Travis' mother, testified during defendant's first trial that the defendant "came by [the mobile home] every two or three weeks to get [Jean]" and that he "had picked Jean up a time or two before the 17th [of June]." This former testimony was utilized by the defense to impeach Mrs. Rose's testimony at the second trial that she did not recall ever having seen defendant before 17 June.

On 16 June 1986, defendant was again arrested for the felony of possessing fourteen grams of cocaine. He was released on bond that same day, and a probable cause hearing was scheduled for 1 July 1986. He did not appear for that hearing.

In the early morning hours of 17 June 1986, Janet Kelly heard a "real noisy car" and a knock on the door. She let Jean into the mobile home. Jean appeared to be intoxicated and was stumbling around and talking with a slur. The two women sat at the kitchen table and talked for about half an hour. Jean told Janet that "she had stolen a large amount of cocaine from a guy named Wayne" that night. Jean stated that she had given the cocaine to a girl named Kim Carnes and that Kim was going to sell it for her. She told Janet that in its uncut state, the cocaine was worth about $1,000. Jean then went to bed, lying down beside Travis on a mattress on the living room floor.

At around 9:30 a.m. on 17 June, Jean woke up and went to the store. When she returned, she told Janet that Wayne was coming over and that she was going to return the cocaine to him. After about an hour, a "candy apple red" car arrived and Jean jumped up, exclaiming, "there's Wayne." Jean went outside to talk to Wayne. She was wearing a black wraparound skirt and a black Harley Davidson tank top. Janet thought the car was a 1969 or early seventies model Chevrolet Nova or Chevelle. Janet later saw Jean and Wayne get into the car and drive away. Barbara Rose also testified that she saw Jean leave the mobile home with defendant on the morning of 17 June. She, too, described his car as

a red Chevelle or Nova and recalled, as did Janet, that Jean was wearing a black skirt and black Harley Davidson tank top. Jean left her belongings, including her purse, at the mobile home. That was the last time she was seen alive.

On 22 June 1986, defendant was arrested for a third time and charged with the felony of possessing twenty-eight grams of cocaine. He was released on bond, and a probable cause hearing was scheduled for 9 July 1986. As was the case with the second arrest, defendant did not appear for the hearing. An order for defendant's arrest for failing to appear on these charges was issued on 11 July 1986.

Jean's mother had an agreement with her daughter that they would keep in touch with each other at least every ten days. Jean visited her mother on 13 June. When Mrs. Sherman did not hear from Jean by 23 June, she went to the mobile home where Jean was living with Travis and his family. She pulled into the driveway, saw someone in the doorway, and honked the horn. Travis came to the car. When Mrs. Sherman asked to speak to Jean, Travis said that she was not there and that he did not know where she was. On 26 June, Mrs. Sherman again returned to the mobile home. Travis then told her that his mother and Janet last saw Jean when she left the house with defendant in his red car.

On 30 June 1986, defendant drove into McLamb's Exxon in Fayetteville complaining that the car had engine trouble. The station attendant diagnosed the problem as being a spun bearing. Defendant stated that he could not afford the repair bill and offered to sell the car to the attendant. McLamb agreed to buy the car, and the two executed a title transfer on the spot.

On 7 July 1986, Mrs. Sherman went to the Franklin County Sheriff's Department and filed a missing person's report on her daughter. Later that summer, Mrs. Sherman visited defendant's mother, and shortly thereafter, she received a telephone call from defendant. She was asleep when he called and asked him to hold on for a moment. Defendant told Mrs. Sherman that "he wasn't going to hold because he thought [she] had the phone bugged or tapped or something" and hung up. Sometime later, he called back. Mrs. Sherman asked defendant if he knew her daughter, and he replied that he did. She asked him to have Jean call her, and defendant explained that Jean was not with him because he had brought her back to the mobile home and left her there. Mrs.

Sherman again asked defendant to have Jean call her, at which time defendant told her "to get the police off his back."

On 19 August 1986, a police officer in Daytona Beach, Florida, saw defendant and recognized him from a description he had received of a man wanted in North Carolina on a narcotics charge. After a prolonged scuffle, a chase, and another scuffle, defendant was subdued and handcuffed.

Later that day, Deborah Bramlett, a Daytona Beach police detective, interviewed defendant at the correctional facility where he was being held pending extradition. She conducted a second interview with defendant on 20 August following a telephone conversation with an officer in another city who informed her of Jean Sherman's disappearance. During that second interview, defendant told Detective Bramlett that he had met Jean Sherman when he picked her up while she was hitchhiking. They had been seeing each other and had engaged in sexual relations. On the morning of 17 June, Jean had hitchhiked to his home and had stayed there from 2:30 a.m. until 7:00 a.m. Defendant then took her back home. When defendant woke up around 11:00 a.m., he discovered that Jean had stolen cocaine worth approximately $500.00 from him. He drove over to Jean's home and honked the horn. She came out and got into the car. He questioned her about the cocaine, and she repeatedly denied having taken it. He eventually told her to get out of the car and to get away from him, at which time he left. He told Detective Bramlett that he later sold his car in North Carolina because "he knew that the police would be looking for him in that vehicle." As he recalled, Jean was wearing either a black skirt with a red top or a red skirt with a black top on that day. When asked whether defendant had stated how he felt about Jean Sherman during the middle of June 1986, Detective Bramlett replied that defendant had told her that "he was mad at [Jean] . . . because she had taken the cocaine." During the interview, defendant stated that he was still mad at Jean for taking his cocaine.

On 27 September 1986, Jean Sherman's remains were discovered at the edge of a wooded path at a remote corner of a field in the Pilot community of Franklin County. The body was found about two-tenths of a mile from a public road. Investigators additionally discovered various items of jewelry and a black Harley Davidson tank top which had cut marks in it. The medical examiner conclud-

ed, on the basis of injuries to three ribs, that the victim's death was caused by multiple stab wounds. Dental records and the jewelry discovered at the scene confirmed that the remains were those of Jean Sherman. The medical examiner testified that he would estimate that the deceased "had been dead for many weeks . . . certainly not days or a few weeks; it would be many weeks."

Defendant entered Central Prison to begin serving a thirty-year sentence for his drug conviction on 15 December 1986. On 11 January 1988, defendant was charged with the murder of Jean Sherman. On 13 January, the Raleigh *News and Observer* published an article entitled "Wake man charged in '86 stabbing death," which described defendant's arrest and some of the details of the investigation of and circumstances surrounding Jean Sherman's death.

Walter Woolard, a fellow inmate at Central Prison who was later transferred to Eastern Correctional Center, read the newspaper article and wrote a letter two days later to the Attorney General in which he asserted that he had "some valuable information for a guilty verdict" in the case. The contents of the letter read as follows:

> Mr. Thornburg. I am an inmate here at Eastern Correctional Center. I was sentenced to fifty years on October the second, 1986, for several counts of arson.
>
> I was taken to Central Prison on October the 9th of '86.
>
> I was reading in the paper the other day where Roger Wayne Franklin was arrested and charged with first degree murder in the death of Jean Marie Sherman. I wanted to let you know that I may have some valuable information for a guilty verdict.
>
> Roger Franklin was assigned to the same dorm that I was in at Central Prison. He was in my dorm until I transferred here on January the 14th of '87.
>
> Roger Franklin and I played cards together and talked about our crimes. He made the statement to me that he had killed a girl before and had never got caught after I told him that arson was an easy crime to get away with.
>
> If you could send someone to talk to me I will be glad to help in any way I can because I can't stand to see someone get out of something when they are in fact guilty. I confessed

to my crimes because I knew I had done them. Anyway, I will be glad to help in any way I can.

I am not a liar and I am an honest person.

Sincerely. Walter Woolard.

P.S. This could be very dangerous for me. I don't want my name in the newspaper. I hope you can use my help.

At trial, Woolard testified that while he and defendant were inmates at Central Prison, they played cards together. One night, Woolard was talking about how much time he had received for his arson conviction and told defendant it was a hard crime to be convicted of, but that he had confessed to it. Defendant then told Woolard that "he had killed a girl before, was questioned about it and got away with it." Defendant also stated, "you ain't never supposed to admit to nothing, you're supposed [to] make them prove it."

Woolard further testified that a week or two after this conversation, Woolard borrowed $7.00 from defendant. Woolard also owed $7.00 to another man, whom he referred to as "the Indian." Woolard asked defendant if he could repay the Indian first because he was scared of the Indian. Defendant then "[got] kind of ill. He said the reason I killed that girl is because she owed me some money. He said it with an attitude, so I went ahead and paid him. . . . He got mad . . . I took it he didn't play with his money, he wanted his."

[1] Defendant initially takes issue with the trial court's denial of his motions to dismiss made at the close of the State's evidence and renewed at the close of defendant's evidence. Defendant contends that the State's evidence was insufficient to support his conviction of first-degree murder or to withstand his motion to dismiss. Specifically, defendant argues that Judge Hobgood's decision to submit to the jury the charge of first-degree murder was improper because there was not substantial evidence that this defendant was in fact the perpetrator of the crime. Although we concede that this is a close question, we have carefully analyzed the facts as they are set out above, excluding the evidence regarding defendant's prior threat for reasons which we set out below, and we conclude that the State's case was sufficient to take the case to the jury.

As an initial matter, we note that defendant moved for a dismissal on two separate occasions—once at the conclusion of the State's case and again at the conclusion of all of the evidence. Because defendant introduced evidence at trial on his own behalf, he waived his right to complain on appeal of the denial of his initial motion to dismiss at the conclusion of the State's evidence. *State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988); N.C.G.S. § 15-173 (1983). Accordingly, only the sufficiency of the evidence at the close of all of the evidence is before us here.

Before a trial court may submit a charge of first-degree murder to a jury, there must be substantial evidence of every essential element of the offense charged and that the defendant was the perpetrator of the crime. *State v. Judge*, 308 N.C. 658, 303 S.E.2d 817 (1983). First-degree murder is defined as the unlawful killing of a human being with malice and with premeditation and deliberation. *Id.* As the trial court instructed in this case, premeditation and deliberation may be, and most often are, proved by circumstantial evidence. *State v. Jones*, 303 N.C. 500, 279 S.E.2d 835 (1981). Among the circumstances which give rise to an inference of premeditation and deliberation are the conduct and statements of defendant before and after the killing, attempts to conceal the body, ill will between the parties, and evidence that the killing was performed in a brutal and vicious manner. *Id.*

The question presented on defendant's motion to dismiss is whether, upon consideration of all of the evidence in the light most favorable to the State, there is substantial evidence that the crime charged in the bill of indictment was committed and that defendant was the perpetrator. *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Greer*, 308 N.C. 515, 302 S.E.2d 774 (1983). This test is the same whether the State's evidence is direct, circumstantial, or a combination of the two. *State v. Porter*, 303 N.C. 680, 281 S.E.2d 377 (1980).

The trial court need only satisfy itself that the evidence is sufficient to take the case to the jury; it need not be concerned with the weight of that evidence. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). If there is any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction, it is for the jury to say whether it is

convinced beyond a reasonable doubt of defendant's guilt. *State v. Batts*, 269 N.C. 694, 153 S.E.2d 379 (1967). The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649.

The State is entitled to every reasonable inference to be drawn from the evidence. Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve. *State v. Workman*, 309 N.C. 594, 308 S.E.2d 264 (1983). Defendant's evidence, unless favorable to the State, is not to be taken into consideration. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649.

In any criminal case, the State must show that a crime was committed and that the defendant committed the crime. *Id.* There is no doubt in this case that the crime in question was in fact committed. The evidence adduced at the scene establishes that Jean Sherman was murdered. The question that must be decided is whether the State has produced sufficient evidence to establish that defendant was the perpetrator of that crime. Upon our review of the evidence in the light most favorable to the State, disregarding both defendant's evidence and any contradictions or discrepancies in the evidence, we conclude that the State has met its burden. While we concede that the evidence in this case is primarily circumstantial, we cannot say that the State's evidence is so lacking as to any material element that this Court must conclude, as a matter of law, that no reasonable juror could have found defendant guilty beyond a reasonable doubt.

Janet Kelly testified that Jean had stated that she had stolen cocaine worth approximately $1,000 from defendant the evening before he drove her away in his car. While Jean had informed Janet that she intended to return the cocaine to defendant that day, Jean also stated that she had given the drugs to another woman, Kim Carnes, in order to permit the other woman to sell it for her. It is reasonable to infer that Jean did not have the cocaine with her when she met with defendant on the afternoon of 17 June and that defendant was angry about that fact. In fact, defendant told Detective Bramlett that he was mad at Jean for having stolen his cocaine. He admitted to Jean Sherman's mother that he had driven away with Jean that day. Jean was never again seen alive, and the medical examiner testified that when her remains were discovered on 27 September, she had been dead

for "many weeks." The black Harley Davidson tank top she had worn on the date of her disappearance was found, riddled with holes, among her remains. Therefore, a reasonable juror could infer that defendant had both the motive and the opportunity to kill Jean Sherman.

Several circumstances surrounding defendant's actions subsequent to the date of Jean Sherman's disappearance lead to an inference of guilt. The facts that defendant sold his car because he knew the police would be looking for him in that vehicle and that he escaped to Daytona Beach, Florida, constitute relevant evidence of flight. While defendant had other reasons, namely, the outstanding drug warrants, to flee, a reasonable juror might nevertheless view this evidence as some indication of guilt for the crime charged in this case. "[E]ven if [defendant] might have had other reasons for fleeing than consciousness of guilt for the crime for which [he was] being tried, this goes only to the weight, not the admissibility of, the evidence of flight." *State v. Belton*, 318 N.C. 141, 152, 347 S.E.2d 755, 762 (1986). Defendant's comments to Jean Sherman's mother, in which he stated that he would not be put on hold because he thought that the telephone was "bugged or tapped" and in which he demanded that she "get the police off his back," likewise may be weighed into the total equation, as may defendant's evasive actions upon being arrested in Florida.

Defendant's boastful admissions to Walter Woolard during his incarceration for the drug convictions are highly relevant in our determination of whether the State's evidence was sufficient to establish defendant's guilt, especially when taken in conjunction with the other evidence in this case. An admission is a statement of pertinent facts which, in light of other evidence, is incriminating. *State v. King*, 326 N.C. 662, 392 S.E.2d 609 (1990). Our long-established rule of *corpus delicti* stands for the proposition that if there is corroborative evidence, independent of the incriminating statements, defendant may be found guilty of the crime charged. *State v. Trexler*, 316 N.C. 528, 342 S.E.2d 878 (1986). The *corpus delicti* rule applies with equal force to confessions and admissions. *Id.* The *corpus delicti* rule only requires evidence *aliunde* the admission which, when considered with the admission, supports the admission and permits a reasonable inference that the crime occurred. *Id.*

[2] Where the body is found with marks of violence upon it, as was the case here, such evidence establishes *corpus delicti*. *State v. Foye*, 254 N.C. 704, 120 S.E.2d 169 (1961). Evidence of *corpus delicti* coupled with the testimony of a cell mate relating inculpatory statements made by the defendant is sufficient to support a conviction. *State v. King*, 326 N.C. at 675, 392 S.E.2d at 617 (1990). In this case, according to Woolard, defendant said that he had killed a girl, had been questioned about it, and had gotten away with it. He further told Woolard that the reason he had killed the girl was because she owed him money. The evidence shows that defendant had previously been questioned about Jean Sherman's disappearance but had not been charged with her murder. The evidence further conclusively shows that Jean Sherman owed defendant money for the cocaine she had stolen on the night before her disappearance. All of this evidence, taken as a whole, is sufficient to take the case to the jury, which was then entitled to evaluate its weight. We conclude that the State's evidence, when viewed in the light most favorable to the State, is sufficient to withstand defendant's motion to dismiss. This assignment of error is overruled.

[3] Defendant's next assignment of error relates to the trial court's admission of the testimony of McLester Turner regarding defendant's statement to Turner containing a threat to "cut" and "kill" a girl who had stolen drugs from him. As the chronology sets out above, Turner estimated that defendant made this threat at some time between 24 May and 29 May 1986. Turner was not able to ascertain the identity of the woman from defendant; he was only able to determine that the woman had stolen $300.00 in drugs and $800.00 in cash, or vice versa, from defendant on the night before defendant made the threat, and that the woman who later picked up defendant at the job site was not the person of whom he spoke.

It is well established in this state that " '[a] threat to kill or injure someone, not definitely designated, is admissible in evidence, when other facts adduced give individuation to it so that . . . the jury may infer that [the threats] were against deceased.' " *State v. Casey*, 201 N.C. 185, 206, 159 S.E. 337, 348 (1931) (quoting 30 C.J. Homicide § 417 (1923) (now codified as 40 C.J.S. Homicide § 236(b) (1944))). General threats which are not shown to have any reference to the deceased are not admissible. *Casey*, 201 N.C. 185, 159 S.E. 337. "Evidence is inadmissible to show a difficulty

between accused and a third person in no way connected with the victim or offense, or to show accused's state of mind toward such a person . . . ." 40 C.J.S. Homicide § 209 (1944); *see State v. Moore*, 276 N.C. 142, 171 S.E.2d 453 (1970).

The State argues that defendant's threats are admissible for the purpose of showing defendant's motive, premeditation, and deliberation in the killing of Jean Sherman. In homicide cases, threats by the accused are often admitted to identify him as the killer, to disprove accident or justification, or to show premeditation and deliberation. *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980). The State contends that the evidence does not show conclusively that defendant did not know the victim at the time he made the threats and points out that the victim did in fact steal defendant's cocaine on the night of 16 June or the early morning of 17 June. From these contentions, the State reasons that defendant could have made these threats against Jean Sherman, apparently basing its reasoning upon an assumption that this was not the first time the victim had stolen defendant's cocaine. The State further argues that defendant's threats could be construed as being threats against a class of persons: any woman who stole drugs from him.

Defendant contends that the nature of this particular threat and the circumstances surrounding it do not give rise to an inference that the statements were directed toward the victim; nor does it constitute a class threat. We agree and accordingly find error by the trial court on this issue.

In its ruling on this evidence, the trial court concluded in its order that the evidence offered was relevant under Rules 401 and 402 of the North Carolina Rules of Evidence as evidence of a threat for a specific act which had previously been committed by the victim, that is, that the victim had "ripped him off cocaine or dope and cash." The court noted that the State intended to offer evidence through Janet Kelly regarding Jean's statement during the early morning hours of the day she disappeared that she stole a large amount of cocaine from a man named Wayne, and concluded that this statement of defendant would provide a "corroborative circumstance."

We find the trial court's ruling to be based on an erroneous premise: that Jean's statement on the morning of 17 June would be corroborated by a threat defendant made regarding an incident

which occurred approximately three weeks earlier. Nothing in the State's evidence ties defendant's threat, contained in his statement to McLester Turner, to the victim. Even if we were to concede that the evidence introduced was sufficient to create an inference that defendant knew the victim at the time he made the threat, which is questionable,[1] such an inference does not logically give rise to the additional inference that defendant's threats were directed toward the victim. Nowhere in the record is there any indication that Jean Sherman stole drugs from defendant on any occasion other than on the morning of 17 June, approximately three weeks *after* defendant threatened to kill the girl who had stolen his cocaine the night before the threat was made. The evidence is undisputed that the victim's acknowledged theft of defendant's cocaine occurred during the early morning hours of 17 June, the day she rode away with defendant, never to return. The State's evidence, at best, simply disclosed that it might have been possible for the victim to have stolen drugs from defendant on an earlier occasion, before 29 May, thereby precipitating defendant's violent reaction. Such a hypothesis, however, is purely conjectural in its nature.

This threat, because it is directed against a specific person, does not qualify as a class threat. Class threats are defined in *State v. Casey*, 201 N.C. 185, 159 S.E. 337, as threats made by a defendant against a general class of persons to which the deceased belonged. Such threats are prima facie referable to the deceased, although the deceased's name is not mentioned. *Id.* This threat does not fall within such a definition. *See, e.g., State v. Shook*, 224 N.C. 728, 32 S.E.2d 329 (1944) (threat against any officer who might come); *State v. Payne*, 213 N.C. 719, 197 S.E. 573 (1938) (threat against officers of the law); *State v. Casey*, 201 N.C. 185, 159 S.E. 337 (threat against the company that had held up payment to defendant); *State v. Baity*, 180 N.C. 722, 105 S.E. 200 (1920) (threat against any officer who interfered with defendant while he was blockading); *State v. Burton*, 172 N.C. 939, 90 S.E. 561 (1916) (threat to kill the first man that tapped on defendant's door

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1. The only testimony which would indicate that defendant and the victim knew each other at the time defendant made the threat was the former testimony of Barbara Rose that was used to impeach her testimony at this, defendant's second, trial. At the first trial, Mrs. Rose testified that defendant "came by [the mobile home] every two or three weeks to get [Jean]" and that he "had picked Jean up a time or two before the 17th [of June]." During the present proceeding, Mrs. Rose testified that she did not recall ever having seen defendant before 17 June.

that night); *State v. Teachey*, 138 N.C. 587, 50 S.E. 232 (1905) (threat against any man defendant caught at his woman's house). If defendant's threat in this case had been directed against *any* woman who stole cocaine or money from him, such a threat would have been admissible as a class threat. Such was not the case here.

Because of the circumstantial nature of the evidence against defendant in this case, we must conclude that the introduction of this evidence was unduly prejudicial to defendant. While a defendant's threat against the deceased may be relevant to show malice or criminal intent, a defendant's threat against a third person has no probative value and serves no other purpose than to arouse prejudice and hostility on the part of the jury against the defendant. Evidence of a defendant's prior collateral threat is very damaging, not only because it improperly encourages a jury's guilty verdict on the basis of its hostility against a defendant because of his violent tendencies, but also because it erroneously motivates a jury to find that the defendant may be predisposed to act violently. *See, e.g.*, N.C.G.S. § 8C-1, Rule 404(b) (1988); *People v. Lampkin*, 98 Ill. 2d 418, 457 N.E.2d 50 (1983). There was no proper purpose for introducing this prejudicial evidence. The testimony that defendant threatened to kill the woman who had stolen his drugs was impermissible because its only purpose was to show defendant's propensity for violence. That defendant had acted in accordance with that propensity was the thrust of the prosecutor's argument to the jury:

> [Defendant] was full of venom and hatred out of his worship for cocaine to the extent that he was willing to state to whoever would listen what he would do to people who stole cocaine from him[.]
>
> . . . .
>
> You know, there's a point at which the circumstances outweigh any reasonable doubt, and the circumstances in this case . . . of a man whose mind in late May and early June made cocaine so precious to him that he would kill women addicted to it . . . .
>
> . . . .
>
> He snuffed out her life. He stabbed her as he forecast.

Our review of the record on appeal indicates that defendant's remaining assignments of error are not likely to recur on retrial. We therefore decline to address them.

For the above reasons, we conclude that defendant is entitled to a new trial. We accordingly remand to the Superior Court, Franklin County, for a disposition in accordance with this holding.

New trial.

STATE OF NORTH CAROLINA v. JAMES LEON SIMPSON

No. 381A89

(Filed 26 July 1990)

1. **Criminal Law § 34.7 (NCI3d)— evidence of defendant's prior assault on murder victim—admissibility to show malice**

Though defendant failed properly to preserve assignments of error with regard to admission of certain evidence for appellate review, the trial court in a first degree murder case nevertheless did not err in admitting evidence of defendant's prior assault on the victim, since it was admissible as tending to establish malice, an element of first degree murder, and thus was relevant to an issue other than defendant's character. N.C.G.S. § 8C-1, Rules 403 and 404(b).

Am Jur 2d, Evidence §§ 321, 324; Homicide § 310.

2. **Criminal Law § 66.9 (NCI3d)— pretrial photographic identification—no impermissible suggestiveness**

A pretrial photographic identification procedure was not impermissibly suggestive where two witnesses were each shown six photographs of black males; although only one picture depicted a balding, light-skinned black male, the suspect's bald spot was on the back rather than on the top of his head, where it would not necessarily be visible in a frontal view photograph; the witnesses were not instructed that any of the pictured men were suspects in the case; no suggestion was given that either witness need pick any of the pictured men as the person they saw on the night of the murder; and one witness's identification of another person to police on the night of the murder went to the credibility of his identification testimony, not its admissibility.

Am Jur 2d, Criminal Law § 974.

3. Criminal Law § 169.6 (NCI3d)— exclusion of evidence—failure to preserve for review

Defendant failed to preserve for review a question as to the exclusion of evidence which allegedly would have shown an inconsistency in one witness's testimony, where the trial court advised defendant that he could read any former statement by the witness into the record at the end of the day, but defendant failed to do so, and defendant failed to elicit the desired inconsistency from another witness whom he subsequently called and who read statements made by the first witness. N.C.G.S. § 15A-1446(a).

Am Jur 2d, Appeal and Review §§ 518, 520.

4. Criminal Law § 35 (NCI3d)— cross-examination of detective—another person as suspect—question impermissible

The trial court in a first degree murder case did not err in refusing to allow defendant to cross-examine a detective as to whether another person was a suspect at a particular time, since the question assumed a fact not in evidence; the question as phrased did not tend to establish that the other person committed the murder; and the excluded evidence therefore would have created a mere inference or conjecture regarding the guilt of another.

Am Jur 2d, Evidence § 441.

5. Criminal Law § 55 (NCI3d)— blood on defendant's shoes—expert witness in serology—testimony properly admitted

The trial court in a first degree murder case did not err in allowing the State's expert witness in serology to testify regarding the type of blood found on defendant's shoes, since the State was not required to prove that defendant wore the clothing in question at the time the crime was committed as a prerequisite to introducing the clothing into evidence, and the prevalence of type A blood in the general population, as well as its presence in both defendant and the victim, went to the weight of the evidence rather than to its admissibility.

Am Jur 2d, Expert and Opinion Evidence §§ 211, 300.

6. Criminal Law § 34.2 (NCI3d)— evidence of arson at murder victim's home—harmless error

Evidence of arson at the victim's home two days after the murder, unconnected to defendant in any way, should have been excluded, but admission of photographs with respect thereto was harmless error because similar evidence was introduced without objection.

Am Jur 2d, Evidence § 329.

7. Homicide § 15 (NCI3d)— witness's view of gun in defendant's car—evidence admissible

The trial court in a first degree murder case did not err in allowing a witness to testify that four or five months before the murder he saw a sawed-off shotgun in defendant's car with a single barrel the size of a finger joint, since the murder weapon was never found; the ballistics expert opined that a twelve-gauge weapon was the murder weapon; and the witness's description of the gun he saw was insufficiently precise to negate the possibility that the weapon he saw in defendant's car was later used to murder the victim.

Am Jur 2d, Homicide §§ 272, 276.

8. Homicide § 21.5 (NCI3d)— first degree murder—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a first degree murder prosecution where it tended to show that the victim had rebuffed defendant's persistent advances from the time he stabbed her in the chest on 10 March 1988 until her murder on 1 October 1988; defendant was convicted of the stabbing just two days before the murder, after which he confronted the victim in her car in the parking lot at her work place; defendant called the victim's home on the evening of the murder and was informed by her son that she was probably with another suitor; two witnesses testified that they saw defendant outside the suitor's apartment building within minutes of the murder; the victim was killed by a shotgun blast at very close range as she cracked the apartment door to look out; and evidence that the victim was still wearing her jewelry, still had money in her purse, and had the back window of her car shattered while a TV was left in the car

permitted an inference that the victim was killed by someone she knew for a motive other than robbery.

Am Jur 2d, Homicide §§ 315, 387, 388.

9. Criminal Law § 491 (NCI4th)— jury view of crime scene not allowed—no error

The trial court did not err in denying defendant's request for a jury view of the crime scene where the court properly found that the photographs and diagrams used at trial were sufficient to assist the jury in visualizing the crime scene.

Am Jur 2d, Homicide § 460; Trial §§ 73, 74.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) (1989) from the imposition of a sentence of life imprisonment upon his conviction of murder in the first degree before *Cornelius, J.*, at the 15 May 1989 Criminal Session of Superior Court, FORSYTH County. Heard in the Supreme Court 9 April 1990.

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, Assistant Attorney General, for the State.

William A. Hough III for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of the first-degree murder of Shirley Ann Ford in a noncapital trial. We find no prejudicial error.

The State's evidence tended to show that defendant and the victim had been involved in a relationship for approximately seven years. On 10 March 1988 defendant stabbed the victim in the chest during an argument. The victim was hospitalized as a result of the stabbing and refused to see defendant afterwards, despite frequent attempts by defendant to communicate with her at work and at home.

James Jones testified that he met Shirley Ford in September 1987 while on work release from prison. She visited him in prison or at his sponsor's home until his release from prison on 31 August 1988. Jones and Ms. Ford saw each other three to four times a week and were planning to be married in December. On the evening of 1 October 1988 Ms. Ford and Jones were sitting and talking in Jones' apartment when they heard a noise, like something heavy

or solid hitting something, that sounded as if it came from close by. A few moments later they heard something solid hitting the apartment door. Jones went to the door and called out, but no one answered. As Jones heard a vehicle start its engine, he looked out the window and saw a white truck backing out of the parking lot. Thinking the truck was going to sideswipe Ms. Ford's car, Jones went outside to move it. He told Ms. Ford to keep the apartment door closed, but he did not know whether she locked the door.

When Jones moved the car he realized the back window had been shattered. After moving the car he looked toward his apartment building and saw a man walk quickly around the corner out of the back alleyway and go into the door of the apartment building. When the man went inside, Jones could see the top of his head and the side of his face through a window in the doorway.

Following a voir dire examination, Jones testified that the man he saw walking from the alleyway to the building was defendant. He walked by the apartment of Juanita Dobson, who lived next door. Her door was open, and she was watching television. After Jones told her he thought someone was trying to break into his apartment, she called the police and told him not to go back over to his apartment because he might get in trouble. When Jones stepped outside, he saw police arriving at the end of the street, so he waited for them.

At some point between the time Jones saw the man go from the alleyway into the apartment house and the time he saw the police arriving, Jones heard a noise like a gunshot coming from the direction of his apartment. Before the police arrived, Jones saw the driver of the white truck, later identified as Benjamin Singletary, go into the hallway of the apartment building and up the stairs. When Jones opened the door to his apartment, it was unlocked, and he saw Shirley Ford lying on the floor dead. The back door to the apartment was open, though Jones testified that he never used that door.

Dr. Thad Jones, an expert pathologist, testified that the top of the victim's head had been blown off by the explosive force of a shotgun wound. The brain was missing from the skull cavity at the time of autopsy. The absence of pellet wounds and the severity of skin laceration led Dr. Jones to conclude that the fatal wound had been inflicted from very short range.

Benjamin Singletary, the driver of the white truck, testified that he was visiting Danny Rogers, the tenant of the apartment located above Jones' apartment, on the night of the murder. Singletary was driving slowly through the parking lot looking for an automobile he had loaned to Danny Rogers. A man walked in front of Singletary's truck, giving him the opportunity to observe the passerby's face. Following voir dire, Singletary identified this man as defendant. After defendant walked by the truck, Singletary located his car in the parking lot, parked his truck, and walked upstairs to Danny Rogers' apartment. While he was knocking at Rogers' door, police came to the apartment below, accompanied by James Jones. On cross-examination, Singletary agreed that on the night of the murder he identified Jones as the person who walked past his truck, although he testified that he knew it was not Jones on the night of the murder, but "that night it really didn't matter because I really didn't want to be involved, to be frank about it."

Detective K.W. Bishop of the Winston-Salem Police Department described the crime scene. The victim was lying on the floor of the apartment to the right of the entrance door. Blood and human tissue were splattered on the walls, floor, and objects in the apartment. Because of the presence of blood on items behind the door, Detective Bishop opined that the victim had been peering out from behind the door when she was shot. Lead pellets and shotgun shell wadding from a twelve-gauge shotgun were found among the debris. The victim's pocketbook containing twenty dollars and a handgun was found in the kitchen.

The police searched defendant's house pursuant to a warrant on 6 October 1988. They seized a pair of athletic shoes and several twelve-gauge shotgun shells. None of these shells contained triple aught pellets, the type of pellets found at the murder scene. Defendant's athletic shoes were stained with a red substance later identified as type A blood, the blood type of both the victim and defendant.

Defendant presented testimony by Carol Booth and Gevette Melton, two roommates who lived in an upstairs apartment across the parking lot from James Jones. Both heard a loud noise on the evening of the murder and saw a tall, dark-skinned black male running down the street with something in his hand. Both stated that defendant was not the man they saw in the parking lot that night.

Juanita Dobson testified that James Jones knocked on her door and asked her to call the police, then stated, "I believe that man done killed that woman." She denied ever telling Jones not to go back to his apartment. Danny Rogers testified that Benjamin Singletary told him he believed James Jones killed the victim.

Eric Simpson, defendant's son, testified that defendant was at home watching the Olympics on television with him on the night of 1 October 1988 until 12:30 a.m.

Additional facts will be discussed as necessary to clarify the issues on appeal.

[1] Defendant assigns error to the admission of testimony by John Ford, the victim's son, and Willie Lee Ford, her brother, regarding the 10 March 1988 incident during which defendant stabbed the victim in the chest. Defendant argues the evidence was inadmissible under N.C.G.S. § 8C-1, Rule 404(b) and more prejudicial than probative under N.C.G.S. § 8C-1, Rule 403.

Defendant has failed to preserve these assignments of error properly for appellate review. Although defendant did lodge two general objections during Willie Lee Ford's account of the victim's hospitalization following the stabbing, he failed to object to Ford's statement that it was defendant who stabbed the victim. In addition, defendant did not object to the admission of John Ford's account of the stabbing. Thus, later admission of similar evidence waived any benefit of the prior objection, and defendant is deemed to have waived his right to assign error to the prior admission of Willie Lee Ford's testimony. *State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989).

Defendant filed a motion in limine to suppress John Ford's testimony regarding the altercation between defendant and the victim on 19 March 1988. The motion did not state Rule 404(b) as a ground for excluding John Ford's testimony. The trial court conducted a voir dire examination of the witness, after which it ruled the testimony admissible. Defendant objected neither to this ruling nor to the admission of John Ford's testimony before the jury. When the court asked whether defendant wished to argue the motion, counsel responded that "[t]he purpose of the voir dire was to test the *relevancy* of the witness's testimony." (Emphasis added.) Failure to make timely objection or exception at trial waives the right to assert error on appeal. *State v. Gardner*, 315 N.C.

444, 447, 340 S.E.2d 701, 704-05 (1986). While a defendant need not renew his objection before the jury if he has excepted to an adverse ruling following a voir dire examination, defendant failed to follow either course of action in the instant case, and thus has waived his right to assert error on appeal. *State v. Shamsid-Deen*, 324 N.C. at 446, 379 S.E.2d at 847-48.

Assuming proper preservation of these assignments of error, the trial court did not err in admitting the accounts of defendant's prior assault on the victim. Evidence of another offense is admissible under Rule 404(b) so long as it is relevant to any fact or issue other than the character of the accused. *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990). The evidence of defendant's prior assault on the victim tends to establish malice, an element of first-degree murder, and thus is relevant to an issue other than defendant's character. *State v. Spruill*, 320 N.C. 688, 693, 360 S.E.2d 667, 669 (1987) (evidence of defendant's prior assaults on victim, his former girlfriend, admissible under Rule 404(b)), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 934 (1988).

Defendant argues that the danger of unfair prejudice substantially outweighed the probative value of the disputed evidence, rendering the evidence inadmissible under Rule 403. "Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court. . . . Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *State v. Coffey*, 326 N.C. at 281, 389 S.E.2d at 56. The trial court did not abuse its discretion under Rule 403 in admitting the evidence of defendant's prior assault on the victim, nor did it err in admitting the evidence under Rule 404(b). These assignments of error are overruled.

[2] Defendant next challenges the admission of two witnesses' in-court identification testimony. Defendant argues that the pretrial photographic lineup used by the police was unnecessarily suggestive, resulting in a substantial likelihood that James Jones and Benjamin Singletary mistakenly identified defendant as the man they saw outside the apartment building on the night of the murder. After conducting a voir dire examination of each witness, the trial court, prior to allowing either witness to identify defendant before the jury, entered findings of fact and concluded that the pretrial identification procedure was not impermissibly suggestive and did not result in a substantial likelihood of misidentification. Following the

respective voir dire hearings, both Jones and Singletary testified that they saw defendant outside the apartment building where the victim was killed within minutes of the murder.

"Identification evidence must be suppressed on due process grounds where the facts show that the pretrial identification procedure was so suggestive as to create a very substantial likelihood of irreparable misidentification." *State v. Wilson*, 313 N.C. 516, 528-29, 330 S.E.2d 450, 459-60 (1985). We must examine the totality of the circumstances to determine whether the photographic lineup used was "so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice." *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984). Only if we conclude that the pretrial identification procedure was impermissibly suggestive do we reach the question whether the procedures employed resulted in a substantial likelihood of misidentification. *Id.*

James Jones testified during voir dire that he gave the police a description of a tall, light-skinned black male with long hair combed straight down and a bald spot on the back of his head. Jones could not remember whether he told the police if the man had any facial hair. He did tell them that he thought he could recognize him if he saw him again. Three days later Detective Bishop showed him a photographic lineup of six black males. Detective Bishop did not indicate which, if any, of the men shown was a suspect in the case. Jones identified defendant's picture as the man he had seen outside his apartment building. On cross-examination, Jones agreed that two of the six males pictured in the photographic lineup had the requisite light complexion. Only one of the pictures showed a balding man, though Jones specified that the bald spot was on the back of the man's head, and the pictures showed a frontal view only. Thus, in Jones' opinion only defendant's picture showed a balding light-skinned black male. The trial court made the following pertinent findings:

> [T]hat on October 4th, 1988, [Jones] observed Exhibit Number 16, a sheet with six photographs of black male individuals approximately the same age, each with facial hair, two being brown-skinned people and the rest being darker skinned; that of these six people only one person had an obvious bald feature; that at the time he looked at these photographs, he was simply told by the officer to look at the photographs, take his time

> and observe each photograph; that no other statement was made by the officer about the photographs and that he was not told whether or not the suspect was in that particular photographic lineup; that he picked on Exhibit Number 17 as shown on the xeroxed copy—picked the photograph circled shown as Number 2; that he observed the individual seated in the courtroom as being the defendant and has indicated to the Court that this is the individual he saw on that occasion; that there was no identification on the photographs that gave any indication as to whether any of the individuals were suspects[;] that there was no discussion between the officer and the witness other than simply to look at the photographs and that the officer made no statement to induce the witness to pick any one of the six; that the description he gave the officer on this occasion is similar to the description of the defendant as he sits in the courtroom; that the level of certainty of the witness as to the identification of the defendant is sure.

Based on these findings, the trial court concluded that the identification procedure was not impermissibly suggestive and that admission of Jones' identification testimony would not violate defendant's due process rights.

Benjamin Singletary testified during voir dire that the person who walked past the headlight of his truck was slightly balding on top. He wore no shirt, had hair on his chest, and was brown-complected. He had a light beard and his hair was combed down. On the night of the murder, a police officer asked Singletary if James Jones was the person he saw, and Singletary said that he was. On 25 October, Detective Bishop came to Singletary's house and showed him a photographic lineup of six black males. Singletary immediately identified defendant's photograph as depicting the man he had seen on the night of the murder. Like Jones, Singletary identified two pictures in the photographic lineup as showing black males with light skin. Singletary agreed that only defendant's picture showed a balding, light-skinned black male. The trial court made the following pertinent findings:

> [T]hat on October 25th, [Singletary] was approached by Officer Bishop at his residence and that he was shown a photo display folder marked as State's Exhibit Number 13; that this folder contains six photographs of six black male individuals approximately the same age, each with facial hair, two of the in-

dividuals being light-skinned, the other four being dark-skinned individuals, one of the individuals being bald in front; that there were no marks on the folder or any identifications on the folder; that the officer showed him the folder, made no statement concerning whether or not any suspect was on this particular folder, just simply asked him to look at the photographs and testify if he could make an identification of anyone; that he looked carefully at the photographs; that he identified the individual in the Number 2 position as being the individual that he observed on October the 1st, 1988, in the parking lot of the apartment complex; that previously the witness had indicated to investigating officers that the individual that was in the company of the officer on the occasion in question—on the night in question was the individual that he had observed approaching his vehicle; that this identification was incorrect in that under the excitement of the moment and the fact that the individual was in the custody of the officer or with the officer, he assumed that he was the same individual in that he was not wearing a shirt also; that the description the individual witness gave to the officer matches the description of the defendant in this action of this matter.

Based on these findings, the trial court concluded that "the credibility of the identification evidence is for the jury to weigh and the pretrial identification procedure of the photographic display involving the defendant was not so impermissibly suggestive as to violate the defendant's right to due process of law."

In arguing that the photographic display was *unnecessarily* suggestive, rather than impermissibly suggestive, defendant misstates the relevant legal standard. In addition, defendant focuses on the fact that only one of the pictures depicted a balding, light-skinned black male. This argument ignores Jones' statement that the suspect's bald spot was on the back rather than the top of his head, where it would not necessarily be visible in a frontal view photograph. Most importantly, the argument ignores the fact that the witnesses were not instructed that any of the pictured men were suspects in the case. No suggestion was given that Jones or Singletary need pick any of the pictured men as the person they saw on the night of the murder. *Cf. State v. Wilson*, 313 N.C. at 529, 330 S.E.2d at 460 (officer's comments to witness suggestive in that they conveyed his belief that the suspect was present in the photographic display and in each lineup). In addition,

Singletary's initial identification of James Jones to the police does not disqualify him from thereafter testifying that he saw defendant on the night of the murder, as defendant argues. As the trial court concluded, such inconsistencies go to the credibility of the testimony, not its admissibility. *See State v. Cummings*, 323 N.C. 181, 188, 372 S.E.2d 541, 547 (1988), *death sentence vacated*, --- U.S. ---, 108 L. Ed. 2d 602 (1990).

The trial court's findings of fact are binding on appeal when supported by competent evidence. *State v. Hannah*, 312 N.C. at 291, 322 S.E.2d at 151-52. Our examination of the record evidence and the photographs used in the pretrial identification procedure fails to disclose substantial evidence of impermissible suggestiveness. The trial court's findings and conclusions that the photographic procedure did not violate defendant's due process rights are supported by ample evidence. These assignments of error are overruled.

[3] Defendant next argues that the trial court erred in sustaining an objection to his question to the witness James Jones. Defendant asked Jones whether he told Detective Rowe that "this girl across the street" had seen the same man outside the apartment building as had Jones. Defendant argues that the question was designed to elicit an inconsistency in Jones' trial testimony from an earlier statement made to police. Nothing in the record supports defendant's interpretation of this alleged former statement as being inconsistent with Jones' trial testimony, and defendant neglected to preserve the proffered evidence by making an offer of proof. Although the trial court advised defendant that he could read any former statement by Jones into the record at the end of the day, defendant failed to do so. Having deprived this Court of the necessary record from which to ascertain whether the alleged error was prejudicial, defendant has precluded proper consideration of this assignment of error, and it is deemed waived. N.C.G.S. § 15A-1446(a) (1988); *State v. Miller*, 321 N.C. 445, 452, 364 S.E.2d 387, 391 (1988). In addition, we note that defendant called Detective Rowe as a witness and failed to elicit the desired inconsistency from his reading of Jones' earlier statements. Indeed, his testimony makes clear that the girl across the street, to whom defendant referred in his question to Jones, was not Juanita Dobson, as argued by defendant, but was one of the roommates who lived upstairs in the building across from Jones, and who testified on defendant's behalf. This assignment of error is without merit.

[4] Defendant next argues that the trial court erred in sustaining an objection to his question to Detective Bishop. Defendant asked Detective Bishop during cross-examination whether James Jones was "still a suspect at that time." Defendant argues that this question falls within the category of evidence pointing directly to the guilt of one other than the defendant, admissible under prior case law. *See State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988); *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987); *State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338 (1981). We disagree. The question assumes a fact not in evidence, *viz*, that Jones had previously been a suspect in the victim's murder; the State's objection was properly sustained on that ground alone. In addition, the question as phrased does not tend to establish that Jones committed the murder. The excluded evidence in *McElrath*, *Cotton*, and *Hamlette* was of an entirely different caliber than the answer sought by defendant's question to Detective Bishop. In *McElrath*, the excluded evidence consisted of a map and written notations indicating a possible larceny scheme, which arguably cast doubt on defendant's identity as the perpetrator of the crime charged. In *Hamlette*, evidence pointing to the existence of a love triangle was excluded as irrelevant. In *Cotton*, the excluded evidence would have shown that markedly similar crimes had been committed near the time and place of the charged assault, and that another victim identified a different suspect in a police lineup. The substantive evidence excluded at trial in these cases stands in marked contrast to the question posed by defendant whereby he sought to establish the guilt of another in an entirely conclusory manner by attempting to elicit the detective's agreement that Jones had at one time been a suspect in the case. We note that Jones was subject to extensive cross-examination regarding his actions on the night of the murder, and that no direct or substantive evidence pointing to his guilt was excluded at trial. The question asked by defendant falls within the class of evidence which creates a mere inference or conjecture regarding the guilt of another, *Cotton*, 318 N.C. at 667, 351 S.E.2d at 279, and is therefore not governed by *McElrath*, *Cotton*, or *Hamlette*. This assignment of error is overruled.

[5] Defendant next argues that the trial court erred by allowing the State's expert witness in serology to testify regarding the type of blood found on defendant's shoes. Brenda Bissette, a forensic serologist employed by the State Bureau of Investigation, testified that she observed a possible bloodstain on tennis shoes submitted

to her by the police. She performed tests on the stain and determined that it was composed of human blood, type A. She also testified that both defendant and the victim, as well as forty percent of the general population, have type A blood. At trial, defendant contended that this evidence was of no probative value because of the general prevalence of type A blood, and because defendant has type A blood. He also argued that the State failed to introduce evidence showing that defendant wore the tennis shoes at the scene of the crime.

The State need not prove that defendant wore the clothing in question at the time the crime was committed as a prerequisite to introducing the clothing into evidence. "That there was no direct evidence showing that defendant had in fact worn this clothing during the assault goes to the weight of the evidence rather than to its admissibility." *State v. Bundridge*, 294 N.C. 45, 58-59, 239 S.E.2d 811, 820 (1978). The prevalence of type A blood in the general population, as well as its presence in both defendant and the victim, also goes to the weight of the evidence rather than to its admissibility. *See State v. Fulton*, 299 N.C. 491, 496-97, 263 S.E.2d 608, 611 (1980). Defendant argues that the probative value of this evidence was outweighed substantially by the danger of unfair prejudice. We disagree. The corollary to the weak probative value of this type of blood grouping evidence is its minimal potential to prejudice defendant or confuse the issues. *See id.* The expert not only testified that defendant, the victim, and forty percent of the general population carry type A blood, but also that she had no opinion as to whose blood was on the shoe or as to how long the bloodstain had been on the shoe. The trial court did not err in admitting the testimony of the serologist. This assignment of error is without merit.

[6] Defendant next assigns error to the trial court's admission into evidence of two photographs depicting the victim's house in a burnt condition. Assistant Fire Marshal Rick Plunkett testified that intense fire damage occurred at the victim's former residence on 3 October 1988 as a result of arson. The photographs were used to illustrate his testimony. We agree with defendant that evidence of arson at the victim's home two days after the murder, unconnected to defendant in any way, should have been excluded. Facts and circumstances which raise only conjecture as to the possibility of collateral incriminating circumstances should be excluded to prevent distracting the attention of juries from material

matters. *State v. Gaskins*, 252 N.C. 46, 49, 112 S.E.2d 745, 747 (1960). Admission of the photographs constitutes harmless error, however, because similar evidence was introduced without objection. Defendant failed to object to the fire marshal's testimony regarding the incidence of the fire. Admission of the photographs, standing alone, could not have prejudiced defendant, given that other evidence was heard regarding the arson. Defendant has demonstrated no reasonable possibility that had the photographs been excluded at trial, the jury would have reached a different result. N.C.G.S. § 15A-1443(a) (1988). Defendant has not argued that admission of the fire marshal's testimony constituted plain error, and such an argument could not prevail in light of the rigorous standard for plain error and the collateral nature of the evidence of arson. This assignment of error is therefore overruled.

[7] Defendant next argues that the trial court erred in overruling his motion in limine to exclude the testimony of Michael King. King was allowed to testify that he saw a sawed-off shotgun in defendant's car in late April or early May of 1988. King described the shotgun as having a single barrel the size of "a finger joint." Defendant contends that this evidence was irrelevant because the gun described by King did not match the description of the gun used to kill the victim, and the danger of unfair prejudice substantially outweighed any minimal probative value imparted by its admission. We disagree. Although the murder weapon was never found, the ballistics expert opined that the shotgun wadding and pellets found at the crime scene had been fired from a twelve-gauge weapon. King's description of a barrel the size of "a finger joint" is insufficiently precise to negate the possibility that the weapon he saw in defendant's car was later used to murder the victim. The evidence was properly admitted.

[8] Defendant contends the trial court erred in overruling his motion to dismiss the charge at the close of all the evidence. His argument centers around the perceived incredibility of Jones' and Singletary's identification testimony placing defendant at the scene of the murder. The evidence on a motion to dismiss must be viewed in the light most favorable to the State. *State v. Cummings*, 323 N.C. at 189, 372 S.E.2d at 547. From that perspective, we find substantial evidence of each element of first-degree murder and that defendant was the perpetrator. *Id.* at 188, 372 S.E.2d at 546. Murder in the first degree is the intentional and unlawful killing of a human being with malice, premeditation, and deliberation.

Id. at 188, 372 S.E.2d at 547. The evidence tended to show that the victim had rebuffed defendant's persistent advances from the time he stabbed her in the chest on 10 March 1988 until her murder on 1 October 1988. Defendant was convicted of the stabbing on 29 September 1988, just two days before the murder, after which he confronted the victim in her car in the parking lot at her work place. Defendant called the victim's home on the evening of the murder and was informed by her son that she was probably with James Jones. Two witnesses testified that they saw defendant outside Jones' apartment building within minutes of the murder. The physical evidence at the scene tended to show that the victim was killed by a shotgun blast at very close range as she cracked the door to look out of Jones' apartment. The victim was still wearing her jewelry, and her purse contained a gun and twenty dollars, thus negating robbery as a possible motive. The back window of the victim's car was shattered, and a television was left in the car. This evidence permits an inference that the victim was killed by someone she knew for a motive other than robbery. The circumstantial evidence implicating defendant was sufficiently substantial to withstand a motion to dismiss. The assignment of error is overruled.

[9] Defendant assigns error to the trial court's denial of his request for a jury view of the crime scene. The decision whether to permit a jury view is vested in the trial court's discretion. N.C.G.S. § 15A-1229 (1988). In the present case, the trial court stated that "based upon the evidence that has been presented, the Court feels the jury—with the photographs and the diagrams and the testimony of the witnesses, that they're able to visualize the scene of the crime." We find no abuse of discretion in the trial court's decision that the photographs and diagrams used at trial were sufficient to assist the jury in visualizing the crime scene.

Finally, defendant assigns error to the admission on rebuttal of evidence by his employment supervisor. Nancy Davis testified that defendant ordinarily had no difficulty walking, despite his use of a cane to walk at trial. Defendant did not object to this testimony at trial, but objected earlier that Davis's testimony rebutted nothing, but presented new evidence. Assuming that Davis testified to matters not previously heard, the trial court did not err. N.C.G.S. § 15A-1226 allows the court to permit a party to offer new evidence during rebuttal so long as the opposing party is permitted further rebuttal. N.C.G.S. § 15A-1226 (1988). This assignment of error is meritless.

For the reasons stated, we conclude that defendant received a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. PHILIP REID PAYNE, JR.

No. 510A89

(Filed 26 July 1990)

1. **Jury § 7.14 (NCI3d)— motion for clerk to record race of prospective jurors—motion not timely**

The trial court did not err in denying defendant's motion for the clerk to record the race of "prospective jurors" after they had been peremptorily excused and the jury had been selected, since it would have been inappropriate to have the clerk make that determination, and defendant should have made his motion prior to jury selection so that the court could have had each prospective juror state his or her race during the court's initial questioning.

Am Jur 2d, Jury §§ 105, 173, 235.

2. **Criminal Law § 62 (NCI3d)— defendant's request for polygraphic readout—denial proper**

The trial court did not err in denying defendant's request for "what the polygraph showed such as heart rate and so forth," since defendant's written motion for an order that the State provide him with the "results" of the polygraph was not sufficiently explicit to inform either the trial court or the prosecutor that defendant sought the actual polygraphic readout or polygram of defendant's physiological responses in addition to the report containing the questions asked and the end result of the examination, *i.e.*, deceptiveness. N.C.G.S. § 15A-903(e).

Am Jur 2d, Depositions and Discovery § 449.

3. Criminal Law § 89.6 (NCI3d)— officers' knowledge of tape recording—failure to disclose—evidence excluded—subsequent evidence admitted—jury argument available

Even if the trial court erred in refusing to allow defendant to present evidence tending to show that two law enforcement officers failed to disclose to either the prosecutor or defendant the existence of a tape recording of defendant's phone call to the county emergency medical services made shortly after the victim was shot, such error was not prejudicial where defendant had opportunities to cross-examine both officers regarding their knowledge of the tape, but chose not to do so; the jury heard one officer testify that he knew of no statements made by defendant other than those to law officers, an insurance agent, and members of the victim's family; the jury thereafter heard the same officer authenticate the tape recording of defendant's call to EMS; and defense counsel therefore was free to argue to the jury as a legitimate inference arising from the evidence that officers had not been candid about the fact that defendant had made a statement to EMS personnel.

Am Jur 2d, Depositions and Discovery §§ 428, 429, 433.

4. Criminal Law § 1371 (NCI4th)— proportionality review—duty of Supreme Court only

The trial court did not err in failing to perform a pretrial proportionality review, since that duty is reserved exclusively for the Supreme Court. N.C.G.S. § 15A-2000(d)(2).

Am Jur 2d, Jury §§ 173-175.

5. Homicide § 17 (NCI3d)— defendant's failure to return to work after medical leave—evidence admissible to show motive

Testimony by the human resources manager at the company where defendant had worked for five years concerning defendant's failure to return to work after a medical leave of absence was admissible as evidence of defendant's motive for killing his wife where, prior to the manager's testimony, the State had introduced evidence of defendant's statements to law enforcement officers that he had decided on the day of the murder to kill his wife in order, among other things, to "collect the insurance money, . . . and not work as much"; after the manager's testimony, the State presented evidence that at a family picnic just eight days before the shooting

defendant told two members of the victim's family, "I'll do anything to keep from going back to work"; and there was no evidence that defendant was fired from his job.

Am Jur 2d, Homicide § 280.

6. Criminal Law § 73.3 (NCI3d)— statements made by murder victim—admissibility to show state of mind

In a prosecution of defendant for the murder of his wife, the trial court did not err in allowing officers to testify concerning statements made by the victim and related to them by defendant, since the victim's statements to defendant were admissible as evidence of the victim's then existing state of mind; they tended to show that the victim felt her marriage was in trouble and had related her feeling to defendant; and such evidence was relevant to corroborate one of defendant's admitted motives for deciding to kill his wife—to "get out of the marriage." N.C.G.S. § 8C-1, Rule 803(3).

Am Jur 2d, Homicide §§ 280-283.

7. Criminal Law § 75.7 (NCI3d)— statements made by defendant after polygraph exam—defendant not in custody—statements voluntary

The trial court's findings were supported by evidence and those findings supported its conclusion that defendant's statements were understandingly and voluntarily made where officers visited defendant and asked him if he would submit to a polygraph examination, stating that taking the test would "clear up the matter and verify the truthfulness of his statements"; defendant agreed; he was transported to another town for the exam and seemed alert and relaxed; the SBI agent administering the exam advised defendant of his rights, told him he was not required to take the exam, that he could stop at any time, that he could consult with an attorney at any time, that he was not in custody, and that he was free to leave at any time; defendant stated that he wished to continue; after the exam defendant was again advised that he was free to leave; defendant replied that he wished to stay and continue; the SBI agent then told defendant that it was his opinion that defendant had lied; defendant remained silent for a period of time, then began making statements to the agent and another law enforcement officer; defendant never

indicated any desire to stop the examination, consult a lawyer, or leave; defendant never indicated in any way that he felt threatened or coerced; and at no time did the officers make defendant any promise, threat, offer of reward or other inducement for his statement.

Am Jur 2d, Evidence §§ 543-554.

APPEAL of right by the defendant pursuant to N.C.G.S. § 7A-27 from the judgment entered by *Lamm, J.*, in the Superior Court, BURKE County, on 16 June 1989, sentencing the defendant to life imprisonment for murder in the first degree. Heard in the Supreme Court on 9 April 1990.

Lacy H. Thornburg, Attorney General, by Jane P. Gray, Special Deputy Attorney General, for the State.

Sam J. Ervin, IV and Robert C. Ervin for the defendant appellant.

MITCHELL, Justice.

The defendant, Philip Reid Payne, Jr., was tried at the 30 May 1989 Criminal Session of Superior Court, Burke County, upon a true bill of indictment charging him with the murder of his wife, Pamela B. Payne. The jury found the defendant guilty of first-degree murder based upon the theory that the killing was premeditated and deliberate. At the conclusion of a separate sentencing proceeding under N.C.G.S. § 15A-2000, the defendant was sentenced to life imprisonment. On appeal the defendant brings forward several assignments of error. We conclude that the defendant received a fair trial free of prejudicial error.

The State's evidence at trial tended to show that on the afternoon of Monday, 31 October 1988, the defendant intentionally shot and killed his wife with a single blast from a .12 gauge shotgun that he had just finished cleaning. The defendant admitted that he had planned to kill his wife by staging a gun cleaning "accident," but claimed that at the last instant he realized that he could not carry out his plan; then the gun truly did fire accidentally.

Additional evidence will be discussed as it relates to the defendant's assignments of error, which we address seriatim.

I.

[1] The defendant first assigns as error the trial court's refusal to order the State to articulate race-neutral reasons for its peremptory excusals of black jurors from the petit jury, which the defendant contends violated his rights under both the Sixth Amendment to the federal constitution and article I, § 26 of our state constitution. At the conclusion of the jury selection process, after the twelve jurors who decided this case had been selected and two alternates were being selected, the defendant (who is white) objected to the State's use of peremptory challenges against black jurors. The defendant requested that the courtroom clerk record the race and sex of the "prospective" jurors who had already been seated or excused, but the trial court denied his request. The next morning, the defendant renewed his objection via a written motion for the clerk to record the race and sex of jurors. The motion was supported by an affidavit, subscribed by one of the defendant's attorneys, purporting to contain the name of each black prospective juror examined to that point, and whether the State had peremptorily excused, challenged for cause, or passed the prospective juror to the defense (the defendant says one black juror did sit on the trial jury). The trial court, viewing the affidavit's allegations as true, nonetheless ruled that the defendant had failed to make a prima facie showing of a substantial likelihood that the State was using its peremptory challenges to discriminate against black jurors. *See, e.g., State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554 (1988).

The Supreme Court of the United States has recently ruled that a white defendant "has standing to raise a Sixth Amendment challenge to the exclusion of blacks from his jury." *Holland v. Illinois*, 493 U.S. ---, ---, 107 L. Ed. 2d 905, 914, *reh'g denied*, --- U.S. ---, 108 L. Ed. 2d 650 (1990). We have not yet decided any similar question arising under our state constitution. However, we need not reach the constitutional issues presented by this assignment of error, as we are not presented with a record on appeal which will support the defendant's argument that jurors were improperly excused by peremptory challenges exercised solely on the basis of race.

By his motion, the defendant sought to have the clerk record the race of the seated jurors and those who had already been peremptorily excused. Regarding a similar proposed practice, we have previously held that:

Although [having the court reporter note the race of every potential juror] *might* have preserved a proper record from which an appellate court could determine if any potential jurors were challenged solely on the basis of race, we find it inappropriate. To have a court reporter note the race of every potential juror examined would require a reporter alone to make that determination without the benefit of questioning by counsel or any other evidence that might tend to establish the prospective juror's race. The court reporter, however, is in no better position to determine the race of each prospective juror than the defendant, the court, or counsel. An individual's race is not always easily discernible, and the potential for error by a court reporter acting alone is great. As the trial court noted, "[The clerk] might note the race as being one race and in fact that person is another race. . . . [M]y observation has been you can look at some people and you cannot really tell what race they are." The approach suggested by the defendant would denigrate the task of preventing peremptory challenges of jurors on the basis of race to the reporter's "subjective impressions as to what race they spring from." *See Batson* [*v. Kentucky*], 476 U.S. [79,] 130 n.10, 90 L. Ed. 2d [69,] 109 n.10 (Burger, C.J., dissenting).

If a defendant in cases such as this believes a prospective juror to be of a particular race, he can bring that fact to the trial court's attention and ensure that it is made a part of the record. Further, if there is any question as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence, as opposed to leaving the issue to the court reporter who may not make counsel aware of the doubt. In the present case the defendant did not avail himself of this opportunity . . . .

. . . .

. . . Thus, the defendant has failed to demonstrate that the prosecutor exercised peremptory challenges solely to remove members of any particular race from the jury.

State v. Mitchell, 321 N.C. at 655-56, 365 S.E.2d at 557.

In the present case, the trial court stated that it would "not require the Clerk or the reporter or anybody else to view someone and determine their sex and race." The trial court noted, however,

that had the defendant made his motion prior to jury selection, the court would have had each prospective juror state his or her race during the court's initial questioning. This would have provided the trial court with an accurate basis for ruling on the defendant's motion, and would also have preserved an adequate record for appellate review. *See id.* Having not made his motion to record the race of prospective jurors until after the twelve jurors who actually decided his case had been selected, the defendant attempted to support his motion via an affidavit purporting to provide the names of the black prospective jurors who had been examined to that point. That affidavit, however, contained only the perceptions of one of the defendant's lawyers concerning the races of those excused—perceptions no more adequate than the court reporter's or the clerk's would have been, as we recognized in *Mitchell. See id.* For the reasons stated in *Mitchell*, we conclude that the trial court did not err by denying the defendant's motion for the clerk to record the race of "prospective jurors" after they had been excused and the jury had been selected. *See id.* For similar reasons, we also conclude that the record before us on appeal will not support the defendant's assignment of error. The defendant's assignment of error is overruled.

II.

[2] The defendant next assigns as error the trial court's refusal to compel the State to disclose certain recorded measurements made during a polygraph examination of the defendant. On 15 November 1988 the defendant voluntarily submitted to a polygraph examination performed by an agent of the State Bureau of Investigation (SBI). After being told that certain answers he had given appeared to be deceptive, the defendant made inculpatory statements to law enforcement officers, which led to his immediate arrest. Throughout the investigation and trial, the defendant consistently contended that the shooting was accidental. It was not until after the polygraph examination that the defendant admitted planning to kill his wife. Even after making this admission, however, the defendant maintained his contention that the actual shooting was accidental, even though he had been planning to shoot his wife until shortly before the gun accidentally fired.

On 23 November 1988 the defendant requested voluntary discovery from the State, including discovery of "[a]ny results or reports of physical or mental examinations or of tests, measurements

or experiments" made in connection with the case. *See* N.C.G.S. § 15A-903(e) (1988). On 10 May 1989 the defendant moved to compel the State to "produce the purported results of the purported polygraph test allegedly administered to the defendant." After a hearing on that same date, Judge C. Walter Allen ordered the State to provide the defense with "the results of any polygraph tests administered to Philip Reid Payne, Jr." The State then provided the defendant with a copy of its "Polygraph Report" which contained, among other information, the opinion of the examiner that deception was indicated, and the three "relevant questions" which, in the examiner's opinion, were answered deceptively by the defendant. On 26 May 1989, four days before trial, the defendant moved for sanctions against the State, contending, as he does here, that the State failed to comply with Judge Allen's order by not providing him with the "results as to what the polygraph showed such as the heart rate and so forth." In his motion the defendant sought to have the statements he made after the polygraph examination suppressed at trial. Even the defendant's written motion for sanctions did not request that he be provided with "what the polygraph showed such as the heart rate and so forth"; he made that specific request for the first time orally at the motion hearing. The trial court denied the defendant's request for the physiological readout of the polygraph machine. Further, the trial court refused to order suppression of the defendant's statements as a form of sanction against the State.

The defendant argues that "the physiological measurements of Mr. Payne's heart and respiration rate made during the polygraph examination plainly constitute the results of a physical examination and a test or measurement made in connection with the case," and that he should have been provided those measurements pursuant to N.C.G.S. § 15A-903(e). The defendant correctly recognizes that polygraph evidence is inadmissible at trial. *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983). He says that he sought these measurements, instead, as part of his challenge to the admissibility of the statements he made to law enforcement officers after the polygraph examination, as well as to challenge the credibility of those officers' testimony. The admissibility of those statements is raised in a separate assignment of error, which we address below.

We conclude that the trial court did not err in denying the defendant's request for "what the polygraph showed such as the heart rate and so forth." We are initially unable to say that the

defendant's written motion for an order that the State provide him with the "results" of the polygraph examination was sufficiently explicit to inform either the trial court or the prosecutor that the defendant sought the actual polygraphic readout or "polygram" of the defendant's physiological responses, in addition to the report containing the questions asked and the end result of the examination, i.e., deceptiveness. This is particularly true in light of the fact that the purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate. *State v. Stevens*, 295 N.C. 21, 243 S.E.2d 771 (1978); *State v. Thomas*, 291 N.C. 687, 231 S.E.2d 585 (1977). Therefore, there was no reason for the trial court or the prosecutor in this case to believe that the defendant sought the polygram, since, as we have pointed out in prior cases, such polygrams are particularly without value as evidence and are inadmissible. *See State v. Grier*, 307 N.C. at 643-45, 300 S.E.2d at 360-61 (quoting *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975)). For the same reason, we are unable to say that the trial court erred in denying the defendant's oral request, made four days prior to trial, by which the defendant appears to have sought the actual polygram. *See id.* The defendant's assignment of error is without merit.

III.

[3] The defendant, by his third assignment of error, contends that the trial court erred by refusing to allow him to present evidence tending to show that two law enforcement officers failed to disclose to either the prosecutor or the defendant the existence of a tape recording of the defendant's telephone call to the Burke County Emergency Medical Services (EMS), made shortly after the victim was shot. We conclude that the trial court's ruling, if erroneous, was nonetheless harmless error.

The State's first witness at trial was Terry Houston, a Burke County EMS dispatcher, who testified to receiving an emergency telephone call on 31 October 1988 from the defendant. At that time, the defendant told Houston that "I was cleaning my gun, and it went off, and it shot my wife." SBI Agent John Suttle, the lead investigating officer for the SBI on the case, later testified during cross-examination by the defendant that he knew of no statements made by the defendant pertinent to the case other than statements made to law enforcement officers, an insurance

agent and members of the victim's family. Agent Suttle did not mention the telephone call to EMS, although he had obtained a copy of a tape recording of that call shortly after the shooting. The State presented no evidence that the conversation between Houston and the defendant had been recorded. Apparently, the prosecutor was not made aware of the fact that the defendant's call to EMS had been recorded until after jury selection, at which time he made the recording available to the defendant. The defendant, however, had already obtained a copy of the recording from Burke County EMS.

During his case-in-chief, the defendant sought to introduce evidence that both Agent Suttle and Captain Robin Dale of the Burke County Sheriff's Department had obtained copies of the tape early in the investigation, but that neither had informed the prosecutor of the tape or made it available to the defendant. During a voir dire examination, Agent Suttle testified that he had acquired a copy of the tape within a month after the shooting, but had not provided the tape to the prosecutor because "after Mr. Payne's statement that he gave to the investigating officers on November 15th, I didn't place a great deal of evidentiary value on the tape; therefore, I did not include it in the investigative file that went to the District Attorney's Office." Captain Dale likewise testified on voir dire that the Burke County Sheriff's Department had a copy of the tape, but did not inform the prosecutor of the tape's existence until after jury selection. The trial court sustained the State's objection to the introduction of the voir dire evidence as being irrelevant to the question of the defendant's guilt or innocence. The jury was returned to the courtroom and the defendant then called Agent Suttle to the stand. Suttle authenticated the tape recording, which was then played to the jury. The defense argued to the jury that the tape showed the defendant displaying an emotional state inconsistent with an intentional killing.

The defendant makes numerous arguments regarding why he should have been allowed to call the two officers as witnesses during his case-in-chief and question them regarding why they had not informed the prosecutor of the tape's existence. He contends that the officers' failure to inform the prosecutor of the tape-recording was an admission of the weakness of the State's case against him. He argues that such evidence tended to show the officers' bias and, if admitted, would have reduced the credibility of their testimony

which was before the jury. He argues that Agent Suttle's knowledge of the tape was inconsistent with his testimony that he knew of no statements made by the defendant pertinent to the case other than statements made to law enforcement officers, an insurance agent, and members of the victim's family. The defendant further argues that the trial court's denial of his attempt to elicit this evidence violated his compulsory process, confrontation, and due process rights under the federal constitution.

We note that during the State's case-in-chief, the defendant had opportunities to cross-examine both Agent Suttle and Captain Dale regarding their knowledge of the tape, but chose not to do so. Even assuming *arguendo* that the trial court erred, however, its error was harmless beyond a reasonable doubt. The jury heard one of the officers testify during the State's presentation of evidence that he knew of no statements made by the defendant other than those made to law enforcement officers, an insurance agent and members of the victim's family. Thereafter, during the defendant's presentation of evidence, the jury heard the same officer authenticate the tape recording of the defendant's call to the Burke County EMS. The tape itself was then played in its entirety for the jury. Therefore, counsel for the defendant was free to argue to the jury, as a legitimate inference arising from the evidence, that the officers had not been candid about the fact that the defendant had made a statement to EMS personnel. Counsel was also free to make reasonable arguments concerning the inferences the jury should draw from the defendant's statement to EMS personnel shortly after the killing, which statement the jury had heard in its entirety. Therefore, we conclude that the error complained of here, if error, was harmless beyond a reasonable doubt. This assignment of error is without merit.

IV.

[4] By his fourth assignment of error, the defendant argues that the trial court erred in failing to perform a pretrial proportionality review. The trial court had no authority to engage in proportionality review, since "[t]hat duty is reserved *exclusively* for this Court." *State v. Jackson*, 309 N.C. 26, 45 n.3, 305 S.E.2d 703, 716 n.3 (1983) (emphasis added); *see* N.C.G.S. § 15A-2000(d)(2) (1988). The defendant's assignment of error is overruled.

V.

[5] The defendant next assigns as error the trial court's admission of testimony concerning his failure to return to work at the Dana Corporation where he was employed as a machinist. At trial, Wilma Taylor, human resources manager for Dana, testified that the defendant had worked at Dana for five years prior to the shooting. For approximately two months before the shooting the defendant had been on medical leave, having suffered a back injury. He was scheduled to return to his second shift job at 3:00 p.m. on 31 October 1988, the day of the shooting. In response to the State's question, and over defense objection, Taylor testified that the defendant did not return to work on 31 October, and did not return to work after that date.

The defendant argues that Wilma Taylor's testimony regarding his failure to return to work was irrelevant, misleading to the jury, and unfairly prejudicial. We disagree. Taylor's testimony was admissible as evidence of the defendant's motive for killing his wife. Prior to Taylor's testimony, the State had introduced evidence of the defendant's statements to law enforcement officers that he had decided on the day of the murder to kill his wife in order to "collect the insurance money, get out of the marriage, pay the house off, get the children, *and not work as much.*" After Taylor's testimony, the State presented evidence that at a family picnic just eight days before the shooting, the defendant told two members of the victim's family, "I'll do anything to keep from going back to work." Taylor's testimony was thus relevant evidence tending to corroborate one of the defendant's admitted motives at the time he decided to kill his wife.

The defendant argues that Taylor's testimony is not probative evidence of motive, as he actually did not return to work at Dana because he was fired after tools allegedly stolen from Dana were found at his home. The defendant's argument, however, is unsupported by record evidence. There is no evidence in the record before us to show that the defendant was fired from the Dana Corporation. The defendant's assignment of error is thus overruled.

VI.

[6] By his next assignment of error, the defendant contends that the trial court erred in allowing two law enforcement officers to testify as to statements made by the victim to the defendant,

who in turn related them to the officers. At trial, SBI Special Agent Jonathan Jones testified that he had interviewed the defendant on 15 November 1988. Over defense objection, Agent Jones testified that the defendant told him

> That on Saturday, October 29, 1988, Pam started asking questions like if Philip wanted out of the marriage, or if Philip may be fooling around on her, and why they did not fool around as much. On Monday, October 31, 1988, "I got up and decided I wanted out of the marriage. That if I shot and killed Pam I could collect the insurance money, get out of the marriage, out from under the house debt, and have the children. I would not have to work as much."

Immediately after the defendant made this statement to Agent Jones, the defendant repeated his statement in the presence of Burke County Sheriff's Detective Dean Lloyd. Detective Lloyd also testified at trial, and related a substantially identical statement by the defendant, also over defense objection.

The defendant contests the overall admissibility of his statements to the two officers in a separate assignment of error, which we address below. For purposes of this assignment of error the defendant acknowledges that if otherwise admissible, the defendant's statements to the officers are admissions of a party opponent, and thus admissible non-hearsay under Rule 801(d)(A) of the North Carolina Rules of Evidence. N.C.G.S. § 8C-1, Rule 801(d)(A) (1988). Nevertheless, the defendant specifically contests the admissibility of the officers' testimony as to the *victim's* statements to the defendant, which were related by the defendant to the officers; this testimony concerned the victim's questions to the defendant as to whether he wanted "out of" their marriage, whether he was having an affair, and why the couple did not "fool around" as much as they apparently did at one time. The defendant initially argues that the officers' testimony as to the victim's statements was hearsay not within any exception to the hearsay rule. *See* N.C.G.S. § 8C-1, Rules 801-05. Alternately, the defendant argues that if the evidence was offered as non-hearsay, it was irrelevant to any material issue at trial and inadmissible.

The State counters, and we agree, that the victim's statements to the defendant were admissible as evidence of the victim's then existing state of mind. N.C.G.S. § 8C-1, Rule 803(3). The victim's statements tended to show that the victim felt the Paynes' mar-

riage was troubled and had related her feeling to the defendant. Such evidence was relevant to corroborate one of the defendant's admitted motives for deciding to kill his wife—to "get out of the marriage." The defendant's assignment of error is thus overruled.

VII.

[7] The defendant's seventh assignment of error concerns the trial court's denial of his motion to suppress the statements he made to SBI Agent John Suttle and Burke County Sheriff's Detective Dean Lloyd on 15 November 1988. The defendant contends that the statements were involuntary, since they were obtained as a result of the defendant's hope of reward which was improperly induced by the State in a coercive atmosphere. We disagree.

At the voir dire hearing on the defendant's motion, three law enforcement officers testified regarding their contacts with the defendant leading up to his statements on 15 November 1988. Following the testimony of those officers and arguments by defense counsel, the trial court made certain findings of fact, which we summarize: On 8 November 1988 Agent Suttle and Detective Lloyd visited the defendant and asked him if he would submit to a polygraph examination. Agent Suttle told the defendant that taking the test would "clear up the matter and verify the truthfulness of his (the defendant's) statements." The defendant agreed to take the polygraph test. At that same meeting, Agent Suttle commented that the defendant's oldest daughter "bore quite a resemblance to her mother." Agent Suttle's remark did not appear to upset the defendant. On the morning of 15 November 1988, the defendant came to the Burke County Sheriff's Department and then rode with Agent Suttle and Detective Lloyd to the SBI office in Hickory. During the ride to Hickory, the defendant appeared relaxed and alert and did not appear to be under the influence of any impairing substance.

After arriving at the SBI office, the defendant was introduced to SBI Agent Jonathan Jones. Agent Jones took the defendant to the room where the polygraph examination was conducted. The examination room was approximately ten feet square, had no windows, and contained a desk and three chairs. Before starting the examination, Agent Jones advised the defendant of his rights regarding the polygraph examination. Agent Jones specifically advised the defendant that he was not required to take the examination and could stop at any point, that he could consult with an

attorney at any time before or during the questioning, that he was not in custody, and that he was free to leave at any time he wished. After being advised of his rights, the defendant stated that he wished to continue. Agent Jones then administered the examination to the defendant. The defendant was attached to the polygraph machine for twenty-three minutes, thirteen of which were occupied by the actual questioning.

After the examination, the defendant was again advised that he was free to leave. The defendant replied that he wished to stay and continue. Agent Jones then told the defendant that, in his opinion, the defendant had lied to him on the relevant questions. The defendant remained silent for a period of time, then began making statements to Agent Jones. After the defendant made incriminating statements to Agent Jones, Agent Jones asked Detective Lloyd to come into the examination room. Agent Jones summarized for Detective Lloyd what the defendant had just told him, then the defendant substantially repeated his prior statement for Detective Lloyd. The defendant was with Agent Jones from approximately 9:27 a.m. until 2:19 p.m. on 15 November, with Detective Lloyd also being present from approximately 12:55 p.m. until 2:19 p.m. There was no evidence that the defendant ever indicated any desire to stop the examination, consult with a lawyer, or leave; the defendant never requested food or drink; and the defendant never indicated in any way that he felt threatened or coerced. At no time on or prior to 15 November 1988 did the officers make the defendant any promise, threat, offer of reward or other inducement for his statement.

Based upon its findings of fact, the trial court concluded that the defendant's statements had been freely and voluntarily made, after he had knowingly and intelligently waived his right to remain silent and right to counsel. The trial court further concluded that none of the defendant's constitutional rights were violated.

North Carolina law is well established regarding this Court's role in reviewing a trial court's determination of the voluntariness of a confession.

> Findings of fact made by a trial judge following a voir dire hearing on the voluntariness of a confession are conclusive upon this Court if the findings are supported by competent evidence in the record. No reviewing court may properly set

aside or modify those findings if so supported. This is true even though the evidence is conflicting.

State v. Jackson, 308 N.C. 549, 569, 304 S.E.2d 134, 145 (1983) (citations omitted). We have reviewed the hearing transcript and conclude that the trial court's findings are not only supported by competent evidence, they are essentially uncontroverted.

Given that the trial court's factual findings were supported by competent evidence, we must next determine whether the trial court's conclusions of law are supported by the findings. "The legal significance of the findings of fact made by the trial court is a question of law for this Court to decide." *Id.* at 582, 304 S.E.2d at 152 (citation omitted). "The North Carolina rule and the federal rule for determining the admissibility of a confession is the same. It is a rule or test of voluntariness in which the court looks at the totality of the circumstances of the case in determining whether the confession was voluntary." *Id.* (citing cases); *see State v. Corley*, 310 N.C. 40, 47-48, 311 S.E.2d 540, 545 (1984).

Given the factual findings before us, we detect no error in the trial court's conclusions. The defendant correctly recognizes that a confession is inadmissible if the State obtains the confession by promises or threats which induce hope or fear and in fact overcome the defendant's will. *State v. Simpson*, 320 N.C. 313, 325, 357 S.E.2d 332, 338-39 (1987), *cert. denied*, 485 U.S. 963, 99 L. Ed. 2d 430 (1988); *see State v. Fox*, 274 N.C. 277, 163 S.E.2d 492 (1968); *State v. Biggs*, 224 N.C. 23, 29 S.E.2d 121 (1944). However, no such promises or threats were made in this case. Agent Suttle's statement to the defendant that his taking the polygraph examination would "clear up and verify the truthfulness of his statement" meant just that. Had the defendant's responses not indicated deception, the examination would have tended to verify the defendant's prior statement, and the State's investigation "would probably have been ended" as Agent Suttle testified. Having reviewed the evidence, we conclude that the trial court's findings were supported by evidence, and that those findings in turn supported its conclusions. Given the totality of the circumstances, the trial court did not err in concluding that the defendant's statements were understandingly and voluntarily made. The defendant's assignment of error is overruled.

VIII.

The defendant's remaining assignments of error relate to issues that the defendant recognizes have previously been decided by this Court contrary to his position, but which he nonetheless brings forward to preserve for further appellate review. As those issues have previously been decided by this Court contrary to the defendant's position, the defendant's related assignments of error are overruled.

IX.

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

No error.

STATE OF NORTH CAROLINA v. GREGORY STEWART LYNCH

No. 679A86

(Filed 26 July 1990)

1. Homicide § 21.5 (NCI3d) — first degree murder — premeditation and deliberation — sufficiency of evidence

Evidence was sufficient to permit the jury to determine defendant's guilt of first degree murder on a theory of premeditation and deliberation where it tended to show that, before the fatal stabbing, defendant had threatened the life of the victim and surreptitiously entered her home; witnesses observed a person matching defendant's description walking with the victim shortly before she was fatally wounded; fingerprints taken from an automobile at the scene of the killing matched those of defendant; a knife with the victim's blood on it was found near where defendant was arrested; a sheath in which this knife fit was located near the automobile on which defendant's fingerprints were found; and the victim was stabbed five separate times.

Am Jur 2d, Homicide §§ 425, 426, 439.

2. Homicide § 21.6 (NCI3d)— first degree murder—lying in wait—insufficiency of evidence

Evidence was insufficient to support defendant's guilt of first degree murder on a theory of lying in wait where there was no evidence that defendant ambushed or surprised the victim when he fatally stabbed her; rather, the evidence showed without contradiction that before the fatal stabbing, defendant walked with his arm around the victim through the parking lot; later defendant was observed chasing the victim across the lot, catching her, and forcing her back to a car in the lot; the victim was heard to say, "No, please, don't do that," after which she was observed coming from between some cars, bleeding and calling for help; and defendant was observed running across the parking lot.

Am Jur 2d, Homicide §§ 44, 47, 49.

3. Homicide § 21.6 (NCI3d)— alternate theories submitted to jury—only one supported by evidence—no indication by jury as to which theory relied on—prejudicial error

Where the trial court erroneously submits the case to the jury on alternate theories, one of which is not supported by the evidence and the other which is, and, as here, it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitles defendant to a new trial.

Am Jur 2d, Homicide §§ 483, 486, 498.

4. Homicide § 17 (NCI3d)— defendant's prior entry into victim's home—admissibility to show intent, malice, identity of defendant

In a prosecution of defendant for the murder of his estranged wife, the trial court did not err in admitting evidence of defendant's surreptitious entry into the victim's home approximately one month before the murder, since such evidence tended to show that defendant was seeking an opportunity to harm his wife; it was some evidence of defendant's malice, intent, and ill will toward his vicitm; and it therefore tended to identify defendant as his wife's assailant when she was murdered.

Am Jur 2d, Evidence §§ 321, 322, 324, 325.

5. Homicide § 17.2 (NCI3d); Criminal Law § 73.3 (NCI3d)—statements by murder victim—admissibility to show state of mind

Testimony by three witnesses that the victim had told them that defendant, her husband, had threatened her and that the victim, when speaking about her husband shortly before the murder, was "nervous and upset," unusually quiet, and had "fear in her voice" was admissible to show the state of mind of the victim and the relationship between her and her husband shortly before her murder. N.C.G.S. § 8C-1, Rule 803(3).

Am Jur 2d, Homicide §§ 329, 330.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a conviction of first degree murder and judgment sentencing him to death imposed by *Hyatt, J.*, presiding at the 13 October 1986 Criminal Session of Superior Court, RUTHERFORD County. Heard in the Supreme Court 13 February 1989.

Lacy H. Thornburg, Attorney General, by Christopher P. Brewer, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant appellant.

EXUM, Chief Justice.

At defendant's trial for first degree murder the jury was instructed that it could find defendant guilty on a theory of premeditation and deliberation or on a theory of lying in wait. The jury returned a general verdict of guilty without specifying upon which theory or theories it relied.

While the evidence was sufficient to support a verdict on a theory of premeditation and deliberation, the evidence was insufficient to support a verdict on a theory of lying in wait. It was reversible error, therefore, to submit the case to the jury on a theory unsupported by the evidence; and defendant must be given a new trial. We also conclude there was no error in the admission of certain evidence against defendant.

I.

Defendant was indicted by the Grand Jury of Rutherford County at the 21 July 1986 Criminal Session of Superior Court for the offense of first degree murder. He was tried capitally in the Superior Court of Rutherford County in October 1986 and found guilty of first degree murder. After a sentencing hearing, the jury found the presence of one aggravating circumstance, that the defendant previously had been convicted of a felony involving the use or threat of violence to a person. The jury found one mitigating circumstance, that the murder occurred while defendant was under the influence of a mental or emotional disturbance. It failed to find that defendant's capacity to appreciate the criminality of his conduct was impaired and that there were any other unspecified mitigating circumstances. The jury determined that the mitigating circumstance was insufficient to outweigh the aggravating circumstance and that the aggravating circumstance was sufficiently substantial to warrant the death penalty. The jury recommended that defendant be sentenced to death. For the statutory authorization for these findings at sentencing, see N.C.G.S. § 15A-2000(e)(3), (f)(2), (c)(2) and (3).

The State's evidence tends to show the following:

On 21 June 1986 at around 11:45 p.m. the victim, Jackie Lynch, was stabbed repeatedly in the parking lot of Spindale Mills, where she worked third shift. She was pronounced dead on arrival at Rutherford County Hospital.

Defendant and Jackie Lynch were married but had been separated for approximately two months before Jackie was killed.

On the morning of 18 May 1986 defendant surreptitiously entered Jackie's home and was discovered by Duprey McDowell, Jackie's son. McDowell escaped through a window and called the police from a neighbor's house. The police found defendant hiding in the basement. Although he was arrested, charges stemming from the incident were dismissed for lack of probable cause. On 19 May 1986 Jackie told Officer Floyd Laughter that defendant had previously telephoned her and threatened to have her killed.

On 21 June 1986 Jackie told two friends, Sharon Pruitt and Gloria Edgerton, that defendant's threats to kill her had frightened her.

About 7:40 p.m. on 21 June 1986 Tony Latham picked up defendant in front of Spindale Drug Store and drove him about one-quarter mile to Petroleum World, a local service station about one-quarter mile from Spindale Mills. Around 11:30 p.m. Ruby Taylor, Robert Lee Barnes and Debbie Hutchins, all third shift employees of Spindale Mills, arrived for work. They saw a black man sitting on the hood of a blue Dodge Daytona parked near the entrance of the parking lot. Hutchins said the black man looked at each car that came into the parking lot. Barnes said the man kept his back to him and never showed his face. Fingerprints lifted from the hood of the Dodge Daytona by an SBI special agent matched those of defendant.

Jackie Lynch arrived at the mill for work around 11:45 p.m. Tim Stamper, another third shift employee, observed a black man and Jackie walking through the parking lot. The man had his arm around Jackie. Moments later Stamper observed the same black man running across the parking lot as Jackie emerged from between some cars with blood all over her, screaming "Help me, help me," before falling down. Floyd Fowler, an employee of the mill who did not know Jackie, observed a black man chasing a black woman across the parking lot. Fowler saw the man catch the woman and lead her back to the car. As they started to move, Fowler heard her say, "No, please, don't do that." A few moments later she said, "Somebody help me." When Fowler went to the parking lot to investigate, he saw the man running across the parking lot and the woman walking out to the center of the parking lot saying, "Will somebody please help me."

Officer Randy Bostic of the Spindale Police Department was dispatched to the Spindale Mills parking lot and arrived just before midnight. Upon examination of Jackie Lynch's body, he detected no pulse. He discovered a knife sheath next to the blue Dodge Daytona. Defendant's fingerprints were found on the Dodge Daytona and on Jackie's Plymouth Valiant. Jackie's car also contained blood which matched her blood grouping. Bostic said witnesses described the suspect as a black man wearing light trousers, a red shirt and a baseball cap.[1]

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1. There was some discrepancy between Stamper's and Fowler's descriptions of the suspect. Stamper identified the black male as wearing light trousers. Fowler said he thought the suspect was wearing dark trousers and a lighter colored shirt.

About 3:15 a.m. on 22 June defendant was arrested some two-tenths of a mile from Spindale Mills. He was wearing light colored trousers, a red shirt and a baseball cap and had blood on his clothes and arms. Defendant was bleeding from wounds on his upper arms. A knife was found on the ground a few feet from where defendant was apprehended. No usable fingerprints were found on the knife, but the knife did have blood on it matching that of Jackie Lynch and not that of defendant.

Defendant was taken to the Rutherford County Hospital for treatment and then to jail. He possessed a key fitting the ignition of Jackie Lynch's car.

Jackie Lynch was dead on arrival at Rutherford County Hospital. Cause of death was shock due to loss of blood from multiple stab wounds.

Defendant offered no evidence in the guilt phase of the case.

II.

[1] Defendant first contends the evidence was insufficient to show that he committed the murder with which he was charged and the trial court erred in denying his motion to dismiss the case for insufficiency of evidence. We conclude the evidence was sufficient to be submitted to the jury on the question of defendant's guilt of first degree murder on a theory of premeditation and deliberation.

The question is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. *State v. Mercer*, 317 N.C. 87, 96, 343 S.E.2d 885, 890 (1986).

> Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). . . . If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed. This is true even though the suspicion so aroused by the evidence is strong.

State v. Earnhardt, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (citation omitted). In determining the sufficiency of the evidence we consider it in the light most favorable to the State.

> [T]he State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

Id. at 67, 296 S.E.2d at 653. The test for sufficiency of the evidence is the same whether the evidence is direct, circumstantial or both. *Id.* at 68, 296 S.E.2d at 653.

> When as here the motion to dismiss puts into question the sufficiency of circumstantial evidence, the court must decide whether a reasonable inference of the defendant's guilt may be drawn from the circumstances shown. If so the jury must then decide whether the facts establish beyond a reasonable doubt that the defendant is actually guilty.

State v. Triplett, 316 N.C. 1, 5, 340 S.E.2d 736, 739 (1986) (citation omitted).

These formulations of the sufficiency of the evidence comport with the United States Supreme Court's articulation that as a matter of constitutional due process the evidence in a criminal case, after it is viewed in the light most favorable to the prosecution, must be such that "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573 (1979). *See State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987).

Here the evidence, although circumstantial, was sufficient to permit the jury to determine defendant's guilt of first degree murder on a theory of premeditation and deliberation beyond a reasonable doubt. Before the fatal stabbing, defendant had threatened the life of the victim and surreptitiously entered her home. Witnesses observed a person matching defendant's description walking with the victim shortly before she was fatally wounded. Fingerprints taken from an automobile at the scene of the killing matched those of defendant. A knife with the victim's blood on it was found near where defendant was arrested, and a sheath in which this knife fit was located near the automobile on which defendant's fingerprints were found. The victim was stabbed five separate times.

Even if each of these circumstances standing alone would be insufficient to raise more than a mere suspicion of defendant's

guilt, all the circumstances taken together are clearly sufficient to permit the jury to find beyond a reasonable doubt that defendant perpetrated the murder, *see Blake*, 319 N.C. 599, 356 S.E.2d 352, and cases therein cited; *State v. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978), and that he did so with premeditation and deliberation. *See State v. Groves*, 324 N.C. 360, 378 S.E.2d 763 (1989).

III.

[2] Defendant next contends the evidence was insufficient to support his guilt of first degree murder on a theory of lying in wait and the trial court erred in submitting this alternative theory of guilt to the jury. This argument has merit.

A "murder perpetrated by lying in wait is a murder in the first degree." *State v. Leroux*, 326 N.C. 368, 375, 390 S.E.2d 314, 320 (1990). If the State can show a murder perpetrated by lying in wait, it need not prove either premeditation and deliberation or a specific intent to kill. *Id.*

For a murder to be perpetrated by lying in wait, it is not necessary that the perpetrator wait at the site of the killing for some period of time or that he be concealed or that the victim be unaware of his presence. *Leroux*, 326 N.C. 368, 390 S.E.2d 314; *State v. Allison*, 298 N.C. 135, 257 S.E.2d 417 (1979). Both *Leroux* and *Allison* and cases relied upon therein do establish, however, that a lying in wait killing requires some sort of ambush and surprise of the victim.

In *Leroux* a lying in wait killing was committed when defendant was "sneaking around" a dark golf course at night in a crouched position with a loaded, cocked rifle and fatally shot a police officer searching for him "with a suddenness which deprived [the officer] of all opportunity to defend himself." *Leroux*, 326 N.C. at 376-77, 390 S.E.2d at 320-21. *Leroux* relied on *State v. Bridges*, 178 N.C. 733, 101 S.E. 29 (1919), where police officers entered defendants' home to make an arrest. Inside the house an officer, upon turning a corner, was suddenly and fatally shot by defendants. The *Bridges* Court characterized the killing as one where the victim "had no time even to raise his pistol in defense of himself. The defendants were waiting in the dark for him, as much concealed as if they had been hidden in ambush, prepared to slay without a moment's warning to their victim." *Bridges*, 178 N.C. at 738, 101 S.E. at 32.

In *Allison* the defendant surreptitiously followed his wife to her trailer. She entered the trailer, and defendant stationed himself some 150 feet away behind or beside a tree. When his wife came out of the trailer defendant fatally shot her from his position at the tree. The *Allison* Court concluded the evidence supported a killing by lying in wait. After reviewing earlier decisions, the Court said:

> The foregoing decisions make it clear that when G.S. 14-17 speaks of murder perpetrated by lying in wait, it refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim. An assailant who watches and waits in ambush for his victim is most certainly lying in wait. However, it is not necessary that he be actually concealed in order to lie in wait. If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait. Certainly one who has lain in wait would not lose his status because he was not concealed at the time he shot his victim. The fact that he reveals himself or the victim discovers his presence will not prevent the murder from being perpetrated by lying in wait. Indeed, a person may lie in wait in a crowd as well as behind a log or a hedge.

Allison, 298 N.C. at 147-48, 257 S.E.2d at 425 (citations omitted).

Although concealment is not a necessary element of a murder perpetrated by lying in wait, it is clear from this Court's prior decisions that some sort of ambush and surprise of the victim are required. "Even a moment's deliberate pause before killing one unaware of the impending assault and consequently 'without opportunity to defend himself' satisfies the definition of murder perpetrated by lying in wait." *Leroux*, 326 N.C. at 376, 390 S.E.2d at 320 (quoting *State v. Wiseman*, 178 N.C. 784, 790, 101 S.E.2d 629, 631 (1919)).

Here there is no evidence that defendant ambushed or surprised Jackie Lynch when he fatally stabbed her. The evidence shows without contradiction that before the fatal stabbing defendant walked with his arm around the victim through the parking lot. Later defendant was observed chasing the victim across the lot, catching her and forcing her back to a car in the lot. The

victim was heard to say, "No, please, don't do that," after which she was observed coming from between some cars, bleeding and calling for help. Defendant was observed running across the parking lot. There is simply no evidence that defendant lay in wait by ambushing or surprising his victim immediately before he inflicted the fatal stab wounds. Such evidence as there is tends to the contrary.

[3] There being no evidence to support murder by lying in wait, it was error for the trial court to instruct the jury on this theory. Where the trial court erroneously submits the case to the jury on alternative theories, one of which is not supported by the evidence and the other which is, and, as here, it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitles defendant to a new trial. *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987).

IV.

[4] Defendant next contends evidence of his surreptitious entry into Jackie Lynch's home on 18 May 1986 should have been excluded because it is not relevant to any issue in the case and simply tends to show that defendant had been arrested for an unrelated offense. We disagree.[2]

Rule 404(b) of the North Carolina Rules of Evidence states that while "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show he acted in conformity therewith," it may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b) (1988).

"When a husband is charged with murdering his wife, the State may introduce evidence covering the entire period of his married life to show malice, intent and ill will toward the victim." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985); *accord State v. Creech*, 229 N.C. 662, 670, 51 S.E.2d 348, 354 (1949). The 18 May incident directly relates to Jackie's and defendant's relationship shortly before the murder. It is simply one circumstance which tends to shed light on the crime itself by showing that approximately a month before the crime defendant may have

2. Since this question and the one following will almost certainly arise at defendant's new trial, we elect to discuss them here for guidance at the new proceeding.

been seeking an opportunity to harm his wife. It is some evidence of defendant's malice, intent and ill will toward his victim and thereby tends to identify defendant as his wife's assailant when she was murdered. It was not error to admit this evidence.

V.

[5] Defendant next contends that it was error to admit certain statements concerning defendant made by Jackie Lynch to several witnesses. Defendant argues the evidence was inadmissible hearsay. Again, we disagree and conclude the evidence was admissible under the state-of-mind exception to the hearsay rule.

During the presentation of the State's case, Gloria Edgerton testified that she and Jackie Lynch walked together to the Spindale Mills parking lot after they got off work at 8 a.m. on 21 June 1986. Jackie said, "I'm scared to go out there." Defendant objected, the jury was excused and the trial court conducted a *voir dire* on the admissibility of Edgerton's testimony. During the *voir dire* Edgerton testified that on the morning of 21 June, Jackie Lynch told her that defendant had threatened to kill her. She also testified that earlier in the week, she and Jackie Lynch had discussed Jackie's marital situation. Jackie told Edgerton that defendant had wanted to come back to her. When Jackie refused, defendant threatened her life. The trial court ruled this testimony admissible as a dying declaration under Rule 804(b)(2).

After this ruling and before the jury, Edgerton testified essentially as follows: She and Jackie Lynch were close friends and often mutually confided in each other about their problems. On the morning of 21 June Edgerton noticed that Jackie was acting differently. She was not as talkative and smoked more. It "seemed like she had things on her mind." Jackie told Edgerton that defendant had threatened her life. As the two women were approaching the parking lot Jackie said, "My tires may be flat."

Sharon Pruitt testified that she had known Jackie Lynch for twenty-five years and was defendant's first cousin. Jackie Lynch was like a sister and they confided in each other. They talked with each other almost every day. On the afternoon of 21 June, Pruitt said Jackie Lynch called her on the telephone and identified herself. During a *voir dire* hearing on the admissibility of Pruitt's testimony concerning the telephone conversation, she testified that she had made a written notation of what was said. She said Jackie

Lynch told her, "Sharon, I know Gregg is going to kill me, like he said he would do." Pruitt, describing Jackie Lynch, said: "I could tell she was frightened. She had fear in her voice."

Again the trial court concluded this testimony was admissible as a dying declaration.

Before the jury Pruitt testified essentially as she had on *voir dire*. The trial court allowed the motion to strike the witness' testimony that Jackie "had fear in her voice" but allowed the witness to testify that she knew defendant was going to kill her, "like he said he would."

Over defendant's objection the trial court, after making appropriate findings, permitted police officer Floyd Laughter to testify under the residual exception to the hearsay rule, N.C.G.S. § 8C-1, Rule 804(b)(5) (1988). Officer Laughter testified he spoke with Jackie Lynch at her residence on 19 May 1986 while he was investigating an unauthorized entry. He described Jackie Lynch as being "very nervous and upset," unable to stand still and constantly pacing the floor. She told him defendant "had called her on the phone on the previous day and told her that he was going to have her killed."

In admitting Officer Laughter's testimony under the residual hearsay exception, Rule 804(b)(5), the trial court made findings and conclusions as follows:

> THE COURT: Let the record show in regard to the statement made by Floyd Laughter in regard to a telephone conversation that Jackie Lynch had with Gregg Lynch, the Court overruled the objection made by the defendant, pursuant to Rule 804(b)(5). The Court determines that the statement [was] offered as evidence on a material fact. . . . The statement is more probative on the point [for] which it is offered than any other evidence which the State can procure through reasonable efforts; that there were circumstantial guarantees of trustworthiness insofar as the statement made to an officer on the day after the telephone conversation subsequent to the time she contacted the police in the course of his investigation; that the interest of justice would be served by admission of the statement in evidence.

Defendant contends the trial court, in following the steps for admission under the residual hearsay exception as enunciated in *Triplett*, 316 N.C. 1, 340 S.E.2d 736, erred in concluding that the

necessary circumstantial guarantees of trustworthiness were present. He also contends the trial court erred in admitting Jackie Lynch's statement to witnesses Pruitt and Edgerton under the dying declaration hearsay exception.

We need not address these arguments because here Officer Laughter's testimony, as well as the testimony of Edgerton and Pruitt, is admissible under the state-of-mind hearsay exception, Rule 803(3). "When a hearsay statement is made expressly admissible by a specific exemption category, there is no necessity for the trial court to consider the catch-all provisions of the other rules." *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (1990).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1988). Jackie Lynch's statements to Edgerton, Pruitt and Officer Laughter regarding threats made by defendant on her life and how these threats affected her would be hearsay and therefore inadmissible unless they fall within an exception to the hearsay rule.

Under recent decisions of this Court, *State v. Faucette*, 326 N.C. 676, 392 S.E.2d 71 (1990); *Cummings*, 326 N.C. 298, 389 S.E.2d 66; *State v. Alston*, 307 N.C. 321, 298 S.E.2d 631 (1983), these hearsay statements are admissible under the state-of-mind exception to the hearsay rule:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (3) Then Existing Mental, Emotional, or Physical Condition—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) . . . .

N.C.G.S. § 8C-1, Rule 803(3) (1988).

In *Faucette*, a homicide and burglary victim's statements to her son and sister regarding threats the defendant, an estranged boyfriend, had made to the victim, although hearsay, were held admissible under Rule 803(3) because they revealed the victim's then-existing fear of the defendant. *Faucette*, 326 N.C. at 683, 392 S.E.2d at 74. The state of mind of the victim was relevant in the burglary case, the Court concluded, to show that defendant entered the victim's home without her consent. The Court concluded it was relevant in the homicide case to rebut the defendant's

"self-defense inferences that he did not start shooting until he saw her reach 'for her gun.' " *Id.* The Court said, "The jury could infer from the evidence regarding [the victim's] state of mind that it was unlikely [she] would do anything to provoke defendant, including reach for a weapon." *Id.* at 683, 392 S.E.2d at 74-75.

In *Cummings*, the victim, Karen Puryear, had two children fathered by the defendant, an estranged boyfriend, at the time of the victim's murder. The victim and defendant had engaged in litigation over custody and support of these children. The State's evidence tended to show that Puryear and her younger sister, Teresa, were shot to death by the defendant. At trial, Celia Mansary, an East Central Community Services paralegal, testified she interviewed Puryear about three weeks before her disappearance. During the interview, Puryear told Mansary the defendant threatened to kill her if she tried to take the children from him. Although the trial court had apparently admitted this testimony under the residual hearsay exception of Rule 803(24), it failed to make the necessary findings required by *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). The Court nevertheless found no error in the admission of this evidence, concluding that it was admissible under the state-of-mind hearsay exception. The Court said Mansary's testimony tended to show the victim's existing state of mind and emotional condition and was admissible if relevant to some issue in the case and if its prejudicial effect did not outweigh its probative value. *Cummings*, 326 N.C. at 313, 389 S.E.2d at 74. The Court concluded that Puryear's state of mind was "highly relevant as it relates directly to the status of her relationship with defendant prior to her disappearance. The probative value of this evidence outweighs any potential prejudice to defendant." *Id.*

In *Alston*, 307 N.C. 321, 298 S.E.2d 631, decided under common law principles before our adoption of the Rules of Evidence, the Court noted that evidence regarding a homicide victim's fear of the defendant may be admissible provided it is accompanied by some factual basis for that fear. We said:

> Evidence of a victim's fear of the defendant is subject to misuse. Therefore, the naked assertion by a victim prior to his death that he fears the defendant should not be admitted into evidence absent some evidence tending to show a factual basis for such alleged fear.

Id. at 328, 298 S.E.2d at 637.

Here, the complained-of testimony was admissible under *Alston*, a pre-Rules case, and under Rule 803(3), as interpreted by *Faucette* and *Cummings*, to show the state of mind of Jackie Lynch and the relationship between her and her husband, defendant, shortly before her murder. The three witnesses testified that Jackie Lynch, when speaking about her husband shortly before the murder, was "nervous and upset," unusually quiet and had "fear in her voice."[3] Evidence of the threats made by defendant was admissible to explain Jackie Lynch's then-existing mental and emotional state, vis-a-vis defendant, as described by the witnesses. As in *Cummings*, the evidence was more probative than prejudicial; there was no error in its admission.

For the reasons given, defendant must have a

New trial.

TRIANGLE LEASING COMPANY, INC. v. ROBERT F. McMAHON, MARILYNNE M. McMAHON, JOSEPH G. PRIEST, AND WILMINGTON AUTO RENTAL, INC.

No. 554A89

(Filed 26 July 1990)

Master and Servant § 11.1 (NCI3d)— noncompetition agreement— reasonableness as to territory and time—preliminary injunction

A noncompetition clause in an employment contract with a car rental business in which defendant agreed that he would not "solicit or attempt to procure the customers, accounts, or business" of the employer within the State of North Carolina for a period of two years following termination of his employment does not prohibit all competition by defendant throughout North Carolina but merely prohibits defendant from directly or indirectly soliciting the business of the employer's known customers in areas in which the employer operates. When so construed, the noncompetition clause is reasonable and en-

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3. Pruitt testified that the victim had fear in her voice. Although this testimony was stricken from the record, it may be allowed as it defines the state of mind of the victim. Other witnesses' testimony clearly described the victim as acting differently than she normally did before she described the defendant's threats.

forceable as to both territory and time, and the trial court properly entered a preliminary injunction restraining defendant from soliciting the business of his former employer for two years. However, the contract did not support a provision of the injunction prohibiting defendant from becoming employed by a competing car rental company in any capacity within North Carolina for the same period of time.

Am Jur 2d, Master and Servant § 106.

Justice MEYER dissenting in part.

Chief Justice EXUM joins in this dissenting opinion.

APPEAL by the plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 96 N.C. App. 140, 385 S.E.2d 360 (1989), reversing the entry of a preliminary injunction by *Allen, J.*, dated 31 October 1988 in the Superior Court of WAKE County. Heard in the Supreme Court 16 May 1990.

Kirby, Wallace, Creech, Sarda, Zaytoun & Cashwell, by John R. Wallace and Cheryl M. Swart, for plaintiff-appellant.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for defendant-appellees.

MARTIN, Justice.

Plaintiff Triangle Leasing Company, Inc. (hereinafter Triangle) is a North Carolina corporation whose primary business is renting automobiles, trucks, and vans in eastern and central North Carolina. Having opened its doors in the Raleigh area in 1979, the company was ready to expand to Wilmington by the fall of 1986 and in September of that year hired defendant Robert F. McMahon to manage their new office there. As part of the employment contract between Triangle and Mr. McMahon, the parties agreed that if Mr. McMahon's employment with Triangle was terminated for any reason, he would not "solicit or attempt to procure the customers, accounts, or business of [Triangle]" for a period of two years following his termination. In November of 1986, Triangle also hired Mr. McMahon's wife, defendant Marilynne McMahon, at the Wilmington location. On Friday, 30 September 1988, both Mr. and Mrs. McMahon informed Triangle that they were terminating their employment and would be establishing a competing car rental business, Wilmington Auto Rental, Inc., which would operate under the Thrifty

Car Rental franchise a few blocks from the Wilmington office of Triangle.

During the next two weeks, a number of Triangle's customers were contacted by the McMahons who attempted to solicit their business for the McMahons' new company, Wilmington Auto Rental. In an effort to enforce the no-solicitation clause of its employment contract with defendant Robert F. McMahon, Triangle sought a temporary restraining order prohibiting such action on the part of the McMahons. A temporary restraining order was filed on 11 October 1988 and renewed by consent of the parties on 21 October 1988. Following an evidentiary hearing, a preliminary injunction was granted on 31 October 1988 which enjoined defendants Robert F. and Marilynne McMahon from (1) using or retaining plaintiff's records, customer lists or price lists; (2) soliciting plaintiff's customers or accounts within the State of North Carolina for two years; (3) encouraging plaintiff's employees to work for a different rental company; and (4) working with co-defendant Wilmington Auto Rental, Inc. in the rental and sales business in North Carolina for two years from the date of termination of defendants' employment with Triangle. Defendants appealed the issuance of this injunction.

In a divided opinion, the Court of Appeals determined that the injunction was invalid because the noncompetition clause of the underlying employment contract was overbroad as to the territorial and time restrictions it imposed on Mr. McMahon and, hence, was unenforceable. Since the contract itself was unenforceable, the majority concluded that the injunction should not have been issued. The majority reached this conclusion based on its understanding that the employment agreement between the parties prohibited Mr. McMahon from working anywhere within the State of North Carolina in the car rental business, although Mr. McMahon's employment contacts were in actuality restricted to the Wilmington area. In his dissent, Judge Cozort adopts the same reading of the employment contract, but concludes that it was reasonable to restrict Mr. McMahon's employment throughout the state despite his exclusive assignment to Wilmington. Hence, from the dissent's point of view, the contract was enforceable and issuance of the preliminary injunction was proper.

Upon examining the record, we have a different view of the employment contract between the parties and conclude that the injunction as written is only partially correct. We find that the

employment contract does not restrict all competition between Mr. McMahon and Triangle throughout the State of North Carolina, but rather only prohibits the direct or indirect solicitation of Triangle's customers and accounts for the specified two year period. As such, we find the noncompetition clause reasonable as to both time and territory and conclude that its terms are enforceable. Since the no-solicitation clause of the contract is enforceable and no other questions regarding the propriety of the issuance of the preliminary injunction are before this Court, we hold that the trial court's order was properly entered. However, we note also that in addition to enjoining solicitation of Triangle's business, the injunction as written also enjoins the McMahons from becoming employed by Wilmington Auto Rental, Inc. in any capacity within the State of North Carolina for two years from the issuance of the injunction. Because this portion of the injunction goes beyond the four corners of the contract it was designed to enforce, we affirm the decision of the Court of Appeals reversing the issuance of the injunction as to this prohibition only. We remand to the Court of Appeals for further remand to the trial court with instructions to strike the fourth clause of the existing order. As to the remainder of the injunction, we reverse the Court of Appeals and hold that its issuance was proper.

Concerning the issuance of a preliminary injunction, this Court has stated:

> A preliminary injunction . . . is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation. *Waff Bros., Inc. v. Bank*, 289 N.C. 198, 221 S.E.2d 273; *Pruitt v. Williams*, 288 N.C. 368, 218 S.E.2d 348; *Conference v. Creech*, 256 N.C. 128, 123 S.E.2d 619.

Investors, Inc. v. Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). The question on appeal in this case concerns the first prong of this test, the plaintiff's likelihood of prevailing on the merits, rather than the second prong of the test, the necessity for the injunction. Where a preliminary injunction is sought to enforce a noncompetition clause in an employment contract, this Court

has held that the employment agreement itself must be valid and enforceable in order for the employer to be able to show the requisite likelihood of success on the merits. *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983). Determination of the enforceability of the contract, in turn, rests on the likelihood that the plaintiff will be able to show that the covenant is (1) in writing; (2) reasonable as to terms, time, and territory; (3) made a part of the employment contract; (4) based on valuable consideration; and (5) not against public policy. *See, e.g., Whittaker General Medical Corp. v. Daniel*, 324 N.C. 523, 379 S.E.2d 824 (1989); *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375 (1988); *Greene Co. v. Kelley*, 261 N.C. 166, 134 S.E.2d 166 (1964). Because the sole question raised in Judge Cozort's dissent concerns the reasonableness of the contract as to time and territory, the plaintiff's likelihood of meeting its burden of proof on the remaining criteria for determining the enforceability of this contract is not before this Court. N.C.G.S. § 7A-30(2). Rather, we need only examine whether this contract's terms which restrict Mr. McMahon's competition with his former employer for a specified period of time and for a specified location are reasonable.

The applicable territorial restriction contained in the parties' employment agreement states the following:

> Employee will not . . . within the State of North Carolina or any other state or territory in which the company conducts business, directly or indirectly solicit or attempt to procure the customers, accounts, or business of Company, or directly or indirectly make or attempt to make car or truck-van rental sales to the customers of Company.

In analyzing the employment agreement, the Court of Appeals concluded that the contract prohibited Mr. McMahon from competing with Triangle in any capacity anywhere in the State of North Carolina for two years. Based on this conclusion, the majority opinion framed the legal question in the case as follows:

> . . . whether the Company can bar Employee from competing with the Company's business throughout North Carolina for two years, when Employee's confidential information and customer contracts derive from only one city in the state. The answer to this issue resolves the ultimate issue of whether the trial court properly granted a preliminary injunction against Employee.

Triangle Leasing Co. v. McMahon, 96 N.C. App. 140, 145-46, 385 S.E.2d 360, 363 (1989).

We disagree with the Court of Appeals' reading of this employment contract, and conclude that the pertinent clause of the contract does not prohibit all competition by Mr. McMahon throughout North Carolina, but rather merely restrains him from soliciting the business of plaintiff's known customers in areas in which the company operates. We therefore find it unnecessary to address the question of whether it would have been reasonable for the plaintiff to have attempted to prohibit all competition by the defendant Robert F. McMahon within the State of North Carolina for two years. In determining whether this preliminary injunction was properly issued, we must instead decide whether the terms and conditions of this contract clause were reasonably necessary to protect the employer's legitimate business interests. *See, e.g., Greene Co. v. Arnold*, 266 N.C. 85, 145 S.E.2d 304 (1965); *Greene Co. v. Kelley*, 261 N.C. 166, 134 S.E.2d 166; *Asheville Associates v. Miller*, 255 N.C. 400, 121 S.E.2d 593 (1961). Upon reviewing the record, we find there is ample evidence to support plaintiff's contention that defendant McMahon's access to customer lists, price sheets, and policies affecting company business outside of the Wilmington area would warrant a contractual prohibition against solicitation of Triangle's customers regardless of their location. Because we find sufficient evidence to support a conclusion that defendant McMahon could properly be restricted from soliciting Triangle's customers where it does business, we conclude that the territorial restriction in the noncompetition clause of the parties' contract was reasonable and enforceable.

Turning next to the question of the reasonableness of the time restriction, we note simply that where the activity prohibited is as narrowly confined as in the case before us, a two year time restriction is not improper. *See, e.g., Whittaker Gen. Medical Corp. v. Daniel*, 324 N.C. 523, 379 S.E.2d 824; *Enterprises, Inc. v. Heim*, 276 N.C. 475, 173 S.E.2d 316 (1970); *Greene Co. v. Arnold*, 266 N.C. 85, 145 S.E.2d 304; *Exterminating Co. v. Griffin*, 258 N.C. 179, 128 S.E.2d 139 (1962).

In conclusion, we hold that the territory and time restrictions of the parties' contract are reasonable in light of the activity constrained, that the contract is enforceable as to the noncompetition clause, and that the Court of Appeals erred in reversing the trial

court's issuance of a preliminary injunction designed to enforce the employment agreement. However, as above noted, the fourth clause of the trial court's order improperly enjoins conduct beyond the scope of the parties' own agreement. That clause states that the defendants are enjoined and restrained from:

> 4. Becoming employed with, consulting with, or participating in the management of the Defendant Wilmington Auto Rental, Inc. and further from being employed by or consulting with the Defendant Joseph G. Priest [a co-owner of Wilmington Auto Rental, Inc.] in the automobile, van and truck rental and sales business in North Carolina for a period of two years from September 30, 1988.

While defendants may properly be restrained from soliciting the business of their former employer under the terms of their employment agreement for two years from the date of issuance of the temporary restraining order, their own contract does not support an injunction against all competition throughout the state for the same period of time. We therefore remand to the Court of Appeals for further remand to the trial court with directions that the injunction remain in effect with proper amendments consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Justice MEYER dissenting in part.

I agree completely with the Court that the contract in question is enforceable. However, I must dissent from that portion of the opinion which overturns the injunctive restraint on the McMahons from employment with or other participation in Wilmington Auto Rental, Inc. The majority would prohibit the defendants McMahons from directly or indirectly soliciting the customers or accounts of Triangle Leasing Company, Inc. (hereinafter "Triangle"). Yet, it permits the McMahons to engage in the same business of auto leasing under the employ of the very party with whom the McMahons earlier conspired to pirate customers and accounts from Triangle. Because the majority affirms a right yet denies the only effective remedy, I must dissent.

It is human nature to tell what one knows and to share that information which one has with a close business associate. There is little doubt that the McMahons can divulge Triangle account

and customer information to their business associate in the privacy of Wilmington Auto Rental offices without ever approaching a Triangle customer, even though doing so could and probably would result in a violation of the injunction not to indirectly solicit Triangle customers or otherwise reveal account information if the associate were to use that information. That they could do so with impunity is manifest; that there is a proclivity to do so is borne out by the facts.

The relevant part of the employment agreement states:

> Employee will not, for a period of two (2) years from the date of termination of this Agreement . . . and within the State of North Carolina . . . , directly or indirectly, solicit or attempt to procure the customers, accounts, or business of [Triangle], or directly or indirectly make or attempt to make car of [sic] truck-van rental sales to the customers of [Triangle]. . . . Employee further agrees not to divulge the names, addresses, or other information concerning the customers and accounts of the Company or any other confidential information acquired during employment by the Company to any person, firm, corporation, association or other entity for any purpose whatsoever.

The employment contract unequivocally prohibits revealing customer and account information to other parties, particularly competitors such as Wilmington Auto Rental. Thus, covenants lying within the four corners of the document make clear that an injunction prohibiting employment with a competitor already shown to solicit and use confidential account information is one within the contemplation of the parties to the agreement.

More importantly, however, and contrary to the notion of the majority, the four corners of the contract do not limit the injunctive relief available to Triangle. "[A] motion for a preliminary injunction is not to be confused with a request for specific enforcement of a provision in a contract which has been proven valid and enforceable." *A.E.P. Industries v. McClure*, 308 N.C. 393, 413, 302 S.E.2d 754, 766 (1983) (Martin, J., dissenting). "The former is a request for *extraordinary equitable relief* pending resolution of the controversy between the litigants. The latter arises after a contract has been either stipulated or proven valid and enforceable and the movant has established his right to have the contract enforced." *Id.* In the case currently before us, we are deciding

the propriety of a preliminary injunction rather than the remedy of specific enforcement of a contract.

It is axiomatic that a court of equity may tailor the remedy necessary to preserve the rights of the complainant and that "a properly tailored injunction may sometimes contain terms that go beyond the plaintiff's rightful position to avoid falling short of it." Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 Minn. L. Rev. 627, 671 (1988). "The injunction's *aim* must be the plaintiff's rightful position, but to achieve that aim, its *terms* may impose conditions on the defendant that require actions going beyond the plaintiff's rightful position." *Id.* at 678. *See, e.g., Hutto v. Finney*, 437 U.S. 678, 687, 57 L. Ed. 2d 522, 532 (1978), *reh'g denied*, 439 U.S. 1122, 59 L. Ed. 2d 83 (1979) (where the Court stated that in fashioning a broad injunctive remedy, the lower court "had ample authority . . . to address each element contributing to the violation . . . [and] was justified in entering a comprehensive order *to insure against the risk of inadequate compliance*" (emphasis added)). Assuming the majority is correct in characterizing the injunction prohibiting employment of the McMahons by Wilmington Auto Rental as a condition going beyond the rights of plaintiff, I conclude that such a condition was a reasonable and necessary one designed to ensure against noncompliance with that part of the prohibitory injunction upheld by the majority.

Nonetheless, it appears to me that the narrow prohibition against employment here was a proper one enforcing Triangle's explicit rights. Here, the trial court determined that plaintiff was likely to show that the McMahons conspired to violate the employment agreement. Injunction is a proper remedy where a stranger attempts to induce another to break a contract which will result in irreparable injury to the rights of the complaining party. *Sineath v. Katzis*, 218 N.C. 740, 755, 12 S.E.2d 671, 681 (1941); *see also* Annot. "Liability for procuring breach of contract," 26 A.L.R.2d 1227 § 46, at 1275 (1952). Moreover, "[i]njunction is an appropriate and available remedy to prevent irreparable injury to property rights or business from illegal conspiracies or confederations of persons for the purpose of destroying or injuring or doing violence to such business or property rights." 42 Am. Jur. 2d *Injunctions* § 73, at 818 (1969). "[S]uch relief is available notwithstanding the fact that the plaintiff may not be entitled to specific performance of the [employment] contract, either positively or negatively." *Id.*

§ 98, at 847. In this case, the trial court did not issue an injunction against Wilmington Auto Rental or Joseph G. Priest barring them from further soliciting the breach of the employment agreement, only because "the legitimate business interests of [Triangle] are protected if . . . [the McMahons] are enjoined from employment and other participation in the operation of Defendant Wilmington Auto Rental, Inc." Yet, the majority would permit the McMahons, as 20% shareholders, to rejoin the 80% shareholder, Mr. Priest, in a business confederation formed as a conspiracy to breach the very covenant which the majority claims it is upholding.

"Although in reviewing the denial of a preliminary injunction this Court is not bound by the findings of the lower court, there is a presumption that the lower court's decision was correct, and the burden is on the appellant to show error." *A.E.P. Industries v. McClure*, 308 N.C. at 414, 302 S.E.2d at 766 (Martin, J., dissenting) (citations omitted). A preliminary injunction is issued for the purpose of preserving the status quo pending the action and will issue to prevent injury being committed or seriously threatened. *Conference v. Creech*, 256 N.C. 128, 142, 123 S.E.2d 619, 628 (1962); *R.R. v. R.R.*, 237 N.C. 88, 93, 74 S.E.2d 430, 434 (1953). The injunction will issue " 'if, in the opinion of the Court, issuance is necessary *for the protection of a plaintiff's rights during the course of litigation.*' " *A.E.P. Industries v. McClure*, 308 N.C. at 405, 302 S.E.2d at 761 (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)). Plaintiff should not be required to submit to, or defendant permitted to, inflict continuous or frequent violations of the plaintiff's rights. Where, as in this case, there is evidence of past wrongdoing by the parties enjoined and there would be grave difficulty in detecting future particular instances of the same type of disclosure, the trial court's injunction barring the McMahons' employment by Wilmington Auto Rental is a proper means to assure Triangle's interest in preserving the confidentiality of its customer and accounts information. *See, e.g., Philadelphia Record Co. v. Leopold*, 40 F. Supp. 346 (S.D.N.Y. 1941) (injunction is appropriate where damages would be difficult to compute and particular instances of contract breach would be difficult to detect); *see also* 42 Am. Jur. 2d *Injunctions* § 23, at 756 (1969) (a court is not obliged to shut its eyes to the demands of justice; the rules of equity are less strict in issuing an injunctive order where a defendant threatens repeated perpetration of a wrong).

The preliminary injunction that issued from the trial court is not an overbroad one. The injunction does not prohibit defendants McMahons from engaging in the auto rental and sales business. Rather, all that is prohibited is that they do not do so with a co-conspirator who knowingly induced the breach of an employment contract. Consequently, I conclude that the injunction in its entirety is both necessary and reasonable under the circumstances of this case.

Chief Justice EXUM joins in this dissenting opinion.

KIRBY BUILDING SYSTEMS, INC., A TEXAS CORPORATION v. MONROE E. McNIEL, DEFENDANT AND THIRD-PARTY PLAINTIFF v. JERRY W. FOLEY, D/B/A FOLEY CONSTRUCTION COMPANY AND JAMES O. MORTON, JR. AND WIFE, REBECCA P. MORTON, THIRD-PARTY DEFENDANTS

No. 222PA89

(Filed 26 July 1990)

1. **Judgments § 6 (NCI3d)— correction of judgment nunc pro tunc—after oral notice of appeal—jurisdiction**

The trial court had jurisdiction to issue *nunc pro tunc* orders on 14 April 1986 in an action which began when plaintiff Kirby Building Systems, Inc. filed an action against McNiel for breach of contract; McNiel answered and filed a third-party complaint against defendants Foley and the Mortons alleging that he had acted as an agent of the third-party defendants; Foley answered that all of his dealings with plaintiff Kirby were as an agent for the Mortons and cross-claimed against the Mortons; evidence in the case was first presented on 11 February 1986; the judge at the close of McNiel's evidence orally stated that he would grant McNiel's motion to dismiss Kirby's claim and ordered McNiel to draw the order but made no formal findings of fact or conclusions of law; the clerk did not record any judgment or order of any kind in the court minutes; Kirby gave oral notice of appeal in open court but undertook no further action; the parties stipulated that judgment could be signed out of term; the trial judge on his own motion filed a *nunc pro tunc* order on 26 February 1986 rescinding the 12 February 1986 order and directing that the case be calendared for further testimony at his next term; the

judge at that time was no longer holding court in that county and his session of court there had ended; following conclusion of evidence after the April hearing, the trial judge announced that he would enter judgment for plaintiff against defendant McNiel and for third-party plaintiff McNiel against third-party defendants; and other *nunc pro tunc* orders disposing of the various claims were subsequently filed. The parties had stipulated that the trial court could sign its judgment out of term and the trial judge made findings and conclusions as required in that the judge specifically found in its first *nunc pro tunc* order that the ends of justice would be more reasonably served by permitting the third-party defendants the opportunity to present their case prior to ruling on defendant McNiel's motion to dismiss and concluding as a matter of law that the case should be continued until the next available nonjury session. By determining in the *nunc pro tunc* order that justice required a denial of defendant McNiel's motion to dismiss, the trial judge nullified his prior ruling rendered in favor of the defendant and the notice of appeal given by plaintiff Kirby was ineffective to wrest jurisdiction from the trial court. N.C.G.S. § 1A-1, Rule 41(b), N.C.G.S. § 1A-1, Rule 52(a)(1).

Am Jur 2d, Judgments §§ 186 et seq.

2. Principal and Agent § 1 (NCI3d)— construction of bowling alley—purchase of materials—agency of purchaser

The evidence supported the trial judge's findings that defendant McNiel was the buyer of building materials from plaintiff Kirby where McNiel signed the purchase order at issue as "buyer"; all accounts, contracts, purchase order supplements, invoices, statements, bills of lading, and other documents were in the name of defendant McNiel individually; plaintiff Kirby delivered the goods; and defendant McNiel himself acknowledged at trial that he could see how Kirby could have looked to his credit. Although third-party defendant Foley apparently telephoned change orders to Kirby, Kirby believed that Foley was an employee of McNiel and that Foley had the authority from McNiel to make changes; there was no intent on the part of Kirby to substitute a new debtor with the intent to release the prior one.

Am Jur 2d, Agency §§ 21, 316 et seq.

3. Principal and Agent § 1 (NCI3d)— construction of bowling alley—purchaser of materials—agency

There was adequate evidence to support the trial judge's finding that McNiel was in fact acting as an agent for the Mortons where McNiel purchased materials to use in the construction of a bowling alley; the Mortons were the lessees of the land on which the bowling alley was to be built; James O. Morton, Jr. and Rebecca P. Morton were not only husband and wife, but were partners doing business as Carteret Lanes; both parties signed the construction financing loan, the lease for the land on which the building was to be constructed, and the contract with Foley, the construction contractor; and McNiel and Foley stated that they were acting as agents for the Mortons.

Am Jur 2d, Agency § 21.

ON petition for certiorari granted 19 October 1989, reviewing a 14 April 1986 judgment entered by *Barefoot, J.*, sitting without a jury in Superior Court, CARTERET County. Heard in the Supreme Court 13 March 1990.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Susan M. Parker, for plaintiff-appellant.

Wheatly, Wheatly, Nobles, Weeks & Wainwright, P.A., by C.R. Wheatly, III, for defendant and third-party plaintiff-appellee.

Bailey & Dixon, by Gary S. Parsons and Patricia P. Kerner, for third-party defendant-appellees James O. and Rebecca P. Morton.

MEYER, Justice.

In this case we decide that the 14 April 1986 decision of the trial court should be affirmed. Because our decision is in large measure one based upon a procedural matter, we set out the posture of the case at some length.

Plaintiff Kirby Building Systems, Inc. (hereinafter Kirby) is a supplier of prefabricated structural steel and sheet metal building materials. Kirby alleged that defendant McNiel ordered Kirby products for use in the construction of a bowling alley. Kirby delivered the materials and invoiced the order to McNiel. Having never received payment, Kirby instituted this action against McNiel for

breach of contract in the amount of $64,723.12, plus interest and attorney's fees.

McNiel answered and filed a third-party complaint against defendants Jerry Foley (hereinafter Foley) and James and Rebecca Morton (hereinafter the Mortons). McNiel alleged that he had met with plaintiff as an agent of the third-party defendants. Foley was the construction contractor on this project, and the Mortons were the lessees of the land on which the bowling alley was to be built. McNiel sought indemnification from the third-party defendants in the event that he should be adjudged liable to Kirby.

Foley answered that all his dealings with Kirby were as agent for the Mortons. He also cross-claimed against the Mortons, alleging that they had failed to pay the amount due him under the construction contract.

The Mortons denied that either Foley or McNiel had acted as their agent in dealing with Kirby. They also denied owing any payments to Foley under their contract for the construction of the building.

Evidence in the case was first presented before Judge Barefoot on 11 February 1986. At the close of McNiel's evidence on 12 February 1986, the judge orally stated that he would grant McNiel's motion to dismiss Kirby's claim and ordered McNiel to "draw your order." The court made no formal findings of fact or conclusions of law at that time, nor did the clerk record any judgment or order of any kind in the court minutes. Kirby gave oral notice of appeal in open court but undertook no further action necessary to perfect such appeal. The parties stipulated that judgment could be signed out of term. Kirby subsequently moved that the trial judge make findings of fact and conclusions of law.

However, in a *nunc pro tunc* order signed 19 February 1986 and filed 26 February 1986, Judge Barefoot on his own motion rescinded his 12 February 1986 order and directed that the case be calendared for further testimony at his next term in Carteret County, beginning 14 April 1986. Public records indicate that Judge Barefoot held court in Carteret County from 10 February 1986 until 14 February 1986. Thus, at the time he signed the *nunc pro tunc* order on 19 February 1986, the judge was no longer holding court in Carteret County, and his session of court there had ended.

Following the conclusion of all evidence after the April 1986 hearing, the trial judge announced he would enter judgment for the plaintiff against defendant McNiel and for third-party plaintiff McNiel against the third-party defendants. On 4 December 1986, Judge Barefoot filed a judgment signed 1 December 1986 *nunc pro tunc* to 14 April 1986 dismissing with prejudice Foley's cross-claim against the Mortons. On that same day, he filed a judgment dated 6 December 1986 *nunc pro tunc* to 14 April 1986 in favor of Kirby against McNiel. A subsequent judgment filed 22 December 1986 and signed 18 December 1986 *nunc pro tunc* to 14 April 1986 gave McNiel the right of indemnification from third-party defendants Mortons and Foley. Though all third-party defendants gave oral notice of appeal, no party in fact perfected an appeal. The Court of Appeals allowed the Mortons' petition for writ of certiorari on 14 December 1987 to review the judgments entered 14 April 1986 and signed in December of that year.

On appeal, the Court of Appeals concluded in a unanimous unpublished opinion, 91 N.C. App. 444, 372 S.E.2d 581 (1988), that the trial court lacked jurisdiction to enter judgments arising from the 14 April 1986 hearing. The Court of Appeals reasoned that plaintiff's unperfected oral notice of appeal following the dismissal of plaintiff's case on 12 February 1986 deprived the trial court of jurisdiction to rescind subsequently and out of session its granting of the motion to dismiss. Accordingly, the Court of Appeals vacated the judgments entered after the 12 February 1986 judgment appealed from. The Court of Appeals declined to consider the merits of the February 1986 dismissal on the grounds that (1) Kirby had failed to properly perfect its appeal and (2) the issue was not before the court by certiorari. This Court denied the plaintiff's petition for discretionary review on 4 January 1989. 323 N.C. 704, 377 S.E.2d 224 (1989).

On 7 April 1989, Kirby filed a petition for writ of certiorari with the Court of Appeals to review the order of 12 February 1986. The Court of Appeals denied this petition. On 27 June 1989, this Court granted plaintiff's petition for certiorari to review the denial of certiorari by the Court of Appeals. 325 N.C. 431, 381 S.E.2d 774 (1989). On 20 October 1989, we allowed the Mortons' petition for the limited purpose of directing that the Court would consider the whole record and would permit the parties to assign error to such portions of the entire record as they deemed appropriate.

Initially, we conclude that Judge Barefoot in effect vacated the February 1986 ruling. We come to this conclusion after first determining that Kirby gave notice of its intent to appeal, which ordinarily would have removed the case from the jurisdiction of the trial court.

[1] Prior to a recent amendment to Rule 3 of the Rules of Appellate Procedure, oral notice of appeal was appropriate as soon as the trial court rendered a judgment. N.C.R. App. P. 3(a) (1989); N.C.G.S. § 1-279 (1983).[1] If a party did not give oral notice of appeal but decided at a later date to appeal a judgment, appeal from the judgment had to be taken within ten days after its entry. N.C.R. App. P. 3(c) (1989); N.C.G.S. § 1-279 (1983). Specifically, these provisions stated in relevant part:

> (a) From Judgments and Orders Rendered in Session. Any party entitled by law to appeal from a judgment or order of a superior or district court *rendered* in a civil action or special proceeding during a session of court may take appeal by
>
> (1) giving oral notice of appeal at trial . . . ; or
>
> (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.
>
> . . . .
>
> (c) Time When Taken by Written Notice. If not taken by oral notice as provided in Rule 3(a)(1), appeal from a judgment or order in a civil action or special proceeding must be taken within 10 days after its *entry*.

N.C.R. App. P. 3(a), (c) (1989) (emphasis added). See also N.C.G.S. § 1-279, which is virtually identical. *Giannitrapini v. Duke University*, 30 N.C. App. 667, 669, 228 S.E.2d 46, 47 (1976). Rule 3 and N.C.G.S. § 1-279 draw a distinction between judgments "rendered" and judgments "entered."

To render judgment means to "pronounce, state, declare, or announce" judgment. Black's Law Dictionary 1165 (rev. 5th ed.

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1. Amendments to Rule 3, effective 1 July 1989, deleted the right to give oral notice of appeal. The legislature repealed N.C.G.S. § 1-279 effective 1 July 1989. These changes apply to all judgments of the district or superior court entered on or after the effective date and thus do not affect the issues before us today.

1979). Rendering judgment is "not synonymous with 'entering' . . . the judgment. Judgment is 'rendered' when [the] decision is officially announced, either orally in open court or by memorandum filed with [the] clerk." *Id.; Provident Finance Co. v. Locklear*, 89 N.C. App. 535, 537, 366 S.E.2d 599, 600 (1988). *See also* N.C.G.S. § 1A-1, Rule 58 (1983) (where judgment is rendered, the clerk's notation shall constitute entry for the purposes of the Rules of Civil Procedure). Thus, the plain language of the Rules of Appellate Procedure requires no formal entry of a written judgment or clerk's notation before notice of appeal is effective to divest the trial court of jurisdiction.

The trial judge stated orally that he was going to allow McNiel's motion to dismiss. Plaintiff Kirby immediately gave oral notice of appeal. In the *nunc pro tunc* order, the trial judge stated that the "Court granted the Defendant McNiel's motion" to dismiss. We thus conclude that the trial court rendered a judgment[2] and that the plaintiff's oral notice of appeal was effective.

As a general rule, an appeal removes a case from the jurisdiction of the trial court. Pending the appeal, the trial judge is *functus officio*, subject to two exceptions and one qualification.

> The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal. The qualification to the general rule is that "the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned" and thereby regain jurisdiction of the cause.

Bowen v. Motor Co., 292 N.C. 633, 635-36, 234 S.E.2d 748, 749 (1977) (quoting *Machine Co. v. Dixon*, 260 N.C. 732, 735-36, 133 S.E.2d 659, 662 (1963)). Abandonment of an appeal exists only where there is express notice, showing, and judgment of abandonment of appeal. Only then does the appeal cease to be pending. *Bowen v. Motor Co.*, 292 N.C. 633, 234 S.E.2d 748.

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2. We note parenthetically that the Court of Appeals in its unpublished opinion stated that judgment had been entered. This proved to be inaccurate, as the clerk filed with this Court an affidavit and an actual certified copy of the minutes of the session to the effect that the judgment had not been entered nor any notation made by the clerk.

The record shows that the session ended before the trial judge signed and filed the *nunc pro tunc* order. The record also indicates that there was neither notice of abandonment of appeal nor showing and judgment of any such abandonment.

However, the parties stipulated that the trial court could sign its judgment out of term. Rule 41(b) of the North Carolina Rules of Civil Procedure states that "[i]f the court renders judgment on the merits against the plaintiff, the court *shall* make findings as provided in Rule 52(a)." N.C.G.S. § 1A-1, Rule 41(b) (1983) (emphasis added). Rule 52(a)(1) of the North Carolina Rules of Civil Procedure states that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court *shall* find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. § 1A-1, Rule 52(a)(1) (1983) (emphasis added). The requirement to make findings of fact and conclusions of law is mandatory, and a failure to do so is grounds for granting a new trial. *O'Grady v. Bank*, 296 N.C. 212, 218, 250 S.E.2d 587, 592 (1978); *Helms v. Rea*, 282 N.C. 610, 618, 194 S.E.2d 1, 7 (1973); *Bank v. Easton*, 12 N.C. App. 153, 182 S.E.2d 645, *cert. denied*, 279 N.C. 393, 183 S.E.2d 245 (1971).

The trial judge in this case specifically found in his *nunc pro tunc* order "that the ends of justice would be more reasonably served by permitting . . . Third-Party Defendants [Foley and the Mortons] opportunity to present their case prior to the Court's ruling on the Defendant McNiel's motion to dismiss." The judge concluded as a matter of law that the cause should be continued until the next available nonjury session of Carteret County Superior Court. The findings of fact and conclusions of law entered by the trial judge supported denial of a motion to dismiss.

The trial judge having made findings of fact and conclusions of law as required by statute and as stipulated to by the parties, it is our duty to determine whether the findings of fact were supported by the evidence and whether those findings support the conclusions of law. *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984); *Williams v. Insurance Co.*, 288 N.C. 338, 343, 218 S.E.2d 368, 371 (1975). Examination of the record reveals that evidence to support the findings does exist and that the conclusions of law are supported by the findings.

By determining in the *nunc pro tunc* order that justice required a denial of defendant McNiel's motion to dismiss, the trial judge nullified his prior ruling rendered in favor of the defendant. There can be no appeal where there is no judgment. Thus, the notice of appeal given by plaintiff Kirby was ineffective to wrest jurisdiction from the trial court.

Consequently, we hold that under the peculiar facts of this case, where the judge was required to make findings of fact and conclusions of law and where he did so pursuant to a stipulation of the parties, the judge could find from the evidence that justice was better served by denial of the motion to dismiss that he had previously granted orally and could enter the *nunc pro tunc* order. The parties having participated fully in the subsequent proceedings without objection, we determine that the proceedings which followed the rendering of the 12 February 1986 ruling were within the jurisdiction of the trial judge.

[2] We must now determine whether the evidence supports the trial judge's findings that defendant McNiel was the buyer of the building materials. If we find that it does, we must then determine whether the findings support the conclusion that defendant McNiel had a right of indemnification from third-party defendants Foley and Mortons in that McNiel acted as an agent and in accommodation to the third-party defendants. We find that the evidence supports the findings and the findings in turn support the conclusions and affirm the decision of the trial court.

"[A]ppellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975); *see also*: 1 Strong N.C. Index 2d, Appeal and Error, § 57.3." *In re Montgomery*, 311 N.C. at 110-11, 316 S.E.2d at 252-53. The evidence supporting a judgment against defendant McNiel was plenary. McNiel signed the purchase order at issue in this case as "buyer." All accounts, contracts, purchase order supplements, invoices, statements, bills of lading, and other documents were in the name of defendant McNiel individually. Plaintiff Kirby delivered the goods, and defendant McNiel himself acknowledged at trial that he could see how Kirby could have looked to his credit. We find that there was sufficient evidence to conclude that McNiel was liable to Kirby.

McNiel urges us to conclude that certain change orders apparently telephoned to Kirby by third-party defendant Foley constituted a novation of the contract by law. Novation requires the agreement of the parties that a new contract take the place of an existing obligation. 58 Am. Jur. 2d *Novation* § 15, at 621 (1989); *see also* 3 Strong's N.C. Index 3d *Contracts* § 19 (1976). The intention of the parties to effectuate a novation must be clear and definite, for novation is never to be presumed. *Wilson v. McClenny*, 262 N.C. 121, 130, 136 S.E.2d 569, 576 (1964). Kirby believed that Foley was an employee of McNiel and that Foley had the authority from McNiel to make changes. There was no intent on the part of Kirby to substitute a new debtor with the intent to release the prior one. *Electric Co. v. Housing, Inc.*, 23 N.C. App. 510, 209 S.E.2d 297 (1974), *cert. denied*, 286 N.C. 413, 211 S.E.2d 795 (1975).

[3] The evidence, the findings, and the conclusions also support the judgment against third-party defendants Mortons and Foley. The evidence reveals that James O. Morton, Jr., and Rebecca P. Morton were not only husband and wife, but were partners doing business as Carteret Lanes. Both parties signed the construction financing loan, the lease for the land on which the building was to be constructed, and the contract with Foley. McNiel and Foley stated that they were acting as agents for the Mortons. Although James Morton denied that an agency relationship existed between himself and McNiel and Foley, the trial court resolved this contradiction of fact against the Mortons. We thus conclude that there was adequate evidence to support the judge's finding that McNiel was in fact acting as an agent for the Mortons.

In conclusion, we hold that on the peculiar facts of this case, the trial court had jurisdiction to enter its *nunc pro tunc* orders of 14 April 1986. We conclude further that the judgments of the trial court in favor of Kirby against McNiel and in favor of McNiel against the Mortons and Foley are supported by the conclusions of law, which are supported by the findings of fact, and that the findings of fact are supported by the evidence offered at trial. The 14 April 1986 judgments of the trial court are affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. MICHAEL LLOYD BRUNSON

No. 564A89

(Filed 26 July 1990)

Constitutional Law § 34 (NCI3d)— driving while impaired—bench trial—attachment of jeopardy

Jeopardy did not attach in a trial in district court for driving while impaired and leaving the scene of an accident where the district attorney called the calendar and asked how all defendants intended to plead; defendant indicated that he would plead not guilty; defendant waited until after 5:00 p.m. for the case to be called; the charges were read to him and he again indicated that he would plead not guilty; the State was unable to contact its witnesses due to the lateness of the hour; the court refused a continuance; and the State dismissed the case, issuing warrants for the same charges that same day. In a nonjury criminal trial, jeopardy attaches when the court begins to hear evidence or testimony; a rule by which jeopardy attaches at the point at which the State introduces evidence or a witness begins to testify reflects an attempt to connect the consequences of jeopardy with the element which could result in conviction.

Am Jur 2d, Criminal Law § 261.

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 96 N.C. App. 347, 385 S.E.2d 542 (1989), vacating the order of *Small, J.*, at the 23 May 1988 Criminal Session of Superior Court, PASQUOTANK County, and remanding the case for trial. Heard in the Supreme Court 12 April 1990.

Lacy H. Thornburg, Attorney General, by Hal F. Askins, Associate Attorney General, for the State.

Twiford, O'Neal & Vincent, by Edward A. O'Neal, for defendant-appellant.

MEYER, Justice.

Defendant appeals the decision of the Court of Appeals, holding that jeopardy did not previously attach in his nonjury criminal

trial because no testimony or evidence was introduced. We conclude that in a nonjury criminal trial, jeopardy attaches when the court begins to hear evidence or testimony. We therefore affirm the order of the Court of Appeals.

As the procedural context of the case is determinative of the issue presented, we set it out in some detail. On 5 May 1987, defendant was charged with driving while impaired (DWI) in violation of N.C.G.S. § 20-138.1 and with leaving the scene of an accident (hit and run) in violation of N.C.G.S. § 20-166. On 20 July 1987, he appeared in district court. The case was scheduled for trial that morning. Like all criminal trials in district court, this was a bench trial, with the defendant having the right of appeal to superior court for a trial *de novo* before a jury. N.C.G.S. § 7A-290 (1989). The district attorney prosecuting the cases called the calendar and asked all defendants how they intended to plead. Defendant indicated that he would plead not guilty and requested a continuance because his attorney could not be present that day. District Court Judge John T. Chaffin declined to grant a continuance.

Defendant then signed a waiver of his right to counsel and waited until after 5:00 p.m. for the case to be called. The charges were read to him, and he again indicated that he would plead "not guilty." It is disputed whether he actually pled "not guilty" directly to the court or whether he merely responded to the prosecutor's inquiry. While waiting for the case to be called, the prosecutor had permitted the witnesses for the State to leave, with the understanding that they were to return to the courthouse upon notification of commencement of the trial. However, because of the late hour, the State was not able to contact its witnesses when the case was finally called. Without its witnesses, the State could not effectively try the case. Before introducing any evidence or calling witnesses, the State moved for a continuance. Judge Chaffin denied the motion and told the prosecutor that he could either try the case or dismiss it. The State dismissed the case, noting on the dismissal document that new warrants were to be issued. That same day, warrants were again issued for the same charges as had been dismissed earlier.

Defendant filed a motion to dismiss, alleging former jeopardy. District Court Judge Grafton G. Beaman heard and denied the motion on 11 December 1987. On 8 February 1988, the case was tried before District Court Judge J. Richard Parker. Defendant

was found guilty of DWI but not guilty of hit and run. Defendant appealed to the superior court, and on 23 May 1988, he again moved to dismiss the case on the grounds of former jeopardy. Superior Court Judge Herbert Small granted the motion to dismiss, holding that the defendant was properly arraigned on 20 July 1987; that in the court proceedings on 20 July 1987, jeopardy attached; and that the subsequent dismissal of the case precluded further prosecution for those offenses.

The Court of Appeals vacated the order of dismissal and remanded the case for trial. Relying on *In Re Hunt and In Re Dowd*, 46 N.C. App. 732, 266 S.E.2d 385 (1980), the Court of Appeals held that jeopardy attaches in a bench trial when "testimony or evidence is introduced," *State v. Brunson*, 96 N.C. App. at 350, 385 S.E.2d at 544, and that jeopardy therefore did not attach at the 20 July 1987 proceeding because no testimony or evidence was heard by the trier of fact.

Defendant contends that North Carolina has an established rule of law that in nonjury trials, jeopardy attaches when a defendant is called to the bar in a court of competent jurisdiction, is arraigned, and enters a plea to the criminal charges pending against him. This Court has held that jeopardy attaches in a jury trial when

> a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn.

State v. Shuler, 293 N.C. 34, 42, 235 S.E.2d 226, 231 (1977). In *State v. Coats*, 17 N.C. App. 407, 194 S.E.2d 366 (1973), the Court of Appeals stated that in nonjury trials in district courts, the aforementioned criteria would be met and jeopardy would attach when a valid warrant charging a defendant with an offense within a district court's jurisdiction is issued, the defendant makes a plea in response to the State's calling, and a "duly elected, qualified, and assigned District Court judge is present to sit as the trier of the facts." *Id.* at 415, 194 S.E.2d at 371-72. Defendant also relies on *State v. Lee*, 51 N.C. App. 344, 276 S.E.2d 501 (1981), as an affirmation of the rule stated in *Coats*.

Application of the above principles would mean that once a defendant has been arraigned, has pled, and has appeared before a qualified judge who is ready to hear the case, jeopardy has attached.

Defendant argues that upon his appearance in court on 20 July 1987, jeopardy attached because he was properly arraigned, entered a plea, and was before a qualified judge ready to hear the case. He contends that the trial in the district court on 8 February 1988 subjected him to jeopardy a second time. We find it unnecessary to determine whether defendant was in fact arraigned before the district court. We determine that the rule in North Carolina is similar to the federal rule in that jeopardy attaches in a nonjury trial when the court begins to hear evidence or testimony. *See, e.g., Serfass v. United States*, 420 U.S. 377, 388, 43 L. Ed. 2d 265, 274 (1975). Jeopardy did not attach on 20 July 1987 because the court did not hear any evidence and no witness testified. Defendant's trial on 8 February 1988 was therefore the first time jeopardy attached.

Two bases exist in North Carolina for the defense of former jeopardy: the state Constitution and the federal Constitution. The North Carolina Constitution does not specifically recognize former jeopardy as a defense, but this Court has interpreted the language of the law of the land clause of our state Constitution as guaranteeing the common law doctrine of former jeopardy. *See State v. Cameron*, 283 N.C. 191, 195 S.E.2d 481 (1973); *State v. Ballard*, 280 N.C. 479, 186 S.E.2d 372 (1972); *State v. Crocker*, 239 N.C. 446, 80 S.E.2d 243 (1954); *State v. Mansfield*, 207 N.C. 233, 176 S.E. 761 (1934); N.C. Const. art. I, § 19.

The federal Constitution explicitly recognizes the right of criminal defendants to be subjected no more than once to the risk of a conviction for a criminal offense. U.S. Const. amend. 5. This right has been extended to the states through the fourteenth amendment. *See Crist v. Bretz*, 437 U.S. 28, 57 L. Ed. 2d 24 (1978); *Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707 (1969). It is well settled that a state cannot establish laws, rules, or procedures that would deprive a defendant of his federally guaranteed freedom from former jeopardy. *See Benton v. Maryland*, 395 U.S. at 795, 23 L. Ed. 2d at 716. A state is free, however, to establish laws, rules, or procedures which preserve a defendant's fifth amendment rights and provide even greater protection than the federal Constitution mandates. *See State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988).

Defendant asserts that this latter course has been taken in North Carolina: that our Constitution confers an additional level

of protection upon defendants by recognizing the attachment of jeopardy at an earlier point in criminal proceedings than is the case under the federal Constitution. We disagree.

This Court has never before addressed the issue of when jeopardy attaches in a nonjury trial. The coverage of this issue by the Court of Appeals is varied. In *State v. Coats*, 17 N.C. App. at 415, 194 S.E.2d at 371-72, the Court of Appeals held that, in a bench trial, the presence of a competent judge who was ready to try a case was the equivalent of the impaneling of a jury and that jeopardy would attach at that time. This holding was reiterated by the Court of Appeals in *State v. Lee*, 51 N.C. App. at 348, 276 S.E.2d at 504. Despite these holdings, the results in these two cases would not have been different had the Court of Appeals applied the rule which we announce today. In *Coats*, a witness had already begun to testify prior to the termination of the first trial, and therefore jeopardy had attached under either rule. *Coats*, 17 N.C. App. at 408, 194 S.E.2d at 368. In *Lee*, the State dismissed the original misdemeanor charges and charged the defendant with a felony prior to arraignment and sixteen days prior to the scheduled start of the trial. *Lee*, 51 N.C. App. at 348, 276 S.E.2d at 504. Under either rule, jeopardy did not attach.

In *In Re Hunt and In Re Dowd*, 46 N.C. App. at 735, 266 S.E.2d at 387, the Court of Appeals stated that in juvenile proceedings, which are conducted without juries, "jeopardy attaches when the judge, as trier of fact, begins to hear evidence."

N.C.G.S. § 15A-931(a), the statute authorizing voluntary dismissals in criminal trials, requires the court clerk to note in the case file whether "a jury has been impaneled or evidence has been introduced." Arguably, this indicates an assumption by the legislature that jeopardy attaches upon introduction of evidence when a bench trial is held. We do not view this as a rule established by the legislature, but rather as an indication of legislative intent as to this issue. It is nevertheless of some persuasive value.

The United States Supreme Court has established the rule for federal courts that in nonjury trials, jeopardy attaches only when the court has begun to hear evidence. *Serfass v. United States*, 420 U.S. at 388, 43 L. Ed. 2d at 274. In jury trials, the established federal rule is identical to North Carolina's rule. *See State v. Shuler*, 293 N.C. at 42, 235 S.E.2d at 231.

The law of the land clause, the basis for the former jeopardy defense in North Carolina, is conceptually similar to federal due process. *Carrington v. Townes*, 306 N.C. 333, 336, 293 S.E.2d 95, 98 (1982), *cert. denied*, 459 U.S. 1113, 74 L. Ed. 2d 965 (1983); *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949). We therefore view the opinions of the United States Supreme Court with high regard in the context of interpreting our own law of the land clause. We do not accept defendant's contention that the law of this state confers greater former jeopardy protection upon defendants than the federal law does. The rule in North Carolina is that in nonjury trials, jeopardy attaches when the court begins to hear evidence or testimony.

The former jeopardy principle is a fundamental feature of our legal system, originating in the common law and later incorporated into our constitutions. *Benton v. Maryland*, 395 U.S. at 795, 23 L. Ed. 2d at 716. It benefits the individual defendants by providing repose; by eliminating unwarranted embarrassment, expense, and anxiety; and by limiting the potential for government harassment. *See Green v. United States*, 355 U.S. 184, 187-88, 2 L. Ed. 2d 199, 204 (1957). It benefits the government by guaranteeing finality to decisions of a court and of the appellate system, thus promoting public confidence in and stability of the legal system. The objective is to allow the prosecution one complete opportunity to convict a defendant in a fair trial. *See Arizona v. Washington*, 434 U.S. 497, 505, 54 L. Ed. 2d 717, 727-28 (1978).

There are competing interests with regard to the resolution of this issue: the interest of society in having a final resolution in which "the truth" is determined; the interest of the defendant in having all issues relating to the charge tried at one time without prolonging the proceedings longer than necessary; and the interest of the State in having the ability to gain conviction of guilty defendants, even in the face of unavoidable delays. *See generally Arizona v. Washington*, 434 U.S. at 503-05, 54 L. Ed. 2d at 727-28; *Wade v. Hunter*, 336 U.S. 684, 689, 93 L. Ed. 974, 978, *reh'g denied*, 337 U.S. 921, 93 L. Ed. 1730 (1949). These interests must be balanced against one another.

In a jury trial, a defendant participates actively in the selection of the trier of fact, the jury, and has an interest, not only in its selection, but also in maintaining that jury once it has been selected. *See Arizona v. Washington*, 434 U.S. at 503, 54 L. Ed. 2d

at 727. This is evidenced by the often lengthy process of voir dire. The rule that jeopardy attaches upon the swearing in of the jury reflects the judicial recognition of this interest. No such interest is involved in a nonjury trial because the defendant does not play an active part in the selection of the trier of fact, the particular judge involved. Therefore, a rule by which jeopardy attaches at the point at which a defendant has been arraigned and a judge is ready to begin trial does not involve that same logical connection with any particular interest of the defendant.

A rule by which jeopardy attaches at the point at which the State introduces evidence or a witness begins to testify reflects an attempt to connect the consequences of jeopardy (that is, the risk of conviction) with that element which could result in conviction (the introduction of evidence). *See generally Serfass v. United States*, 420 U.S. at 391-92, 43 L. Ed. 2d at 276. Without the introduction of evidence, a defendant claiming innocence cannot be legally convicted. When evidence or testimony against him is accepted by the court, the potential exists for a conviction. It is logical to associate the attachment of legal jeopardy with the actual cause of that jeopardy. That rationale is missing in a rule by which jeopardy attaches at a point when a defendant has pled and a judge is ready to try the case but when no evidence has been introduced or testimony heard. Such a rule would be arbitrary, and while it is true that it would give defendants greater rights than are mandated by the federal Constitution, we find no sound reason to adopt an arbitrary rule when a logical, practical rule is available.

The rule we announce today is consistent with the trend, if not the majority rule, of our sister states and is in accordance with the federal rule. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 51 L. Ed. 2d 642 (1977); *Bunnell v. Superior Court*, 13 Cal. 3d 592, 531 P.2d 1086, 119 Cal. Rptr. 302 (1975); *Pollard v. State*, 175 Ga. App. 269, 333 S.E.2d 152 (1985); *People v. Deems*, 81 Ill. 2d 384, 410 N.E.2d 8 (1980), *cert. denied*, 450 U.S. 925, 67 L. Ed. 2d 355 (1981); *Commonwealth v. DeFuria*, 400 Mass. 485, 510 N.E.2d 264 (1987); *Fonseca v. Judges*, 59 Misc. 2d 492, 299 N.Y.S.2d 493 (1969); *People v. Willingham*, 52 Misc. 2d 1067, 277 N.Y.S.2d 778 (1967); *State v. Dallman*, 11 Ohio App. 3d 64, 463 N.E.2d 96 (1983); *Commonwealth v. Jung*, 366 Pa. Super. 438, 531 A.2d 498 (1987); *Peterson v. Commonwealth*, 5 Va. App.

389, 363 S.E.2d 440 (1987); *Manning v. Inge*, 169 W. Va. 430, 288 S.E.2d 178 (1982).

Not only is this rule theoretically sound, but it is also practical. It is a bright-line rule that clearly identifies the point in time at which jeopardy attaches.

For the above reasons, we affirm the Court of Appeals and remand this case to that court for further remand to Superior Court, Pasquotank County, for trial.

Affirmed.

THOMAS L. THRASH AND LORA R. THRASH v. CITY OF ASHEVILLE, A MUNICIPAL CORPORATION, W. LOUIS BISSETTE, MAYOR OF THE CITY OF ASHEVILLE, MARY LLOYD FRANK, VICE-MAYOR OF THE CITY OF ASHEVILLE, WALTER BOLAND, WILHELMINA BRATTON, GEORGE TISDALE, NORMA PRICE AND KENNETH MICHALOVE, CITY COUNCILPERSONS OF THE CITY OF ASHEVILLE

BASF CORPORATION v. CITY OF ASHEVILLE

JOHN F. TYNDALL AND WIFE, HELEN TYNDALL, WILLARD HINTZ AND WIFE, ELIZABETH HINTZ, ALVA L. WALLIS, JR., AND WIFE, KANNIE WALLIS, BEULAH WILSON AND INA N. FISHER v. CITY OF ASHEVILLE

No. 455A89

(Filed 26 July 1990)

Municipal Corporations § 2.2 (NCI3d) — annexation — percentage of land subdivided — erroneous classification — failure of ordinance to meet statutory requisites for annexation

Respondent erroneously included an 18.25-acre tract in the calculation of developed property under N.C.G.S. § 160A-48, and respondent's ordinance therefore failed to comply with statutory requisites for annexation, where tax records indicated that the tract in question was subdivided into approximately one-acre lots, and respondent relied on this information in making its calculations, while an aerial photograph revealed that no lots or streets had been laid out, thus indicating that the tax records were not a reliable basis upon which to make

estimates for the purpose of determining subdivision; when the 18.25-acre tract was subtracted from the "subdivision" acreage figure, the resulting figure was 59.643% developed for urban purposes, which was less than the 60% required by statute; and the difference between that figure and respondent's original figure of 64.9% exceeded the statutorily permissible 5% margin of error. N.C.G.S. § 160A-54(3).

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivision § 72.

APPEAL by petitioners pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals reported at 95 N.C. App. 457, 383 S.E.2d 657 (1989), affirming a judgment entered for respondent on 20 May 1988 by *Sitton, J.*, at the 18 April 1988 Civil Term of Superior Court, BUNCOMBE County. Heard in the Supreme Court 16 May 1990.

Adams, Hendon, Carson, Crow & Saenger, P.A., by S. Jerome Crow and Martin K. Reidinger, for petitioner-appellants Thrash.

Moore & Van Allen, by Daniel G. Clodfelter and Douglas R. Ghidina, for petitioner-appellant BASF Corporation.

Herbert L. Hyde for petitioner-appellants Tyndall et al.

Nesbitt & Slawter, by William F. Slawter, and Sara Patterson Brison, Assistant City Attorney, for respondent-appellee City of Asheville.

North Carolina League Of Municipalities, by S. Ellis Hankins and Andre K. Flowers, amicus curiae.

WHICHARD, Justice.

This consolidated civil action was brought pursuant to N.C.G.S. § 160A-50 for judicial review of Ordinance No. 1649, passed by the City of Asheville to annex territory west of the city into its corporate limits. Upon review in a nonjury trial the ordinance was upheld, and the order of the trial court was affirmed by the Court of Appeals. Although two issues were raised by the dissent in the Court of Appeals, one is dispositive and obviates discussion of the other: because an 18.25-acre tract was erroneously included in the calculation of developed property under N.C.G.S. § 160A-48, the ordinance failed to comply with statutory requisites for annexation.

On 9 June 1987 the City of Asheville passed a resolution of intent to consider annexation of certain properties west of its boundaries. The statute governing annexation by this method provides:

> (a) A municipal governing board may extend the municipal corporate limits to include any area
>
> (1) Which meets the general standards of subsection (b), and
>
> (2) Every part of which meets the requirements of either subsection (c) or subsection (d).
>
> (b) The total area to be annexed must meet the following standards:
>
> (1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun.
>
> (2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary.
>
> (3) No part of the area shall be included within the boundary of another incorporated municipality.
>
> (c) Part or all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:
>
> (1) Has a total resident population equal to at least two persons for each acre of land included within its boundaries; or
>
> (2) Has a total resident population equal to at least one person for each acre of land included within its boundaries, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage consists of lots and tracts five acres or less in size and such that at least sixty-five percent (65%) of the total number of lots and tracts are one acre or less in size; or
>
> (3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the

> time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size.

N.C.G.S. § 160A-48 (1987). The three alternative tests posited under subsection (c) express the legislative intent that the character of the property to be annexed exemplify a certain minimum, actual urbanization through population density, through the division of property, through actual, urban use, or through a combination of these characteristics.

Part of the territory that respondent Asheville sought to annex was the 18.25-acre Owenby property, which was characterized for annexation purposes as "consist[ing] of lots and tracts five acres or less in size." N.C.G.S. § 160A-48(c)(3) (1987). The trial court found that a subdivision plat for this property had been recorded in the Buncombe County Register of Deeds Office in 1976 and that at the time of annexation this property was identified on Buncombe County tax maps and records as eighteen separate lots. Although none of the eighteen lots had been sold since the recording of the plat, and although, after adoption of the annexation ordinance, the owner of the Owenby property had requested that the Tax Office combine the eighteen lots on record into one, the trial court observed that the subdivision plat remained of record in the Buncombe County Register of Deeds Office. In addition, the trial court found that conveyance to the owner of the Owenby property had been subject to the restriction that the property be used for residential purposes with houses similar to those in an adjoining subdivision. The trial court concluded from these facts that the method used by the City had been calculated to provide "reasonably accurate results" pursuant to N.C.G.S. § 160A-54.

In affirming the trial court, the Court of Appeals noted that under N.C.G.S. § 160A-42(2), a recorded plat "should be considered" a reasonably reliable source for purposes of showing subdivision. *Thrash v. City of Asheville*, 95 N.C. App. 457, 464, 383 S.E.2d 657, 661 (1989). The majority did not consider significant the fact that the property had never actually been developed. In *Williams v. Town of Grifton*, 19 N.C. App. 462, 199 S.E.2d 288 (1973), undeveloped property registered as subdivided in the Tax Office but not in the Register of Deeds Office was held to have been properly considered one tract because the city did not have proper record notice of subdivision. The Court of Appeals deduced from

Williams that recordation of a subdivision plat with the Register of Deeds supported the City's assessment of the Owenby property as a subdivided tract. Like the trial court, the Court of Appeals was impressed by the fact that conveyance of the Owenby tract had been subject to a restrictive covenant requiring that development be similar to that of an adjacent subdivision, indicating a lack of intent on the part of the grantor to withdraw the offer of dedication of streets indicated on the plat. *Id.* at 464-65, 383 S.E.2d at 661; *cf. Rowe v. Durham*, 235 N.C. 158, 69 S.E.2d 171 (1952).

Judge Greene, dissenting, opined that the classification of the Owenby property as "subdivision" did not reflect the factual characteristics of the property. He noted that the conveyance of the Owenby property in 1984 had described the property by metes and bounds, not by reference to a recorded subdivision plat. The property "had never been surveyed and divided on the ground, no lots had been sold, and no roads had been constructed and opened for traffic." *Thrash v. City of Asheville*, 95 N.C. App. at 476, 383 S.E.2d at 668 (Greene, J., dissenting). Moreover, the Buncombe County Tax Office had exceeded statutory authorization in classifying the Owenby property as "subdivision," for pertinent provisions then in effect restricted such classification to tracts that have "been divided into lots that are located on streets laid out and open for travel and that have been sold or offered for sale as lots." N.C.G.S. § 105-287(b)(4) (1985). *See also* N.C.G.S. § 105-287(d) (1989) ("A tract is considered subdivided into lots when the lots are located on streets laid out and open for travel and the lots have been sold or offered for sale as lots since the last appraisal of the property."). *See Thrash v. City of Asheville*, 95 N.C. App. at 476, 383 S.E.2d at 668. Petitioners exercised their right to appeal to this Court based on the dissenting opinion. N.C.G.S. § 7A-30(2) (1989).

Where an appeal is taken from the adoption of an annexation ordinance and the proceedings show *prima facie* that there has been substantial compliance with the statute, the burden is upon the party attacking the annexation to show, by competent evidence, failure on the part of the municipality to comply with the statutory requirements. *Dale v. Morgantown*, 270 N.C. 567, 574, 155 S.E.2d 136, 143 (1967). "Substantial compliance means compliance with the essential requirements of the Act." *Huntley v. Potter*, 255 N.C. 619, 627, 122 S.E.2d 681, 686 (1961).

Municipalities seeking to annex new areas into their corporate limits are directed by N.C.G.S. § 160A-54 to "use methods calculated to provide reasonably accurate results" in determining the degree of land subdivision for purposes of meeting the requirements of N.C.G.S. § 160A-48. In reviewing whether the requisites of N.C.G.S. § 160A-48 have been met, the court must accept the estimate as to degree of land subdivision by the municipality

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

N.C.G.S. § 160A-54(3) (1987). This provision governing methods for estimating the degree of subdivision authorizes alternative methods for appraising the character of property being considered for annexation, and in so doing it reflects the general statutory intent "to provide municipalities with a flexible planning tool." *Lowe v. Town of Mebane*, 76 N.C. App. 239, 243, 332 S.E.2d 739, 742 (1985). However, the use of such methods is conditioned upon their being "reasonably reliable." N.C.G.S. § 160A-54(3) (1987). "The reasonableness of the method chosen is to be determined in light of the particular circumstances presented by the annexation proceedings in question." *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 26-27, 265 S.E.2d 123, 127 (1980). If on appeal petitioners show that the estimates are in error because, for example, they were based upon a method that in actuality proved to be inaccurate, the fact that the municipality relied for its calculations on a method presumed in the statute to be "reasonably reliable" will not salvage an erroneous result. The critical question is not whether the city followed one method or another in calculating the number of lots, but whether "the method utilized is calculated to provide reasonably accurate results." *Id.* at 27, 265 S.E.2d at 127. If the results prove to be inaccurate beyond the statutorily allowable five percent margin of error, the statutory presumption as to reliability is rebutted.

The annexation statutes clearly take into account the difficulty of ascertaining the character of all acreage intended for annexation. Not only do they permit a margin of error of five percent, but they provide a check in the form of a challenge to the annexation by petition. The objective of the annexation statutes is to provide "legislative standards applicable throughout the State" to serve

as guidelines for "sound urban development." N.C.G.S. § 160A-45 (1987). "Sound urban development" does not mean a territory may be annexed whenever some documentation of record supports its assessment as urban; it means a territory may be annexed when its character reflects some actual, minimum urbanization. This actual, minimum urbanization is an essential requirement of the annexation act. *See* N.C.G.S. § 160A-48(c) (1987); *Huntley v. Potter*, 255 N.C. at 627, 122 S.E.2d at 686.

The city planner for respondent Asheville testified that she used aerial photographs and a tax map for the Owenby property in assessing whether that property was subdivided. Although she perceived that the tax map showed a road through the property but the aerial photograph did not and that, generally speaking, nothing in the aerial photograph confirmed what the tax map represented with regard to development, she relied upon the tax map because "[i]t was the better tool to use in qualifying the area for annexation." Evidence before the trial court included the same aerial photographs indicating that neither lots nor streets had been laid out on the Owenby property. The owner testified that the land had remained vacant and unimproved since she had acquired it and confirmed that there was no road on the property. An employee of the Buncombe County Land Records Office, whose duties included maintaining the Buncombe County tax records, testified that the Owenby property had been mapped as an eighteen-parcel piece, although, according to mapping standards adopted in 1983, it should have been mapped as a single acreage, without lot lines. This remapping and a concomitant consolidation of tax bills were effected at the request of the Owenby property owner shortly after the passage of the annexation ordinance.

In its recalculation of acreage classified by respondent Asheville under N.C.G.S. § 160A-48(c)(3), the trial court determined that 434.66 acres of the total 698.17 fit the classification of lots or tracts less than five acres in size. The resulting percentage—62.257%—indicated a discrepancy of less than five percent from the 64.9% figure derived from the city's uncorrected calculations. Because of the minimal discrepancy, the trial court stated it was required to accept the city's estimates as to the amount of acreage subject to annexation that consisted of lots or tracts five acres or less in size. *See* N.C.G.S. § 160A-54 (1987).

Findings of fact made below are binding on the appellate court if supported by the evidence, even when there may be evidence to the contrary. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980). In this case, however, the evidence does not support the trial court's findings of fact with regard to the Owenby property: when the accuracy of record evidence proffered by the city to meet requisites for annexation is belied by evidence before the reviewing court of the actual condition of the property, such records are not a "reasonably reliable" basis upon which estimates may be made for purposes of determining subdivision. The reliability of tax records is particularly dubious where the property in question meets neither the definition of "subdivision" set out in the tax statutes nor standards for characterizing subdivisions for tax purposes adopted by the Buncombe County Land Records Office. It was therefore error to include the Owenby property among the acreage counted as subdivided and used for residential purposes. *See* N.C.G.S. § 160A-48(c)(3) (1987).

When the 18.25 acres of the Owenby property is subtracted from the "subdivision" acreage figure, the resulting ratio is 59.643%, which is less than the minimum requisite ratio of 60%. Moreover, the difference between that figure and respondent Asheville's original figure of 64.9% exceeds the statutorily permissible five percent margin of error. Because petitioners succeeded in their burden of showing by competent evidence that respondent Asheville thus failed to comply with the statutory requirements for annexation, the trial court erred in affirming Ordinance No. 1649, and the decision of the Court of Appeals affirming the trial court is accordingly reversed.

Reversed.

STATE OF NORTH CAROLINA v. IRWIN THOMAS STEVENSON

No. 465A89

(Filed 26 July 1990)

1. Homicide § 30 (NCI3d)— first degree murder—submission of second degree murder not required by evidence

The trial court in a first degree murder case did not err in failing to submit second degree murder as a possible verdict where there was no evidence to support a reasonable finding by the jury that defendant killed his victim but did so without premeditation and deliberation, as the evidence tended to show that defendant repeatedly threatened the victim on the day she was killed; he then concealed a small pistol in one of his pockets and waited in the victim's apartment until her arrival; when the victim arrived at the apartment, defendant had a brief argument with her; as she attempted to leave, defendant pulled out his gun and fired two shots at the back of her head; and the victim died as a result of a gunshot wound to the back of her head.

Am Jur 2d, Homicide §§ 525, 526, 529.

2. Homicide § 25.2 (NCI3d)— premeditation and deliberation—inference from circumstances—lack of provocation—instruction proper

The trial court's instruction that premeditation and deliberation could "be proved by circumstances from which they [could] be inferred, such as the lack of provocation by [the victim]," could not be construed as an expression of opinion by the court that any of the circumstances had been proved; moreover, the challenged instruction was justified because the evidence at trial tended to show that the victim did not provoke defendant.

Am Jur 2d, Homicide § 501.

3. Homicide § 25 (NCI3d)— first degree murder—final mandate—failure to instruct on intent to kill—no plain error

The trial court did not commit plain error by failing during its final mandate to instruct that, in order to convict, the jury must find that defendant intended to kill the victim, since the trial court's failure so to instruct did not create a conflict

in the instructions included within the charge; the trial court properly instructed the jury concerning all the elements of first degree murder during its charge, but failed to restate the intent to kill in the final mandate; and the jury probably would not have reached a different verdict absent the error, as the evidence that the killing in this case was first degree murder was overwhelming and not seriously contested by defendant.

Am Jur 2d, Homicide §§ 498, 499.

APPEAL of right pursuant to N.C.G.S. § 7A-27 from judgment entered by *Rousseau, J.*, in the Superior Court, GUILFORD County, 2 June 1989, sentencing the defendant to life imprisonment for murder in the first degree. Heard in the Supreme Court on 15 March 1990.

Lacy H. Thornburg, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Constance H. Everhart, Assistant Appellate Defender, for the defendant-appellant.

MITCHELL, Justice.

The defendant, Irwin Thomas Stevenson, was tried in a non-capital trial upon a true bill of indictment charging him with the murder of Myrna Cole. The State's evidence at trial tended to show that the defendant had a romantic relationship with Myrna Cole. Sherrie Cole, the victim's sister, testified that the defendant was possessive of Myrna. Periodically, the defendant and Myrna argued about where she had been and with whom.

Robert Royster testified that he and the defendant drove around town drinking beer and looking for Myrna Cole on 10 January 1989. The defendant told Royster he was "sick and tired of Myrna doing him wrong and getting over on him." The defendant also stated he had something for her. Royster observed a small derringer in the defendant's possession. Failing to find Myrna Cole, the two men went to her apartment around 8:00 p.m. in order to wait for her and drink some more beer. The defendant used a key to enter the apartment. After about an hour, Sherrie Cole arrived. The defendant argued with Sherrie about Myrna. He was

mad and demanded to know where Myrna was. In order to get rid of the defendant, Sherrie lied saying that Myrna was at the Motel 6. Afterwards, the defendant left.

The defendant returned to Myrna's apartment about thirty minutes later and told Sherrie that he would wait all night for Myrna. He made a statement to the effect that if Myrna was out partying with another man, it would be her last time.

Sherrie Cole testified that later, when Myrna came home, the defendant got off the couch and began an argument with Myrna. Then Myrna turned around and ran out the door. The defendant followed, and Sherrie observed him pulling a gun out of his pocket. He fired the gun twice, shooting Myrna once in the back of her head. Myrna fell to the porch immediately. A later autopsy revealed that Myrna Cole died from a single gunshot wound to the back of her head.

The defendant told Sherrie not to move Myrna and then walked away from the apartment. Because there was no telephone in the apartment, Sherrie then left to seek help.

Further evidence for the State tended to show that Michael Canada and Michael Robertson gave Myrna Cole a ride to her apartment around 11:00 p.m. on 10 January 1989. Canada testified that he walked Myrna to the door. As Canada walked away, he heard the defendant arguing with Myrna. Canada testified that he then heard gunfire. When he looked around, Myrna was lying on the porch and the defendant was pointing the gun at him; whereupon, Canada left.

Tyrone Maynard testified that he was upstairs in Myrna's apartment on the evening 10 January 1989 when he heard the defendant arguing with Myrna. Hearing two gunshots, Maynard looked downstairs and saw the defendant with a gun. Maynard helped Sherrie drag Myrna inside and then ran to call for help. After calling for help, Maynard observed the defendant walking up the street toward a van. Maynard approached the defendant and asked him why he had shot Myrna, but the defendant denied shooting her. Maynard then grabbed the defendant in order to hold him for the police. Doug Patrick assisted Maynard by removing the gun from the defendant's pocket.

Responding to a call at 12:40 a.m. on 11 January 1989, Greensboro Police Officer J. G. DeYoung found Tyrone Maynard

and another person holding the defendant on the ground near Myrna Cole's apartment. DeYoung testified that he recovered a derringer at that time which contained two empty shell casings. Thereafter, DeYoung took the defendant to the police station. En route, the defendant told DeYoung that he did not shoot Myrna Cole and that he had been walking to his van when he was jumped by several black men and robbed.

At trial, the defendant denied shooting Myrna Cole. He testified that he was taking Tylenol No. 3 and other medications for diabetes on 10 January 1989. In response to a call from Myrna, he agreed to pick her up at her apartment. As she was not at the apartment when he arrived, he decided to wait on the couch. Although there were several people in the apartment drinking and using cocaine, the medication he had taken allowed him to fall asleep. He was awakened by people screaming that Myrna had been shot. When he learned that no one had called for help, the defendant left the apartment to do so. The defendant testified that while he was on his way to get help, he was assaulted and robbed by Tyrone Maynard and others.

Dr. David Sillman testified that he had prescribed Tylenol No. 3 and phenobarbital for the defendant for arthritis and seizures. Dr. Sillman testified that this medication could cause drowsiness.

The jury found the defendant guilty of first-degree murder on the theory that the killing of Myrna Cole was premeditated and deliberate. The District Attorney having stipulated that the State had no evidence that would tend to show aggravating circumstances, the trial court sentenced the defendant to life in prison.

Additional evidence and other matters relevant to the defendant's specific assignments of error are discussed in other parts of this opinion.

[1] On appeal, the defendant assigns error contending that the trial court committed reversible error by failing to submit a possible verdict on the lesser included offense of second-degree murder for the jury's consideration. The trial court submitted two possible verdicts for the jury to consider: guilty of first-degree murder and not guilty. The defendant argues that the evidence also required an instruction on and submission of a possible verdict finding him guilty of second-degree murder. We disagree.

While second-degree murder is a lesser included offense of premeditated and deliberate first-degree murder, the trial court was not required to submit a verdict on that lesser included offense unless it was supported by evidence. *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983). The mere fact that the jury could selectively believe part of the State's evidence and disbelieve part of it did not entitle the defendant to an instruction on a lesser included offense. *State v. Brewer*, 325 N.C. 550, 576, 386 S.E.2d 569, 584 (1989). If, however, there was any positive evidence tending to support the lesser included offense of second-degree murder, then it was the trial court's duty to submit a possible verdict for that lesser included offense after appropriate instructions.

The defendant argues that the evidence at trial would have supported a reasonable finding by the jury that he shot the victim without a specific intent to kill her. However, the State's evidence tended to show that the defendant repeatedly threatened the victim on the day she was killed. He then concealed a small pistol in one of his pockets and waited in the victim's apartment until her arrival. When the victim arrived at the apartment, the defendant had a brief argument with her. As she attempted to leave, the defendant pulled out his gun and fired two shots at the back of her head. The victim died as a result of a gunshot wound to the back of her head. Such evidence unequivocally tends to show an intentional killing with malice, premeditation and deliberation. The defendant testified at trial that he did not shoot the victim at all. We find no evidence in the record to support a reasonable finding by the jury that the defendant killed Myrna Cole, but did so without premeditation and deliberation. Therefore, the evidence would not have supported a verdict finding the defendant guilty of second-degree murder, and the trial court did not err in failing to submit such a possible verdict to the jury. This assignment of error is without merit.

[2] By his next assignment of error, the defendant argues that the trial court erred when it instructed the jury as follows:

> Now neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as the lack of provocation by [Myrna] Cole, the conduct of the defendant before, during, and after the killing, threats and declarations of the

> defendant, and the manner in which or means by which the killing was done.

The defendant argues that this instruction amounted to error requiring a new trial "[b]ecause (1) the evidence failed to disclose a lack of provocation by the victim, and (2) this instruction could be understood by the jury as an opinion . . . of the court that the absence of provocation in fact had been proven. . . ." We do not agree.

In the recent case of *State v. Cummings*, we noted that "[t]he elements listed [in an instruction identical to the one complained of here] are merely examples of circumstances which, if found, the jury could use to infer premeditation and deliberation." *Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 76 (1990). Further, in *Cummings* we held that it is not required that each of the circumstances listed by the trial court as examples in such an instruction be proven beyond a reasonable doubt before the jury may infer premeditation and deliberation. *Id.* Therefore, the trial court's mere recital of such examples cannot be construed as an expression of an opinion that any of them have been proven.

Additionally, from our review of the record, we conclude that the challenged instruction was justified because the evidence at trial tended to show that the victim did not provoke the defendant. The evidence presented at trial tended to show that the armed defendant waited in Myrna Cole's apartment until she returned. Upon her return, the defendant verbally accosted her. After a brief argument, Myrna Cole turned to leave the apartment. The defendant followed her out the door and shot her in the back of the head. This brief argument between the defendant and the victim "can by no means be said to have been adequate to provoke a killing in the heat of passion or one motivated by any other mens rea less inculpatory than premeditation and deliberation." *State v. Artis*, 325 N.C. 278, 310, 384 S.E.2d 470, 488 (1989), *judgment vacated on other grounds*, --- U.S. ---, 108 L. Ed. 2d 604 (1990). We conclude that the trial court's instruction concerning lack of provocation was supported by the evidence. This assignment of error is without merit.

[3] By his final assignment of error, the defendant argues that the trial court committed plain error by failing during its final mandate to instruct the jury on the intent to kill required to support a murder conviction. In the body of the jury charge, the

trial court correctly instructed that, to return a verdict of guilty of first-degree murder, the jury must find that (1) the defendant intentionally and with malice shot the victim with a deadly weapon, (2) the defendant's act was a proximate cause of the victim's death, (3) the defendant *intended to kill* the victim, and (4) the defendant acted with premeditation and deliberation. During its final mandate to the jury, the trial court repeated these instructions but omitted the requirement that, in order to convict, the jury must find that the defendant intended to kill the victim.

Relying on cases such as *State v. Harris*, 289 N.C. 275, 221 S.E.2d 343 (1976), the defendant contends that the omission of the element of a specific intent to kill from the trial court's final mandate was plain error which requires a new trial. Because the defendant did not object to this instruction at trial, he must show that the trial court committed plain error in this regard. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983). The test for plain error is whether absent the omission the jury probably would have returned a different verdict. *State v. Joplin*, 318 N.C. 126, 347 S.E.2d 421 (1986); *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986). In reviewing jury instructions for such error, the instructions must be considered in their entirety. *State v. Poole*, 305 N.C. 308, 289 S.E.2d 335 (1982).

State v. Harris, relied upon by the defendant, involved a situation in which the trial court gave two instructions which directly contradicted each other as to whether the defendant or the State had the burden of proof on an issue. *Harris*, 289 N.C. at 279, 221 S.E.2d at 346. Faced with *conflicting* instructions, we held that "where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part." *Id.* at 280, 221 S.E.2d at 347. In the present case, however, the trial court's failure in the final mandate to restate the requirement that the jury must find an intent to kill before convicting did not create a conflict in the instructions included within the charge. Our review of the jury instructions in their entirety reveals that the trial court properly instructed the jury concerning all the elements of first-degree murder during its charge but failed to restate the intent to kill element at one point, albeit during the final mandate. Further, at several points, and again in the final mandate, the trial court instructed the jury that to convict they must find that the defendant killed the victim with malice after premeditation and deliberation. Hence,

the trial court's charge in this case was not internally contradictory, but was, at most, incomplete at one important point.

Even assuming *arguendo* that the trial court erred in its charge, we are not persuaded that absent the error the jury probably would have reached a different verdict. The evidence for the State at trial tended to show that after the defendant threatened Myrna Cole, he waited with a gun in his pocket most of the day for her to return to her apartment. When she arrived, he shot and killed her as she ran away from him. Evidence that the killing in this case was first-degree murder was overwhelming and not seriously contested by the defendant; he simply testified and contended that he had nothing at all to do with the murder of the victim. Under these circumstances, we are convinced that the trial court's inadvertent omission of the intent to kill element from its final mandate did not rise to the level of plain error. *See generally State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986). Therefore, this assignment of error is without merit.

For the reasons stated, we hold that the trial of the defendant was free of reversible error.

No error.

STATE OF NORTH CAROLINA v. EURSTON IVON SNEED

No. 402A88

(Filed 26 July 1990)

1. **Criminal Law § 35 (NCI3d)— murder and attempted armed robbery—evidence that another committed offense—admissible**

The trial court erred in a prosecution for murder and attempted armed robbery by excluding testimony that another committed the crime where the proffered evidence tended to show that a specific person other than defendant robbed and killed the victim and the evidence was also inconsistent with the guilt of defendant.

Am Jur 2d, Evidence §§ 441, 496.

2. Criminal Law § 73.3 (NCI3d)— statement of intent—state of mind exception to hearsay rule

Testimony in a prosecution for murder and attempted armed robbery that a person other than defendant stated that he intended to rob a service station on the night the victim was killed was admissible. N.C.G.S. § 8C-1, Rule 803(3) allows the admission of a hearsay statement of a then existing intent to engage in a future act.

Am Jur 2d, Evidence §§ 441, 496.

3. Criminal Law § 73.4 (NCI3d)— evidence that another committed crime—hearsay—startling event—admissible

Testimony in a prosecution for murder and attempted armed robbery that a person other than defendant had returned to the witness's presence and said that he had done something he didn't want to do was admissible. N.C.G.S. § 8C-1, Rule 803(2) allows the admission of a statement made by declarant relating to a startling event and made while the declarant was under the stress of that event.

Am Jur 2d, Evidence §§ 441, 496.

4. Criminal Law § 66.1 (NCI3d)— murder and attempted armed robbery—witness—identification not incredible

Eyewitness identification testimony in a prosecution for murder and attempted armed robbery was not inherently incredible and was properly admitted where the witness's testimony that he had carefully observed the perpetrator under artificial lighting in order to be able to identify him and that the perpetrator was the defendant was not inherently impossible or in conflict with indisputable physical facts or laws of nature. The weight to be given the identification of defendant was for the jury.

Am Jur 2d, Evidence §§ 367, 372.

APPEAL of right pursuant to N.C.G.S. § 7A-27 from a judgment entered by *Phillips, J.*, in the Superior Court, PITT County, on 29 April 1988, sentencing the defendant to life imprisonment for murder in the first degree and to imprisonment for a term of thirty years for attempted armed robbery. Heard in the Supreme Court on 13 February 1990.

Lacy H. Thornburg, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for the defendant-appellant.

MITCHELL, Justice.

The defendant was tried on true bills of indictment charging him with robbery with a dangerous weapon and with the first-degree murder of Willie Hubert Tripp, Sr. The State's evidence at trial tended to show that Willie Hubert Tripp owned and operated Tripp's Service Station in Greenville. On the evening of 31 December 1983, Tripp was shot and killed at his service station.

Douglas Adams testified that on 31 December 1983, shortly after 6:15 p.m., he was across the street from Tripp's Service Station and heard several gunshots. He looked toward the gas station and saw a black male and the victim struggling at the door. He watched the struggle for approximately ninety seconds. He observed that the black male was about six feet tall, weighed about 160 pounds and wore a dark windbreaker and dark pants. At the trial, Adams identified the defendant as the man he saw struggling with the victim.

Greenville police officer John Fleming testified that he arrived at Tripp's Service Station at 6:36 p.m. on 31 December 1983. At that time, Tripp was wounded but still alive. Officer Fleming testified that Tripp told him that a young black male had tried unsuccessfully to rob him.

Testimony from other witnesses placed the defendant near Tripp's Service Station on 31 December 1983. They testified that the defendant was armed and wore a dark jacket and jeans.

At trial, the defendant denied shooting Tripp. Linda Crandall testified that the defendant was with her at the time of the shooting.

The jury found the defendant guilty of first-degree murder and attempted armed robbery. A sentencing proceeding was conducted and the jury recommended a sentence of life imprisonment for the first-degree murder. The trial court entered judgment sentencing the defendant to life for the murder and entered, but arrested, judgment imposing a thirty year sentence for the attempted armed robbery.

Additional evidence and other matters relevant to the defendant's specific assignments of error are discussed at other points in this opinion.

[1] On appeal, the defendant argues that the trial court erroneously excluded proffered testimony of Steven Ward tending to show that Joe Reid, not the defendant, committed the crimes for which the defendant was charged. We agree.

Prior to trial, the State made a motion *in limine* seeking to exclude the testimony of Steven Ward. At that time, the trial court deferred ruling on the State's motion. When the defendant sought during the trial to call Steven Ward as a witness, the trial court considered the State's pending motion to exclude Ward's testimony. Thereafter, the trial court refused to let Ward testify before the jury. The trial court allowed Ward's testimony to be entered in the record as an offer of proof made by the defendant out of the presence of the jury. During the defendant's offer of proof, Ward testified as follows:

Q. Mr. Ward, did you see . . . Joe Reid that night?

A. Yes, I did.

Q. December 31, 1983?

A. Yes.

Q. And who else was present when you saw Joe Reid?

A. Joe Cobb.

Q. Did you have a conversation with Joe Reid?

A. Indirect, yes.

Q. Well, would you tell us what you said to him and what he said to you?

. . .

A. He asked Joe Cobb would I take him out to rob a place and Joe Cobb asked me would I do it. And Joe Reid said, well, you just take me out there and I'll do it; all you have to do is just sit in the car. I told him I didn't want to have anything to do with it.

Q. Okay. And he wanted to go where?

. . .

A. He wanted to go on Memorial Drive.

Q. Where on Memorial Drive?

A. He asked me to take him out to Tripp's Service Station.

. . .

Q. Did he indicate to you what he was going to do when he got to Tripp's Service Station?

A. He told me that all he wanted me to do was sit in the car, he would do the job.

. . .

Q. What did you understand him to mean that he would do the job?

A. That he would do the job, in other words—well, I understand robbery.

. . .

Q. Did Joe Reid have a gun?

A. Yes, he had a gun.

. . .

Q. Now, after—did there come a time when Joe Reid left the trailer?

A. Yes, he left. Right after he left, Joe Cobb and I left and went and got a beer at Earl's store and went back to the mobile home. About an hour later Joe Reid came back.

. . .

Q. I'm sorry. Go ahead.

A. He came back and he had been running. I could tell he had been running because of lack of breath, and he told Joe he did something he didn't want to do.

Q. That he had did something he didn't want to do?

A. Yes.

The trial court excluded Ward's testimony on the grounds that it was not admissible as either substantive or impeachment

evidence. We disagree. Evidence that another committed a crime is relevant and admissible as substantive evidence, so long as it points directly to the guilt of some specific person or persons *and* is inconsistent with the guilt of the defendant. *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987).

The proffered testimony of Ward, which was excluded here, specifically implicated Joe Reid as Tripp's killer. Ward's excluded testimony tended to show that Joe Reid planned to rob Tripp's Service Station on the same evening that the victim was killed. Ward's testimony not only tended to show that Reid was armed with a gun and in the neighborhood of Tripp's Service Station at approximately the time of the crimes in question, but also that Reid carried out his announced plan to rob the station. Moreover, Ward's excluded testimony tended to show that Reid's clothing and physical description closely matched those of the killer as described by the eyewitness to the murder and robbery of 31 December 1983. The excluded evidence tended to show that Joe Reid, a specific person other than the defendant, robbed Tripp's Service Station and killed Tripp. Since all of the evidence tended to show that only one person committed the robbery and murder, Ward's testimony implicating Joe Reid was also inconsistent with the guilt of the defendant. Therefore, the excluded testimony was relevant and admissible as substantive evidence.

[2] The State argues that, in any event, certain portions of Ward's proffered testimony were inadmissible hearsay. We disagree. Rule 803(3) of the North Carolina Rules of Evidence provides that testimony of a witness, concerning a statement by a declarant other than the witness, as to the declarant's then-existing state of mind is not excludable under the hearsay rule. N.C.G.S. § 8C-1, Rule 803(3) (1988). One part of Ward's testimony, which the State says was excludable as hearsay, tended to show that Reid had stated that he intended to rob Tripp's Service Station on the same night that the station was robbed and Tripp was killed. "Rule 803(3) allows the admission of a hearsay statement of a then-existing intent to engage in a future act." *State v. McElrath*, 322 N.C. 1, 17, 366 S.E.2d 442, 451 (1988). Therefore, Ward's testimony as to Reid's declaration that he wanted to go rob Tripp's Service Station was admissible as evidence of Reid's then-existing intent to engage in a future act.

[3] Ward's testimony concerning Reid's statement that "he had [done] something that he didn't want to do" was also admissible at trial. Rule 803(2) of the North Carolina Rules of Evidence provides that testimony of a witness as to a statement made by a declarant relating to a startling event and made while the declarant was under the stress of that event is not excludable under the hearsay rule. N.C.G.S. § 8C-1, Rule 803(2) (1988). In this case, Ward testified that on the night of the crimes charged Reid burst into a mobile home without knocking and immediately declared that he had done something that he didn't want to do. At the time, Ward observed that Reid was out of breath because he had been running. Apparently, Reid was still under stress and excitement caused by the event to which he said he had been a party. Therefore, Ward's testimony concerning Reid's statement was admissible under Rule 803(2).

Here the proffered testimony of Ward, pointing to Joe Reid as the perpetrator of the murder and robbery in question, should have been admitted as substantive evidence; the excluded evidence was relevant and admissible under the North Carolina Rules of Evidence. Further, we conclude on the record before us that the error in excluding this evidence was prejudicial within the meaning of N.C.G.S. § 15A-1443(a) and that the defendant is entitled to a new trial.

[4] Because of the likelihood that it will arise again upon any retrial of this case, we now address an additional issue raised by the defendant. Relying on cases such as *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902 (1967), the defendant argues that the trial court committed reversible error by admitting inherently incredible identification testimony of an eyewitness, which was inadmissible as a matter of law. *Miller* was not, strictly speaking, a case involving the admissibility of evidence. Instead, *Miller* concerned the question of whether the State's evidence was sufficient to withstand a motion to dismiss (at that time denominated a motion for nonsuit). This Court concluded that, where the sole evidence tending to identify the defendant as the perpetrator of the crime charged was evidence which was inherently impossible or in conflict with indisputable facts or laws of nature, the evidence was not sufficient to take the case to the jury. *Id.; State v. Cox*, 289 N.C. 414, 422-23, 222 S.E.2d 246, 253 (1976). In later cases, this Court

> extended the *Miller* test to apply to instances where the defendant challenges the admissibility of identification evidence on grounds that it is inherently incredible. In all these cases the Court held the identification testimony admissible on grounds that there was "a reasonable possibility of observation sufficient to permit subsequent identification."

State v. Green, 296 N.C. 183, 188, 250 S.E.2d 197, 201 (1978).

In the present case we conclude that the eyewitness who testified at trial and purported to identify the defendant as the perpetrator of the crimes charged had a reasonable possibility of observing the perpetrator of the crimes sufficient to permit his subsequent identification of the perpetrator, since his identification testimony was not inherently incredible. Therefore, the trial court was not required as a matter of law to exclude the witness's identification testimony, and the trial court did not err by allowing its admission into evidence for the jury's consideration.

The witness Douglas Adams testified that he observed the defendant struggling with the victim at the service station shortly after 6:15 p.m. on 31 December 1983. His testimony tended to show that he carefully observed the defendant and the victim for approximately ninety seconds and that he could see the defendant's face clearly under the bright fluorescent lights lighting the area of the gasoline pumps outside the service station. Adams' testimony also tended to show that he concentrated particularly on being able to identify the defendant and the clothing the defendant was wearing, because Adams had "just seen a man shot" and knew he would have to identify the defendant at some later time.

The defendant argues that records of the United States Naval Observatory establish that sunset on 31 December 1983 occurred at 5:06 p.m. in Greenville, and that civil twilight ended at 5:34 p.m. there. Therefore, the defendant argues that, "except for any artificial light, it was pitch black . . ." when Adams observed the perpetrator of the crimes in question, even though Adams and another witness testified that it was not yet dark at the time the crimes in question were committed. The defendant also points out that Adams' testimony indicates that he observed the commission of the crime across a busy six-lane highway from a distance of no less than 170 feet. Further, the defendant points out that the description of the perpetrator given the authorities by Adams shortly after the crime was very general in nature. Even assuming

that the crimes in question were committed after dark and that Adams' observations were made under the conditions the defendant points out, however, we conclude that Adams' testimony was admissible. His testimony that he carefully observed the perpetrator under artificial lighting in order to be able to identify him and that the perpetrator was the defendant was not inherently impossible or in conflict with indisputable physical facts or laws of nature. As Adams' identification of the defendant as the perpetrator of the crimes in question was not inherently incredible, it was admissible; the weight to be given his identification of the defendant was a question for the jury. *State v. Green*, 296 N.C. at 188, 250 S.E.2d at 201.

For reasons previously discussed, we conclude that the trial court erred in excluding evidence pointing to the guilt of a person other than the defendant and inconsistent with the guilt of the defendant for the crimes charged. As we also conclude that this error was prejudicial, the defendant is entitled to a new trial.

New trial.

REGIONAL ACCEPTANCE CORPORATION v. HELEN A. POWERS, SECRETARY, NORTH CAROLINA DEPARTMENT OF REVENUE

No. 457PA89

(Filed 26 July 1990)

Bills and Notes § 1 (NCI3d); Taxation § 32 (NCI3d)— intangibles tax—agreement meeting definition of note

An agreement between parties met the legal and accounting definitions of the term "note" and complied with the definition of "note" in N.C.G.S. § 25-3-104, so that amounts owed by plaintiff thereunder could be deducted against notes receivable for intangibles tax purposes, where plaintiff was in the business of making consumer loans to clients secured by promissory notes; plaintiff entered into a Rediscount Financing Security Agreement under which Walter E. Heller & Company advanced funds to plaintiff and plaintiff granted Heller a security interest in the promissory notes plaintiff received from its consumers; the agreement between plaintiff

and Heller allowed plaintiff to borrow from Heller funds limited by a stated percentage of plaintiff's consumer notes; and plaintiff unconditionally promised to repay the loan funds on demand to Heller and to pay interest monthly at a specified percentage rate.

Am Jur 2d, Bills and Notes § 21.

ON discretionary review pursuant to N.C.G.S. § 7A-31(b) prior to a determination by the Court of Appeals of a decision granting summary judgment in favor of defendant entered by *Bowen, J.*, at the 3 July 1989 Session of Superior Court, WAKE County. Heard in the Supreme Court 14 May 1990.

Adams, McCullough & Beard, by John J. Butler, for the plaintiff-appellant.

Lacy H. Thornburg, Attorney General, by Marilyn R. Mudge, Assistant Attorney General, for the North Carolina Department of Revenue.

MARTIN, Justice.

Regional Acceptance Corporation ("RAC") is a North Carolina corporation with its principal place of business in Greenville, North Carolina. It is in the business of making consumer loans to clients secured by promissory notes. On 26 April 1978, RAC entered into a Rediscount Financing Security Agreement ("Agreement") with Walter E. Heller & Company ("Heller"). Pursuant to the Agreement, Heller advanced funds to RAC and RAC granted Heller a security interest in the promissory notes RAC received from its consumers.

In 1983, 1984 and 1985 RAC timely filed intangible personal property tax returns and listed the promissory notes held by it. The taxpayer classified the amounts owed to Heller as notes payable and deducted them from its taxable promissory notes pursuant to N.C.G.S. § 105-202. As a result, RAC owed no intangibles tax.

The North Carolina Department of Revenue ruled that the obligation of the taxpayer to Heller was an account payable under N.C.G.S. § 105-201 and not a note or other evidence of debt under N.C.G.S. § 105-202. Since accounts payable are not deductible, the Department determined the assessments against the taxpayer to be as follows:

Year	*Tax*	*Penalty*	*Interest*	*Total*
1983	$10,360.33	$1,036.03 (10%)	$2,175.67	$13,572.03
1984	$14,334.95	$1,433.50 (10%)	$1,720.19	$17,488.64
1985	$15,440.39	$2,316.06 (15%)	$ 463.21	$18,219.66
				$49,280.33

On 21 July 1986, the North Carolina Department of Revenue, Intangibles Tax Division, issued Notices of Tax Assessment to the taxpayer in the amount of $49,280.33. RAC timely objected in a letter dated 12 August 1986 and requested a hearing before the Secretary of Revenue pursuant to N.C.G.S. § 105-241.1(c). The hearing was held on 17 February 1988 and the Secretary upheld the assessments but waived the penalties based on a finding that RAC's classification of the obligations was not in bad faith.

The Department of Revenue duly notified RAC of the amended assessments which are as follows:

Year	*Tax*	*Interest*	*Total*
1983	$10,360.33	$3,885.12	$14,245.45
1984	$14,334.95	$4,085.46	$18,420.41
1985	$15,440.39	$3,010.88	$18,451.27
			$51,117.13

RAC paid the proposed assessment in the amount of $51,117.13 on 8 June 1988 and filed a Claim for Refund of Taxes on the ground that the obligations in question were improperly characterized by the Department of Revenue. By letter dated 14 July 1988 the Department of Revenue acknowledged receipt of payment but denied RAC's demand for refund.

Having exhausted its administrative remedies, RAC properly filed suit in the Superior Court of Wake County for a refund of the assessments paid, $51,117.13, plus interest from 8 June 1988 pursuant to N.C.G.S. § 105-267. Both parties subsequently moved for summary judgment and on 15 July 1989 the trial court entered summary judgment for defendant. RAC gave notice of appeal and this Court granted discretionary review prior to a determination by the Court of Appeals.

The relevant statutes in pertinent part are:

> All accounts receivable on December 31 of each year, having a business, commercial or taxable situs in this State . . . , shall be subject to an annual tax. . . . Provided, that from the face value of such accounts receivable there may be deducted the accounts payable of the taxpayer as of the valuation date of the accounts receivable: Provided further, that no deduction in any case shall be allowed under this section of any indebtedness of the taxpayer on account of capital outlay, permanent additions to capital or purchase of capital assets.

N.C.G.S. § 105-201 (1989).

> All bonds, notes, and other evidences of debt however evidenced whether secured by mortgage, deed of trust, judgment or otherwise, or not so secured, having a business, commercial or taxable situs in this State on December 31 of each year shall be subject to an annual tax . . . provided, that from the actual value of such bonds, notes, and other evidences of debt there may be deducted like evidences of debt owed by the taxpayer as of the valuation date of the receivable evidences of debt. The term "like evidences of debt" deductible under this section shall not include:
>
> (1) Accounts payable; . . .

N.C.G.S. § 105-202 (1989).

Both parties concede by their pleadings that the obligations received by RAC securing its consumer loans are promissory notes. Therefore, N.C.G.S. § 105-201 is not pertinent to this appeal. The sole issue before us is whether RAC's obligations to Heller should be classified as accounts payable or as notes pursuant to N.C.G.S. § 105-202. If the obligations were properly classified by the taxpayer as notes, then the statute allows them to be deducted for intangibles tax purposes to offset the "evidences of debt" between RAC and its consumers and the taxpayer has been wrongfully assessed. If, however, the obligations should have been characterized as accounts payable as the Department of Revenue contends, the taxpayer is not entitled to said offset.

When there is a doubt as to the meaning of a statute levying a tax, it is to be strictly construed against the state and in favor of the taxpayer. *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210

S.E.2d 199, 202 (1974). Here, doubt arises because the statutes fail to define "note." Where words of a statute are not defined, the courts presume that the legislature intended to give them their ordinary meaning determined according to the context in which those words are ordinarily used. *Midrex Corp. v. Lynch, Sec. of Revenue*, 50 N.C. App. 611, 614, 274 S.E.2d 853, 855, *disc. rev. denied*, 303 N.C. 181, 280 S.E.2d 453 (1981). Therefore, we look to the meaning of "note" as used by lawyers, bankers and accountants. The legal definition of "note" is "an instrument containing an express and absolute promise of signer (i.e. maker) to pay to a specified person or order, or bearer, a definite sum of money at a specified time." Black's Law Dictionary 956-57 (rev. 5th ed. 1979). Likewise, bankers view notes in this manner. Accountants define "note" as "an unconditional written promise, signed by the maker, to pay a certain sum in money on demand or at a fixed and determinable future date." Davidson, Stickney and Weil, *Accounting: The Language of Business* 54 (7th ed. 1987). Notes generally are characterized by an interest charge and are often secured by collateral such as receivables. *See generally* 2 Strong's N.C. Index 3d *Bills and Notes* § 1-6 (1976).

The Agreement between Heller and RAC meets both the legal and accounting definitions of the term "note." The Agreement allowed RAC to borrow from Heller funds limited by a stated percentage of RAC's consumer notes, and RAC unconditionally promised to repay the loaned funds on demand to Heller and to pay interest monthly at a specified percentage rate. The loans to RAC were evidenced by promissory notes payable to Heller. The agreement also complies with the definition of "note" in N.C.G.S. § 25-3-104.

The public policy of this state, as expressed in N.C.G.S. § 105-202, is to allow a taxpayer to offset notes receivable by notes and other evidences of debt created when the taxpayer subsequently uses the receivables to obtain financing.

Therefore, we hold that the Agreement with Heller was a note or other evidence of debt within the meaning of N.C.G.S. § 105-202, and amounts owed by RAC thereunder could be deducted against RAC's notes receivable for intangible tax purposes.[1] Ac-

1. This holding is consistent with the decision of this Court in *Guilford Mills, Inc. v. Helen A. Powers, Secretary of Revenue of the State of North Carolina*, No. 429PA89, also filed this date.

cordingly, the summary judgment in favor of defendant is reversed, and the cause is remanded to the Superior Court, Wake County, for entry of summary judgment for the plaintiff.

Reversed and remanded.

GUILFORD MILLS, INC., A DELAWARE CORPORATION v. HELEN A. POWERS, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 429PA89

(Filed 26 July 1990)

Taxation § 32 (NCI3d)— *intangibles tax—accounts receivable assigned to factors—classification as accounts receivable improper*

Where plaintiff assigned its accounts receivable to commercial factors pursuant to agreements with the factors, the obligations of the commercial factors to plaintiff were not accounts receivable owned by plaintiff which it could not deduct from its obligations on bonds, notes, or other evidences of debt in calculating its intangibles tax; rather, the factors' obligations to plaintiff were other evidences of debt under N.C.G.S. § 105-202 which could be deducted for purposes of calculating the tax.

Am Jur 2d, State and Local Taxation §§ 197, 212.

ON discretionary review of the decision of the Court of Appeals, 95 N.C. App. 417, 382 S.E.2d 456 (1989), affirming a judgment entered by *Walker, J.*, in the Superior Court, GUILFORD County, on 17 October 1988. Heard in the Supreme Court 14 May 1990.

This is an action by the plaintiff for a refund of taxes paid under protest. The following facts are not in dispute. The plaintiff is in the business of manufacturing textile products. It assigns its accounts receivable to commercial factors pursuant to agreements with the factors. The plaintiff may draw on these accounts according to the terms of these agreements. In its intangible tax returns for 1981 through 1984, the plaintiff showed the amount owed to it by factors as "bonds, notes or other evidences of debt however evidenced" pursuant to N.C.G.S. § 105-202. By showing it in this

manner the plaintiff was able to deduct the amounts of the bonds, notes and other evidence of debt for which it was obligated from the amounts owed to it by factors.

On 31 May 1985, a field auditor with the North Carolina Department of Revenue recommended that the amounts owed the plaintiff by the factors be classified as accounts receivable pursuant to N.C.G.S. § 105-201. The defendant adopted this report. The plaintiff paid the amount of additional tax the defendant contended was due under protest, and after exhausting its administrative remedies, it filed this action for a refund. The superior court allowed a motion for summary judgment by the defendant and the Court of Appeals affirmed. We allowed the plaintiff's petition for discretionary review.

Floyd, Greeson, Allen and Jacobs, by Jack W. Floyd and Robert V. Shaver, for the plaintiff appellant.

Lacy H. Thornburg, Attorney General, by Marilyn R. Mudge, Assistant Attorney General, for the defendant appellee.

WEBB, Justice.

The resolution of this case depends on whether the obligations of the factors to the plaintiff should be classified as accounts receivable under N.C.G.S. § 105-201 or as other evidence of debt under N.C.G.S. § 105-202. N.C.G.S. § 105-201 provides in part:

> All accounts receivable on December 31 of each year, having a business, commercial or taxable situs in this State, other than credit balances on accounts with investment brokers or security dealers, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars ($100.00) of the face value of such accounts receivable, ... Provided, that from the face value of such accounts receivable there may be deducted the accounts payable of the taxpayer as of the valuation date of the accounts receivable.
>
> . . . .
>
> Indebtedness of commercial factors incurred directly for the purchase of accounts receivable may be deducted from the total value of such accounts receivable.

N.C.G.S. § 105-202 provides in part:

> All bonds, notes, and other evidences of debt however evidenced whether secured by mortgage, deed of trust, judgment or otherwise, or not so secured, having a business, commercial or taxable situs in this State on December 31 of each year shall be subject to an annual tax which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars ($100.00) of the actual value thereof, . . . provided, that from the actual value of such bonds, notes, and other evidences of debt there may be deducted like evidences of debt owed by the taxpayer as of the valuation date of the receivable evidences of debt.

If the obligations of the commercial factors to the plaintiff are accounts receivable owned by the plaintiff it may not deduct from them its obligations on bonds, notes or other evidences of debt in calculating its intangibles tax. If the obligations are other evidences of debt it may make this deduction. The plaintiff does not contend it does not owe any tax on these obligations. It contends they are other evidences of debt and not accounts receivable.

The statute does not define accounts receivable. We have strong evidence of the intent of the General Assembly, however. One paragraph of N.C.G.S. § 105-201 provides that the indebtedness of commercial factors incurred for the purchase of accounts receivable may be deducted from the value of such accounts receivable. If the General Assembly had considered the obligations of factors to be accounts payable this paragraph would not have been necessary. We believe the General Assembly did not consider the obligations of the factors to be accounts payable for the factors or accounts receivable for the assignors.

In *Moore and Van Allen v. Lynch*, 61 N.C. App. 601, 301 S.E.2d 426, *disc. rev. denied*, 308 N.C. 677, 304 S.E.2d 756 (1983), the Court of Appeals said, relying on Black's Law Dictionary 17 (rev. 5th ed. 1979), 1 C.J.S. *Account* (1936), and 1 Am. Jur. 2d *Accounts and Accounting* § 2 (1962), that an account receivable "is ordinarily understood to be an amount owing from one person to another usually arising from the sale of goods or rendering of services and not supported by negotiable paper." The author of this opinion wrote *Moore and Van Allen* for the Court of Appeals. We believe the definition of accounts receivable used in that case is correct except that a debt should not be considered an account receivable if it is evidenced by a note, negotiable or not. We do not believe the obligations incurred by the factors to the plaintiff

in this case fit the definition of accounts receivable. The dealings between the plaintiff and its factors were pursuant to a written agreement. It assigned accounts and the factors incurred obligations according to the contract. We do not believe these dealings constituted a sale of goods as contemplated in the definition of accounts receivable. We believe the factors' obligations to plaintiff were other evidences of debt under N.C.G.S. § 105-202.

For the reasons stated in this opinion we reverse the Court of Appeals and remand for remand to the Superior Court of Guilford County for entry of a judgment for the plaintiff.

Reversed and remanded.

GLENN W. JOHNSON, ADMINISTRATOR OF THE ESTATE OF JAMES WAYLAND JOHNSON, AND BARBARA K. JOHNSON AND GLENN W. JOHNSON v. RUARK OBSTETRICS AND GYNECOLOGY ASSOCIATES, P.A. (FORMERLY THE RUARK CLINIC, P.A.), L. JOSEPH SWAIM, THOMAS B. GREER, WARNER L. HALL AND COURTNEY D. EGERTON

No. 177PA88

(Filed 29 August 1990)

1. **Damages § 3.4 (NCI3d); Negligence § 1.1 (NCI3d) — negligent infliction of emotional distress — relation to other cause — concern for another — overruling of Hinnant decision**

The opinion in *Hinnant v. Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925) is overruled to the extent that it may be read as barring claims for negligent infliction of emotional distress when such claims are unrelated to any other cause of action, or as totally barring any such claims when based upon emotional distress arising from a plaintiff's concern for another person's condition.

Am Jur 2d, Damages §§ 481, 871, 872; Fright, Shock, and Mental Disturbance §§ 1, 3, 13, 23, 24, 36, 37.

2. **Damages § 3.4 (NCI3d); Negligence § 1.1 (NCI3d) — negligent infliction of emotional distress — physical injury — overruling of Williamson decision**

The opinion in *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960) is disapproved to the extent that it may be read as requiring a physical injury in addition to mental or emotional injury to sustain a claim for negligent infliction of emotional distress or as barring any recovery for emotional distress caused by concern for another.

Am Jur 2d, Damages §§ 481, 871, 872; Fright, Shock, and Mental Disturbance §§ 1, 3, 13, 23, 24, 36, 37.

3. **Damages § 3.4 (NCI3d); Negligence § 1.1 (NCI3d) — negligent infliction of emotional distress — physical impact, injury or manifestation — overruling of Court of Appeals' decisions**

Various decisions of the Court of Appeals are overruled to the extent that they require a plaintiff to show, in addition to mental or emotional injury, a physical impact, physical injury, or physical manifestation of emotional distress to succeed on a claim of negligent infliction of emotional distress.

Am Jur 2d, Damages §§ 481, 871, 872; Fright, Shock, and Mental Disturbance §§ 1, 3, 13, 23, 24, 36, 37.

4. **Damages § 3.4 (NCI3d); Negligence § 1.1 (NCI3d)— negligent infliction of emotional distress—severity of distress—physical impact, injury or manifestation unnecessary**

Where a defendant's negligent act has caused a plaintiff to suffer mere fright or temporary anxiety not amounting to severe emotional distress, the plaintiff may not recover damages for his fright and anxiety on a claim for infliction of emotional distress. Where, however, such a plaintiff has established that he or she has suffered severe emotional distress as a proximate result of the defendant's negligence, the plaintiff need not allege or prove any physical impact, physical injury or physical manifestation of emotional distress in order to recover on a claim for negligent infliction of emotional distress.

Am Jur 2d, Damages §§ 481, 871, 872; Fright, Shock, and Mental Disturbance §§ 1, 3, 13, 23, 24, 36, 37.

5. **Damages § 3.4 (NCI3d); Negligence § 1.1 (NCI3d)— negligent infliction of emotional distress—necessary allegations—meaning of severe emotional distress**

To state a claim for negligent infliction of emotional distress, a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress, and (3) the conduct did in fact cause the plaintiff severe emotional distress. In this context, the term "severe emotional distress" means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

Am Jur 2d, Damages §§ 481, 871, 872; Fright, Shock, and Mental Disturbance §§ 1, 3, 13, 23, 24, 36, 37.

6. **Damages § 3.4 (NCI3d); Negligence § 1.1 (NCI3d)— negligent infliction of emotional distress—physical impact, injury or manifestation not required—concern for another**

Neither a physical impact, a physical injury, nor a subsequent physical manifestation of emotional distress is an ele-

ment of the tort of negligent infliction of emotional distress. Further, a plaintiff may recover for his or her severe emotional distress arising due to concern for another person if the plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and foreseeable result of the defendant's negligence.

Am Jur 2d, Damages §§ 481, 871, 872; Fright, Shock, and Mental Disturbance §§ 1, 3, 13, 23, 24, 36, 37.

7. Damages § 3.4 (NCI3d); Negligence § 1.1 (NCI3d)— emotional distress—concern for another—factors considered

Factors to be considered on the question of foreseeability of emotional distress arising from concern for another include the plaintiff's proximity to the negligent act, the relationship between plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act.

Am Jur 2d, Damages §§ 481, 871, 872; Fright, Shock, and Mental Disturbance §§ 1, 3, 13, 23, 24, 36, 37.

8. Damages § 3.4 (NCI3d); Negligence § 1.1 (NCI3d)— parents of stillborn fetus—negligent infliction of emotional distress—statement of claim for relief against physicians

The father and mother of a stillborn fetus stated individual claims for negligent infliction of emotional distress against defendant physicians whose negligence allegedly caused the stillbirth where the complaint alleged that, as a foreseeable and proximate result of defendants' negligence, each plaintiff experienced "past, present and future pain and suffering and emotional distress of enduring the labor, with the knowledge that their unborn child was dead, and the delivery of that dead child."

Am Jur 2d, Fright, Shock, and Mental Disturbance § 57.

Justice MEYER dissenting.

Justice WEBB dissenting.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 89 N.C. App. 154, 365 S.E.2d 909 (1988), reversing the judgment dismissing the claims against all the defendants entered by *Bailey (James H. Pou), J.*, at the

29 May 1986 Regular Non-Jury Civil Session of Superior Court, WAKE County. Heard in the Supreme Court on 13 December 1988.

Merriman, Nicholls & Crampton, P.A., by Steven L. Evans, for the plaintiff appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson and William H. Moss, for the defendant appellants.

Joseph E. Elrod III and J. Reed Johnston, Jr., for the North Carolina Society of Obstetricians and Gynecologists, Amicus Curiae.

James P. Cooney III and Charles V. Tompkins, Jr., for the North Carolina Association of Defense Attorneys, Amicus Curiae.

MITCHELL, Justice.

We must decide in this case whether the father and mother of a stillborn fetus have individual claims for negligent infliction of emotional distress against the defendants whose alleged negligence caused the stillbirth. For reasons differing from those relied upon by the Court of Appeals, we hold that both of the plaintiffs have stated cognizable claims, and we affirm the holding of the Court of Appeals.

As this case was dismissed prior to trial, the facts set forth herein are taken from the allegations of the complaint, which must be taken as true at this point. *See Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). We express no opinion, of course, as to whether the plaintiffs will be able to prove at trial that these allegations are true.

The complaint alleged that the plaintiffs were expectant parents; the defendants were the doctors and their professional association who provided prenatal medical care to the plaintiff Barbara Johnson. Mrs. Johnson learned on 1 March 1983 that she was about ten weeks pregnant. She was examined monthly from March through July, then examined almost weekly from August until the stillbirth in early October. Over this period, Mrs. Johnson was informed several times that her pregnancy was progressing normally, and she continued to experience fetal movement through the evening of 2 October 1983. On 3 October 1983, Mrs. Johnson began experiencing contractions and was admitted to Wake Medical Center at 5:30 p.m. Although the defendant Dr. Egerton had reported

that fetal heart tones were present at 9:30 that morning, stethoscopic and ultrasound monitoring conducted after Mrs. Johnson's admission failed to reveal any fetal heart tones. The plaintiffs were notified at approximately 8:00 p.m. that the fetus was dead. Mrs. Johnson's labor continued until the fetus was stillborn at 3:27 a.m. on 4 October 1983.

After the stillbirth, Mrs. Johnson's husband, Glenn Johnson, as administrator of the fetal estate, brought a wrongful death claim against the defendants under N.C.G.S. § 28A-18-2. In the same complaint, the plaintiffs Glenn and Barbara Johnson also brought claims for negligent infliction of emotional distress in their individual capacities as father and mother of the fetus. The central allegation of the plaintiffs' claims was that the defendants were negligent by providing Mrs. Johnson inadequate prenatal care, thereby proximately causing the stillbirth and related injuries. The complaint sought damages for injuries to the individual plaintiffs in the form of costs and expenses, lost wages, and the "past, present and future pain and suffering and emotional distress of enduring the labor, with the knowledge that their unborn child was dead, and the delivery of the dead child."

The defendants answered, denying negligence. The answer also contained a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief could be granted. The defendants subsequently moved for summary judgment, and after argument the trial court dismissed all of the plaintiffs' claims. Although the defendants' last motion was for summary judgment, the trial court considered the matter as a motion to dismiss pursuant to Rule 12(b)(6), or a motion for a judgment on the pleadings pursuant to Rule 12(c). *See Burton v. Kenyon*, 46 N.C. App. 309, 264 S.E.2d 808 (1980).

The Court of Appeals reversed the trial court's dismissals of the wrongful death claim by Glenn W. Johnson as administrator, the claims for emotional distress by the plaintiff parents as individuals, and the claim of Mrs. Johnson for other injuries she sustained throughout her pregnancy. *Johnson v. Ruark Obstetrics*, 89 N.C. App. 154, 365 S.E.2d 909 (1988). Regarding the plaintiffs' emotional distress claims, the defendants argued to the Court of Appeals, as they now argue to this Court, that "to maintain an action for the negligent infliction of mental distress [*i.e.*, emotional distress], North Carolina law requires that the mental distress either

be caused by physical injury or, in the absence of any impact or physical injury caused by the defendants, that the mental distress must be the cause of physical injury." The defendants also argued, as they do here, that "North Carolina law does not recognize recovery for mental anguish caused by concern for the safety and welfare of another." As to those issues, the Court of Appeals concluded that Mrs. Johnson had alleged two physical injuries. First, she alleged that her diabetic condition was not properly treated by the defendants. *Id.* at 166, 365 S.E.2d at 916. Second, the Court of Appeals reasoned that the alleged fatal physical injury to the fetus was also an injury to Mrs. Johnson, since the fetus was physically attached to the mother. *Id.* at 166-67, 365 S.E.2d at 916-17. Regarding Mr. Johnson's claim, the Court of Appeals concluded that his allegations of emotional distress also amounted to allegations of foreseeable physical injury to him, and contained nothing which would bar him from later forecasting or introducing more specific evidence that the defendants' negligence had caused him physical injury. *Id.* at 167-70, 365 S.E.2d at 917-19. Regarding the issue of allowing recovery for emotional distress caused by concern for another person, the Court of Appeals held that neither of the plaintiffs' claims were too remote to bar recovery as a matter of public policy. *Id.* at 167, 169-70, 365 S.E.2d at 917-19. We allowed the defendants' petition for discretionary review, which was limited to questions concerning the plaintiffs' claims for negligent infliction of emotional distress.

I.

The tort of negligent infliction of emotional distress apparently has a long and winding history in every state. Many scholarly articles admirably attempt to collect and analyze state and national trends. *See, e.g.*, Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill. L. Rev. 781 (1988) (herein "Comment"); *Prosser and Keeton on the Law of Torts* § 54 (5th ed. 1984); Byrd, *Recovery For Mental Anguish In North Carolina*, 58 N.C. L. Rev. 435 (1980); Annot. "Relationship Between Victim And Plaintiff-Witness As Affecting Right To Recover Damages In Negligence For Shock Or Mental Anguish At Witnessing Victim's Injury Or Death," 94 A.L.R.3d 486 (1979); Annot. "Right To Recover Damages In Negligence For Fear Of Injury To Another, Or Shock Or Mental Anguish At Witnessing Such Injury," 29 A.L.R.3d 1337 (1970);

Annot. "Right to recover for emotional disturbance or its physical consequences, in the absence of impact or other actionable wrong," 64 A.L.R.2d 100 (1959). *See also* Restatement (Second) of Torts §§ 313, 436-36A (1965), and cases collected therein.

For purposes of our analysis, it will suffice to say that today, many states appear to apply one of three prerequisite "tests" to claims for negligent infliction of emotional distress, or one of several variants on those basic tests. As a prerequisite to a valid claim for negligent infliction of emotional distress, some states require that the act causing the emotional distress be accompanied by some physical impact to the plaintiff. States still retaining this requirement often are referred to as having a "physical impact" requirement. *See, e.g.*, Comment, 33 Vill. L. Rev. at 782-94 (current "physical impact" states are listed at 792 n.59). Some states, however, have abandoned the physical impact requirement, adopting instead a requirement that the plaintiff must have been placed in imminent danger of physical harm by the defendant's action and must have suffered a subsequent physical manifestation of the emotional distress. *See id.* at 794-96 & 796 n.91; Restatement (Second) of Torts §§ 313, 436. These requirements are known as the "zone of danger" and "physical manifestation" requirements. "Notably, this test does not extend [a defendant's] liability to those individuals who are foreseeably psychologically affected, but rather is limited to those who are placed in imminent apprehension of physical harm at the time of the breach." Comment, 33 Vill. L. Rev. at 794 (footnotes omitted). (The Comment, *id.* at 796 n.91, lists North Carolina as among the states having both "zone of danger" and "physical manifestation" requirements. As explored and explained in this opinion, that categorization is incorrect.) Some states allow a plaintiff within the "zone of danger" to recover, even though his or her emotional distress was caused by concern for the safety of another person, instead of by concern for personal safety. *See id.* at 799. Other states retain the "zone of danger" requirement, but do not require any physical manifestation of the emotional distress. *See id.* at 796-98 & 798 n.92, 802 n.119.

In cases involving emotional distress arising from the plaintiff's concern for another person, several states have abandoned the "zone of danger" requirement, adopting various versions of what is often called a "*Dillon* test" or a "foreseeable plaintiff" test. *See id.* at 803-17. These tests place various emphases on three main factors: (1) the proximity of the plaintiff to the physical site

of the alleged negligent act; (2) whether the plaintiff's emotional distress was caused by observing the negligent act, as opposed to distress caused by learning of the act via some intermediary; and (3) the relationship between the plaintiff and the victim. *See Dillon v. Legg*, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968). The factors announced in *Dillon*, as well as the mechanistic application of those factors, have been extensively and soundly criticized. *See, e.g.*, Bell, *The Bell Tolls: Toward Full Tort Recovery For Psychic Injury*, 36 U. Fla. L. Rev. 333, 338-39 (1984); Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 Hastings L.J. 477, 483-96 (1984); Comment, *Duty, Foreseeability, and the Negligent Infliction of Emotional Distress*, 33 Me. L. Rev. 303, 316 (1981).

While some authors have miscategorized the law of North Carolina (as we explore and explain herein), the authors who have collected other states' cases are likely correct in most of their analyses and generalizations—certainly to the extent of recognizing that many different doctrines exist with respect to claims for negligent infliction of emotional distress. We perceive no single clear doctrine to which it can be said that a majority of states adhere. However, it has been noted that, "[a]s the courts have faced new and more compelling fact patterns, the tests have progressed in a linear fashion towards allowing greater degrees of recovery." Comment, 33 Vill. L. Rev. at 817.

II.

The issues before us in this appeal must, of course, be decided under North Carolina law. Claims for negligent infliction of emotional distress have been recognized by this Court for at least one hundred years. *See generally* Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C. L. Rev. 435 (1980). Although the term "negligent infliction of emotional distress" is of fairly recent origin, this Court has dealt with negligently inflicted emotional distress (often called "mental anguish" or "mental distress") many times. As North Carolina tort law has expanded over time to more frequently allow juries to determine questions of proximate causation and foreseeability, our courts have occasionally made misstatements concerning actions for emotional distress. Such misstatements have led some to believe that an action for negligent infliction of emotional distress may not be maintained absent some physical impact,

physical injury or subsequent physical manifestation of the emotional distress, and also that recovery may not be had for emotional distress caused by a plaintiff's concern for another person. Further, varying and at times inconsistent analyses used by our courts have apparently buttressed such misconceptions. As we now undertake to explore and explain, our law includes no arbitrary requirements to be applied mechanically to claims for negligent infliction of emotional distress.

A.

The history of the tort of negligent infliction of emotional distress in North Carolina begins for all practical purposes with *Young v. Telegraph Co.*, 107 N.C. 370, 11 S.E. 1044 (1890) (Clark, J., later C.J.). On 26 February 1889 the plaintiff's stepfather-in-law sent the plaintiff a telegram stating: "Come in haste. Your wife is at the point of death." *Id.* at 370, 11 S.E. at 1044. The telegram arrived at the New Bern telegraph office on 27 February. The plaintiff was well-known in New Bern, and his business was within 400 yards of the telegraph office. The plaintiff did not receive the telegram, however, until he demanded it at the telegraph office on 6 March, having received a letter from the sender on 5 March—after the plaintiff's wife was dead and buried. The plaintiff sued the telegraph company in tort, seeking damages for the "great pain, mental anguish and distress" caused by the defendant's negligence. *Id.* at 371, 11 S.E. at 1044. The defendant demurred, arguing that the plaintiff was not entitled to recover for mere mental anguish and grief. The trial court overruled the defendant's demurrer, and the defendant appealed.

The primary question this Court addressed in *Young* was "whether the plaintiff can recover for mental pain and anguish when there has been no physical injury." *Id.* at 373, 11 S.E. at 1045. After collecting and summarizing a number of other states' opinions on the topic, we noted that the issue was "one of first impression in this State." *Id.* at 383, 11 S.E. at 1048. We then noted other causes of action where damages for mental anguish were available absent physical injury, and that some of those claims could properly be brought under either contract or tort theories. *Id.* at 384-85, 11 S.E. at 1048. We then went on to hold that:

> When a passenger, while traveling on the [railway] cars, is injured by a collision or other negligence, though there is a breach of the contract of safe carriage, yet the plaintiff

can elect to hold the carrier liable in tort for the negligence which caused the injury.

By analogy, when there is an injury caused by negligence and delay in the delivery of a telegram, the party injured is entitled to sue *in tort* for the wrong done him. . . . [I]t is said: "We have no forms of action or technical rules which can prevent a plaintiff, upon a statement of facts of his case, from recovering all the damages shown to be sustained. If the facts show a breach of contract, and also that the breach is of such a character as to authorize an action of tort, all the damages for the thing done or omitted, either *ex contractu* or *ex delicto*, may be recovered in the one action."

It seems to us that *this action is in reality in the nature of tort for the negligence*, and that, as is usually the case in such actions, the plaintiff is entitled to recover, in addition to nominal damages, compensation for the actual damages done him, and that mental anguish is actual damage.

It is very truthfully and appropriately remarked by a learned author that "the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. Indeed, the sufferings of each frequently, if not usually, act reciprocally on the other." And Cicero (who certainly may be quoted as an authority among lawyers) says, in his Eleventh Philippic against Anthony, "quo major vis est animi quam corporis, hoc sunt graviora ea quae concipiuntur animo quam illa quae corpore." "For, as the power of the mind is greater than that of the body, in the same way the sufferings of the mind are more severe than the pains of the body."

The difficulty of measuring damages to the feelings is very great, but the admeasurement is submitted to the jury in many other instances, as above stated, and it is better it should be left to them, under the wise supervision of the presiding judge, with his power to set aside excessive verdicts, than, on account of such difficulty, to require parties injured in their feelings by the negligence, the malice or wantonness of others, to go without remedy.

Id. at 385-86, 11 S.E. at 1048-49 (emphasis added) (citations omitted). In our earliest consideration, this Court thus held that "mental

injury" is simply another type of "injury"—like "physical" and "pecuniary" injuries—for which the plaintiff could recover in tort upon showing that his injury was proximately and foreseeably caused by the defendant's negligence, and that the plaintiff could recover for emotional distress caused by his concern for another person, his wife.

Fourteen years later, in *Bowers v. Telegraph Co.*, 135 N.C. 504, 47 S.E. 597 (1904), we reaffirmed that mental injury is as real as physical injury, in a case in which the plaintiff's emotional distress was alleged to have arisen from concern for another person's condition. In *Bowers*, a mother sent her son a telegram to "come at once." Delivery of the telegram was delayed, and the plaintiff son missed the earliest train that could have taken him to his mother's home. The telegram was sent not because of illness, but because the plaintiff's mother wanted to see her son on business matters. Nonetheless, the plaintiff claimed that he had suffered emotional distress, apparently from concern over his mother's health. This Court held that on the peculiar facts before it there could be no recovery, but *only* because the evidence did not tend to show that the plaintiff's distress was caused by the defendant's negligence:

> [W]e see no ground to authorize a recovery by the plaintiff for mental anguish. His mother was not dead nor at the point of death. He knew that, because her name was signed to the dispatch. It was his own misapprehension which caused him any uneasiness, and not the negligence and delay of the defendant. . . . Mental anguish is as real as physical, and recovery in proper cases is allowed of just compensation when anguish, whether physical or mental, is caused by the negligence, default or wrongful act of another. The difficulty of measuring compensation does not bar a recovery for physical anguish nor when the anguish is mental. But if the plaintiff suffered any mental anguish in this case it was not caused by the negligence of the defendant.

Id. at 505, 47 S.E. at 597. This Court again reaffirmed that mental injury, standing alone, is compensable and recognized "the growing tendency of judicial opinion to allow compensatory damages for mental suffering even when not connected with any physical suffering" in *Green v. Telegraph Co.*, 136 N.C. 489, 497, 49 S.E. 165, 168 (1904).

In 1905 this Court first made the clear distinction between "mental anguish," which we now call "emotional distress" and for which a plaintiff may recover on a separate tort claim for negligent infliction of emotional distress, and mere temporary "fright," "disappointment," or "regret," for which no such recovery is allowed. *Hancock v. Telegraph Co.*, 137 N.C. 498, 500-501, 49 S.E. 952, 953 (1905) (a case which otherwise applied Maryland law). We went on to state that under North Carolina law, *"[t]he right to recover damages for purely mental anguish, not connected with or growing out of a physical injury, is the settled law of this State, and it is too late now to question it."* *Id.* (emphasis added).

Later, in *Kimberly v. Howland*, 143 N.C. 399, 55 S.E. 778 (1906), we stated:

> All the courts agree that mere fright, unaccompanied or followed by physical injury, cannot be considered an element of damage. . . . [However, t]he nerves are as much a part of the physical system as the limbs . . . . We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether wilful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs. Injuries of the former class are frequently more painful and enduring than those of the latter. A recent writer on the subject trenchantly says: "To deny recovery against one whose wilful or negligent tort has so terribly frightened a person as to cause his death, or leave him through life a suffering and helpless wreck, and permit a recovery for exactly the same wrong which results, instead, in a broken finger, is a travesty upon justice. . . ."

Id. at 403-04, 55 S.E. at 780 (quoting *Case and Comment*, August 1906). The *Kimberly* opinion was the first opinion of this Court to characterize, unfortunately, emotional injury as a type of physical injury—albeit injury for which plaintiffs could recover in emotional distress actions. Our earlier opinions had *not* treated emotional distress as such a type of compensable physical injury, but simply as *another type of injury* for which a plaintiff could recover. Such mischaracterizations of emotional distress as a type of physical injury do not prevent plaintiffs from recovering on claims for emotional distress, but seem to have misled some to infer that a plaintiff bringing an emotional distress claim must prove emotional injury

plus some *additional* physical injury; yet our law includes no such requirement. Therefore, we disapprove the unnecessary and erroneous terminology used in *Kimberly*, which apparently led many lawyers and some scholars away from the underlying reasoning of our well settled law allowing recovery for emotional distress, not connected with or growing out of a physical injury, in negligence actions.

B.

A number of our early cases dealt with emotional distress caused by negligent acts relating to corpses. *E.g.*, *Morrow v. R.R.*, 213 N.C. 127, 195 S.E. 383 (1938) (mutilation of corpse); *Bonaparte v. Funeral Home*, 206 N.C. 652, 175 S.E. 137 (1934) (husband's body withheld from widow to induce payment for embalming services); *Kyles v. R.R.*, 147 N.C. 394, 61 S.E. 278 (1908) (mutilation of corpse). In *Byers v. Express Co.*, 165 N.C. 542, 81 S.E. 741 (1914) (Clark, C.J.), *rev'd on other grounds*, 240 U.S. 612, 60 L. Ed. 825 (1916), the plaintiff widower sued the defendant railway for mental anguish caused by the defendant's negligent misrouting of the casket and burial clothes to be used for his wife's funeral in South Carolina. As a result of the delay, the body was buried in a "cheap casket" and "without proper burial clothing." *Id.* at 544, 81 S.E. at 742. The jury awarded mental anguish damages of $200, and this Court affirmed. The Supreme Court of the United States reversed, holding that under applicable federal interstate commerce statutes, the defendant had limited its liability under the bill of lading to $50, based upon the value and weight of the shipment. *Southern Exp. Co. v. Byers*, 240 U.S. 612, 613-14, 60 L. Ed. 825, 826-27 (1916).

Although *Byers* was reversed on federal statutory grounds, the Supreme Court of the United States, in dicta, questioned this Court's view of the evidence and our resulting application of the common law. Our Court had noted that:

> There was evidence of mental suffering, but it would have been inferred as a matter of law upon the circumstances of this case. Under the law of this State, where the contract of shipment was made, the plaintiff is entitled to recover such damages. Upon all the authorities, damages for mental anguish are compensatory damages. . . . "Wounding a man's feelings is as much actual damages as breaking his limbs. The difference is that one is internal and the other external; one mental,

> the other physical. At common law, compensatory damages include, upon principle and upon authority, salve for wounded feelings, and our Code had no purpose to deny such damages where the common law allowed them."
>
> It makes no difference, as this Court has always held, whether the action or claim to recover damages for mental suffering is based upon breach of contract or upon tort.

Byers v. Express Co., 165 N.C. at 545-46, 81 S.E. at 742 (citations omitted). The Supreme Court of the United States, however, characterized the claim as one "too vague for legal redress." *Southern Exp. Co. v. Byers*, 240 U.S. at 615, 60 L. Ed. at 827. However the Courts may have disagreed over the evidence and the law, the views of the Supreme Court of the United States were not, and are not, binding upon this Court with regard to questions of North Carolina common law—questions as to which this Court's holding was and is the final and controlling authority. *Lea Co. v. N.C. Board of Transportation*, 308 N.C. 603, 610, 304 S.E.2d 164, 170 (1983) (citing *Watch Co. v. Brand Distributors and Watch Co. v. Motor Market*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974)).

C.

Any doubt as to whether North Carolina law allows recovery for negligent infliction of purely emotional or mental injury—without physical impact, physical injury, or physical manifestations—and, in appropriate cases, for emotional distress arising from concern for another person should have been put to rest by our decision in *Bailey v. Long*, 172 N.C. 661, 90 S.E. 809 (1916). In *Bailey*, the plaintiff widower brought suit against the defendant, a hospital owner. The plaintiff took his wife to the defendant's hospital for treatment of a broken hip. The hospital's defective construction allowed rain water to leak into the plaintiff's wife's room, covering the floor to a depth of more than an inch on several occasions, where it remained uncollected for several hours. The damp room caused the plaintiff's wife to catch a cold, which worsened into pneumonia and caused her death. The plaintiff alleged that he had "suffered great pain and mental anguish . . . [t]o his feelings and sympathies in witnessing the agony and suffering of his said wife while lingering with such cold and pneumonia, and in the act and article of death resulting therefrom." *Id.* at 662, 90 S.E. at 809. This Court, reversing the trial court's dismissal of the action, stated that:

> We see no reason why, if the husband can recover damages from a telegraph company for mental anguish for delay in delivering a telegram informing him of his wife's illness, he should not recover for the mental anguish occasioned by witnessing her suffering and death against the alleged author of such suffering and death.

Id. at 663, 90 S.E. at 810.

Unfortunately, the clear language of *Bailey* and our earlier cases—in which the plaintiffs and defendants happened to have some contractual relationship—was mischaracterized in *Hinnant v. Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925), *overruled on other grounds by Nicholson v. Hospital*, 300 N.C. 295, 266 S.E.2d 818 (1980). In *Hinnant* we made the erroneous statement that "[t]he foundation of liability in *Bailey's case* was the contractual relation between the plaintiff and the defendant." *Id.* at 125, 126 S.E. at 310. This reading of *Bailey* simply was wrong. In emotional distress cases where the plaintiff and defendant have a contractual relationship, the correct rule was and is that the contractual relationship provides a strong factual basis to support *either* a claim for emotional distress based upon a breach of the contract *or* a finding of proximate causation and foreseeability of injury sufficient to establish a tort claim for emotional distress. None of our cases prior to *Hinnant* based their holdings favorable to the plaintiffs upon the existence of a contractual relationship, and *Bailey* certainly did not. Instead, those cases had discussed how a jury could find that the contractual relationship made the plaintiffs' emotional distress all the more the proximate and foreseeable result of the defendants' negligence in an action in *tort*. None of our earlier cases had held that the contractual relationship was a prerequisite to the plaintiff's cause of action. In fact, this Court had already rejected any such notion. *E.g.*, *Byers v. Express Co.*, 165 N.C. 542, 546, 81 S.E. 741, 742 (1914) ("It makes no difference, as this Court has always held, whether the action or claim to recover damages for mental suffering is based upon breach of contract or upon tort."), *rev'd on other (i.e., federal statutory) grounds*, 240 U.S. 612, 60 L. Ed. 825 (1916); *see Young v. Telegraph Co.*, 107 N.C. 370, 384-85, 11 S.E. 1044, 1048 (1890).

[1] *Hinnant* considered the question "whether the plaintiff may recover damages for the mental anguish she experienced from the sight and knowledge of her husband's suffering when she has no

other cause of action." *Hinnant*, 189 N.C. at 128, 126 S.E. at 312. The Court stated, contrary to established case law, that

> the general rule is that mental suffering, unrelated to any other cause of action, is not alone a sufficient basis for the recovery of substantial damages. To this rule there are exceptions, of course, as, for example, actions for breach of promise of marriage, or actions growing out of the failure properly to transmit and deliver telegraphic messages not of a pecuniary nature, and similar instances in which mental suffering is recognized as the ordinary and proximate consequence of the wrong complained of.

Id. at 128-29, 126 S.E. at 312 (citations omitted). *Hinnant* dealt primarily with a consortium claim, and its reasoning was later rejected and its holding as to that claim overruled. *See Nicholson v. Hospital*, 300 N.C. 295, 266 S.E.2d 818. Although the *Hinnant* opinion properly recognized lack of proximate causation or lack of foreseeability of injury as bars to many tort claims for emotional distress, its erroneous interpretation of *Bailey* and its unnecessarily broad language at other points could be read as placing limitations upon emotional distress claims not found in our law. For example, we said in *Hinnant*, without analysis or citation to any of the controlling North Carolina cases to the contrary, that:

> "In the law, mental anguish is restricted, as a rule, to such mental pain and suffering as arises from an injury or wrong to the person himself, as distinguished from that form of mental suffering which is the accompaniment of sympathy or sorrow for another's suffering, or which arises from a contemplation of wrongs committed on the person of another." 8 R.C.L., 515, sec. 73, and cases cited.

Hinnant, 189 N.C. at 129, 126 S.E. at 132. To the extent that it may be read as barring claims for negligent infliction of emotional distress when such claims are unrelated to any other cause of action, or as totally barring any such claims when based upon emotional distress arising from a plaintiff's concern for another person's condition, *Hinnant* failed to follow our settled common law, was erroneous and is hereby overruled. *See Nicholson v. Hospital*, 300 N.C. 295, 266 S.E.2d 818 (overruling *Hinnant* to extent it had applied such restrictions to loss of consortium claims).

Having firmly established at an early point that emotional distress, standing alone, is an actual and compensable injury, this Court turned in subsequent cases to focus more on issues of foreseeability and proximate causation. We have held in this regard that "[t]he measure of recovery [for personal injuries or other torts] is reasonable satisfaction for loss of both bodily and mental powers, and for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injury." *Helmstetler v. Power Co.*, 224 N.C. 821, 824, 32 S.E.2d 611, 613 (1945), *overruled on other grounds by Nicholson v. Hospital*, 300 N.C. 295, 266 S.E.2d 818 (The central holding in *Helmstetler*, overruled in *Nicholson*, was that a husband could not recover for consortium and his emotional distress damages resulting from his concern for his wife); *see also Matthews v. Forrest*, 235 N.C. 281, 285, 69 S.E.2d 553, 556 (1952) ("The law must heed the realities of life if it is to fulfill its function"). "It is also required that the defendant might have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might have been expected." *Crews v. Finance Co.*, 271 N.C. 684, 689, 157 S.E.2d 381, 385 (1967) (dealing with intentional infliction of emotional distress).

D.

In *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960), the plaintiff and defendant were involved in a minor car wreck. The evidence showed that the plaintiff experienced "no direct bodily contact and received no immediate physical injury from the collision." *Id.* at 502, 112 S.E.2d at 51. The defendant admitted negligently backing into the plaintiff's car, causing minor property damage. About one month before the incident, the plaintiff's brother-in-law, while driving his car, had collided with and killed a young child on a bicycle. When the plaintiff heard the defendant's car scrape against her own car, "she was seized with fear and anxiety that she had hit a child on a bicycle . . . . From this experience she developed a neurosis which resulted in a conversion reaction or pseudo-paralysis." *Id.*

[2] This Court was faced in *Williamson* with the question whether the plaintiff could recover for "fear and resultant neurasthenia allegedly caused by *ordinary negligence.*" *Id.* at 503, 112 S.E.2d at 51 (emphasis in original). Our holding was to reverse the trial court's award of damages for the plaintiff's mental injuries *due to a lack of evidence of proximate causation.* However, we went

on to cite and quote from statements of courts of other states, thereby erroneously suggesting that physical injury—in addition to mental or emotional injury—might be required to sustain a claim for negligent infliction of emotional distress in North Carolina. *See id.* at 503-05, 112 S.E.2d at 51-53. We now expressly disapprove any such reading of *Williamson.*

Williamson also could be read to have interpreted the overbroad language of *Hinnant*, which we have overruled in this case, as totally barring any recovery for emotional distress caused by concern for another. *See id.* at 508, 112 S.E.2d at 53. More recently, however, in *Nicholson v. Hospital*, 300 N.C. 295, 266 S.E.2d 818 (1980), we rejected the reasoning underlying *Williamson, Hinnant* and *Helmstetler* to the extent that those cases could be read as preventing plaintiffs from ever recovering for their emotional distress arising from their concerns for other persons, even where such results were proximately and foreseeably caused by a defendant's negligent acts. We now disapprove any such reading of *Williamson.* Common sense and precedent tell us that a defendant's negligent act toward one person may proximately and foreseeably cause emotional distress to another person and justify his recovering damages, depending upon their relationship and other factors present in the particular case. *See, e.g., Bailey v. Long*, 172 N.C. 661, 90 S.E. 809 (1916); *Bowers v. Telegraph Co.*, 135 N.C. 504, 47 S.E. 597 (1904); *Young v. Telegraph Co.*, 107 N.C. 370, 11 S.E. 1044 (1890); *Prosser and Keeton on The Law of Torts* § 54 at 360 (5th ed. 1984); Bell, *The Bell Tolls: Toward Full Tort Recovery For Psychic Injury*, 36 U. Fla. L. Rev. 333, 347-91 (1984).

E.

[3] In 1977, our Court of Appeals, relying upon *Williamson*, erroneously stated that "[f]or a plaintiff to recover for emotional or mental distress in an ordinary negligence case, he must prove that the mental distress was the proximate result of some physical impact with or physical injury to himself also resulting from the defendant's negligence." *McDowell v. Davis*, 33 N.C. App. 529, 537, 235 S.E.2d 896, 901 (citing *Williamson*, 251 N.C. 498, 112 S.E.2d 48, and *Alltop v. Penny Co.*, 10 N.C. App. 692, 179 S.E.2d 885, *cert. denied*, 279 N.C. 348, 182 S.E.2d 580 (1971)), *disc. rev. denied, appeal dismissed*, 293 N.C. 360, 237 S.E.2d 848 (1977). The holding in *McDowell* was followed by similar holdings in *Edwards v. Advo Systems, Inc.*, 93 N.C. App. 154, 376 S.E.2d 765 (1989); *Ledford*

v. Martin, 87 N.C. App. 88, 359 S.E. 2d 505 (1987), *disc. rev. denied*, 321 N.C. 473, 365 S.E.2d 1 (1988); *Campbell v. Pitt County Memorial Hosp.*, 84 N.C. App. 314, 352 S.E.2d 904, *aff'd on other grounds*, 321 N.C. 260, 362 S.E.2d 273 (1987); *Woodell v. Pinehurst Surgical Clinic, P.A.*, 78 N.C. App. 230, 336 S.E.2d 716 (1985), *aff'd per curiam*, 316 N.C. 550, 342 S.E.2d 523 (1986); *Craven v. Chambers*, 56 N.C. App. 151, 287 S.E.2d 905 (1982); and *Wesley v. Greyhound Lines, Inc.*, 47 N.C. App. 680, 268 S.E.2d 855, *disc. rev. denied*, 301 N.C. 239, 283 S.E.2d 136 (1980). For the reasons previously given and explained in this opinion, to the extent that those cases require a plaintiff to show—in addition to mental or emotional injury—a physical impact, physical injury, or a physical manifestation of emotional distress to succeed on a claim of negligent infliction of emotional distress, they are overruled.

F.

After the Court of Appeals' decision in *McDowell*, this Court made the error of stating that some "physical injury" was required to support a claim for *intentional* infliction of emotional distress. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979), *disapproved by Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). In *Stanback* we were dealing with a contract claim for damages flowing from the defendant's intentional breach of a separation agreement entered into with the plaintiff. We addressed the prerequisites for recovery on a claim for emotional distress arising from a breach of contract:

> [A] claim for mental anguish damages resulting from breach of contract is stated only when the plaintiff's complaint reveals the following. First, that the contract was not one concerned with trade and commerce with concomitant elements of profit involved. Second, that the contract was one in which the benefits contracted for were other than pecuniary, *i.e.*, one in which pecuniary interests were not the dominant motivating factor in the decision to contract. And third, the contract must be one in which the benefits contracted for relate *directly* to matters of dignity, mental concern or solicitude, or the sensibilities of the party to whom the duty is owed, and which *directly* involves interests and emotions recognized by all as involving great probability of resulting mental anguish if not respected.

Id. at 194, 254 S.E.2d at 620. Unfortunately, we went on to say, with regard to tort claims for intentional infliction of emotional distress, that:

> Although it is clear that plaintiff must show some physical injury resulting from the emotional disturbance caused by defendant's alleged conduct, given the broad interpretation of "physical injury" in our case law, we think her allegation that she suffered great mental anguish and anxiety is sufficient to permit her to go to trial upon the question of whether the great mental anguish and anxiety (which she alleges) has caused physical injury.

Stanback v. Stanback, 297 N.C. at 198-99, 254 S.E.2d at 623 (footnote omitted).

While we *said* in *Stanback* that a showing of "physical injury" was required, we also relied upon our earlier statement in *Kimberly*, indicating that emotional distress is *one type* of physical injury, and *held* that the trial court's dismissal of the plaintiff's claim must be reversed. *Id.* at 199 & n.1, 254 S.E.2d at 623 & n.1 (quoting *Kimberly v. Howland*, 143 N.C. 398, 403-04, 55 S.E. 778, 780 (1906)). Thus, the statement in *Stanback* is, to some extent at least, at odds with its holding. Further, the awkward two-step analysis of *Stanback* and *Kimberly*—by which we implied that physical injury was required, but then defined emotional distress as *a type* of physical injury for which a plaintiff could recover—was entirely unnecessary in light of the analyses contained in our prior cases which *reached the same result* in a more straightforward and less cumbersome fashion. As previously discussed herein, our earlier cases did *not* require any physical impact or injury *in addition to* the mental or emotional injury itself; instead, our earlier cases simply treated emotional distress as any other type of injury—compensable if the plaintiff shows that the injury was foreseeably and proximately caused by the defendant's negligence. For this reason, we have in this opinion disapproved *Kimberly* to the extent it stands for a different rule—if it does so at all.

G.

In 1981 we explicitly held that "physical injury" is *not* an element of the tort of *intentional* infliction of emotional distress. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). We noted in *Dickens* that:

> There is, however, troublesome *dictum* in *Stanback* that plaintiff, to recover for [intentional infliction of emotional distress], "must show some physical injury resulting from the emotional disturbance caused by defendant's negligent conduct" and that the harm she suffered was a "foreseeable result." Plaintiff in *Stanback* did not allege that she had suffered any physical injury as a result of defendant's conduct. We noted in *Stanback*, however, that "physical injury" had been given a very broad interpretation in some of our earlier cases . . . .
>
> . . . .
>
> After revisiting *Stanback* in light of the earlier authorities upon which it is based and considering an instructive analysis of our cases in the area by [Professor Robert G. Byrd], we are satisfied that the *dictum* in *Stanback* was not necessary to the holding and in some respects actually conflicts with the holding. *We now disapprove it.*
>
> If "physical injury" means something more than emotional distress or damage to the nervous system, it is simply not an element of the tort of intentional infliction of emotional distress.

Id. at 447-48, 276 S.E.2d at 332 (emphasis added) (disapproving *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979)).

[4] While in *Dickens* we were dealing with a claim of *intentional* infliction of emotional distress, we also observed that:

> A strong argument can be made that [this Court's] earlier decisions did not intend to make "physical injury" an essential element [of either intentional or negligent infliction of emotional distress]. When the Court said that "mere fright" was not actionable it was probably attempting to distinguish *not* between physical injury and emotional disturbance but rather between momentary or minor fright and serious emotional or nervous disorders.

Id. at 452 n.10, 276 S.E.2d at 334 n.10 (citation omitted). Now that we are squarely presented with the issue in this case, we conclude that this argument as stated in *Dickens* is correct, and has long been our law. Where a defendant's negligent act has caused a plaintiff to suffer mere fright or temporary anxiety not amounting to severe emotional distress, the plaintiff may not recover damages

for his fright and anxiety on a claim for infliction of emotional distress. Where, however, such a plaintiff has established that he or she has suffered severe emotional distress as a proximate result of the defendant's negligence, the plaintiff need not allege or prove any physical impact, physical injury, or physical manifestation of emotional distress in order to recover on a claim for negligent infliction of emotional distress.

III.

[5] Our cases have established that to state a claim for negligent infliction of emotional distress, a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as "mental anguish"), and (3) the conduct did in fact cause the plaintiff severe emotional distress. *See, e.g., Bailey v. Long*, 172 N.C. 661, 90 S.E. 809 (1916); *Green v. Telegraph Co.*, 136 N.C. 489, 49 S.E. 165 (1904); *Young v. Telegraph Co.*, 107 N.C. 370, 11 S.E. 1044 (1890). Although an allegation of ordinary negligence will suffice, a plaintiff must also allege that severe emotional distress was the foreseeable and proximate result of such negligence in order to state a claim; mere temporary fright, disappointment or regret will not suffice. *E.g., Hancock v. Telegraph Co.*, 137 N.C. 498, 500-501, 49 S.E. 952, 953 (1905). In this context, the term "severe emotional distress" means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

[6] While admittedly some of our opinions have suggested contrary results, the overwhelming weight of this Court's opinions for the past one hundred years leads us to the conclusion that neither a physical impact, a physical injury, nor a subsequent physical manifestation of emotional distress is an element of the tort of negligent infliction of emotional distress. Further, a plaintiff may recover for his or her severe emotional distress arising due to concern for another person, *if* the plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and *foreseeable* result of the defendant's negligence. *See, e.g., Bailey v. Long*, 172 N.C. 661, 90 S.E. 809; *Bowers v. Telegraph Co.*, 135 N.C. 504, 47 S.E. 597 (1904); *see also Nicholson v. Hospital*, 300 N.C. 295, 266 S.E.2d 818 (1980) (loss of consortium a natural and

foreseeable consequence of defendant's negligence and not "too remote" for recovery on a claim for loss of consortium).

In some of our prior cases we have held that a plaintiff's emotional distress ("mental anguish") arising from the plaintiff's concern for another was a natural and foreseeable consequence of the defendant's negligence and have allowed recovery on a theory of negligent infliction of emotional distress. *E.g., Hipp v. Dupont*, 182 N.C. 9, 108 S.E. 318 (1921) (wife could recover for emotional distress caused by "fearful injury of her husband" and being forced to view his "horribly mutilated condition"), *disapproved* in *Hinnant v. Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925), on reasoning upon which *Hinnant* was itself *overruled* by *Nicholson v. Hospital*, 300 N.C. 295, 266 S.E.2d 818 (1980); *Bailey v. Long*, 172 N.C. 661, 90 S.E. 809 (husband's concern for wife who died due to negligence of defendant doctor and his hospital). In other cases we have concluded that a plaintiff's emotional distress arising from concern for another was not a natural and foreseeable consequence of the defendant's negligence and have denied recovery. *E.g., Benevolent Association v. Neal*, 194 N.C. 401, 139 S.E. 841 (1927) (mother's claim for her mental anguish allegedly resulting from her son's "temporary loss of sanity" due to negligence of a private mental institution rejected on the ground that her damages were "too remote" to allow recovery); *Ferebee v. R. R.*, 163 N.C. 351, 79 S.E. 685 (1913) (action brought under Federal Employers' Liability Act; mother could not recover for her concern, that her child was not yet educated, arising from the death of her husband due to defendant's negligence, as such concern not "the natural and proximate result of the injury as it affects the [mother herself] . . . ."), *aff'd*, 238 U.S. 269, 59 L. Ed. 1303 (1915).

[7] Factors to be considered on the question of foreseeability in cases such as this include the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act. Questions of foreseeability and proximate cause must be determined under all the facts presented, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury. *See Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E.2d 296 (1968); *Toone v. Adams*, 262 N.C. 403, 137 S.E.2d 132 (1964).

[8] The plaintiffs here allege that they were the parents of the fetus which allegedly died as a result of the defendants' negligence and were in close proximity to and observed many of the events surrounding the death of the fetus and its stillbirth. We conclude that these plaintiffs may proceed with their action for severe emotional distress. If they can prove to a jury at trial that they have suffered severe emotional distress and otherwise prove the facts alleged as the basis for their claims, they are entitled to recover damages.

As we have pointed out in other cases, "Under traditional theories of tort law, defendants are liable for all of the *reasonably foreseeable* results of their negligent acts or omissions." *Azzolino v. Dingfelder*, 315 N.C. 103, 111, 337 S.E.2d 528, 534 (1985) (emphasis added) (citations omitted). "If recovery is limited to instances where it would be generally viewed as appropriate and not excessive, then, by definition, the defendant's liability is commensurate with the damage that the defendant's conduct caused. Further, the judicial system would not be overburdened by administering fair and proper claims." Comment, 33 Vill. L. Rev. at 819. Additionally, our trial courts have adequate means available to them for disposing of improper claims for negligent infliction of emotional distress and for adjusting excessive or inadequate verdicts. *E.g.*, *Young v. Telegraph Co.*, 107 N.C. at 385-86, 11 S.E. at 1049; *see also Chappell v. Ellis*, 123 N.C. 259, 263, 31 S.E. 709, 711 (1898) (rejecting a claim for mental anguish arising from loss of property during a lawful eviction, this Court stated: "But it is urged that the principle [recovery for mental anguish] . . ., if carried out to its fullest extent, would directly lead to the recovery of damages for all kinds of mental suffering. It may be, but we feel compelled to carry out a principle only to its necessary and logical results, and not to its furthest theoretical limit, in disregard of other essential principles.").

Given the allegations in the plaintiffs' complaint, which have not yet been supported by evidence but must be taken as true for purposes of reviewing the trial court's judgment, the plaintiffs' claims against the defendants for negligent infliction of emotional distress should not have been dismissed by the trial court on the pleadings. The complaint here stated claims upon which relief could be granted to each of the plaintiff parents, because it alleged that as a foreseeable and proximate result of the defendants' negligence, each of the plaintiffs experienced the "past, present and future

pain and suffering and emotional distress of enduring the labor, with the knowledge that their unborn child was dead, and the delivery of that dead child."

For the foregoing reasons, which differ from the reasoning relied upon by the Court of Appeals, the decision of the Court of Appeals, reversing the trial court's judgment for the defendants on the plaintiffs' claims for negligent infliction of emotional distress and remanding this case for further proceedings, is affirmed.

Affirmed.

Justice MEYER dissenting.

First, I wish to make clear that this action has nothing whatever to do with the separate lawsuit for the wrongful death of the fetus—that suit is alive and well and proceeding completely separate from this action and may result in substantial sums flowing to these plaintiff-parents. The negligence alleged by the Johnsons in this action refers to acts causing or permitting the death of the fetus and forms the basis for a completely separate action for emotional distress suffered by the parents. The damages alleged by Mr. and Mrs. Johnson were damages that arose after they learned of the death. Specifically, Mr. and Mrs. Johnson alleged:

> Past, present and future pain and suffering and emotional distress of *enduring the labor, with the knowledge that their unborn child was dead*, and the delivery of a dead child.
>
> Past, present and future mental distress and anguish resulting from the *dramatic circumstances surrounding the stillbirth of their child.*

(Emphasis added.) The Johnsons do not allege that the defendants acted negligently towards them, except insofar as the defendants' acts created serious emotional distress.

The majority sets out the three tests commonly adopted by other jurisdictions to limit bystander recovery for serious emotional distress. Each of these tests is admittedly somewhat arbitrary, but they are conscientious efforts to avoid what would otherwise become a tort-feasor's unlimited liability to any bystander suffering foreseeable serious emotional distress. Of these three, the California *Dillon* factorial approach to foreseeability is the most expansive, but even the court in *Dillon* sought "to limit the otherwise poten-

tially infinite liability which would follow every negligent act" through adoption of its factorial approach, *Dillon v. Legg*, 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968), and has subsequently adopted even stricter limitations. Today's majority goes beyond even *Dillon*'s broad approach, for it rejects the limitations on absolute foreseeability that are essential elements of the *Dillon* rule. Concluding that plaintiff may recover for his or her emotional distress arising due to concern for another person, *if* the plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and *foreseeable* result of the defendant's negligence, the Court nonetheless finds it unnecessary and undesirable to attempt to state any rules to be applied as rules of law in determining when a plaintiff's evidence concerning foreseeability will be sufficient.

The majority declines to discuss in detail the development of the law outside our own borders. Instead, the majority elects to set out its broad rule of recovery without seeking guidance from the experience of other jurisdictions with less expansive doctrines of recovery.[1] Note, *Bystander Recovery: A Policy Oriented Approach*, 32 N.Y.L. Sch. L. Rev. 877 (1987); Jin Hwang, *Emotional Distress Law in Disarray*, 1987 Ann. Surv. Am. L. 475, 477-91 (1989). Even those jurisdictions most permissive in allowing recovery place limits on those bystander recoveries which are based exclusively on foreseeability. *Kelley v. Kokua Sales and Supply, Ltd.*, 56 Haw. 204, 209, 532 P.2d 673, 676 (1975) (requiring plaintiffs to be within a reasonable distance from the scene of the accident); *McLoughlin v. O'Brian*, 2 All E.R. 298, 304-05 (1982) (per Wilberforce, Lord Justice) (alleged emotional injury must come through sight or hearing of the event or its immediate aftermath; bystander must be proximate in time and space to the accident; relation to the bystander is a factor). California, that jurisdiction with the greatest experience in permitting wide latitude for recovery of serious emotional distress, has found it necessary to strictly construe the *Dillon* requirements and has in fact begun a retreat from the broad rule set out in *Dillon. Thing v. La Chusa*, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989) (relating difficulties encountered after *Dillon*; establishing strict requirements of physical presence, contemporaneous awareness that the event is causing

1. As of 1987, twenty-one jurisdictions had adopted the *Dillon* rule or some modification thereof, while fifteen jurisdictions expressly rejected it. Jin Hwang, *Emotional Distress Law in Disarray*, 1987 Ann. Surv. Am. L. 475, 475 n.4 (1989).

injury, and close consanguine or marital relationship to the primary victim); *Elden v. Sheldon*, 46 Cal. 3d 267, 274-76, 758 P.2d 582, 586-88, 250 Cal. Rptr. 254, 258-60 (1988) (denial of recovery by live-in lover due to: state interest in promoting marriage, potential burden on courts, and need to limit defendant liability); Comment, *A New Tort in California: Negligent Infliction of Emotional Distress (For Married Couples Only)*, 41 Hastings L.J. 447 (1990). The majority fails to heed the difficulties faced by earlier pioneers of this tort.

Under the majority formulation, a defendant has a duty not to cause serious emotional distress in any person who might foreseeably suffer such distress from proximate negligence. This duty is limited only by the foreseeability that such harm may occur. The majority lists several "factors" to be considered on the question of foreseeable harm. Those factors—a plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whom the plaintiff is concerned, and whether the plaintiff personally observed the negligent act—are indicia that tend to establish foreseeability. Because the majority does not make these factors determinative of the foreseeability of a bystander's emotional distress, there is no real limitation on foreseeability. But as California has noted, with apologies to Bernard Witkin, "there are clear judicial days on which a court can foresee forever." *Thing v. La Chusa*, 48 Cal. 3d at 668, 771 P.2d at 830, 257 Cal. Rptr. at 881.

The majority undertakes no analysis of how negligent acts causing lost viability of the fetus create a duty flowing to the mother, nor is there analysis of how the duty flows to the father, who never alleges any duty existed except to avoid inflicting serious emotional distress. The majority assumes a duty exists because the fetus lost viability and the Johnsons suffered the pain of the loss and the despair of a childless labor. Compare this treatment of duty to that of *Tebbutt v. Virostek*, 65 N.Y.2d 931, 483 N.E.2d 1142, 493 N.Y.S.2d 1010 (1985) (memorandum), in which the New York court denied recovery for serious emotional distress arising from death of a fetus due to a negligently performed amniocentesis on the basis that there was no duty flowing to the plaintiff-parents from the defendant-physician. *See also Vaillancourt v. Medical Ctr. Hosp. of Vt.*, 139 Vt. 138, 425 A.2d 92 (1980) (denying recovery for emotional distress of parents witnessing negligent act resulting in death of fetus, as parents not within zone of danger; therefore, no duty owed them).

That the foreseeability and proximate cause requirements as set out by the majority are low hurdles indeed is readily apparent. I assume that by distinguishing between fright and serious emotional distress, the majority is drawing a distinction similar to that between a primary response to a traumatic event and a secondary response.[2] *See, e.g., Leong v. Takasaki*, 55 Haw. 398, 411-12, 520 P.2d 758, 766-67 (1974). Medicine identifies at least three diagnosable serious secondary responses to traumatic events: anxiety reaction, conversion reaction, and hypochondriasis. *Id.* at 412, 520 P.2d at 767. The prevalence of these disorders is "common." *Diagnostic and Statistical Manual of Mental Disorders* at 235-53, 257-67 (3d rev. ed. 1987). It would appear that serious emotional distress arising from a traumatic event is a statistical likelihood in any bystander exposed to the negligently created traumatic event. Thus, the majority's entry requirement that the injury be severe ("severe emotional distress" meaning, "for example," neurosis, psychosis, chronic depression, phobias, and other types "generally recognized by professionals") is a totally ineffective barrier.

Foresight alone does not provide a socially and judicially acceptable limitation on recovery of damages for negligent infliction of emotional distress. *Thing v. La Chusa*, 48 Cal. 3d at 668, 771 P.2d at 830, 257 Cal. Rptr. at 881. The majority establishes no limit to foreseeability with its list of factors. The majority makes some reference that the relationship between the bystander and the primary victim (parent, spouse, sibling, grandparent, cousin, etc.) may be of some help in determining foreseeability. However, there is no real limitation to the class of foreseeable plaintiffs on this basis. Even the most liberal jurisdictions have a relationship requirement for the class of persons who can recover for the tort.

Nor does the majority's analysis address, in the overall context of the tort, any requirement of proximity to the alleged negligent acts. Many courts make this an important consideration in automobile injury or death cases. *See, e.g., Thing v. La Chusa*, 48 Cal. 3d 644, 669, 771 P.2d 814, 830, 257 Cal. Rptr. 865, 881 (recovery denied

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2. "The primary response, an[] immediate, automatic and instinctive response designed to protect an individual from harm, unpleasantness and stress aroused by witnessing the painful death of a loved one, is exemplified by emotional responses such as fear, anger, grief, and shock." *Leong v. Takasaki*, 55 Haw. 398, 411-12, 520 P.2d 758, 766 (1974). A secondary response is a longer lasting reaction "caused by an individual's continued inability to cope adequately with a traumatic event." *Id.* at 412, 520 P.2d at 767.

to mother who was neither present at scene of accident nor aware that son was being injured); *Wright v. City of Los Angeles*, 219 Cal. App. 3d ---, ---, 268 Cal. Rptr. 309, 329 (1990) (plaintiffs must be on the scene and "*then* aware [that decedent] was being injured by [the tort-feasor's] negligent conduct"); *Kelley v. Kokua Sales and Supply, Ltd.*, 56 Haw. 204, 209, 532 P.2d 673, 676 (physical proximity to scene of tort is determining factor); *Wilder v. City of Keene*, 131 N.H. 599, 604, 557 A.2d 636, 639 (1989) (recovery denied to parents who neither saw nor heard collision); *Burris v. Grange Mutual Cos.*, 46 Ohio St. 3d 84, 93, 545 N.E.2d 83, 91 (1989) (recovery denied to parent who had "no sensory perception of the events surrounding the accident"); *Gain v. Carroll Mill Co.*, 114 Wash. 2d 254, ---, 787 P.2d 553, 557 (1990) (plaintiff required to be "present at the scene of the accident and/or arrive shortly thereafter").

Any considered opinion adopting a strict foreseeability approach without establishing *limits* on the class of bystander plaintiff, the type of primary injury creating the distress, and the proximity of perception cries out for an exploration of the foreseeable implications.

Does the majority give equal causes of action for the grieving mother and the family friend? Is it just as surely foreseeable that grandparents, siblings, other relatives, and close friends may also suffer demonstrably serious emotional distress? "Cases involving relational interests pose difficult problems with respect to mental anguish claims . . . . Under these circumstances the fear of an indefinite liability is a legitimate one, and the need to impose reasonable limits upon the extent of a defendant's responsibility clearly exists." Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C.L. Rev. 435, 448 (1980).

Liability without limitation adversely affects three distinct groups: tort-feasors, the physically injured primary and secondary victims, and society as a whole. As described earlier, the universe of plaintiffs contemplated by the majority's rule is infinite indeed.

> It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as all his friends.

Prosser and Keeton on The Law of Torts § 54, at 366 (5th ed. 1984). "If recovery is to be permitted, . . . it is . . . clear that there must be some limitation." *Id.* Though the purpose of tort law is to right wrongs negligently committed, prior to this decision it has not been the policy of this jurisdiction to extend an infinite responsibility to everyone who has suffered. *See generally* Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C.L. Rev. 435 (1980).

That the law can retard as well as promote social and economic development is very nearly axiomatic. H. deSoto, *The Other Path* at 177-87 (1989). Virtually all conduct is risk creating. Recognizing this, "the decision must be made concerning the quality of the risks toward plaintiff that the defendant created by his conduct." Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 Utah L. Rev. 1, 8 (1977). Learned Hand proposed his famous cost-benefit equation in an effort to distinguish between risks which were worth taking and those which were not. *United States v. Carroll Towing Co.*, 159 F.2d 169, *reh'g denied*, 160 F.2d 482 (2d Cir. 1947).[3] Today's decision, drawing no such distinction, stands for the proposition that no risk of serious emotional distress is acceptable. The impact of this rule on the availability of medical care, particularly that of obstetrics, will be to further discourage qualified physicians from practicing. The risk of liability and the escalated premium for insurance to cover the liability are already seriously affecting the delivery of obstetrical care in this state, particularly to the rural areas and to the poor. With the addition of this new layer of liability to bystanders, that problem will be seriously exacerbated. I cannot think that our state will benefit from a rule that discourages such risk-taking activity without regard to the costs society might pay or the benefits society might derive therefrom.

If there be any limitations whatsoever on this duty not to negligently inflict foreseeable serious emotional distress, the nonexclusive list of factors recited by the majority which may be "considered" does not establish them. In adopting a rule, it should

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3. Hand described the duty of an actor to protect against resulting injuries as being a function of three variables: (1) the probability (P) of injury occurring, (2) the gravity (L) of resulting injury, and (3) the burden (B) of adequate precautions. Hand described this relationship algebraically as an inquiry as to whether $B \geq PL$. *United States v. Carroll Towing Co.*, 159 F.2d at 173.

not be so vague that it provides no guidance to the judges and juries that must implement it. "When making a decision under a rule that provides little or no guidance, decision makers will inevitably decide upon whatever basis seems important to them." Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 483 (1982). Professor Pearson's description of the difficulty of implementing vague rules precisely describes California's twenty-year struggle with the *Dillon* rule.

From this analysis of case law from jurisdictions that have introduced a more restrictive version of the foreseeability rule adopted today, I conclude that the majority sets out on an unwise course. Though it adopts foreseeability as its polestar, the majority fails to use that guide in formulating its rule. I must dissent from the overbroad rule adopted today.

An alternative proposal would be to place limitations on the definition of "foreseeability" based upon the relationship of the plaintiff, the proximity of perception, and the severity of the injury that would give rise to a bystander's cause of action for serious emotional distress. For limitations on foreseeability based on plaintiff's relationship to the victim, *see, e.g., Thing v. La Chusa*, 48 Cal. 3d 644, 667-68, 771 P.2d 814, 829-30, 257 Cal. Rptr. 865, 880 (mother of victim is "closely related"); *Elden v. Sheldon*, 46 Cal. 3d 267, 273, 758 P.2d 582, 587, 250 Cal. Rptr. 254, 258 (unmarried cohabitant denied recovery); *Dillon v. Legg*, 68 Cal. 2d 728, 741, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (mother of victim is "closely related"); *Quesada v. Oak Hill Improvement Co.*, 213 Cal. App. 3d 596, ---, 261 Cal. Rptr. 769, 778, *rev. denied*, Nov. 16, 1989 (niece given opportunity to prove sufficiently close relationship). For limitations on foreseeability based on the proximity of perception, *see, e.g., Thing v. La Chusa*, 48 Cal. 3d 644, 669, 771 P.2d 814, 830, 257 Cal. Rptr. 865, 881 (recovery denied to mother who was neither present at scene of accident nor aware that son was being injured); *Wright v. City of Los Angeles*, 219 Cal. App. 3d ---, ---, 268 Cal. Rptr. 309, 329 (plaintiffs must be on the scene and "*then* aware [that decedent] was being injured by [the tortfeasor's] negligent conduct"); *Kelley v. Kokua Sales and Supply, Ltd.*, 56 Haw. 204, 209, 532 P.2d 673, 676 (physical proximity to scene of tort is determining factor); *Wilder v. City of Keene*, 131 N.H. 599, 604, 557 A.2d 636, 639 (recovery denied to parents who neither saw nor heard collision); *Burris v. Grange Mutual Cos.*,

46 Ohio St. 3d 84, 93, 545 N.E.2d 83, 91 (recovery denied to parent who had "no sensory perception of the events surrounding the accident"); *Gain v. Carroll Mill Co.*, 114 Wash. 2d 254, ---, 787 P.2d 553, 557 (plaintiff required to be "present at the scene of the accident and/or arrive shortly thereafter"). For limitations on foreseeability based on the severity of the injury to the bystander, *see, e.g., Thing v. La Chusa*, 48 Cal. 3d 644, 668, 771 P.2d 814, 829-30, 257 Cal. Rptr. 865, 880-81 ("serious emotional distress" required as a limitation on recovery); *Lejeune v. Rayne Branch Hospital*, 556 So. 2d 559, 570 (La. 1990) (emotional distress must be both severe and debilitating for recovery). This has been the preferred approach by the considered opinions of those jurisdictions extending liability to bystanders. *See, e.g., Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983); *Gates v. Richardson*, 719 P.2d 193 (Wyo. 1986); Note, *Bystander Recovery: A Policy Oriented Approach*, 32 N.Y.L. Sch. L. Rev. 877 (1987).

The New Mexico court has limited claims to those with a "marital, or intimate familial relationship between the victim and the plaintiff, limited to husband and wife, parent and child, grandparent and grandchild, brother and sister and to those persons who occupy a legitimate position in loco parentis." *Ramirez v. Armstrong*, 100 N.M. at 541, 673 P.2d at 825. Unfortunately, I have failed to convince my brethren that this Court should do the same.

This Court's expansion of tort liability for emotional distress raises other troubling questions when one considers the possibility of inconsistent verdicts and double recoveries for the same loss. In the case at hand, should a recovery by the prospective parents be permitted if another jury allows no recovery in the wrongful death action based upon the same acts of negligence? If the pending wrongful death claim of Glenn W. Johnson (plaintiff here, administrator in the companion case) is successful, despite admonitions to the contrary, that jury is likely to factor in a compensation to the plaintiff for his emotional distress in his capacity as father, a major element of plaintiff's claim in this case. The jury in this negligent infliction of emotional distress case, being unaware of the action of the jury in the other case, will also award damages for the emotional distress suffered by Glenn W. Johnson as the father. These dangers will exist whenever the intentional infliction of emotional distress is tried separate and apart from the wrongful death action. Perhaps consideration should be given to requiring

that such claims be tried in the same action. *See Crump v. Bd. of Education*, 326 N.C. 603, 629-30, 392 S.E.2d 579, 593-94 (1990) (Meyer, J., dissenting).

Finally, I share my brother Webb's skepticism that the majority indeed reflects "the overwhelming weight of this Court's opinions for the past one hundred years" in an opinion effectively overruling *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979), and *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960); and openly overruling *Edwards v. Advo Systems, Inc.*, 93 N.C. App. 154, 376 S.E.2d 765 (1989); *Ledford v. Martin*, 87 N.C. App. 88, 359 S.E.2d 505 (1987), *disc. rev. denied*, 321 N.C. 473, 365 S.E.2d 1 (1988); *Campbell v. Pitt County Memorial Hosp.*, 84 N.C. App. 314, 352 S.E.2d 902, *aff'd on other grounds*, 321 N.C. 260, 362 S.E.2d 273 (1987); *Woodell v. Pinehurst Surgical Clinic, P.A.*, 78 N.C. App. 230, 336 S.E.2d 716 (1985), *aff'd per curiam*, 316 N.C. 550, 342 S.E.2d 523 (1986); *Craven v. Chambers*, 56 N.C. App. 151, 287 S.E.2d 905 (1982); *Wesley v. Greyhound Lines, Inc.*, 47 N.C. App. 680, 268 S.E.2d 855 (1980); and *McDowell v. Davis*, 33 N.C. App. 529, 235 S.E.2d 896, *disc. rev. denied*, 293 N.C. 360, 237 S.E.2d 848 (1977). To arrive at this characterization, the majority is forced to conclude that our cases contain unfortunate and erroneous misstatements. The majority says that "some writers" have "miscategorized" the law of North Carolina in this area, though in categorizing the law of other states these same commentators "are likely correct" in their analyses. The majority states further that "our courts" have made "misstatements" of law and that "our courts" have used "inconsistent analyses" and have thereby "buttressed" "misconceptions" as to our law. The majority opinion is exceedingly (and in my view unnecessarily) critical of the care this Court has previously exercised in this area. Besides being inaccurate, these statements do nothing to instill confidence in this Court's opinions.

The majority has neglected to overrule or otherwise treat other cases containing "unfortunate" language similar to that which it has determined goes against "the overwhelming weight of this Court's opinions." In *Arthur v. Henry*, 157 N.C. 438, 73 S.E. 211 (1911), this Court stated that a plaintiff could recover for emotional distress if the jury found that "she was put in fear and frightened to such an extent that she suffered *physical pain*" as a result of debris propelled through the house in which she was living by negligent blasting. *Id.* at 439, 73 S.E. at 212 (emphasis added).

The Court noted with approval that the trial judge "was careful to exclude the idea that the plaintiff could recover for fright unaccompanied by physical injury." *Id.* In *Kirby v. Stores Corp.*, 210 N.C. 808, 812, 188 S.E. 625, 627 (1936), we stated, " '[a]s a general rule, damages for mere fright are not recoverable; but they may be recovered where there is some physical injury attending the cause of the fright, or, in the absence of physical injury, where the fright is of such character as to produce some physical or mental impairment.' " *Id.* (quoting *Candler v. Smith*, 50 Ga. App. 667, 673, 179 S.E. 395, 399 (1935)). We made the same statement in 1937 in the case of *Sparks v. Products Corp.*, 212 N.C. 211, 213-14, 193 S.E. 31, 33 (1937). *See also Slaughter v. Slaughter*, 264 N.C. 732, 735, 142 S.E.2d 683, 686 (1965).

In *Crews v. Finance Company*, 271 N.C. 684, 689, 157 S.E.2d 381, 385 (1967), we find more of this "unfortunate" language. We held in *Crews* that "angina and increased blood pressure constituted physical injury" so as to survive the defendant's motion for involuntary nonsuit and to require the case to be submitted to the jury. *Id.* at 690, 157 S.E.2d at 386.

The majority mischaracterizes as dicta the holding in *Williamson v. Bennett*, 251 N.C. at 503, 112 S.E.2d at 52, that "recovery may be had for mental or emotional disturbance in ordinary negligence cases where, coincident in time and place with the occurrence producing the mental stress, some actual physical impact or genuine physical injury also resulted directly from defendant's negligence." This Court denied recovery in that case because it was a case of "fright, anxiety and other emotional stress, *unaccompanied by actual physical injury.*" *Id.* at 507, 112 S.E.2d at 54 (emphasis added). It is apparent that even if the the majority is correct in stating that "our earlier cases did not require any physical impact or injury," a point which I do not concede, physical impact or injury became generally accepted as a requirement and was applied as such in those very cases the majority finds necessary to overrule as well as in cases it neglects to mention.

Our cases have consistently denied bystander recovery for the mental anguish of a parent over the negligently caused death or injury of a child. *Benevolent Association v. Neal*, 194 N.C. 401, 139 S.E. 841 (1927) (injury); *Croom v. Murphy*, 179 N.C. 393, 102 S.E. 706 (1920) (death); *Ballinger v. Rader*, 153 N.C. 488, 69 S.E. 497 (1910) (death). This Court has allowed no recovery for mental

suffering caused by injury to a spouse by means other than alienation of affections or criminal conversation. *Craig v. Lumber Co.*, 189 N.C. 137, 126 S.E. 312 (1925) (denying wife's recovery for grief and pain where husband died instantaneously); *Cottle v. Johnson*, 179 N.C. 426, 102 S.E. 769 (1920) (criminal conversation and alienation of affections); *Powell v. Strickland*, 163 N.C. 393, 79 S.E. 872 (1913) (criminal conversation). In *Ferebee v. R.R.*, 163 N.C. 351, 79 S.E. 685 (1913), *aff'd*, 238 U.S. 269, 59 L. Ed. 1303 (1915), this Court denied recovery for mental suffering resulting from concern for plaintiff's wife and child. *Id.* at 354-55, 79 S.E. at 686-87.

The majority cites *Hipp v. Dupont*, 182 N.C. 9, 108 S.E. 318 (1921), for the proposition that our jurisdiction permits bystander recovery for the negligent infliction of serious emotional distress. The majority neglects to mention that the plaintiff in that case alleged *physical*, as well as mental, injuries arising from the alleged acts of negligence directed at her husband. *Id. Hipp* stands for no more than the established rule of our jurisdiction that mental injury is actionable where there is a physical manifestation of harm.

This very brief examination of North Carolina law indicates that a rule permitting recovery for *all* foreseeable serious emotional distress arising from negligence is not a statement of the overwhelming authority of this state. Rather, the rule of this state has been to require physical manifestation of injury or physical impact in order to distinguish claims for *fright*, which the majority concedes is not actionable. I cannot agree with the majority's reading of current North Carolina law.

I would think that the more considered approach to the problem raised by the Johnsons' complaint would be to create a special exception to the general rule denying recovery for emotional distress of a bystander not suffering physical manifestations or a physical impact. This exception would permit recovery for the serious emotional distress suffered by a mother as a result of a stillbirth caused by negligence. Such a special category would be similar to those already established in our case law. For example, we have allowed recovery without regard to any bodily injury for mental distress which results from the negligent transmission of important telegraphic messages. *Russ v. Telegraph Co.*, 222 N.C. 504, 23 S.E.2d 681 (1943) (late delivery of death message); *Green v. Telegraph Co.*, 136 N.C. 489, 49 S.E. 165 (1904) (failure to properly deliver message of arrival); *Meadows v. Telegraph Co.*, 132 N.C.

40, 43 S.E. 512 (1903) (late delivery of sickness message); *Young v. Telegraph Co.*, 107 N.C. 370, 11 S.E. 1044 (1890) (late delivery of sickness message). Additionally, this Court has allowed recovery, absent physical injury, for the negligent handling of a dead relative's corpse. *Morrow v. R.R.*, 213 N.C. 127, 195 S.E. 383 (1938) (mutilation of dead body); *Bonaparte v. Funeral Home*, 206 N.C. 652, 175 S.E. 137 (1934) (husband's body withheld from wife to induce payment for embalming services). In *Kirby v. Stores Corp.*, 210 N.C. 808, 188 S.E. 625, defendant's bill collector sat in his parked car about fifteen feet away from plaintiff and repeated threats to get the sheriff and have plaintiff arrested if she did not pay her bills. Plaintiff alleged that the trauma of this event caused her to suffer a miscarriage, and this Court affirmed the jury verdict in her favor. A subsequent case affirmed this approach where there was a miscarriage. *Martin v. Spencer*, 221 N.C. 28, 30, 18 S.E.2d 703, 703 (1942). Such an exception as may be appropriate here has been the preferred approach of a significant number of sister states and commentators. *See, e.g., Tebbutt v. Virostek*, 65 N.Y.2d at 936, 483 N.E.2d at 1146, 493 N.Y.S.2d at 1014 (Jasen, J., dissenting) (citing numerous cases and authorities); *Naccash v. Burger*, 223 Va. 406, 416, 290 S.E.2d 825, 831 (1982). Our cases suggest that this is the proper manner in solving the problem posed today.

Justice WEBB dissenting.

I dissent. The majority, in order to reach the result it has reached, says it has followed "the overwhelming weight of this Court's opinions for the past one hundred years." In applying this "overwhelming weight" of authority the majority has found it necessary to overrule *Hinnant v. Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925), and seven cases decided by the Court of Appeals. I do not believe the Court of Appeals has been wrong in the way it has interpreted our cases.

I believe the cases relied on by the majority show that in some earlier cases we held that negligent infliction of emotional distress without showing more was actionable. These cases involved principally the negligent delivery of telegrams and the negligent burial of bodies. *Morrow v. R.R.*, 213 N.C. 127, 195 S.E. 383 (1938); *Young v. Telegraph Co.*, 107 N.C. 370, 11 S.E. 1044 (1890). As the law developed we held that there must be some impact or physical injury accompanying the negligent act to support a claim. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611; *Williamson*

v. Bennett, 251 N.C. 498, 112 S.E.2d 48; *Hinnant v. Power Co.*, 189 N.C. 120, 126 S.E. 307; *Kimberly v. Howland*, 143 N.C. 399, 55 S.E. 778 (1906); Byrd, *Recovery For Mental Anguish In North Carolina*, 58 N.C. L. Rev. at 457. We have now overruled or disapproved these cases, which I do not think we should do. The rule we have followed is somewhat arbitrary but it is based on the policy that there must be some limit to the liability of a negligent person. I would hold that Glenn W. Johnson and Barbara K. Johnson have not stated claims.

STATE OF NORTH CAROLINA v. STANLEY SANDERS

No. 88A85

(Filed 29 August 1990)

1. **Searches and Seizures § 2 (NCI3d)— search and seizure by civilian—items seized inadmissible**

The trial court did not err in a prosecution for first degree murder and first degree rape by denying defendant's motion to suppress a ring and watch taken from the victim's residence and seized from defendant's bedroom by a civilian, Curtis Gardin. While Gardin's actions were based on information shared with him by government investigators and furthered their efforts, Gardin's primary purposes were to console the grieving family which he had known a long time and to alleviate tensions the murder had caused in the community. Furthermore, defendant failed to show that Gardin was acting as an agent for the State when he searched defendant's bedroom and seized the watch and ring.

Am Jur 2d, Searches and Seizures §§ 13, 14.

2. **Constitutional Law § 28 (NCI3d)— false and misleading testimony from deputy—defendant not deprived of fair trial**

Defendant was not deprived of his right to a fair trial by false and misleading testimony from a deputy where defendant failed to establish either that the testimony was material or that the prosecution knew it was false and intentionally used it to defendant's prejudice.

Am Jur 2d, Criminal Law § 829.

3. Searches and Seizures § 19 (NCI3d)— evidence seized pursuant to flawed warrant—admission not prejudicial

There was no prejudicial error in a prosecution for first degree rape and first degree murder in the admission of evidence seized pursuant to a flawed search warrant where the evidence had minimal probative value and little prejudicial impact, and in light of the overwhelming admissible evidence of defendant's guilt.

Am Jur 2d, Evidence § 408.

4. Criminal Law § 75 (NCI3d)— confession—invalid search—subsequent arrest proper—confession admissible

The trial court did not err in a prosecution for first degree murder and first degree rape by admitting defendant's confession where defendant's arrest was proper despite an invalid search preceding the arrest because other information lawfully obtained independently of information obtained in the invalid search provided probable cause for defendant's arrest. Defendant's confession was not obtained by trickery, duress, or in violation of his right to counsel because defendant's arrest and a private citizen's seizure of a watch and ring taken from the victim were valid and there was therefore no unconstitutional activity to taint the confession. Defendant's contention of duress was meritless in that it was based on the fact that law enforcement officers confronted the defendant during questioning with a watch and ring lawfully obtained.

Am Jur 2d, Evidence § 546.

5. Witnesses § 1.4 (NCI3d); Criminal Law § 361 (NCI4th)— master witness list—name omitted—not allowed to testify

The trial court did not abuse its discretion in a prosecution for first degree rape and first degree murder by refusing to allow the testimony of a witness who would have been defendant's fifth alibi witness and whom defendant had failed to include on a master list of all potential witnesses. Defendant received explicit instructions that only those names submitted on the master list would be allowed to testify, defendant stated before trial that the list was complete, did not explain why he omitted the witness's name, expressed no special circumstances or need for the testimony, and the testimony would have been cumulative.

Am Jur 2d, Witnesses § 74.

6. **Criminal Law § 443 (NCI4th) — prosecutor's closing argument — prosecutor's duty — not improper**

A prosecutor's argument in a prosecution for first degree rape and first degree murder that he had taken an oath to fairly enforce the criminal laws and would dismiss a prosecution if he suspected anything wrong in the investigation was made in response to defendant's allegation of a "setup" and was not so grossly improper as to require the trial court to intervene *ex mero motu.*

Am Jur 2d, Trial §§ 218, 274.

7. **Criminal Law § 1352 (NCI4th) — murder — sentencing — unanimity requirement — new sentencing hearing**

A defendant found guilty of murder and sentenced under instructions containing unanimity requirements ruled unconstitutional in *McKoy v. North Carolina*, 108 L. Ed. 2d 369, was entitled to a new sentencing hearing where there was prejudice in that there was evidence to support the submitted but unfound mitigating circumstances. Although defendant did not object to the instructions at trial, the Supreme Court chose to apply Appellate Rule 2 and consider the error as if defendant had timely objected.

Am Jur 2d, Homicide § 513.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27,[1] from judgments imposing a sentence of death and a sentence of life imprisonment, entered by *Winberry, J.*, at the 4 February 1985 Criminal Session of Superior Court, TRANSYLVANIA County.[2] Heard in the Supreme Court on 9 March 1987. Reargued on 14 December 1988.

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1. At the time of defendant's appeal, N.C.G.S. § 7A-27 permitted appeals directly to this Court from all sentences of death or life imprisonment. The statute was amended in 1987 to permit direct appeals only from first degree murder convictions.

2. Defendant was previously tried and convicted in June 1982 but inaccurate and inadequate transcriptions of these trial proceedings required this Court to vacate the convictions and remand for a new trial. *State v. Sanders*, 312 N.C. 318, 321 S.E.2d 836 (1984) (per curiam).

Lacy H. Thornburg, Attorney General, by J. Michael Carpenter and William N. Farrell, Jr., Special Deputy Attorneys General, for the State.

Ann B. Petersen and James R. Glover for defendant appellant.

EXUM, Chief Justice.

Defendant was tried on proper bills of indictment charging him with first degree murder and first degree rape. After hearing arguments, we remanded for a hearing on defendant's motion to suppress certain evidence. This hearing was conducted at the 24 August 1987 Special Session of Superior Court, Transylvania County, Saunders, J., presiding. On 25 September 1987, Judge Saunders, after making findings of fact and conclusions of law, ordered that defendant's motion be granted in part and denied in part. Defendant assigned error to various aspects of this order, additional briefs were filed and the case was reargued on 14 December 1988.

We find no error in the hearing on defendant's motion to suppress or in Judge Saunders' 25 September 1987 order. Neither do we find error in the guilt phase of defendant's trial. The decision in *McKoy v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 369 (1990), requires that we remand for a new sentencing proceeding.

I.

The State's evidence at trial tended to show the following:

On 10 November 1981 the seventeen-year-old victim Jackie Lee lived with her two sisters and her mother in Brevard. Her mother worked at a local paper mill on the midnight to 8 a.m. shift. On the afternoon of 10 November 1981 the victim arrived home from school at around 3:15 p.m., changed into sweatclothes and went jogging. After returning, she watched television with her mother until 7:30, and then dropped her mother off at a restaurant.

Mrs. Lee returned home at approximately 10:45 p.m. She discovered her car parked in front of the house with the door ajar and her daughter's purse on the ground. The front door of her home was also open and inside lights were on. Two of Jackie's friends subsequently arrived and began looking for her.

Mrs. Lee reported to work at 11:55 p.m. Approximately five minutes later, she received a telephone message from one of the

friends reporting that Jackie's keys had been found near the front porch. Mrs. Lee immediately returned home and called the police. She discovered her daughter's jogging pants strewn on the bathroom floor and that her own white gold watch and topaz ring were missing. Mrs. Lee later provided investigating officers with drawings of both items.

The police began searching for Jackie. Between 3 and 4 a.m., they found a necklace belonging to Jackie behind the house. They also found some coins and bloody leaves near the picnic table in the Lees' backyard.

At approximately 5:30 p.m. on 11 November a neighbor discovered the victim's body in a nearby field. Her face was badly bruised; there were scratches on her arms and a gunshot wound in her chest. A fencepost, approximately four feet long with bloodstains on one end, was found nearby.

Dr. Page Hudson performed an autopsy on 12 November 1981. Injuries to the victim's head included a badly fractured skull, a bruised right cheek, a linear scrape on the chin, numerous tiny-dot hemorrhages on both sides of the head, lacerations on the lip, and a chipped front tooth. The bruising in the right cheek extended approximately five inches. Dr. Hudson testified that these injuries could have been inflicted by a hand and the bruising to the right cheek was likely caused by several blows. There was blood on the surface of the brain and a tear in the cerebellum. On the opposite side, there were small hemorrhages on the brain's surface. Dr. Hudson testified that a blunt object, possibly the fencepost found near the body, caused the skull fracture. Scratches and bruise lines were also found on the victim's neck. Between the lines were small circular bruises. Dr. Hudson testified that the victim had been strangled by a belt with grommets surrounding its perforations. He stated that defendant's belt, which had been examined, could have caused these marks. Dr. Hudson testified that the victim was alive when she was shot in the chest. He also found superficial tears in the vulva area and next to the anus. Spermatoza was found both inside and outside the vagina. He testified that these injuries were consistent with forcible sexual intercourse. Dr. Hudson stated that the injury to the back of the head, the gunshot wound, and the strangulation were each potentially fatal.

On 4 December 1981, law enforcement officers searched defendant's residence. They seized jewelry thought to be stolen and am-

munition boxes. Defendant was subsequently arrested as he approached his house.

Included in the jewelry listed as seized during the search were the gold watch and topaz ring belonging to Jackie's mother. The State introduced these items at trial, and Jackie's mother identified them. She testified that she remembered seeing both pieces of jewelry on top of her dresser before leaving for work on the night Jackie was murdered.

Sheriff's Deputy Hubert Brown also testified about the topaz ring and gold watch. He maintained that law enforcement officers recovered these items while searching defendant's home.

After defendant's arrest, SBI Assistant Supervisor Dan Crawford and Deputy Brown questioned defendant at the Transylvania County Sheriff's Department. Defendant waived his rights and agreed to speak with the officers. When shown the watch and ring that had been stolen from the victim's home and recovered in defendant's bedroom, defendant claimed that he had owned the items for "about a year." Until then, there had been no mention of the Lee murder or theft. Deputy Brown stated that he could not understand how defendant could have possessed both items for a year since they belonged to the Lee family on 10 November 1981. At that point, defendant denied killing anyone. Deputy Brown then left the room.

The conversation continued between Agent Crawford and defendant. The interview room had a two-way glass mirror through which several officers, including Deputy Brown, SBI Agent Davis Jones and Chief L. B. Vaughan of the Brevard Police Department observed the interview. Crawford advised defendant that the victim had been strangled, shot, and had her head bashed.

Defendant eventually stated that "it was an accident," he "didn't mean to do it," and that he wanted to tell about it. Defendant related that he had known the victim and had talked to her on the telephone. He described leaving his home on 10 November 1981 after dark and walking to the Lee home. He went around to the rear of the house where he watched the victim through a bedroom window. He came to the front of the house and as he was entering the porch, the victim came out the front door. She saw defendant and screamed. He grabbed her and forced her around the side of the house to the rear. The victim fell and hit

her head on a bench. He told her he needed money. She replied that her pocketbook was in the car in front of the house. He forced the victim back up the side of the house, across the yard and between several houses to Maple Street. They proceeded down another street and into a field. He removed his coat and they sat down and began to talk, subsequently having sexual intercourse. The victim then dressed herself and they continued talking. Defendant saw a light on in a house and thought he saw a man watching.

Defendant decided to put the victim "to sleep" by the use of a choke hold he had learned in the military, squeezing her neck until she went limp. He realized that he had choked her too hard and believed she was dead. When defendant thought he saw her move, he picked up a fencepost and hit her in the head. Unsure whether she were dead, he hit her again.

As defendant got up to leave he saw the moon reflect off his gun, which was on the ground. Defendant went back, picked up the gun and fired one time toward the victim's chest. Defendant had borrowed the gun from an acquaintance.[3] After shooting the victim, defendant walked from the field to his girlfriend's house. He played cards and later went home to bed.

Defendant admitted to Agent Crawford that he had been in the Lee residence before 10 November 1981 and had taken jewelry. He specifically admitted that he took the gold watch and topaz ring on 10 November 1981. Several officers who observed the discussion between defendant, Brown and Crawford corroborated the versions of defendant's statement presented by the State at trial.

Defendant's evidence tended to show he was not with the victim on the evening of the murder. Several witnesses testified that defendant was at a Carver Street poolroom that night. Curtis Gardin, a civilian, also testified. He related his role in the investigation and the 4 December 1981 search of defendant's home. Gardin claimed that he had procured the topaz ring and white gold watch from defendant's bedroom after defendant's sister invited him into their home.

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3. The acquaintance offered corroborating testimony for the State. A firearms expert testified that this gun was of the same caliber as the one used to shoot the victim. While the bullet removed from the victim's body was too damaged to be conclusively matched to the gun, it did bear similar rifling characteristics to other bullets fired from the gun.

The jury convicted defendant of first degree murder and first degree rape.

During the capital sentencing proceeding, the State presented no additional evidence. Defendant introduced the testimony of Billy Williamson Royal, M.D., a forensic psychiatrist at Dorothea Dix Hospital. Dr. Royal had examined defendant and determined that he was competent to stand trial and had been functioning well enough at the time of the Lee murder to be considered responsible for his actions. Dr. Royal testified that even though defendant was competent to stand trial, he suffered from a significant mental illness, possibly paranoid schizophrenia. Dr. Royal further diagnosed identity disorders and antisocial traits as aspects of defendant's illness and testified that defendant had a history of psychological problems. No other witnesses were called.

The trial court instructed the jury and submitted a verdict sheet to it. The jury found two aggravating circumstances unanimously and beyond a reasonable doubt: (1) that defendant committed murder while engaged in flight after committing rape; and (2) that the murder was especially heinous, atrocious or cruel.

The jury found unanimously and answered "yes" to the mitigating circumstance that the "murder was committed while [defendant] was under the influence of [a] mental or emotional disturbance." The jury failed to find unanimously and answered "no" the following proposed mitigating circumstances submitted to it:

> [1]. The capacity of [defendant] to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.
>
> [2]. Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value.

The jury then found unanimously and beyond a reasonable doubt that the mitigating circumstance it found was insufficient to outweigh the aggravating circumstances it found; that the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty when considered with the mitigating circumstance it found; and that defendant should be sentenced to death rather than life imprisonment. The trial court entered judgment accordingly. It also sentenced defendant to life imprisonment for first degree rape. Defendant appealed to this Court.

II.

A.

[1] Defendant assigns as error the trial court's denial of his motion to suppress as evidence the topaz ring and white gold watch seized by Curtis Gardin, the civilian who searched defendant's bedroom.

Deputy Hubert Brown obtained a warrant to search defendant's premises, alleging that probable cause arose from a reliable, confidential informant's report that the informant saw incriminating evidence in defendant's home.

At defendant's first trial he moved that the State reveal the identity of the informant and that the trial court suppress the evidence purportedly seized pursuant to the search warrant on the grounds that it was seized illegally by an agent for the State. This motion was supported by the testimony of defendant's sister. The trial court denied both motions and found the sister's testimony to be "inherently lacking in credibility."

At defendant's second trial, he again moved to suppress the seized evidence. In support of this motion, defendant tendered the testimony of Curtis Gardin, who he claimed was the informant mentioned in Deputy Brown's search warrant application. The trial court refused to hear Gardin because he was not called as a witness at the suppression hearing before defendant's first trial, and denied defendant's motion under the theory of *res judicata.*

After defendant's convictions at the second trial, he appealed to this Court. On 7 April 1987 we remanded to the trial division for the sole purpose of hearing defendant's motion to suppress. We ordered that all witnesses tendered by either the State or defendant offering competent testimony on issues raised by defendant's motion be heard, and that the trial court should then make findings of fact and conclusions of law before entering an order on the motion.

Judge Saunders heard the motion at the 24 August 1987 Criminal Session of Superior Court, Transylvania County. The court issued an order on 25 September 1987, finding the following facts (paraphrased except where quoted):

Curtis Gardin, a long-time friend of the victim's family, first became involved in this case when he visited the Lee home after the murder. He told the family that he would help in any way

possible to relieve the "grief of the family" and the "turmoil in the community." He wanted to "do what was just." The victim's sister asked Gardin to call the Transylvania Sheriff's Department. On or about 20 November 1981 Gardin voluntarily went to the Sheriff's Department and met with the case investigator, Deputy Brown. Before then Gardin had no specific information concerning the Lee murder, and had never met Brown nor served as an informant for him.

Deputy Brown told Gardin he suspected that a person probably known to Gardin was the murderer. Brown described a pattern of behavior attributed to the suspect, and Gardin responded that "it's probably Stanley," apparently referring to defendant. Brown then told Gardin his hypothesis of the murder, explaining how it was similar to another crime for which defendant was a suspect. Deputy Brown stated that he needed only a little more information to conclude the investigation with defendant's arrest. Brown showed Gardin sketches of jewelry missing from the Lee home and described a red cowboy hat he believed was also stolen. Brown asked Gardin if he knew defendant's family and if he could get into their home to see if the jewelry was there. He told Gardin that defendant was known to keep stolen items in a box, and he instructed Gardin to "go into the community, locate Stanley, talk to him, and see what you can develop." Gardin was also told to look for a red cowboy hat in the community if nothing was found at defendant's home.

Gardin told Brown he had not visited defendant's home for some time and was not sure he could get into it. Brown advised Gardin that there was reward money offered, but Gardin denied any interest in it. Finally, Brown warned Gardin that he might get hurt and that he should say nothing about the matter until he decided about participating. Deputy Brown gave Gardin the code name "Blueboy" if Gardin decided to contact him.

Gardin later discussed with his mother whether he should get involved. Over her objections he decided to help because he believed "Jesus placed the task in front of me." Gardin contacted Brown a second time, indicating he had developed a plan to gain entry into defendant's home by requesting an old recipe from defendant's mother. There is no evidence that Brown approved or disapproved this plan or offered Gardin any instructions.

On 3 December 1984 Gardin went to defendant's home and asked for the recipe. Gardin then visited the home of defendant's sister Teresa Wynn and said he was looking for a red cowboy hat for his daughter. With Wynn's permission Gardin looked around her house. Brown never told Gardin to do this.

Gardin returned to defendant's home on 4 December and talked with another of defendant's sisters. He told her he wanted a recipe and she let him into the house. Gardin then explained that a friend had some jewelry stolen by defendant, and that if it were returned no charges would be brought. The sister led Gardin to defendant's bedroom and there they located a box of jewelry. Gardin examined the contents, finding a topaz ring and a white gold Caravelle watch matching the sketches he had seen at the Sheriff's office. He removed these items from the box and left.

Brown never directed Gardin to take the jewelry, nor did Brown know about the ruse to gain access to defendant's room. Brown was not present when Gardin took the jewelry and could not have prevented it. "There is no evidence that Gardin was ever compelled by Investigator Brown for any reason to act the way he did."

Gardin took the jewelry to his sister and asked her advice. She suggested he not get involved. Gardin then went to see Deputy Brown, with whom he had not spoken since describing his plan to ask defendant's mother for a recipe. Gardin showed Brown the jewelry, explaining how he obtained the items. They discussed whether Gardin should have left the jewelry in defendant's home. Gardin expressed fear about returning to the home, and Brown said "We'll figure out something." Brown thanked Gardin and told him he would send him one thousand dollars whether Gardin wanted it or not.[4] Gardin then left the office.

Jackie's mother was brought to the sheriff's office. She identified the watch and ring as her own.

Brown contacted SBI agent Crawford and discussed the need for a search warrant, expressing a desire to keep Gardin's identity

4. The money was delivered three days later. Gardin ultimately received over seven thousand dollars for his assistance, which he accepted in part because he believed the black community had ostracized him and the police department failed to respond to threats made to him.

confidential. He was told that this was possible only if Gardin had been a confidential, reliable informant in the past. Brown misrepresented to Agent Crawford that Gardin had previously served as an informant.

At 4:50 p.m. on 4 December 1984, Brown applied for a warrant. He asserted that there was probable cause to believe a lady's watch, ring, and necklace, and a red cowboy hat were to be found on defendant's premises. He stated the following basis for probable cause:

> On today's date a reliable informant who has proven reliable in the past and given me information which resulted in the arrest and convictions of persons involved in other felony cases . . . stated to me today around 2:00 p.m. that after visiting at the residence of Hattie and Stanley Sanders, the said informant observed jewelry with the same description and type known to have been stolen from the residence of Linda Lee on Turnpike Dr., Brevard, N.C. Informant further stated they looked at a Caravelle Bulova lady's wristwatch and a gold topaz ring with large stone which is property described as taken in a felonious breaking and entering of the Lee residence on Nov. 10, 1981. The informant told me they also observed a large quantity of other jewelry and rings and necklaces of all types in the Hattie and Stanley Sanders residence.

When this application was prepared, Brown already possessed the watch and ring, having received them from Gardin. Gardin had never before served as an informant.

The warrant was served. Among the items listed as recovered in the search by law enforcement officers were the two jewelry pieces Gardin had delivered to Brown earlier that afternoon. The watch and ring were not seized pursuant to the warrant. While the warrant was being executed defendant approached the house and was arrested.

Based on these factual findings, the trial court drew the following conclusions of law: that when Gardin seized the ring and watch he was acting as a private person and not as a government agent or instrument; and that after properly striking the false information found on the warrant, it was invalid as offering no assurances of credibility. Therefore, evidence seized under the warrant was inadmissible. The court ordered that the State was entitled to

introduce the ring and watch as evidence seized by a private person, but that defendant was entitled to suppress the other items seized by police officers pursuant to the invalid 4 December 1984 warrant.

Defendant assigns as error the trial court's denial of his motion to suppress as evidence the topaz ring and white gold watch seized by Curtis Gardin. Defendant contends that Gardin was acting as an agent for the State when he seized the victim's jewelry, thereby violating defendant's right to be free from unreasonable government searches and seizures under the fourth and fourteenth amendments to the federal Constitution and Article I, Section 20 of the North Carolina Constitution.

The trial court, after making the foregoing findings of fact and conclusions of law, concluded otherwise. Because the evidence supports the court's findings of fact,[5] which in turn support its conclusions of law, we find no error in the court's denial of defendant's motion to suppress the white gold watch and topaz ring.

The fourth amendment as applied to the states through the fourteenth amendment protects citizens from unlawful searches and seizures committed by the government or its agents. This protection does not extend to evidence secured by private searches, even if conducted illegally. *Burdeau v. McDowell*, 256 U.S. 465, 65 L. Ed. 1048 (1921). The party challenging admission of the evidence has the burden to show sufficient government involvement in the private citizen's conduct to warrant fourth amendment scrutiny. *United States v. Snowadzki*, 723 F.2d 1427 (9th Cir. 1984).

In *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564 (1971), *reh'g denied*, 404 U.S. 874, 30 L. Ed. 2d 120 (1971), the United States Supreme Court considered whether the defendant's wife was a government agent when she permitted police officers to search her husband's bedroom. The Court stated that if the exclusionary rule were to apply to the evidence obtained from Mrs. Coolidge, it would have to be based upon some type of unconstitutional police conduct. The Court emphasized that the fourth and fourteenth amendments in no way should "discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Coolidge*, 403 U.S. at 488, 29 L. Ed. 2d at 595.

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5. Defendant makes no contention that Judge Saunders' findings are not supported by the evidence.

This Court also has expressed the standard for determining whether a private party has acted as an agent of the government when searching for and seizing evidence:

> When a private party has engaged in a search and has seized property or information, the protections of the fourth amendment apply only if the private party "in the light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the State." *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). Once a private search has been completed, subsequent involvement of government agents does not transform the original intrusion into a government search. *United States v. Sherwin*, 539 F.2d 1, 6 (9th Cir. 1976).

State v. Kornegay, 313 N.C. 1, 10, 326 S.E.2d 881, 890 (1985).

Some courts have adopted a two-factor analysis for determining whether a private citizen's search or seizure amounts to government action: (1) whether the government instigated, participated, or acquiesced in the citizen's conduct; and (2) whether the citizen engaged in the search with the intent to further law enforcement efforts. *United States v. Bazan*, 807 F.2d 1200 (5th Cir. 1986); *United States v. Lambert*, 771 F.2d 83 (6th Cir. 1985); *United States v. Snowadzki*, 723 F.2d 1427 (9th Cir. 1984); *United States v. Miller*, 688 F.2d 652 (9th Cir. 1982); *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981).

In a number of cases courts have determined there was no governmental involvement in a search by a private citizen. *See, e.g., Peters v. State*, --- S.C. ---, 393 S.E.2d 387 (1990) (private citizen visiting ill sister found LSD underneath a lamp, and believing it belonged to the sister's husband, notified authorities, who instructed her to return and retrieve the drugs for them); *United States v. Jennings*, 653 F.2d 107 (4th Cir. 1981) (after being tipped by DEA agents regarding drug shipment, airline employee after inviting DEA agent to be present searched a suspicious-looking package); *United States v. Pierce*, 893 F.2d 669 (5th Cir. 1990) (similar facts to *Jennings*); *United States v. Koenig*, 856 F.2d 843 (7th Cir. 1988) (Federal Express employee independently opened suspicious package and subsequently delivered it to authorities).

When crime victims seek to recover their own property by searching a defendant's premises, the search may be deemed a

private act not attributable to the police. *State v. Peele*, 16 N.C.App. 227, 192 S.E.2d 67 (1972), *cert. denied*, 282 N.C. 429, 192 S.E.2d 838 (1972).

Several courts, after examining police encouragement of a private citizen, have concluded the encouragement was insufficient to subject the private searches to constitutional scrutiny. *Snowadzki*, 723 F.2d 1427 (defendant's co-worker contacted IRS, reported tax evasion, copied and forwarded defendant's records, and inquired about reward money); *United States v. Miller*, 688 F.2d 652 (9th Cir. 1982) (after citizen passed a tip to police that property stolen from him was at defendant's business, FBI agents invited citizen to visit the business with them, suggesting citizen pose as a customer; citizen saw and later returned to photograph stolen items); *People v. Sellars*, 93 Ill. App. 3d 744, 417 N.E.2d 877 (1981) (after individuals reported defendant's burglary and possession of stolen property, officers suggested they get invited inside the apartment and directed them to report observations of items stolen from them; they subsequently delivered to police stolen items they confiscated after breaking into apartment; because police never encouraged the breaking, held individuals not agents of police).

In other cases a private citizen's search or seizure was attributable to the State and evidence was suppressed under the fourth amendment exclusionary rule. *See, e.g., Walther*, 652 F.2d 788 (airline agent was a regular informant, and his sole motivation in searching luggage that DEA agents could not search was the expectation of reward money); *People v. Barber*, 94 Ill. App. 3d 813, 419 N.E.2d 71 (1981) (landlord met police at defendant's apartment at a prearranged time, inviting them inside where they discovered stolen items; the meeting was for the joint purposes of determining whether the defendant had moved out without notification and of seeing if stolen items were within the premises); *United States v. Robinson*, 504 F. Supp. 425 (N.D. Ga. 1980) (airline employee retrieved the defendant's suitcase for DEA agents and accompanied them, opening it without defendant's consent in the presence of the agents whose conduct had encouraged the employees' actions, despite the absence of a verbal request to open the case); *State v. Boynton*, 58 Haw. 530, 574 P.2d 1330 (1978) (police actively recruited a citizen to climb a fence and peer into an enclosed area); *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966) (airline employees searched luggage for stolen watches at the request of the police).

Based on the authorities we have reviewed and general principles of fourth amendment jurisprudence, we conclude that determining whether a private citizen's search or seizure is attributable to the State and therefore subject to constitutional scrutiny demands a totality of the circumstances inquiry. Factors to be given special consideration include the citizen's motivation for the search or seizure, the degree of governmental involvement, such as advice, encouragement, knowledge about the nature of the citizen's activities, and the legality of the conduct encouraged by the police.

While defendant has demonstrated that some of Gardin's activities were attributable to the State, under all the circumstances he has failed to show that Gardin's seizure specifically of the topaz ring and white gold watch was so attributable.

Defendant attempts to distinguish Gardin's actions from those cases allowing into evidence items seized by private citizens. Because Gardin had no independent duty to search and no motive to recover his own property, defendant argues that he acted with the intent to assist the police. Defendant also argues that the government conduct in the search was pervasive enough to attribute Gardin's actions to the State. Therefore, he contends that the search violated the fourth and fourteenth amendments. We disagree.

The evidence supports the trial court's findings which relate to Gardin's personal motivations for visiting defendant's residence. His expressed intent when searching defendant's home and seizing evidence was a desire to help "relieve the grief of the family" and end the "turmoil in the community." He met with Deputy Brown only after the victim's sister asked whether Gardin still wanted to help the family, and did not immediately agree to be an informant. He solicited advice from his mother and she discouraged his involvement. Gardin only agreed to participate over his mother's objections after concluding that "Jesus placed the task in front of" him. After seizing the jewelry, Gardin's actions of deliberating and seeking advice from his sister further indicates that his primary intent was not to serve law enforcement efforts. While Gardin's actions were based on information shared with him by government investigators and furthered their efforts, Gardin's primary purposes were to console a grieving family which he had known a long time and to alleviate tensions the murder had caused in the community.

Neither has defendant shown sufficient governmental involvement to render Gardin a State agent as to all his investigatory activities. The extent of Brown's recruitment of Gardin was to advise him that defendant was under suspicion, describe certain evidence that might link defendant to the crime, and to ask Gardin if he could gain entry into defendant's house or locate defendant and talk with him. Brown mentioned a reward fund and Gardin said he was not interested in money. The meeting ended with Brown warning Gardin to say nothing until Gardin made up his mind to participate, and giving Gardin a code name to use if Gardin called him. Only later, after Gardin believed Jesus "placed the task in front of" him, did Gardin call Brown and tell him he would visit defendant's home and ask for a recipe.

Even if these facts justify a conclusion that in visiting defendant's home on 3 December and asking for a recipe, Gardin was acting as an agent for the State, there is no similar government involvement in subsequent actions by Gardin. Deputy Brown had no knowledge of Gardin's later visit to defendant's sister. Gardin's subsequent seizure of evidence from defendant's bedroom was committed without the knowledge, encouragement or acquiescence of law enforcement officials.

At no time did any law enforcement official tell Gardin to do anything illegal. No officer ever knew of Gardin's ruse to gain entry into defendant's bedroom by lying to defendant's sister about defendant's criminal liability. No officer ever encouraged, instructed or even knew beforehand of Gardin's search of defendant's bedroom and seizing evidence, nor was any officer present when Gardin seized the evidence.

In light of all the circumstances, Brown's involvement both before Gardin conducted his private search and after Gardin had seized evidence from defendant's bedroom, fails to transform Gardin's private, unsolicited, unsupervised act of seizing evidence into a government search. Defendant has failed to show Gardin was acting as an agent for the State when he searched defendant's bedroom and seized the white gold watch and topaz ring. His motion to suppress as to these items was therefore properly denied.

B.

[2] Defendant next contends that Deputy Hubert Brown's trial testimony was false and misleading, prejudicing defendant and depriving him of his right to a fair trial. We disagree.

Brown testified at trial that he searched defendant's bedroom pursuant to a warrant on 4 December 1981 and seized a watch and ring matching descriptions provided by the victim's mother. During cross-examination Brown acknowledged knowing and speaking with Curtis Gardin, but refused to answer questions regarding what he had asked Gardin to do or whether Gardin had entered defendant's home. Brown testified that he never paid Gardin any money. Brown's testimony about who found the jewelry and whether Gardin was paid for his information was directly contradicted by Gardin's own testimony. Both Brown's and Gardin's versions of this incident were before the jury.

The State concedes that portions of Brown's testimony were false or misleading. At the posttrial hearing on defendant's motion to suppress evidence, Judge Saunders found that Curtis Gardin seized the watch and ring from defendant's bedroom and delivered the items to Brown, later receiving reward money from him. Defendant contends that because these facts are inconsistent with Brown's trial testimony, he is entitled to a new trial. We disagree.

When a defendant shows that "testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction," he is entitled to a new trial. *See, e.g., State v. Robbins*, 319 N.C. 465, 514, 356 S.E.2d 279, 308 (1987), *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

In *Mooney v. Holohan*, 294 U.S. 103, 112, 79 L. Ed. 791, 794 (1935), the defendant alleged that the sole basis of his conviction was the government's knowing use of perjured testimony. The United States Supreme Court agreed, noting that "deliberate deception of the court and jury" was "inconsistent with the rudimentary demands of justice." The Supreme Court has used *Mooney* and its progeny to establish a "standard of materiality" under which the knowing use of perjured testimony requires a conviction to be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Augurs*, 427 U.S. 97, 103, 49 L. Ed. 2d 342, 349-350 (1976). *See also Pyle v. Kansas*, 317 U.S. 213, 87 L. Ed. 214 (1942); *Alcorta*

v. Texas, 355 U.S. 28, 2 L. Ed. 2d 9 (1957); *Napue v. Illinois*, 360 U.S. 264, 3 L. Ed. 2d 1217 (1959); *Miller v. Pate*, 386 U.S. 1, 17 L. Ed. 2d 690 (1967); *Giglio v. United States*, 405 U.S. 150, 31 L. Ed. 2d 104 (1972); *Donnelly v. DeChristoforo*, 416 U.S. 637, 40 L. Ed. 2d 431 (1974). In *Napue v. Illinois*, 360 U.S. 264, 3 L. Ed. 2d 1217 (1959), a new trial was granted because the State's chief witness, the defendant's accomplice, lied about receiving promises of consideration for his testimony. Likewise, in *Giglio v. United States*, 405 U.S. 150, 31 L. Ed. 2d 104 (1972), a new trial was awarded when the prosecution knowingly allowed false testimony to stand uncorrected. The testimony was offered by the only witness linking the defendant to the crime and therefore was unquestionably material.

Defendant contends that under *Mooney*, *Napue* and *Giglio* he is entitled to a new trial.

Although Brown's testimony was in part false, defendant fails to establish either that it was material or that the prosecution knew it was false and intentionally used it to defendant's prejudice. Deputy Brown's testimony, with regard to how and by whom the white gold watch and topaz ring were found, is not material. The material fact linking defendant to the crimes is that these items were found in his bedroom. Brown's testimony was also shown to be false with regard to whether Gardin was paid. Again, this is not a material fact. It goes only to the credibility of the witness Gardin. The jury heard conflicting evidence on this point. Indeed, Gardin himself admitted that he had been paid. The jury could thus adjudge the credibility of both Brown and Gardin. We are confident beyond a reasonable doubt that Brown's misleading testimony did not contribute to defendant's conviction and that had Brown testified truthfully the trial's result would have been no different.

C.

[3] Defendant next assigns error to evidence introduced at trial which Judge Saunders in his 25 September 1987 order concluded should have been suppressed.

Deputy Brown applied for the warrant to search defendant's home by submitting an affidavit falsely describing Curtis Gardin as a "reliable informant who has proven reliable in the past and given information which resulted in the arrest and convictions of

persons involved in other felony cases." The State seized from the house ammunition and some jewelry belonging to the victim's family while executing the flawed warrant. This evidence was introduced at trial.

At the hearing on defendant's motion to suppress evidence Judge Saunders concluded as a matter of law that the warrant Brown obtained to search defendant's home "fail[ed] to meet either Constitutional or North Carolina statutory standards, and therefore is invalid," and that evidence seized pursuant to the warrant should not have been admitted at defendant's trial. While we agree with Judge Saunders' conclusions regarding this evidence, we hold the error in admitting it was harmless beyond a reasonable doubt.

This evidence had minimal probative value and little prejudicial impact. Evidence that additional jewelry and ammunition were found in defendant's bedroom was cumulative in light of other, properly admitted evidence, such as the white gold watch and topaz ring also found in defendant's bedroom. The victim's family testified, moreover, that those two items had been in their home on the night of the murder; but they could not remember whether the other jewelry items had been present at the home any more recently than two to four weeks before the killing.

Admission of the ammunition found in defendant's bedroom provided somewhat attenuated circumstantial evidence. The State's firearms expert testified the victim was shot with a .32 caliber weapon. He was unable to conclude that the handgun of that caliber found in defendant's bedroom had in fact fired the shots. Admission into evidence of the seized ammunition, only some of which was .32 caliber, added little to the properly admitted circumstantial evidence against defendant.

In light of the overwhelming admissible evidence of defendant's guilt, especially his possession of the topaz ring and white gold watch known to have been in the victim's home on the night she was killed and his own detailed confession, we hold the erroneous admission of other jewelry and the ammunition improperly seized during a police search of defendant's bedroom was harmless beyond a reasonable doubt.

D.

[4] Defendant next contends that it was error to admit his confession into evidence. We disagree.

Before both his trials, defendant unsuccessfully moved to suppress evidence seized during the execution of the search warrant and all statements he made after arrest. He argued that the confession was obtained by duress and trickery and in violation of his right to counsel, and that it was the fruit of tainted evidence improperly seized under an invalid search warrant. For the first time on this appeal, he argues that there was no probable cause to arrest him. As such, he contends that the arrest itself was unlawful and the subsequent confession was inadmissible, having been obtained pursuant to an unlawful arrest.

Defendant's failure to assert before or during either of his trials that there was no probable cause for his arrest precludes him from doing so now. When the issue of an illegal arrest is not timely raised at trial, it will not be heard for the first time on appeal. *State v. Hunter*, 305 N.C. 106, 286 S.E.2d 535 (1982).

We have nevertheless elected to review this contention under Rule 2 of the North Carolina Rules of Appellate Procedure. We hold that defendant's arrest itself was proper despite the invalid search immediately preceding it. Other information lawfully obtained by investigators from Curtis Gardin, independently of information obtained in the invalid search, provided probable cause for defendant's arrest.

Whether probable cause exists to justify an arrest depends on the "totality of the circumstances" present in each case. *Massachusetts v. Upton*, 466 U.S. 727, 80 L. Ed. 2d 721 (1984); *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (1983); *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984). Information obtained from ordinary citizens cooperating with police may be entitled to a greater degree of credibility than information obtained from habitual informants. Indeed, "the ordinary citizen who has never before reported a crime to the police, may, in fact, be more reliable than one who supplies information on a regular basis." *United States v. Harris*, 403 U.S. 573, 599, 29 L. Ed. 2d 723, 743 (1971) (Harlan, J., dissenting). This Court has declined to demand of private citizens who are voluntarily assisting the police the same standards of reliability applicable to paid police informants. *State v. Martin*, 315 N.C. 667, 340 S.E.2d 326 (1986).

Applying these principles to the facts, we hold that Curtis Gardin's lawfully obtained information provided to law enforcement investigators was sufficiently reliable to establish probable cause

for defendant's arrest. Gardin turned over to the sheriff's department the topaz ring and white gold watch stolen from the victim's home on the night of the murder, stating that he found them in defendant's bedroom. Gardin was acting as a private citizen volunteering to assist the police out of the compassion he felt for the victim's family. Gardin's reliability and the information he lawfully provided were sufficient to establish probable cause for defendant's arrest.

Neither was defendant's confession obtained by trickery, duress, or in violation of his right to counsel. Because defendant's arrest and Gardin's seizure of the white gold watch and topaz ring were valid, there is no unconstitutional activity to taint the confession which followed adequate Miranda warnings and defendant's knowing and intelligent waiver of rights.

Defendant's allegations of duress are meritless since they arise only from the fact that while questioning defendant, law enforcement officials confronted him with the white gold watch and topaz ring seized from his bedroom by Curtis Gardin. Because these items were lawfully obtained, their exclusion is not required under *State v. Silva*, 304 N.C. 122, 282 S.E.2d 448 (1981) (holding that confronting a defendant with unlawfully seized evidence renders a subsequent statement involuntary and therefore inadmissible).

We consequently overrule this assignment of error.

E.

[5] Defendant next assigns as error the trial court's refusal to allow the testimony of one who would have been defendant's fifth alibi witness and whom defendant had failed to include on a master list of all his potential witnesses. We find no merit in the assignment.

The trial court required witness lists from both the State and defendant before jury selection as a means of screening out potential jurors who might have known the witnesses. To this end, the trial judge instructed counsel on both sides that absent extraordinary or special circumstances, only listed witnesses would be allowed to testify. The judge distributed to both counsel a list of witnesses who had appeared at defendant's first trial. Counsel then compiled their own lists and submitted them to the court. Before the master list was distributed to the jury, the court inquired whether both counsel had listed all potential witnesses. They assured the court that they had.

At trial defendant called Thomas Conley to testify. During a subsequent bench conference, the trial court advised defense counsel that Conley's name was not on the master list. Because Conley had testified at the first trial, his name had been included on the initial list distributed to both counsel by the court. Defense counsel later omitted Conley's name when returning the list. The State objected to Conley's testifying, and defendant offered no explanation as to why Conley had not been listed. The court sustained the objection. Defendant made no offer of proof or otherwise attempted to place Conley's testimony in the record.

Later in the trial defendant again called Conley. Another bench conference was conducted, and a similar discussion ensued. The State's objection was again sustained, and defendant again failed to preserve Conley's testimony for appellate review. Defendant asserts that the trial court's refusal to allow Conley to testify was reversible error. We disagree.

Exclusion of Conley's testimony was within the sound discretion of the trial judge.

> It is within the discretion of the trial judge to decide whether a witness shall testify when his name does not appear on a list of witnesses . . . . The Judge's ruling will not be reversed absent a showing of abuse of discretion. *State v. Anderson*, 281 N.C. 261, 188 S.E.2d 336 (1972). Under such circumstances, we think it to be the better practice before ruling for the Court to interrogate the jurors as to their relationship with the tendered witnesses. Although this procedure was not followed here, we find no prejudice to defendants.

State v. Spaulding, 288 N.C. 397, 414, 219 S.E.2d 178, 188-89 (1975). So it is here. The trial judge's decision to sustain the State's objection to Conley as a witness was not an abuse of discretion. Defendant received explicit instructions that, absent any extraordinary or special circumstances, only those names submitted on the master list would be allowed to testify. Defendant stated before trial that the list he returned was complete. He did not explain why he omitted Conley's name, and expressed no special circumstances or need for Conley's testimony. At least two of defendant's other four alibi witnesses testified to defendant's whereabouts at 8 p.m. on the night of Jackie Lee's murder, which was what Conley testified to at the first trial. If Conley would have testified consistently in the second trial, the testimony would have been merely cumulative.

For these reasons, even had defendant properly preserved Conley's testimony for appellate review, he has failed to show an abuse of discretion. This assignment of error is overruled.

F.

[6] Defendant next assigns error to the prosecutor's closing argument. We find no merit in this assignment of error.

The challenged portion of the argument follows:

> And I'm bound by an oath, also, as your District Attorney. I took an oath to fairly enforce the criminal laws, and that's what I intend to do.
>
> And if I smell, or have any notion in my intimate involvement with a criminal lawsuit, involvement that involves paperwork to the extent that it fills up this bucket that you see me lug around all week, if I smell something foul, then I'll be the first one to walk to this desk right over here and say, "Ms. McMahan, you give me a dismissal. I'm going to dismiss this lawsuit."
>
> I'm not going to operate that way. My conscience means more to me than that. My law license means more to me than that.

Defendant failed to object to this argument at trial. Objections to a prosecutor's closing argument to the jury should be made before the verdict to preserve the alleged error for appeal. *State v. Brock*, 305 N.C. 532, 290 S.E.2d 566 (1982). "In the absence of such objection, we will review the prosecutor's argument to determine only whether it was so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct the error." *State v. Allen*, 323 N.C. 208, 226, 372 S.E.2d 855, 865 (1988). Arguments by counsel are ordinarily left to the sound discretion of the judge who tries the case, and whose decisions will be upheld unless the impropriety of counsel was gross and purposely designed to prejudice the jury unfairly against defendant. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985); *State v. Locklear*, 291 N.C. 598, 231 S.E.2d 256 (1977).

Defendant contends that the argument meets this standard. We disagree.

The prosecutor made this argument directly following defendant's closing statements, when defense counsel had claimed repeatedly that the State's case was the result of a "setup," that the criminal investigation was unfair and conducted "by an officer . . . that's [sic] got a special interest," and that the police officers involved suffered from a "total lack of credibility." We have held that "[t]he prosecutor may defend his tactics, as well as those of the investigating authorities when their propriety is challenged." *State v. Mason*, 315 N.C. 724, 735, 340 S.E.2d 430, 437 (1986). We hold that the prosecutor's argument in response to defendant's allegation of a "setup" if improper at all was not so grossly improper as to require the trial court to intervene *ex mero motu*.

This assignment of error is overruled.

III.

[7] We now turn to defendant's assignments of error regarding the sentencing proceeding. Because we find that there is error under *McKoy v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 369, we remand for a new sentencing proceeding.

In *McKoy* the United States Supreme Court condemned North Carolina's jury instructions which required that the jury unanimously find the existence of a mitigating circumstance before individual jurors could consider that circumstance when later determining the ultimate recommendation as to punishment. Such a unanimity requirement is unconstitutional because, in violation of the eighth and fourteenth amendments, it "prevent[s] the sentencer from considering all mitigating evidence." *McKoy*, 494 U.S. at ---, 108 L. Ed. 2d at 376.

Because the instructions at defendant's trial contained these unanimity requirements, defendant is entitled to a new sentencing proceeding unless we can say the error was harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426. The State must demonstrate harmlessness beyond a reasonable doubt because the error is of constitutional dimension. N.C.G.S. § 15A-1443. The State has failed to meet its burden.

Two proposed specified mitigating circumstances were presented to the jury together with a "catchall" issue regarding any unspecified circumstances the jury might find. The jury found unanimously the mitigating circumstance that the murder was committed while defendant was under the influence of a mental or emotional disturb-

ance. However, it failed to find unanimously that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. It also failed to find unanimously that any other unspecified circumstance or circumstances arising from the evidence had mitigating value.

Because there was evidence to support the submitted but unfound mitigating circumstances, the *McKoy* error was not harmless. Much of the evidence tending to show that defendant was suffering from mental or emotional disturbance at the time of the murder would also have supported a conclusion that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Dr. Royal testified that defendant had a "significant mental illness," possibly "schizophrenia-paranoid type," and had "manic depressive-like symptoms." For example, defendant told Dr. Royal of his belief that the defense attorney, the prosecutor, and the court were conspiring to put defendant away. Dr. Royal observed during interviews that defendant did not express an appreciation or understanding of the seriousness of the charges against him. According to Dr. Royal:

> In Mr. Sanders' situation, even with talking about his legal charges, the fact that they were serious, that they could mean the termination of his life, that's what was going to be involved, he would be inappropriately jolly smiling, laughing. In a manner that was—that we thought was inappropriate and involved a significant illness.

Defendant also suffered rapid mood changes, resisted medical treatment, and exhibited antisocial traits. His I.Q. was 72, which means defendant suffered from borderline mental retardation.

Though this evidence does not *explicitly* address defendant's capacity to appreciate the criminality of his conduct or to conform his actions to the requirements of the law, it is nevertheless sufficient to allow a reasonable juror examining defendant's behavior, mental problems, and intelligence to conclude that defendant's capacity was impaired.

There was therefore evidence which would have reasonably permitted one or more jurors to find and consider the mitigating circumstance which was not unanimously found and thus not considered by any juror in the final balancing process. Had the unanimity instruction not been given, one or more jurors might have found

and considered these additional mitigating circumstances and reached a different conclusion as to sentence. At least we cannot say beyond a reasonable doubt that this would not have occurred. We cannot conclude, therefore, that error in the unanimity instruction was harmless beyond a reasonable doubt. *See State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426; *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990).

The State argues that because defendant did not object to the unanimity instructions at trial, this assignment of error must be addressed under the plain error rule pursuant to Appellate Rule 10(b)(2). For the reasons given in *State v. Sanderson*, 327 N.C. 397, 394 S.E.2d 803 (1990), we elect not to apply Appellate Rule 10(b)(2), but to apply instead Appellate Rule 2 and consider the *McKoy* error as if defendant had timely objected to it at trial.

Because events leading to defendant's remaining assignments of error to the capital sentencing proceeding will not necessarily recur at the new sentencing proceeding, we do not address them.

IV.

In summary, we hold that in the guilt determination proceeding in both the rape (No. 81CRS2879) and murder (No. 81CRS2850) cases there was no error. No error regarding defendant's sentence in the rape case has been assigned or argued, and we find none. Because of *McKoy* error in the sentencing proceeding in the murder case, the matter must be remanded for a new sentencing proceeding.

Case No. 81CRS2879—No error.

Case No. 81CRS2850—No error in guilt proceeding; remanded for a new sentencing proceeding.

STATE OF NORTH CAROLINA v. EDDIE CARSON ROBINSON

No. 689A84

(Filed 29 August 1990)

1. **Constitutional Law § 31 (NCI3d)— indigent defendant—private psychiatrist at State expense—denial at trial and sentencing—insufficient showing of need**

The trial court in a capital trial for three murders did not err in the denial of the indigent defendant's pretrial motion for the appointment of a private psychiatrist at State expense to assist in his defense at trial where defendant had previously been examined by a psychiatrist at Dorothea Dix Hospital; defendant made no preliminary showing that his sanity at the time of the offenses would be a significant factor at trial but merely argued that "some type of mental abnormality" must have been present because of the nature of the offenses; and defendant had available the assistance of the psychiatrist who examined him at Dix Hospital. Nor did the court err in failing to appoint a private psychiatrist at State expense to assist defendant in the sentencing phase of the trial where there was no suggestion at the hearing on the pretrial motion that defendant needed any psychiatric assistance beyond that which the Dix Hospital psychiatrist was already prepared to give, and did give, on any issue regarding defendant's mental state that was likely to arise at the sentencing proceeding.

Am Jur 2d, Criminal Law §§ 955, 1006.

2. **Homicide § 20.1 (NCI3d)— first degree murders—crime scene photographs and slides not excessive**

The trial court did not abuse its discretion in allowing the State to introduce 23 crime scene photographs and slides in defendant's trial for three first degree murders where there was no suggestion that the slide projections were done unfairly, there was no needless repetition of photographs, and the presentation of each photograph or slide was accompanied by competent testimony of witnesses which the photographic or slide evidence illustrated. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Homicide §§ 416-419.

3. Jury § 7.11 (NCI3d)— death penalty views—excusal for cause—new sentencing proceeding—harmless error

Defendant's assignment of error to the excusal for cause of several jurors because of their death penalty views will not be addressed by the Supreme Court where the defendant is being given a new sentencing proceeding since any error in the excusal of such jurors would have affected only the sentencing proceeding.

Am Jur 2d, Jury § 289.

4. Criminal Law § 472 (NCI4th)— display of murder weapon during charge—no gross prosecutorial misconduct—mistrial or instruction not required

The clerk's placement of an iron pipe used in two murders on the railing of the clerk's table during the court's jury charge, allegedly at the direction of the district attorney, did not constitute gross prosecutorial misconduct requiring the court *ex mero motu* to declare a mistrial or give supplemental jury instructions where the pipe was relevant and admissible evidence which had been introduced by the State as an exhibit and seen by the jury during trial.

Am Jur 2d, Trial §§ 192, 198.

5. Appeal and Error § 331 (NCI4th); Constitutional Law § 28 (NCI3d)— alleged errors in trial transcript—no due process violation

Defendant's due process rights were not violated by the court reporter's allegedly poor transcription of his trial for three first degree murders where defendant contended that the transcript is replete with incoherent, inconsistent, and senseless language but failed to point to any such significant language in the transcript; there was no indication of efforts to work with either the court reporter or the district attorney to attempt to correct any errors; and there was no suggestion that the transcript could not have been reconstructed if this were truly necessary for a proper understanding of the case on appeal.

Am Jur 2d, Appeal and Error § 411.

6. Appeal and Error § 155 (NCI4th) — grand jury foreman — racial discrimination — failure to raise issue at trial

Defendant waived his right to raise on appeal the issue of alleged racial discrimination in the selection of the foreman of the grand jury that indicted him where he made no motion at or before trial challenging any aspect of his indictment. N.C.G.S. § 15A-952(b)(4).

Am Jur 2d, Appeal and Error § 545; Grand Jury §§ 14, 23.

7. Criminal Law § 1352 (NCI4th) — death sentences — McKoy error — harmless error analysis — new sentencing proceeding

The State failed to demonstrate that the trial court's erroneous instruction requiring unanimity on mitigating circumstances in a capital sentencing proceeding was harmless beyond a reasonable doubt, and three sentences of death imposed on defendant are set aside and the cases are remanded for a new sentencing proceeding, where some evidence was presented at defendant's sentencing proceeding tending to support, in varying degrees, each of five mitigating circumstances submitted to but rejected by the jury, and it cannot be said beyond a reasonable doubt that the erroneous unanimity requirement did not preclude at least one juror from considering one or more of these mitigating circumstances not unanimously found when weighing all circumstances in the ultimate sentencing decision or that no juror would have voted for life imprisonment if proper instructions on the mitigating circumstances had been given.

Am Jur 2d, Criminal Law §§ 600, 628; Homicide § 513.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from three judgments sentencing him to death imposed by *H. Hobgood, J.*, presiding at the 15 October 1984 Criminal Session of Superior Court, BLADEN County. Heard in the Supreme Court on 15 March 1988 and 22 August 1988.

Lacy H. Thornburg, Attorney General; Elizabeth G. McCrodden, Associate Attorney General; James J. Coman, Senior Deputy Attorney General; William N. Farrell, Jr., Special Deputy Attorney General, and Joan H. Byers, Special Deputy Attorney General, for the State.

H. Goldston Womble, Jr. and James R. Melvin for the defendant appellant.

E. Ann Christian, Robert E. Zaytoun and John A. Dusenbury, Jr. for North Carolina Academy of Trial Lawyers, amicus curiae.

EXUM, Chief Justice.

Defendant brings forward several assignments of error and contends he is entitled to a new trial or, alternatively, a new sentencing proceeding. We hold defendant's trial was free from reversible error but that the decision in *McKoy v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 369 (1990), entitles him to a new sentencing proceeding.

I.

Defendant was indicted on 31 May 1984 for the first degree murders of James Elwell Worley, his wife Shelia Denise Worley and her daughter Psoma Wine Baggett. He was tried capitally in the Superior Court, Bladen County, in October 1984 and was found guilty as charged in all three cases.

State's evidence in the guilt phase of the trial tended to show the following: On 26 March 1984 James Elwell Worley was murdered. On 29 April 1984 his wife, Shelia Denise Worley, and her daughter, Psoma Wine Baggett, were both murdered.

After Elton McLaughlin, a boyfriend of Shelia Denise Worley, was taken into custody, the police picked up and interrogated defendant. In a statement to the police defendant provided the following description of James Worley's murder: Defendant met Elton McLaughlin in early March 1984. McLaughlin told defendant he had been hired to kill a young woman's husband and that there would be "some money in it" for defendant's help. Defendant met McLaughlin in late afternoon on 26 March 1984. At approximately 11:30 p.m. they drove to Worley's home, entered through an unlocked back door and found Worley sleeping in bed next to his wife and her child. McLaughlin took a .22 caliber automatic rifle from defendant and fired two shots at James Worley. The victim's wife got out of bed and waited in a hallway with her child while defendant and McLaughlin removed James Worley's body from the house and placed it in the passenger side of Worley's Volkswagen. Defendant drove Worley's car and followed McLaughlin, who was driving his own car, to the Lisbon area of Bladen County where

they parked the cars on the shoulder of the pavement. Defendant removed a jug of gasoline from McLaughlin's car, poured it into the driver's area of the deceased's car and ignited it. Defendant got into McLaughlin's car and McLaughlin drove him home.

Medical evidence indicated Worley died of gunshot wounds to the chest. Two .22 bullets were removed from the body.

In another statement to the police, defendant described Shelia Denise Worley's murder. On 29 April 1984 McLaughlin picked up defendant in Newtown and told him "it was time for Denise to go." Defendant knew this meant it was time to kill Shelia Denise Worley. At McLaughlin's trailer, defendant hid in the master bedroom while Worley and McLaughlin talked. At some point, McLaughlin motioned for defendant to come to the bathroom, where he showed defendant a steel pipe and told defendant to kill Worley with it. McLaughlin returned to Worley and held her with her back to defendant while defendant slipped out of the bathroom and hit her twice in the back of the head with the pipe. Worley fell to the floor and McLaughlin grabbed Worley by the neck, dragged her to the bathroom and held her head underwater in the bathtub for a period of five to ten minutes. After cleaning up the blood, the two men placed the body in the trunk of the victim's car.

Worley's two daughters, four-year-old Psoma and one-year-old Alicia, were then awakened and led to their mother's car. McLaughlin drove to a field and defendant followed in the victim's car with Worley's body in the trunk and her two children inside. At the field McLaughlin told defendant they would have to kill the four-year-old Psoma "because she could talk and identify them." McLaughlin struck the child on the head with the steel pipe twice.

The two men removed the body of Shelia Denise Worley from the trunk and placed it with Psoma in the passenger side of Worley's automobile. Alicia remained in this car. Psoma began to move and defendant struck her once with the pipe. Defendant then drove the automobile to an embankment near a bridge and let it roll into a creek. McLaughlin pulled Worley's body from the passenger side of the car into the water, and he threw Psoma out of the car into the water. As the men left the area, defendant heard Psoma "struggle in the water like she was trying to get help."

Alicia was recovered the next morning mosquito-bitten and frightened, but otherwise physically unharmed.

Medical evidence indicated Shelia Worley died as a result of "asphyxia from drowning, . . . with a blunt [force] injury to the head as contributing or causing factor." Traces of blood located in the bathroom of the mobile home of McLaughlin and on a towel and vest recovered from the trunk of Worley's car were consistent with the blood type of Worley.

Medical evidence also indicated that Psoma's cause of death was blunt force injuries to the head and drowning.

Defendant offered no evidence.

II.

[1] Defendant assigns as error the trial court's denial of his pretrial motion for the appointment of a psychiatrist to assist in his defense. We find no merit in this assignment.

On 31 May 1984, the same day defendant was indicted, the trial court granted defendant's motion for a psychiatric examination and committed him to Dorothea Dix Hospital to determine his capacity to proceed to trial. Defendant was admitted to Dorothea Dix Hospital on 1 June 1984 and remained there for examination and observation until 15 June 1984. Dr. Lara, a forensic psychiatrist at Dorothea Dix Hospital, examined defendant and filed a report with the court describing him as follows:

> This patient appeared in a conventional grooming, in no major distress with a friendly, appropriate, cooperative attitude. He was engaging, pleasant. His speech was clear. His thought process involved coherent and organized thinking. His mood involved no major distress, but presented him preoccupied and concerned about his legal situation. He presented no evidence of psychosis. His concentration, orientation, and memory were intact. His intellectual functions appeared within an average or dull normal level. His judgment was appropriate. His insight appeared limited. Mr. Robinson demonstrated to be well informed in regards to the nature of his legal situation and the severity of his charges. He denied any history of mental illness, admitted to drinking, and occasional use of marijuana and cocaine. He appeared concerned about his own life and the kind of problems he was involved in.

Defendant scored 82 on an I.Q. test, indicating, according to Dr. Lara, a level of "high borderline intellectual functioning."

Doctor Lara diagnosed unspecified alcohol abuse and a "personality disorder, mixed with dependent, impulsive, and avoidant features." He stated that traits of aggression, apprehensiveness and insecurity were common in persons with defendant's psychological patterns. The report noted defendant's history of alcohol abuse and use of marijuana, cocaine and "injectable drugs."

Doctor Lara found no "evidence of mental illness that could have impaired [defendant's] ability to recognize right from wrong" at the time the crimes were committed. He expressed an opinion that defendant presented "no evidence of psychosis or other severe mental illness," and recommended defendant be discharged for the purposes of proceeding to trial.

On 3 August 1984 defendant moved that he be examined by a private psychiatrist at state expense to determine defendant's mental competence to stand trial. The written motion asserted defendant was indigent and claimed "the alleged facts surrounding the murders of the decedents raise a strong inference that the person or persons who committed these acts was at that time suffering from some sort of mental disease or disability." The motion stated it was necessary to examine defendant again to determine whether he was insane at the time he committed the acts, and it referred to Dr. Lara's report indicating defendant's I.Q. of 82, his history of alcohol and drug abuse and his traits of apprehensiveness and insecurity common in persons similar to defendant.

At the 6 August 1984 Criminal Session of Superior Court, Bladen County, defense counsel, relying essentially on Dr. Lara's report, orally presented this motion to the court. He argued that defendant's I.Q., his "involvement with drugs, alcohol and injectable drugs," the traits of apprehensiveness and insecurity mentioned in Dr. Lara's report and "the very nature of the offenses with which [defendant] is charged . . . indicate that there was some type of mental abnormality present . . . when the acts took place." The trial court reviewed Dr. Lara's report and denied defendant's motion.

Assigning error to this ruling, defendant relies on *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985), and *State v. Gambrell*,

318 N.C. 249, 347 S.E.2d 390 (1986). *Ake*, followed in *Gambrell*, held that when a defendant makes "a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one." *Ake*, 470 U.S. at 74, 84 L. Ed. 2d at 60.

> In determining whether defendant has made the threshold showing required by *Ake*, the trial court should consider all the facts and circumstances known to it at the time the motion for psychiatric assistance is made. . . . The question under *Ake* is not whether defendant has made a *prima facie* showing of legal insanity. The question is whether, under all the facts and circumstances known to the court at the time the motion for psychiatric assistance is made, defendant has demonstrated that his sanity when the offense was committed will likely be at trial a significant factor.

Gambrell, 318 N.C. at 256, 347 S.E.2d at 394. In both *Ake* and *Gambrell* the courts concluded defendants had made the requisite preliminary showing; consequently, in those cases defendants were entitled under the federal Constitution to state-furnished psychiatric assistance.

Defendant here made no preliminary showing that his sanity at the time of the offense would be a significant factor at trial. In support of his motion for state-furnished psychiatric assistance he relied essentially on the report of Dr. Lara. Not only does this report fail to show that defendant's sanity at the time of the offense would be a factor at his trial, it affirmatively indicates that his sanity would not be such a factor. Nor in oral argument on the motion did defendant, through counsel, suggest he would interpose insanity as a defense to the charges against him. He merely referred to "some type of mental abnormality" which he argued must have been present because of the nature of the offenses committed. This showing at the hearing on the motion, as any cursory comparison of the facts will reveal, falls far short of the preliminary showing required by and found to have been made in *Ake* and *Gambrell*.

Ake also held that in a capital trial where the state offered psychiatric evidence of defendant's future dangerousness at the sentencing phase, defendant "was entitled to the assistance of a psychiatrist on this issue and . . . denial of that assistance deprived

him of due process." *Ake*, 470 U.S. at 86-87, 84 L. Ed. 2d at 68. In *Gambrell* we characterized this aspect of *Ake*, perhaps overbroadly, as meaning "that an indigent defendant is entitled to state furnished psychiatric assistance on issues relating to his mental state which may arise at a capital sentencing hearing." *Gambrell*, 318 N.C. at 256, n.2, 347 S.E.2d at 394, n.2. We have read both aspects of the *Ake* decision to be consistent with holdings of this Court that to be entitled to the assistance of an expert at state expense an indigent defendant must show "a particularized need" for the expert. *State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987) (applying *Ake* to defendant's request for a psychiatric expert to assist at the sentencing phase of a capital case); *State v. Penly*, 318 N.C. 30, 347 S.E.2d 783 (1986) (applying *Ake* to the guilt phase of a capital case).

Relying on *Ake*'s application to the sentencing phase of a capital case, defendant argues in his brief that it was error to deny his pretrial motion because a "private psychiatrist would have in all probability assisted the defendant in his being given more consideration regarding the mitigating circumstances surrounding mental or emotional disturbance and his susceptibility of acting under the domination of . . . McLaughlin" by the jury at his sentencing proceeding.

This argument must also fail. There is no suggestion in defendant's showing at the hearing on his pretrial motion that he needed any psychiatric assistance beyond that which Dr. Lara was already prepared to give, and did give, on any issue regarding defendant's mental state that was likely to arise at the sentencing proceeding. *See State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987).

As a matter of state procedural law an indigent defendant is entitled to the assistance of state-furnished experts, including medical experts, only upon a showing "that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial." *State v. Gray*, 292 N.C. 270, 278, 233 S.E.2d 905, 911 (1977) (interpreting N.C.G.S. § 7A-450(b)); *see also State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985); *State v. Craig*, 308 N.C. 446, 302 S.E.2d 740, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983). Making such a determination depends upon

the facts and circumstances of each case and rests, finally, in the trial judge's discretion. *Id.*

Because of the vagueness of defendant's showing at the hearing on his pretrial motion regarding his need for a psychiatric expert in addition to Dr. Lara and because he had available the assistance of Dr. Lara, the denial of his motion as a matter of state procedural law was well within the discretion of the trial judge and constitutes no error.

III.

[2] Defendant next argues the trial court erred in allowing the State to introduce, over defendant's objections, twenty-three "crime-scene" photographs and slides.

State's Exhibits Nos. 1-9 depict various aspects of James Worley's murder. Exhibits 1 and 2 showed different photographs of James Worley's car and illustrated testimony given by the witness who first discovered the burned car containing the victim. Exhibits 3 and 4 showed the body of James Worley as it was found in the automobile and illustrated the testimony of Special Agent Michael Lowder who investigated the crime scene. Photographs depicting various aspects of Worley's body were introduced as Exhibits 5 through 11 and illustrated the testimony of Dr. Radische, who performed the autopsy on Worley and established Worley's cause of death.

Exhibits 15 through 18 were photographs of Shelia Denise Worley's car as it was found partially submerged in a creek, and of the locations of the victims' bodies after they were recovered from the creek. These illustrated the testimony of Kent Allen, a witness who testified about his discovery of the bodies. Exhibits 20 through 23 were photographic slides in color of Shelia Denise Worley's body and illustrated the testimony of Dr. John Butts, the pathologist who performed that autopsy. Exhibits 25 through 30 were slides of Psoma Baggett's autopsy and illustrated the testimony of Dr. Radische, who also performed that autopsy.

Defendant argues these photographs and slides should have been excluded under Rule 403 of the North Carolina Rules of Evidence, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair preju-

dice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, Rule 403 (1986). Defendant contends the photographs and slides were unfairly prejudicial and that this prejudice outweighed their relevancy.

The issue of admitting at trial photographic evidence with inflammatory potential was exhaustively reviewed by this Court recently in *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988). We said:

> "Unfair prejudice" means an undue tendency to suggest a decision on an improper basis, usually an emotional one. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). Photographs are usually competent to explain or illustrate anything that is competent for a witness to describe in words, *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988), and properly authenticated photographs of a homicide victim may be introduced into evidence under the trial court's instructions that their use is to be limited to illustrating the witness's testimony. *Id.*, *State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984). Thus, photographs of the victim's body may be used to illustrate testimony as to the cause of death, *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983). Photographs may also be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree, *State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978), and for this reason such evidence is not precluded by a defendant's stipulation as to the cause of death. *State v. Elkerson*, 304 N.C. 658, 285 S.E.2d 784 (1982). Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury. *State v. Murphy*, 321 N.C. 738, 365 S.E.2d 615 (1988); *State v. King*, 299 N.C. 707, 264 S.E.2d 40 (1980).
>
> This Court has recognized, however, that when the use of the photographs that have inflammatory potential is ex-

cessive or repetitious, the probative value of such evidence is eclipsed by its tendency to prejudice the jury.

. . . .

In general, the exclusion of evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence is within the trial court's sound discretion. *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (1988); *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 [1986]. Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in light of the illustrative value of each likewise lies within the discretion of the trial court. *State v. Sledge*, 297 N.C. 227, 254 S.E.2d 579 [1979]. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

The test for excess is not formulaic: there is no bright line indicating at what point the number of crime scene or autopsy photographs becomes too great. The trial court's task is rather to examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation. What a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, the scope and clarity of the testimony it accompanies—these are all factors the trial court must examine in determining the illustrative value of photographic evidence and in weighing its use by the state against its tendency to prejudice the jury.

State v. Hennis, 323 N.C. at 283-85, 372 S.E.2d at 526-27.

This Court has rarely held the use of photographic evidence to be unfairly prejudicial, and the case presently before us is distinguishable from the few cases in which we have so held. In *Hennis* we found error in permitting repetitious photographic evidence portraying autopsies performed upon the mutilated bodies of a mother and two of her children. In that case twenty-six slides were introduced and projected in the courtroom directly over defendant upon an unusually large screen accommodating two images three feet, ten inches by five feet, six inches, side by side. This

presentation was followed by the distribution of thirty-five eight-by ten-inch glossy photographs, most in color, to jurors one at a time for an hour.

In *State v. Mercer*, 275 N.C. 108, 121, 165 S.E.2d 328, 337 (1969), *overruled on other grounds, State v. Caddell*, 287 N.C. 266, 215 S.E.2d 348 (1975), we held photographs taken in a funeral home of the victim's body were "poignant and inflammatory" and should not have been admitted where the evidence tended to show the victim had been lying on a bed when shot and the evidence as to cause of death was uncontroverted.

While some of the photographic evidence at issue here is gruesome, there is no suggestion the slide projections were done unfairly, there was no needless repetition of photographs and the presentation of each photograph or slide was accompanied by competent testimony of witnesses, which the photographic evidence illustrated. In *State v. Dollar*, 292 N.C. 344, 233 S.E.2d 521 (1977), we recognized it is

> well settled that the mere fact that a photograph is gruesome, revolting or horrible does not prevent its use by a witness to illustrate his testimony. Nevertheless, an excessive number of such photographs may not properly be admitted in evidence. What constitutes an excessive number of photographs must be left largely to the discretion of the trial court in the light of their respective illustrative values. The photographs in the present case are not merely repetitious. They portrayed somewhat different scenes and we find in the use of the total number no abuse of discretion.

Id. at 354-55, 233 S.E.2d at 527 (citations omitted).

So it is here. Considering all the circumstances pertaining to the photographic evidence, we conclude the trial court did not abuse its discretion in permitting the photographic evidence to be used as it was.

IV.

[3] Defendant assigns error to the excusal for cause of several jurors because of their views concerning the death penalty. He contends the jurors were improperly excused under *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968), and *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985). Even if these jurors

had been improperly excused because of their death penalty views, the error would have affected only the sentencing proceeding. Since defendant is being given a new sentencing proceeding, we deem it unnecessary to address this assignment of error. Suffice it to say that we have carefully examined the record regarding each excusal complained of by defendant and find that each was altogether proper.

V.

[4] Defendant also argues the trial court erred in failing to declare a mistrial because of alleged prosecutorial misconduct during the court's instructions to the jury before verdict deliberations. We find no error.

After the jury retired defense counsel requested the record reflect "that the court clerk, Ms. Simmons, at the direction of the District Attorney this morning when we came in for the jury charge, had State's Exhibit Number 44, I believe, the iron pipe" used to strike Shelia Denise Worley and her daughter, placed on a railing atop the clerk's table "in full view of the jury . . . right where they would walk by that on their way out." Defendant claimed the pipe's proximity to the jury "sent a message," and asked that the record reflect the contention that the District Attorney acted improperly. The trial court ordered the pipe to be moved out of sight, and defense counsel thanked the court.

Defendant contends on appeal the trial court should have *ex mero motu* declared a mistrial or at least given supplemental jury instructions to mitigate the prejudicial effect of the pipe's placement. We disagree.

The decision whether to order a mistrial lies within the discretion of the trial judge, to be exercised upon the happening of some prejudicial event rendering a fair and impartial trial impossible. *State v. McLaughlin*, 323 N.C. 68, 96, 372 S.E.2d 49, 68 (1988), *cert. granted and judgment vacated*, --- U.S. ---, 108 L. Ed. 2d 601 (1990); *State v. Crocker*, 239 N.C. 446, 80 S.E.2d 243 (1954). Our review of a trial court's decision not to intervene *ex mero motu* to correct an alleged impropriety concerning the prosecutor's closing argument not objected to at trial is limited to determining whether the complained-of conduct was so grossly improper that the trial court abused its discretion in failing to intervene. *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988).

We find no abuse of discretion here. No request for supplemental instructions or motion for mistrial was made. The pipe was relevant and admissible evidence, *see State v. Joyner*, 301 N.C. 18, 269 S.E.2d 125 (1980), was introduced by the State as an exhibit, and was seen by the jury during trial. The placement of the pipe on the railing of the clerk's table fails to amount to conduct so grossly improper as to say the trial court abused its discretion in failing on its own motion to intervene or declare a mistrial.

VI.

[5] Defendant next argues he has been prejudiced by and assigns error to the court reporter's allegedly poor transcription of trial proceedings. He contends the transcript, encompassing eight volumes, is replete with "incoherent, inconsistent, and sometimes totally senseless language." Defendant argues, due to the seriousness of defendant's sentence and the frequency of errors in the transcript, he has been effectively denied due process of law as required by the fifth amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution.

A certified record imports verity, and this Court is bound by it. *See State v. Sanders*, 312 N.C. 318, 319, 321 S.E.2d 836, 837 (1984) (per curiam) (and cases cited therein). Defense counsel and the district attorney, as officers of the court, have an equal duty to see that reporting errors in the transcript are corrected. *State v. Fields*, 279 N.C. 460, 183 S.E.2d 666 (1971). This duty does not, however, embrace the right to perpetuate and then take advantage of transcript mistakes. *Id.*

In *Sanders* this Court remanded a capital case for a new trial because the transcript was an altogether inaccurate and inadequate transcription of the trial proceedings and no adequate record of what transpired at trial could be reconstructed. Several significant factors led to this decision. First, the defendant reproduced specific portions of the trial judge's instructions to the jury which clearly had been erroneously transcribed by the court reporter. Second, counsel for the State and the defendant diligently attempted to correct the problem, but were unable to do so. Last, the original court reporter responsible for the transcript was no longer available to the parties. *Id.* at 319-20, 321 S.E.2d at 837.

The instant case is easily distinguished from *Sanders*. Defendant fails to point to any significantly incoherent, inconsistent or

senseless language in the transcript. Assuming there were errors, there is no indication of efforts to work with either the court reporter or the district attorney to attempt to correct them; nor is there any suggestion that the transcript could not have been reconstructed if this were truly necessary for a proper understanding of the case on appeal.

This assignment of error is overruled.

VII.

[6] Defendant also claims, by way of an addendum to the Record on Appeal, that he was denied constitutionally protected rights because of alleged racial discrimination in the selection of the foreman to the grand jury that indicted him.

In North Carolina one member of each impaneled grand jury is chosen by the presiding superior court judge to serve as foreman. N.C.G.S. § 15A-622(e). In *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987), we held racial discrimination against black persons in the selection of the grand jury foreman denies a black defendant the protections of Article I, section 19 and Article I, section 26 of the Constitution of North Carolina as well as the equal protection clause of the fourteenth amendment to the federal Constitution and vitiates the proceeding against the defendant.

The defendant in *Cofield* raised the issue by moving before trial to dismiss his indictment. Here defendant made no motion at or before trial challenging any aspect of his indictment. He raised the issue for the first time on appeal. Defendant has thus waived his right to make this challenge to the grand jury which indicted him. N.C.G.S. §§ 15A-952(b)(4).[1]

VIII.

[7] Defendant contends and we agree that he is entitled to a new sentencing proceeding under *McKoy v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 369 (1990). *See also State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990).

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1. Such waiver, except for failure to move for dismissal for improper venue, is subject to the trial judge's power to grant relief. N.C.G.S. § 15A-952(e). Defendant here never afforded the trial judge opportunity to exercise this power. Assuming without deciding that this statutory power also resides in this Court, we decline to exercise it.

After defendant's sentencing proceeding the jury found the presence of two aggravating circumstances in the murder of James Elwell Worley: Defendant had been previously convicted of a felony involving violence to another person, and the murder was committed for pecuniary gain. Three aggravating circumstances were found in the murders of Shelia Denise Worley and Psoma Wine Baggett: Defendant had been previously convicted of a felony involving violence to another, each murder was committed for the purpose of avoiding arrest, and each murder was part of a course of conduct by defendant that included crimes of violence inflicted on others.

The jury's findings of mitigating circumstances in each of the three murders were virtually identical: In all three defendant was found to have testified truthfully on behalf of the State in another felony prosecution; voluntarily acknowledged wrongdoing at an early stage of the criminal process; and voluntarily confessed to the crimes after being warned of his right to remain silent and without requesting the assistance of counsel. In the murder of Shelia Denise Worley the jury found her participation in defendant's murder of James Worley to be a mitigating circumstance. In all three murder convictions the jury considered and rejected five submitted mitigating circumstances: The murders were committed while defendant was under the influence of mental or emotional disturbance; the murders were actually committed by another and defendant served only as an accomplice with minor participation; defendant acted under the domination of another; his mental or emotional development was significantly below normal in that his I.Q. was 82, and he was remorseful for the crimes. In all three cases the jury failed to find the existence of any unspecified circumstances arising from the evidence and deemed to have mitigating value.

In all three cases the jury determined the mitigating circumstances were insufficient to outweigh the aggravating circumstances and these aggravating circumstances, when considered with the mitigating circumstances, were sufficiently substantial to warrant the death penalty. The jury recommended defendant be sentenced to death for the three murder convictions, and the trial court entered judgments accordingly.

The United States Supreme Court held unconstitutional under the federal Constitution the portion of North Carolina's capital sentencing instructions which require the jury unanimously to find the existence of a mitigating circumstance before that circumstance,

and, in effect, evidence in support of it can be considered by any juror when determining the ultimate recommendation as to punishment. Such a requirement was deemed constitutionally infirm because it "prevent[ed] the sentencer from considering all mitigating evidence" in violation of the eighth and fourteenth amendments. *McKoy*, 494 U.S. at ---, 108 L. Ed. 2d at 376.

The instructions and verdict sheet at defendant's trial contained *McKoy* error. Both required the jury to find each mitigating circumstance unanimously before any juror could consider that circumstance favorably to defendant in the ultimate sentencing decision. Defendant is therefore entitled to a new sentencing proceeding unless the error was harmless. *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426.

The State must demonstrate constitutional error to be harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443. Here the State has failed to meet this burden. Mitigating circumstances submitted to but rejected by the jury included the following: defendant was under the influence of mental or emotional disturbance; his role in the murders was that of a minor accomplice; he acted under the domination of Elton McLaughlin; his mental or emotional development was significantly below normal and he was remorseful for the crimes committed.

At defendant's sentencing proceeding some evidence tending to support, in varying degrees, each of these mitigating circumstances was presented. Defendant testified at the sentencing proceeding that he was following the instructions of McLaughlin and was carrying out McLaughlin's plan to murder the victims. When asked if he wanted to say anything to the court or to Shelia Denise Worley's mother, defendant responded:

> Yes, I would like to say to the court and Ms. Washington at this time that I am truly sorry for the participation that I had in this and if there was some way that I could make things straight I would.

Defendant also presented the expert testimony of Dr. Patricio Lara, a forensic psychiatrist at Dorothea Dix Hospital. Doctor Lara testified defendant's I.Q. was 82, "approximately in the middle range between the highest mental retardation score and the lowest average." The doctor testified he diagnosed defendant as suffering from both alcohol abuse and a personality disorder.

We cannot say beyond a reasonable doubt that the erroneous unanimity requirement did not preclude at least one juror from considering one or more of these mitigating circumstances not unanimously found when weighing all circumstances in the ultimate sentencing decision. Neither can we say beyond a reasonable doubt that no juror would have voted for life imprisonment rather than the death penalty if proper instructions on the mitigating circumstances had been given. *See State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990). We, therefore, remand this case for a new sentencing proceeding in all cases.

Remanded for new sentencing proceeding.

STATE OF NORTH CAROLINA v. PERRY RALPH WARREN

No. 456A89

(Filed 29 August 1990)

1. **Homicide § 25.2 (NCI3d) — murder — premeditation and deliberation — instructions**

The evidence in a murder prosecution supported an instruction that premeditation and deliberation could be proved by circumstances including the brutal or vicious circumstances of the killing where the evidence tended to show that defendant beat the victim with a baseball bat before shooting him in the back as he fled, the instruction was a direct quote from the N. C. Pattern Jury Instructions, and the elements listed in the challenged instruction are merely examples of circumstances which may be used by the jury to infer premeditation and deliberation. It is not required that each of the circumstances be proven beyond a reasonable doubt.

Am Jur 2d, Homicide § 501.

2. **Homicide § 30 (NCI3d) — murder — instruction on second degree murder denied — no error**

The trial court did not err in a first degree murder prosecution by denying defendant's request for submission of a possible verdict finding him guilty of second degree murder where the State's evidence unequivocally tended to show an inten-

tional killing with premeditation and deliberation and defendant simply testified that he did not shoot the victim. There was no evidence in the record to support a reasonable finding by the jury that defendant killed the victim without premeditation and deliberation.

Am Jur 2d, Homicide § 530.

3. Criminal Law § 753 (NCI4th)— murder—instruction on presumption of innocence—no error

The trial court did not err in a murder prosecution by denying defendant's request to instruct the jury that it was to presume his innocence "unless and until the contrary is proven beyond a reasonable doubt" where the instruction given adequately links the burden of proof with the presumption of innocence.

Am Jur 2d, Homicide § 509; Trial § 763.

4. Homicide § 15 (NCI3d)— murder—cross-examination of defendant—previous testimony misstated—no prejudicial error

There was no prejudicial error in a murder prosecution where the State was allowed to misstate a previous witness's testimony in cross-examining defendant because defendant had previously answered essentially the same question and because defendant denied that the witness had testified as stated by the prosecution and denied that her testimony was truthful.

Am Jur 2d, Homicide §§ 536, 540.

5. Criminal Law § 73.1 (NCI3d)— murder—hearsay—defendant involved in drugs—admission not prejudicial

There was no prejudicial error in a murder prosecution from the admission of hearsay testimony tending to show defendant's involvement in the drug business where this evidence was of little probative value when compared to the overwhelming competent evidence of defendant's guilt.

Am Jur 2d, Homicide § 310.

6. Homicide § 15 (NCI3d)— murder—irrelevant cross-examination of defendant—no prejudice

There was no prejudicial error in a murder prosecution from the State's cross-examination of defendant about whether he worked every day, the number of suits he owned, and

whether he knew a certain person. There was plenary eyewitness testimony identifying defendant as having shot and killed the victim and, even assuming this evidence was inadmissible, it was innocuous and could not have contributed to the defendant's conviction.

Am Jur 2d, Homicide § 536.

7. **Criminal Law § 169.3 (NCI3d)— notes admitted without objection—subsequently read by jury—no error**

The trial court did not err in a murder prosecution by allowing the jury to view two of defendant's handwritten notes which had been introduced into evidence and read to the jury where defendant did not object to the notes when they were introduced or when they were read to the jury.

Am Jur 2d, Trial § 185.

8. **Criminal Law § 544 (NCI4th)— murder—cross-examination—reference to defendant's prior imprisonment—mistrial denied**

The trial court did not err in a murder prosecution by denying defendant's motion for a mistrial after the State made three references to defendant's time in prison where defendant had testified on direct examination that he had been convicted seven separate times of various crimes and any potential adverse impact of additional information was minimal.

Am Jur 2d, Homicide § 310.

9. **Appeal and Error § 425 (NCI4th)— arguments or citations not presented—assignment of error abandoned**

An assignment of error was deemed waived where defendant presented neither argument nor citation of authority.

Am Jur 2d, Appeal and Error §§ 697, 700.

APPEAL of right pursuant to N.C.G.S. § 7A-27 from a judgment entered by *Hudson, J.*, in the Superior Court, WAKE County, on 23 June 1989, sentencing the defendant to life imprisonment for murder in the first degree. Considered pursuant to N.C.R. App. P. 30(d), without oral argument, by the Supreme Court on 16 May 1990.

Lacy H. Thornburg, Attorney General, by David F. Hoke, Assistant Attorney General, for the State.

John T. Hall for the defendant-appellant.

MITCHELL, Justice.

The defendant, Perry Ralph Warren, was tried in a noncapital trial upon a true bill of indictment charging him with the murder of Leon Henry. The State's evidence presented at trial tended to show, *inter alia*, that Ester Jackson called the police to investigate gunshots fired outside her apartment in the early morning hours of 7 October 1988. Responding to the call at the Southgate Apartments, officers with the Raleigh Police Department and the City-County Bureau of Identification found Leon Henry's lifeless body lying on the ground outside Jackson's apartment. Subsequently, they questioned witnesses and conducted their investigation of the crime.

Harold Lewis Wortham testified that he was with Leon Henry on 7 October 1988. He watched Henry argue with the defendant outside a building at the Southgate Apartments. As Henry and the defendant walked to Henry's truck, Anthony Boyd jumped Henry and began to beat him. The defendant joined the fight, hitting Henry with a baseball bat. When Henry broke free and tried to run away, the defendant ran between some cars, raised a pistol and shot twice. Henry took a couple of steps and then fell to the ground.

Michael Anthony Hinton testified that he was riding around with the defendant on 7 October 1988. The defendant pulled into the parking lot of the Southgate Apartments to take care of some business. Hinton observed the defendant's argument with Leon Henry. He also saw the defendant and Anthony Boyd fight with Henry. As Hinton walked over to the fight, he saw a gun in the defendant's hand. As Henry jumped up and ran away, the defendant pointed the gun at Henry and shot him. Hinton testified that the defendant threw the gun at him after the shooting. Thereafter, Hinton took the gun to his house and buried it under a tire in his back yard.

Anthony Boyd testified that he saw the defendant approach Leon Henry with a baseball bat on 7 October 1988. He heard the defendant demand money from Henry. The defendant made Henry

take everything out of his pockets and then took the keys to Henry's truck. The defendant struck Henry on the shoulder with the baseball bat. Boyd pushed Henry to the ground and, while Henry was on the ground, the defendant looked into Henry's truck. At that point, Henry tried to run away, but the defendant pulled out a gun and shot him. Boyd then gave Michael Hinton a ride home. Hinton had the defendant's gun in his possession when he got out of the car.

Melissa Jones testified that she saw the defendant receive a gun in exchange for some cocaine several days before Leon Henry was shot. She identified the gun in evidence at trial as being the one she saw given to the defendant in exchange for cocaine. She further testified that Boyd told her that the defendant shot someone on 7 October 1988.

Kim Castle testified that she was on a date with the defendant on 7 October 1988. After the defendant parked his car at the Southgate Apartments, she observed the defendant hit Leon Henry with a baseball bat. While she did not see the defendant shoot Henry, she did see the defendant holding a gun immediately after the shots were fired.

Dr. Dewey Harris Pate testified that the cause of Henry's death was the loss of blood from a gunshot wound to the back.

At trial, the defendant denied shooting Leon Henry. He testified that he used cocaine and drank beer and gin during most of the day before Henry was killed. While on a date with Kim Castle, he ended up in the parking lot at the Southgate Apartments. He got out of his car carrying his baseball bat. Outside, he spoke to Leon Henry, who owed him $50. As they walked to Henry's truck, Henry grabbed the defendant's arms. At that time, Harold Wortham stuck a knife to the defendant's throat and demanded money. Anthony Boyd pushed Henry to the ground, and the defendant swung the bat at Henry but missed. At this point, Henry ran away. The defendant testified that Michael Hinton pulled a gun and shot Henry in the back. Immediately after the shooting, Hinton handed the gun to the defendant. The defendant handed the gun back to Hinton and left with his date.

The jury found the defendant guilty of first-degree murder on the theory that the killing was premeditated and deliberate. The District Attorney having indicated that the State could pro-

duce no evidence of aggravating circumstances, the trial court sentenced the defendant to the mandatory term of life in prison.

Additional evidence and other matters relevant to the defendant's specific assignments of error are discussed at other points in this opinion.

[1] On appeal, the defendant argues that the trial court erred when it instructed the jury as follows:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as lack of provocation on the part of the victim, conduct of the defendant before, during, and after the killing, threats and declarations of the defendant, *brutal or vicious circumstances of the killing*, and the manner in which or the means by which the killing was done.

The defendant argues that this instruction amounted to error requiring a new trial because "the evidence in this case [does] not justify the use of the phrase 'brutal or vicious circumstances of the killing.'" We do not agree.

The instruction was a direct quote from the North Carolina Pattern Jury Instructions. N.C.P.I.—Crim. 206.13. The elements listed in the challenged instruction are merely examples of circumstances which, if present, may be used by the jury to infer premeditation and deliberation. *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 76 (1990). It is not required that each of the circumstances listed by the trial court in this instruction be proven beyond a reasonable doubt before the jury may infer premeditation and deliberation. *Id.*

Further, we conclude that the challenged portion of the instruction was justified because the evidence presented at trial tended to show that the defendant beat the victim with a baseball bat before shooting him in the back as he fled. Several witnesses testified that the defendant approached Leon Henry with the bat in his hand. After a disagreement, the defendant beat the victim to the ground with the bat. Thereafter, when Henry broke away from the defendant and attempted to run, the defendant pointed and fired a gun at Henry, shooting him in the back. Under these circumstances, we conclude that the trial court's instruction concerning the "brutal or vicious circumstances of the killing" was supported by the evidence. This assignment of error is without merit.

[2] By his next assignment of error, the defendant contends that the trial court committed reversible error by denying his request for submission of a possible verdict finding him guilty of second-degree murder. We disagree.

While second-degree murder is a lesser included offense of premeditated and deliberate first-degree murder, the trial court was not required to submit a verdict on that lesser included offense unless it was supported by the evidence. *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983). The mere fact that a jury could selectively believe part of the State's evidence and disbelieve part of it did not entitle the defendant to an instruction on a lesser included offense. *State v. Brewer*, 325 N.C. 550, 576, 386 S.E.2d 569, 583 (1989), *cert. denied*, --- U.S. ---, 109 L. Ed. 2d 541 (1990). If, however, there was any positive evidence tending to support the lesser included offense of second-degree murder, then it was the trial court's duty to submit a possible verdict for that lesser included offense, after appropriate instructions. *State v. Strickland*, 307 N.C. at 285, 298 S.E.2d at 653.

The defendant argues that the evidence at trial would have supported a reasonable finding by the jury that he did not act with premeditation and deliberation. However, the State's evidence tended to show that the defendant initiated the confrontation with Henry. Several witnesses testified that the defendant approached Henry with a baseball bat in hand and demanded money. The defendant then beat Henry with the bat. As the victim attempted to run away, the defendant drew his gun, aimed, and shot Henry in the back. With Henry lying on the ground, the defendant announced to several of the witnesses, "I better not hear nothing about this." The defendant then left the area. The victim died as a result of the gunshot wound to the back. Such evidence unequivocally tends to show an intentional killing with premeditation and deliberation. The defendant, on the other hand, simply testified at trial that he did not shoot the victim at all. We find no evidence in the record to support a reasonable finding by the jury that the defendant killed Leon Henry, but did so without premeditation and deliberation. Therefore, the evidence would not have supported a verdict finding the defendant guilty of second-degree murder, and the trial court did not err in failing to submit such a possible verdict to the jury.

[3] The defendant also argues that the trial court erred by denying his request to instruct the jury that it was to presume his innocence "unless and until the contrary is proven beyond a reasonable doubt." Instead, the trial court instructed the jury as follows:

> The defendant in this case has entered a plea of not guilty. The fact that he has been charged is not evidence of his guilt. Under our system of justice when a defendant pleads not guilty, he is not required to prove his innocence; he is presumed to be innocent. The State must prove to you that the defendant is guilty beyond a reasonable doubt.

The defendant argues that this instruction amounted to error requiring a new trial because it failed to link "the concept of the presumption [of innocence] with the standard of proof beyond a reasonable doubt." We disagree.

A trial court is not required to give requested instructions verbatim. *State v. Corn*, 307 N.C. 79, 86, 296 S.E.2d 261, 266 (1982). However, if a party requests an instruction which is a correct statement of the law and is supported by the evidence, the court must give the instruction at least in substance. *Id.* In this case, the instruction given the jury, when read as a whole, adequately links the burden of proof with the presumption of innocence. *State v. Flowers*, 318 N.C. 208, 347 S.E.2d 773 (1986). We conclude that this assignment of error is without merit.

[4] By his next assignment of error, the defendant argues that the trial court abused its discretion by allowing the State to assume facts contrary to the evidence when questioning the defendant during cross-examination as to whether Kim Castle, a witness for the State, had told the truth during her testimony. The State's witness, Kim Castle, testified on direct examination as follows:

> I asked [the defendant] did he shoot the deceased and *he said he didn't know*, and I said what do you mean you didn't know. He said, *I don't know* because it was dark, and I said, well, did you know—did you shoot him? He said *he didn't know*. . . .

The defendant later testified on direct examination that he told Castle he was not sure whether Henry had been shot, but he thought that a third person had done the shooting. Thereafter, during the State's cross-examination of the defendant, the State misstated Castle's testimony and the following colloquy occurred:

Q. Do you recall [Kim Castle] testifying when she asked you, [defendant], did you shoot that man, *you said I think I did*? Do you recall her saying that on the stand?

A. No, I didn't.

Q. Is it your testimony she didn't say that?

A. I can't recall her saying that.

Q. Okay. If she said that, then she would be telling a lie on you, wouldn't she?

A. If she have she would, she would have misinterpreted.

Q. I'm asking you what she said, not how you interpreted it or—your testimony is, when you got on the stand, when you answered Mr. Hall's [defendant's attorney] question about those things you think I did, you said no, no, she was wrong, that is what I did. Do you recall Mr. Hall asking those questions about you and Kim talking about the shooting?

A. Yes, sir.

Q. And she testified that you said, *I think I did.* And, Mr. Hall asked you the question about what you said. You said, oh, no, I didn't say that, I said I think he could have. Is that the way you told that story?

A. Yes.

[DEFENSE ATTORNEY]: Objection, Your Honor. It assumes facts not in evidence.

COURT: Overruled.

Q. Has Kim Castle told the absolute truth to this jury about what happened that night?

A. If she stated that I said *I think I did*, she did not tell the truth. If she stated that in that way, she didn't tell the truth about that.

The defendant argues, without citing any authority, that the trial court's ruling on his objection amounted to error requiring a new trial because it allowed the State to cross-examine him with a question that misstated Castle's testimony. We disagree.

Generally, much latitude is given counsel on cross-examination to test matters related by a witness on direct examination. *State v. Burgin*, 313 N.C. 404, 329 S.E.2d 653 (1985). The scope of cross-examination is subject to two limitations: (1) the discretion of the trial court; and (2) the questions offered must be asked in good faith. *State v. Dawson*, 302 N.C. 581, 585, 276 S.E.2d 348, 351 (1981). Furthermore, the questions of the State on cross-examination are deemed proper unless the record discloses that the questions were asked in bad faith. *Id.* at 586, 276 S.E.2d at 352.

Prior to the defendant's objection, the State asked the defendant if he remembered Kim Castle's testimony that the defendant had said he thought he shot the victim. Although the State had misstated Castle's testimony, the defendant answered and specifically denied that she had testified in this manner. Later, when the State repeated its misstatement of Castle's testimony as a preface to another question, the defendant objected because the misstatement assumed facts not in evidence. The defendant had previously answered essentially the same question concerning Castle's testimony without an objection. Where evidence is admitted over objection after the same evidence has already been admitted without objection, the benefit of the objection is lost. *State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 458 (1989).

Even assuming error *arguendo*, any misstatement of Kim Castle's testimony by the State could not have been harmful, because the defendant denied that she had testified as stated by the prosecutor and denied that her testimony was truthful. Under these circumstances, the defendant has failed to show that the State's misstatement of Castle's testimony was prejudicial. N.C.G.S. § 15A-1443(a) (1988). This assignment of error is overruled.

[5] By another assignment of error, the defendant argues that the trial court erred in admitting the testimony of two witnesses tending to show the defendant's involvement in the drug business, because the testimony was in the form of inadmissible hearsay. The trial court allowed Harold Wortham to testify over objection that someone had told his grandmother to warn him away from the Southgate area where drugs were sold. The trial court also allowed Wortham to testify over objection that someone told him the defendant wanted some cocaine. Melissa Jones, another witness, was allowed to testify over the defendant's objection about a conversation between Larry McAllister and the defendant. The

defendant submits, *inter alia*, that such testimony violated his Sixth Amendment right to confront witnesses and prevented him from receiving a fair trial. We do not agree.

It is well established that the erroneous admission of hearsay is not always so prejudicial as to require a new trial. *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986). N.C.G.S. § 15A-1443(b) provides:

> A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

Even if it is assumed *arguendo*, that all of the testimony complained of here was inadmissible hearsay, we are convinced beyond a reasonable doubt that any error in its admission was harmless. At trial, several eyewitnesses testified that they saw the defendant beat Leon Henry with a baseball bat and then shoot him as he tried to run away. The evidence the defendant complains of here was of so little probative value, when compared to the overwhelming competent evidence of the defendant's guilt, that we conclude it did not contribute to the defendant's conviction. *State v. Hooper*, 318 N.C. 680, 351 S.E.2d 286 (1987). At trial, several eyewitnesses testified that they saw the defendant beat Leon Henry with a baseball bat and then shoot him as Henry tried to run away. We conclude, therefore, that if the admission of the evidence in question was error, it was harmless beyond a reasonable doubt. *Id.*; N.C.G.S. § 1443(b) (1988). We find no merit in this assignment of error.

[6] By another assignment of error, the defendant argues that the trial court committed reversible error by allowing the State to cross-examine him about irrelevant matters. During the State's cross-examination of the defendant, the trial court allowed the prosecutor to question the defendant over objection about whether he worked every day and the number of suits he owned. The trial court also allowed the State to question the defendant over objection about whether he knew a man named Joe with a certain telephone number. The defendant argues that the State's cross-examination was irrelevant and amounted to error requiring a new trial because it violated his rights to due process and equal protection under both the state and federal constitutions. We do not agree. Plenary eyewitness testimony identified the defendant as

having shot and killed Leon Henry. Even if it is assumed *arguendo* that the evidence complained of was inadmissible and that its admission violated constitutional protections, it was innocuous and could not have contributed to the defendant's conviction. Therefore, any error in this regard was harmless beyond a reasonable doubt. *State v. Hooper*, 318 N.C. 680, 351 S.E.2d 286 (1987).

[7] The defendant also argues under this assignment of error that the trial court erred by allowing the jury to view two of the defendant's handwritten notes which had been introduced into evidence and read to the jury without objection. The record reveals that the defendant read both notes to the jury after they had been introduced into evidence. The trial court asked the jury whether it had been able to hear the reading. Some of the jurors responded that they hardly heard the reading, and the trial court allowed the prosecutor to pass the notes to the jury. The defendant objected. The defendant argues that the trial court committed reversible error because the notes were not relevant evidence. We do not agree.

When the two handwritten notes were admitted into evidence, the defendant did not object. Further, there was no objection when the defendant read the notes to the jury. Therefore, the defendant cannot now complain that the two notes were inadmissible as evidence. When evidence is admitted over objection after the same evidence has previously been admitted without objection, the benefit of the objection is lost. *State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 458 (1989). This assignment of error is without merit.

[8] By his next assignment of error, the defendant argues that it was error to deny his motion for mistrial after the State made three references to his time spent in prison. During the State's cross-examination of the defendant, the prosecutor asked the defendant the following questions:

> Q. Well, when you came out of prison, did you have to get a whole new wardrobe?
>
> . . .
>
> Q. As of the time you went to prison, how many suits did you own?
>
> . . .

> Q. As of October 7th, 1988 when you went to prison—I assume—have you bought any suits since you have been in prison?

After these questions had been asked of the defendant, he made a motion for mistrial, which the trial court denied. The defendant contends that the trial court's error in denying his motion for a mistrial amounted to reversible error because the references to his imprisonment prejudiced him and made it more likely that the jury would convict him of the charges in this case. We disagree.

The decision to grant or deny a mistrial rests in the sound discretion of the trial court. *State v. Laws*, 325 N.C. 81, 105, 381 S.E.2d 609, 623 (1989), *judgment vacated on other grounds*, --- U.S. ---, 108 L. Ed. 2d 603 (1990). "A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *Id.*; N.C.G.S. § 15A-1061 (1988). Consequently, a trial court's decision concerning a motion for mistrial will not be disturbed on appeal unless there is a clear showing that the trial court abused its discretion. *Id.* We do not perceive that the State's cross-examination concerning the defendant's imprisonment prevented a fair and impartial trial. At trial, the defendant testified on *direct* examination that he had been convicted seven separate times of various crimes. Therefore, any potential adverse impact of additional information regarding the defendant's imprisonment was minimal. We conclude that the defendant has failed to show that the trial court abused its discretion by denying a mistrial. This assignment of error is without merit.

[9] By his next assignment of error, the defendant contends that the trial court improperly denied his motion to strike the response of Harold Wortham to a question posed by the defendant on cross-examination. During the defendant's cross-examination of Wortham the following colloquy occurred:

> Q. Okay, are you saying you don't remember saying, or you deny saying to Detective Howard later that day, you know, I couldn't see over the car because he was laying flat, talking about Leon?
>
> A. Leon was laying flat, not when he was beating Leon. Let me say something. When they was beating him, okay,

Leon was just saying hey, man, don't hurt me, please don't hurt me. That's what he was saying. He was saying, please don't hurt me, man, I told you I would give you my TV. He was trying to, you know, tell them in so many words, please, man, don't hurt me. That's, that's all he was saying. So after Leon—after they ceased the beating part, that's when Leon, you know, saw that he could jump and run and when he saw a little light and he went for it, and when he jumped and ran, that's when Perry shot twice. The only thing I heard was oh, oh, with the understanding that, hey maybe the bullet could have braced him. Because he shot twice. I thought maybe one missed him and one braced him or he could have braced him. I didn't know Leon was dead until Perry and them left. I went around to Debra's house. They said, hey, a man got killed out here. I said, who? Some people riding out there and I knew what Leon was wearing. I looked in the grass and I said, dog—

COURT: Mr. Wortham, just answer his question. Answer his question if you can answer it the way he asked it, if you can. You may explain your answer if you feel like you need to explain it.

After the trial court directed Wortham to answer the question more directly, the defendant moved to strike on the ground that Wortham's answer had been unresponsive. The trial court denied the motion. In support of his assignment contending that the trial court erred in this ruling, the defendant presents neither argument nor citation of authority. He has therefore waived his exception to this ruling, and it is deemed abandoned. *State v. Bright*, 320 N.C. 491, 358 S.E.2d 498 (1987); N.C.R. App. P. 28(b)(5) (1989).

By his final assignment of error, the defendant contends that the trial court committed reversible error in denying his motion to dismiss after the return of the jury's guilty verdict for first-degree murder. The defendant argues that the State failed to introduce any substantial evidence tending to show premeditation or deliberation on his part in the killing of Leon Henry. For reasons previously stated in this opinion, we do not agree. This assignment is overruled.

For the reasons stated, we hold that the trial of the defendant was free of reversible error.

No error.

STATE OF NORTH CAROLINA v. LEE HAMILTON MOORE

No. 502PA89

(Filed 29 August 1990)

1. **Narcotics § 1.3 (NCI3d)— narcotics statute—offenses created**

N.C.G.S. § 90-95(a)(1) creates three offenses: (1) manufacture of a controlled substance, (2) transfer of a controlled substance by sale or delivery, and (3) possession with intent to manufacture, sell or deliver a controlled substance.

Am Jur 2d, Drugs, Narcotics, and Poisons § 40.

2. **Narcotics § 1.3 (NCI3d)— single transaction—no conviction for sale and delivery**

A defendant may not be convicted under N.C.G.S. § 90-95(a)(1) of both the sale *and* delivery of a controlled substance arising from one transaction. Whether the defendant is tried for transfer by sale, by delivery, or by both, the jury in such cases should determine whether the defendant is guilty or not guilty of transferring a controlled substance to another person.

Am Jur 2d, Drugs, Narcotics, and Poisons § 40.

3. **Narcotics § 5 (NCI3d); Criminal Law § 904 (NCI4th)— transfer by sale or delivery—unanimity of verdict**

The transfer by sale or delivery of a controlled substance is one statutory offense, the gravamen of the offense being the transfer of the drug. So long as each juror finds that the defendant transferred the substance, whether by sale, by delivery, or by both, the defendant has committed the statutory offense, and no verdict unanimity concerns are implicated.

Am Jur 2d, Drugs, Narcotics, and Poisons § 40.

4. **Narcotics § 5 (NCI3d)— improper conviction for sale and delivery—resentencing—correction of judgment**

Where the jury was improperly allowed to convict defendant under each of two indictments of both sale and delivery of a controlled substance arising from a single transfer, three

convictions under each indictment were consolidated into one judgment per indictment, and the appellate court is unable to determine what weight, if any, the trial court gave each of the separate convictions for sale and delivery in calculating the sentences imposed upon defendant, the case must be remanded for resentencing. On remand, the judgments in each case should be amended to reflect that defendant was convicted on each indictment of a single count for the "sale or delivery of a controlled substance."

Am Jur 2d, Criminal Law § 583; Drugs, Narcotics, and Poisons § 48.

Justice MEYER dissenting.

Justice MARTIN joins in this dissenting opinion.

Justice FRYE concurring in part and dissenting in part.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 95 N.C. App. 718, 384 S.E.2d 67 (1989), which modified the judgments entered by *Small, J.*, in the Superior Court, PITT County, on 29 September 1988, and remanded the case for resentencing. Heard in the Supreme Court on 16 May 1990.

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

Robin L. Fornes for the defendant appellee.

MITCHELL, Justice.

This case calls upon us to determine whether a defendant may be convicted under N.C.G.S. § 90-95(a)(1) for both the sale and the delivery of a controlled substance arising from one transaction. We conclude that a defendant may not be so convicted.

The evidence at trial tended to show that on 16 October 1987 the defendant, Lee Hamilton Moore, sold and delivered five grams of mushrooms containing the hallucinogenic psilocyn to an undercover officer of the Pitt County Sheriff's Department. Psilocyn is a Schedule I controlled substance under the North Carolina Controlled Substances Act. N.C.G.S. § 90-89(c)(15) (1985). On 15 November 1987 the defendant sold and delivered ten more grams of psilocyn mushrooms to the same officer. After his arrest, a Pitt County

Grand Jury returned two indictments against the defendant. Each indictment charged the defendant, in separate counts, with (1) possession of a Schedule I controlled substance with intent to sell or deliver, (2) sale of a Schedule I controlled substance, and (3) delivery of a Schedule I controlled substance. On the indictment relating to the 16 October 1987 transaction, the defendant was found guilty of possession of a Schedule I controlled substance (a lesser included offense of possession with intent to sell or deliver), sale of a Schedule I controlled substance, and delivery of a Schedule I controlled substance. On the indictment relating to the 15 November 1987 transaction, the defendant was found guilty of the three counts charged. The record indicates that as to each indictment, the trial court treated the sale count and the delivery count as separate offenses. However, the trial court consolidated the three counts in each indictment for the purpose of judgment. The trial court then entered two judgments—one for each indictment—and sentenced the defendant to a six-year term on each indictment. The trial court ordered that those terms run consecutively for a total of twelve years' imprisonment.

On the defendant's appeal, a unanimous Court of Appeals affirmed the convictions against the defendant, but remanded the case for resentencing, concluding that:

> In summary, a prosecutor may of course go to trial against a single defendant on charges for the sale of a controlled substance and the delivery of the same substance. These two crimes are separate and distinct offenses. However, in light of the legislative intent of the statute, we hold that the defendant may be punished for only one of those offenses where they involve the same transaction.
>
> For purposes of sentencing in this case, the convictions against the defendant for delivery of psilocyn on each bill of indictment are merged into the charges of selling the drug. A new sentencing hearing is ordered.

State v. Moore, 95 N.C. App. 718, 722, 384 S.E.2d 67, 69 (1989). We allowed the State's Petition for Discretionary Review.

I.

The State argues that under N.C.G.S. § 90-95(a)(1), "[t]he separate convictions and separate punishment that the Defendant has suffered are exactly what the General Assembly intended by enacting

G.S. § 90-95 (a)." We disagree, but for a different reason than that given by the Court of Appeals.

N.C.G.S. § 90-95(a)(1) makes it unlawful to "manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." The intent of the legislature in enacting N.C.G.S. § 90-95(a)(1) was twofold: "(1) to prevent the manufacture of controlled substances, and (2) to prevent the transfer of controlled substances from one person to another." *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985). In the context of this Court's and the Court of Appeals' prior opinions, the Court of Appeals in this case examined the legislative intent of the statute, and concluded that:

> By criminalizing the sale *or* delivery of a controlled substance, the Legislature sought to prevent all attempts to place drugs into commerce by any act of transfer. To expedite this purpose the more inclusive word "delivery" was used in the statute. The only difference in the terms "sell" and "delivery" is that money changes hands in a sale; otherwise; the terms in this context are the same.
>
> It is an overreading of the statute to conclude that the Legislature intended to punish a defendant twice for one drug transaction. The purpose of the statute is to prevent drug transfers, a double punishment for a single transaction violates this legislative intent and accomplishes nothing short of placing the defendant in double jeopardy.

State v. Moore, 95 N.C. App. 718, 721-22, 384 S.E.2d 67, 69 (1990) (citations omitted). This analysis of legislative intent and the result reached by the Court of Appeals in this case are admittedly reasonable in light of statements this Court has made in prior cases. However, as we explain below, we do not entirely agree with either the reasoning utilized or the result reached by the Court of Appeals in this case.

[1] Having examined the statute, we now conclude that the language of N.C.G.S. § 90-95(a)(1) creates three offenses: (1) *manufacture* of a controlled substance, (2) *transfer* of a controlled substance by sale or delivery, and (3) *possession with intent to manufacture, sell or deliver* a controlled substance. We disapprove the contrary language in *State v. Clark*, 71 N.C. App. 55, 322 S.E.2d 176 (1984), which interpreted the statute as creating six separate offenses.

By phrasing N.C.G.S. § 90-95(a)(1) to make it unlawful to "manufacture, *sell or deliver*, or possess with intent to manufacture, sell or deliver, a controlled substance" (emphasis added), the legislature, *solely for the purpose of this statutory subsection*, has made each single transaction involving transfer of a controlled substance one criminal offense, which is committed by either or both of two acts —sale or delivery.

"A sale is a *transfer* of property for a specified price payable in money." *State v. Creason*, 313 N.C. at 129, 326 S.E.2d at 28 (emphasis in original) (citing *State v. Albarty*, 238 N.C. 130, 76 S.E.2d 381 (1953) (citing cases)). "Delivery" is "the actual constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." N.C.G.S. § 90-87(7) (1985). We need not address the relationship between the acts of sale and delivery as it might exist under any other statutory or common law provision, because by the statutory language at issue here the legislature has made it *one criminal offense* to "sell or deliver" a controlled substance under N.C.G.S. § 90-95(a)(1).

[2] We recognize that "sell" and "deliver" are not synonymous terms. We have previously said that, under N.C.G.S. § 90-95(a)(1), "the two acts could have been *charged* as separate offenses." *State v. Dietz*, 289 N.C. 488, 498, 223 S.E.2d 357, 364 (1976) (emphasis added). In *State v. Creason*, we said that "the *sale* of narcotics and the *delivery* of narcotics are separate offenses." *Creason*, 313 N.C. at 129, 326 S.E.2d at 28 (citing *State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357). Admittedly, the language in *Dietz* and *Creason* indicates that a defendant may properly be charged, indicted and tried under N.C.G.S. § 90-95(a)(1) for both the sale and the delivery of a single controlled substance arising from a single transfer. However, those cases do not *mandate* the conclusion that a defendant may also be *convicted* for two offenses in such situations. Having reconsidered the language of the statute, we disapprove any reading of *Dietz* or *Creason* which infers that a defendant may be so convicted. A defendant may be indicted and tried under N.C.G.S. § 90-95(a)(1) in such instances for the transfer of a controlled substance, whether it be by selling the substance, or by delivering the substance, or both. We conclude that a defendant may not, however, be convicted under N.C.G.S. § 90-95(a)(1) of both the sale *and* the delivery of a controlled substance arising from a single transfer. Whether the defendant is tried for transfer by

sale, by delivery, or by both, the jury in such cases should determine whether the defendant is guilty or not guilty of transferring a controlled substance to another person.

[3] Our conclusion regarding the proper interpretation of N.C.G.S. § 90-95(a)(1) does not create a risk of a defendant being convicted by a nonunanimous verdict. The legislature intended that there be one conviction and punishment under the statute for defendants who transfer, *i.e.*, "sell or deliver," a controlled substance. The transfer by sale or delivery of a controlled substance is one statutory offense, the gravamen of the offense being the transfer of the drug. So long as each juror finds that the defendant transferred the substance, whether by sale, by delivery, or by both, the defendant has committed the statutory offense, and no unanimity concerns are implicated. *Cf. State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990) (addressing the unanimity requirement in the context of indecent liberties); *State v. Creason*, 313 N.C. 122, 326 S.E.2d 24 (1985) (concerning possession of a controlled substance with intent to sell or deliver); *Jones v. All American Life Ins. Co.*, 312 N.C. 725, 325 S.E.2d 237 (1985) (concerning denial of life insurance proceeds to the plaintiff if the jury found that she killed *or* procured the killing of the victim).

II.

[4] The jury in this case was improperly allowed under each indictment to convict the defendant of two offenses—sale and delivery—arising from a single transfer. Because the three convictions on each indictment were consolidated into one judgment per indictment, and because of the lengths of the prison terms imposed, we are unable to determine what weight, if any, the trial court gave each of the separate convictions for sale and for delivery in calculating the sentences imposed upon the defendant. This case must thus be remanded for resentencing. On remand, the judgments in this case should be amended to reflect that the defendant was convicted on each indictment of a single count for the "sale or delivery of a controlled substance." These amendments will not prejudice the defendant; indeed, they will effectively remove one conviction from each of the two judgments in this case. The possession-related convictions on each indictment will not be affected, and they are not challenged on this appeal.

For the foregoing reasons, the decision of the Court of Appeals in this case is affirmed in part and modified in part. This case

is remanded to the Court of Appeals for its further remand to the Superior Court, Pitt County, for amendment of the judgments against the defendant and resentencing consistent with this opinion.

Affirmed in part; modified in part; remanded with instructions.

Justice MEYER *dissenting.*

The majority opinion, relying on an analysis from *State v. Creason*, 313 N.C. 122, 326 S.E.2d 24 (1985), holds that a defendant may not be convicted under N.C.G.S. § 90-95(a)(1) for both the sale and the delivery of a controlled substance arising from one transaction. I disagree.

Creason is cited by the majority to support the collapse of what has historically been two separate offenses, sale or delivery, into one offense, the "transfer of a controlled substance by sale or delivery." *Creason* involved an exploration of the legislative intent of N.C.G.S. § 90-95(a)(1) focusing on the single offense of possession. The analysis there was between possession "with the intent to sell" and possession "with the intent to deliver." *Creason*, 313 N.C. at 129, 326 S.E.2d at 28.

This Court in *Creason* held that the legislative intent in making possession with the intent to "sell or deliver" a crime was to prevent the transfer of a controlled substance from one person to another. *Id.* The Court went on to state that "[w]hile the *sale* of narcotics and the *delivery* of narcotics are separate offenses, *State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357 (1976), the *possession* of narcotics with the intent to 'sell or deliver' is one offense." *Creason*, 313 N.C. at 129, 326 S.E.2d at 28 (emphasis added). The *Creason* reasoning is inapposite to the case at bar.

N.C.G.S. § 90-95(a)(1) makes it unlawful to: (1) manufacture a controlled substance, (2) sell a controlled substance, (3) deliver a controlled substance, (4) possess with intent to manufacture, sell or deliver a controlled substance. *Creason* was only concerned with the defendant's conviction of possession with intent to sell or deliver a controlled substance. In *Creason*, the Court held that this was an intent crime, the elements being (1) possession of the drug, and (2) defendant's intention to "sell or deliver" the drug.

In the present case, defendant was convicted of selling the controlled substance and of delivering the controlled substance.

Neither offense is an intent crime, that is, intent is not an element of either offense. The majority fell into error in attempting to apply the reasoning of *Creason* to this appeal. To the contrary, *Creason* held that the sale of narcotics and the delivery of narcotics are two separate offenses, citing *State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357.

A sale is a transfer of property for a specified price payable in money. *State v. Albarty*, 238 N.C. 130, 76 S.E.2d 381 (1953). In the context of controlled substance statutes, "deliver" means the actual, constructive, or attempted transfer from one person to another of a controlled substance. N.C.G.S. § 90-87(7) (1985); *State v. Medina*, 87 N.M. 394, 395, 534 P.2d 486, 487 (1975).

The decision of the Court of Appeals in this case was entirely correct in holding that the sale of a controlled substance is a separate act from the delivery of a controlled substance and therefore a separate crime. *See State v. Dietz*, 289 N.C. at 498, 223 S.E.2d at 364; *see also State v. McLamb*, 313 N.C. 572, 330 S.E.2d 476 (1985); *accord State v. Creason*, 313 N.C. at 129, 326 S.E.2d at 28.

The distinct acts (manufacture, sell, deliver, possess) denounced by statute have consistently been held to constitute separate and distinct offenses. *State v. Perry*, 316 N.C. 87, 103, 340 S.E.2d 450, 460 (1986); *State v. Aiken*, 286 N.C. 202, 206, 209 S.E.2d 763, 766 (1974) ("One may sell an article or substance which he does not possess").

The majority, *sub silentio*, by its decision overrules at least three of the decisions of this Court and three of the Court of Appeals.

In *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450, this Court quoted with approval from *State v. Anderson*, 57 N.C. App. 602, 606, 292 S.E.2d 163, 166, *disc. rev. denied*, 306 N.C. 559, 294 S.E.2d 322 (1982), the following: " 'The distinct acts denounced by the statute (manufacture, sell, deliver, possess) have been held to constitute separate and distinct offenses. [Citing authorities.]' " *Perry*, 316 N.C. at 103, 340 S.E.2d at 460.

In *Creason*, we reiterated that the sale of narcotics and the delivery of narcotics are separate offenses.

Again, in *State v. McLamb*, 313 N.C. 572, 330 S.E.2d 476, this Court held that a verdict finding that defendant "feloniously

did sell or deliver" cocaine was fatally defective and ambiguous because sale and delivery are distinct and separate offenses.

This Court held in *State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357, that charging a defendant with "sale *and* delivery" of marijuana is one criminal act not defective because the two offenses could have been charged as separate offenses. There was no prejudice to defendant.

See also State v. Aiken, 286 N.C. 202, 209 S.E.2d 763 (where the Court held that possession of controlled substance and sale of a controlled substance were separate offenses and that a defendant could be convicted of both and sentenced to prison for each); *State v. Cameron*, 283 N.C. 191, 195 S.E.2d 481 (1973) (where the Court held that sale and possession of narcotics are separate and distinct offenses).

See also State v. Pulliam, 78 N.C. App. 129, 336 S.E.2d 649 (1985); *State v. Clark*, 71 N.C. App. 55, 322 S.E.2d 176 (1984).

To the same effect, in *Albrecht v. United States*, 273 U.S. 1, 11, 71 L. Ed. 505, 511 (1927), Brandeis, J., writing for the Court, said: "But possessing and selling are distinct offenses . . . . There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction . . . ."

The Court of Appeals also held, unfortunately, that "while it is appropriate to separate these offenses [sale and delivery] for the purpose of charging a defendant, we do not believe the Legislature intended to punish a defendant twice for one transfer of the same contraband." *State v. Moore*, 95 N.C. App. 718, 721, 384 S.E.2d 67, 68-69 (1989). I disagree. The General Assembly has proscribed not just the *transfer* of controlled substances, but has specifically proscribed both their sale and their delivery. The intent of the General Assembly was to charge and punish separately both for the acceptance of money for the sale of a controlled substance and for the delivery of the substance, even where both occur in the same transaction. The trial court did not err in punishing the defendant for both.

Justice MARTIN joins in this dissenting opinion.

Justice FRYE concurring in part and dissenting in part.

I believe that the Court of Appeals reached the right result in this case and that both the majority and dissenting opinions in this Court are incorrect in part.

In *State v. Perry*, 305 N.C. 225, 236-37, 287 S.E.2d 810, 817 (1982), this Court said that

> the crimes of larceny, receiving, and possession of stolen property are separate and distinct offenses, but having concluded that the Legislature did not intend to punish an individual for receiving or possession of the same goods that he stole, we hold that, though a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses.

When the legislature made it unlawful to "manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance," N.C.G.S. § 90-95(a)(1), I believe that the legislature intended that the crimes of sale and delivery of a controlled substance, in violation of N.C.G.S. § 90-95(a)(1), though separate and distinct offenses, would be treated as one crime for purposes of punishment when the sale and delivery constitute one transaction for the same controlled substance. Stated differently, the legislature did not intend to punish an individual for selling a controlled substance and then punish him again for delivering that same substance pursuant to the sale when both are handled in one transaction. Had it intended to do so, the statute would have made it unlawful to "manufacture, sell, deliver, or possess . . . a controlled substance," rather than making it unlawful to "manufacture, sell or deliver, or possess . . . a controlled substance." I believe that the punctuation controls.

I vote to affirm the unanimous decision of the Court of Appeals to the effect that the delivery convictions in this case, for sentencing purposes, are merged into the sales charges and defendant is entitled to a new sentencing hearing on the convictions of selling a controlled substance.

STATE OF NORTH CAROLINA v. LEROY McNEIL

No. 37A87

(Filed 29 August 1990)

1. **Criminal Law § 1352 (NCI4th)— death sentence—no express requirement of unanimity—McKoy error**

Death sentences for two first degree murders were remanded for a new sentencing proceeding under *McKoy v. North Carolina*, 108 L. Ed. 2d 369, even though trial of this case was held before our trial courts began to uniformly instruct juries as to unanimity for mitigating circumstances and there was no express requirement here that the jury be unanimous, because the trial court stated at least three times that the jury's answer to all the issues must be unanimous. Viewed in the context of the overall charge, there is a reasonable likelihood that the jury interpreted the instructions here to require unanimity as to mitigating circumstances.

Am Jur 2d, Homicide § 513.

2. **Criminal Law § 1352 (NCI4th)— death sentence—McKoy error—not harmless**

A *McKoy* unanimity error in a death sentence was not shown by the State to be harmless because the verdict form revealed only that the jury found one or more mitigating circumstances to exist and it was impossible to determine which of the five specifically worded and one catchall mitigating circumstances submitted to the jury were found. There was substantial evidence that each of the mitigating circumstances submitted existed and the unanimity requirement may have precluded a juror from finding a circumstance which he or she thought had been established but which the jury did not unanimously find. N.C.G.S. § 15A-2000, N.C.G.S. § 15A-1443(b).

Am Jur 2d, Homicide § 513.

ON remand by the Supreme Court of the United States, 494 U.S. ---, 108 L. Ed. 2d 756 (1990), to the Supreme Court of North Carolina for further consideration in light of *McKoy v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 369 (1990). Heard on remand in the Supreme Court of North Carolina on 14 May 1990.

Lacy H. Thornburg, Attorney General, by William N. Farrell, Jr., Joan H. Byers, and Steven F. Bryant, Special Deputy Attorneys General, and Barry S. McNeill, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for the defendant appellant.

MITCHELL, Justice.

At the 30 April 1984 Criminal Session of Superior Court, Wake County, the defendant was convicted of two counts of first-degree murder for the murders of Deborah Jean Fore and Elizabeth Faye Stallings. The jury found the defendant guilty of each first-degree murder, both upon the theory of premeditation and deliberation and under the felony murder rule. Upon the jury's recommendations after a separate capital sentencing proceeding, the trial court sentenced the defendant to death for each murder. On the defendant's direct appeal, this Court—in an opinion written by Justice Whichard, with Chief Justice Exum concurring in a separate opinion and Justice Frye dissenting as to sentence—found no error and upheld the convictions and death sentences. *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909 (1989). Thereafter, the Supreme Court of the United States granted the defendant's petition for a writ of certiorari and remanded the case for our further consideration in light of that Court's recent decision in *McKoy v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 369 (1990). *McNeil v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 756 (1990).

The evidence supporting the defendant's convictions and death sentences is summarized in this Court's prior opinion, *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909, and we will not repeat it here except as necessary to discuss the questions put before us on remand by the Supreme Court of the United States. On remand, we are required to answer three questions. First, did the jury instructions given at the defendant's sentencing proceeding create an unacceptable risk that individual jurors were prevented from considering mitigating evidence in making their sentencing decision, thereby violating the Eighth Amendment as construed by the Supreme Court of the United States in *McKoy*? We are required to answer this question affirmatively. Second, may harmless error analysis be used in reviewing any such constitutional error

in this case? We answer this question affirmatively. Third, was the error in this case harmless? In light of the recent decision by the Supreme Court of the United States in *McKoy*, we are required to answer this question negatively. Accordingly, we must now vacate the death sentences previously upheld by this Court on the direct appeal of this case. We must also remand the case to the Superior Court, Wake County, for a new capital sentencing proceeding.

I.

[1] We first consider whether the jury instructions given at the defendant's sentencing proceeding violated the Eighth Amendment, as recently construed by the Supreme Court of the United States in *McKoy*, by creating an unacceptable risk that individual jurors were prevented from "consider[ing] and giv[ing] effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death . . . ." *McKoy v. North Carolina*, 494 U.S. ---, ---, 108 L. Ed. 2d 369, 381 (1990); *see Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384 (1988). For the reasons explained below, we conclude that the same type of error discovered and announced by the Supreme Court of the United States in *McKoy* was present here.

A.

During the capital sentencing proceeding conducted after the defendant McNeil's trial, the trial court gave the jury printed forms the jury was to use in recording and returning its recommendations as to punishment. As the defendant had been convicted of two first-degree murders, the jury was given two such forms; each was entitled "Issues and Recommendation as to Punishment." Each form contained four sections, labeled "Issue One" through "Issue Four."

Issue One on each form was: "Do you *unanimously* find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?" (Emphasis added.) For the murder of Deborah Jean Fore, the trial court submitted two aggravating circumstances, both of which the jury found to exist: (1) that the defendant had "been previously convicted of a felony involving the use of violence to the person," and (2) that the murder was committed while the defendant "was engaged in the commission of a robbery with a firearm." For the murder of

Elizabeth Faye Stallings, the trial court submitted the same two aggravating circumstances submitted for the Fore murder, plus a third, that the Stallings murder was "especially heinous, atrocious or cruel." The jury found all three of those aggravating circumstances to exist.

Issue Two was: "Do you find from the evidence the existence of one or more of the following mitigating circumstances?" For both the Fore and the Stallings murders, the trial court submitted six possible mitigating circumstances, each of which is discussed in detail at a later point in this opinion. Unlike Issue One which required the jury to give a specific answer as to each aggravating circumstance, the jury was not required under Issue Two to specify whether it found each individual mitigating circumstance to exist. As a result, for each murder the jury only answered "yes," it had found "one or more" mitigating circumstances.

Issue Three was: "Do you *unanimously* find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?" (Emphasis added.) The jury answered Issue Three "yes" for both the Fore and Stallings murders.

Issue Four was: "Do you *unanimously* find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?" (Emphasis added.) For each murder, the jury answered this issue "yes," and thereafter recommended that the defendant be sentenced to death for each murder.

B.

In *McKoy v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 369 (1990), the Supreme Court of the United States held unconstitutional North Carolina's trial procedure in capital cases of requiring that jurors *unanimously* agree upon the existence of a mitigating circumstance before any juror could consider that circumstance during sentencing deliberations. The trial of this case in 1984, however, was held before our trial courts began to uniformly instruct juries as to that trial practice, and the jury instructions regarding mitigating circumstances here differed from those found unconstitutional in *McKoy*.

Issue Two on the forms used in *McKoy* was: "Do you *unanimously* find from the evidence the existence of one or more of the following mitigating circumstances?" *McKoy*, 494 U.S. at ---, 108 L. Ed. 2d at 376 (emphasis added). That general question was followed by a list of possible mitigating circumstances. *Id.* Alongside each possible mitigating circumstance, a space was provided for the jury to answer whether it had unanimously found that particular circumstance to exist. *Id.* Therefore, the jury instructions in *McKoy* differed from the jury instructions now before us in two respects: (1) Issue Two on the jury forms used in this case contained no express requirement that the jury be unanimous before finding the existence of a mitigating circumstance; and (2) the jury in this case was not required to state whether it found each individually listed possible mitigating circumstance to exist.

The State contends that since Issue Two on the forms used in this case did not contain an *express* unanimity requirement, the jury must have understood that it was not required to be unanimous as to the existence of mitigating circumstances; thus, *McKoy* error was not present in the sentencing proceeding in this case. We disagree.

To determine whether the jury instructions in this case violated the Eighth Amendment as construed by the Supreme Court of the United States in *McKoy*, we must decide whether there is a "reasonable likelihood" that the jury here believed it was required to apply "the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. ---, ---, 108 L. Ed. 2d 316, 329, *reh'g denied*, --- U.S. ---, 109 L. Ed. 2d 322 (1990). Issue Two on the forms given the jury in this case did not *expressly* contain a unanimity requirement regarding mitigating circumstances. However, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47, 38 L. Ed. 2d 368, 373 (1973) (citing *Boyd v. United States*, 271 U.S. 104, 107, 70 L. Ed. 857, 859 (1926)), *quoted in Boyde v. California*, 494 U.S. at ---, 108 L. Ed. 2d at 327; *see also, e.g., Murrow v. Daniels*, 321 N.C. 494, 497, 364 S.E.2d 392, 395 (1988) (citing *Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E.2d 488, 492 (1967) (citing cases)). We can only conclude that when viewed in the context of the overall charge, there is a reasonable likelihood that the jury interpreted the instructions here to require unanimity as to mitigating circumstances.

In its charge to the jury at the conclusion of the sentencing proceeding, the trial court used the word "unanimous" no less than thirteen times while instructing the jury concerning the two "Issues and Recommendation as to Punishment" forms that the jury was to complete. In the final mandate, the trial court instructed the jury that: "Your decision, your answers to *any of the issues* as to your final recommendation *must be unanimous* . . . ." After the jurors had deliberated for approximately one day, the trial court inquired as to their progress. During that inquiry, the trial court stated: "Now as I indicated in my instructions to you, of course your answers to *each* of the issues *must be unanimous* in your recommendation in each case." Although the trial court never explicitly stated that the jury had to be unanimous concerning mitigating circumstances under Issue Two on the forms used, the trial court stated at least three times that the jury's answers *to all* the issues must be unanimous.

The State argues that the lack of an express unanimity requirement in Issue Two on the forms given the jury stands in plain contrast to the express unanimity requirements of Issues One, Three and Four on those forms, and thus no reasonable juror would have interpreted the forms or the instructions to require unanimity as to mitigating circumstances. We disagree. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the way lawyers might." *Boyde v. California*, 494 U.S. at ---, 108 L. Ed. 2d at 329. In this case in which the jurors were instructed at least three times by the trial court that they must be unanimous in their decisions on *all the issues* they answered, we are forced to conclude that, in their entirety, the jury instructions gave rise to a reasonable likelihood that some of the jurors were prevented from considering constitutionally relevant evidence. *See id.* The instructions thus contained the same type of error held to violate the Eighth Amendment by the Supreme Court of the United States in *McKoy*.

II.

[2] Having determined that a *McKoy* unanimity error occurred in this case, we must next consider whether a harmless error analysis may be undertaken. For the reasons set forth in *State v. McKoy*, 327 N.C. 31, --- S.E.2d --- (1990), we conclude that this case may be further examined to determine whether the constitutional error committed was harmless.

III.

As the *McKoy* error in the jury instructions was of constitutional magnitude, "[t]he burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443(b) (1988). On the record before us, we are forced to conclude that the State has not carried this burden.

The trial court submitted six possible mitigating circumstances for both the Fore and the Stallings murders: (1) that the defendant had "no significant history of prior criminal activity"; (2) that the defendant's "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired"; (3) that the defendant "confessed to the crime and did so shortly after the crime was committed"; (4) that the defendant "has an I.Q. of seventy-eight and is borderline mentally retarded"; (5) that the defendant "had been a good and useful employee for Rea Construction Company" prior to the killings; and (6) the mitigating circumstance of "[a]ny other circumstance or circumstances arising from the evidence" which the jury deemed to have mitigating value. The jury was not required to indicate whether it found each individual mitigating circumstance to exist; instead, for each murder the jury only indicated on the form provided that, "yes," it had found "one or more" of the mitigating circumstances to exist.

Given the verdict forms used in this case, it is impossible for this Court to determine which, if any, of the five specifically worded mitigating circumstances the jury found to exist. Nor can we determine which, if any, "other [mitigating] circumstance or circumstances" the jury found to exist under the sixth or "catchall" circumstance on each list. We only know that the jury found "one or more" mitigating circumstances to exist as to each murder. Thus, if substantial evidence was introduced at trial to support any two or more mitigating circumstances, the *McKoy* error has not been shown to be harmless, because the erroneous unanimity requirement may have precluded a juror from considering a circumstance which he or she thought had been established by evidence and was mitigating but which the jury did not unanimously find.

We express no opinion as to the existence of any mitigating circumstances. However, our review of the record reveals that substantial evidence was introduced from which a juror might reasonably have found *each* of the mitigating circumstances submitted to exist.

The first possible mitigating circumstance submitted as to each murder was that the defendant had "no significant history of prior criminal activity." The evidence tended to show that in 1977, some seven years before the trial in this case, the defendant had pled guilty to voluntary manslaughter. Voluntary manslaughter is certainly a very significant crime. However, we are unable to say beyond a reasonable doubt that no juror could reasonably have found that a defendant's commission of a single very serious non-capital crime years before was *not* a significant *history* of prior criminal activity.

The second possible mitigating circumstance was that the defendant's capacity to "appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired." There was evidence at trial that the defendant consumed substantial amounts of alcohol on the weekend of the murders in question here. Expert testimony indicated that the defendant was an alcoholic, and his consumption of alcohol "impaired his judgment and impaired his brain and in that sense was a contributing factor to whatever behavior he engaged in." Given such evidence, we are unable to say beyond a reasonable doubt that no juror could reasonably have found this circumstance to exist and to be mitigating.

The third possible mitigating circumstance was that the defendant "confessed to the crime and did so shortly after the crime was committed." The murders were committed on 8 April and 10 April 1983. The defendant was arrested on 21 April and confessed on 23 April 1983. Even though fifteen days passed between the first murder and the defendant's confession, we are unable to say beyond a reasonable doubt that no juror could reasonably have found this time between the murders and the confession "short" enough to have some mitigating value.

The fourth possible mitigating circumstance was that the defendant "has an I.Q. of seventy-eight and is borderline mentally retarded." There was evidence supporting this possible mitigating circumstance, and a juror could reasonably have found this circumstance to exist and to be mitigating.

The fifth possible mitigating circumstance was that the defendant "had been a good and useful employee for Rea Construction Company" prior to the killings. There was substantial evidence supporting this possible mitigating circumstance. We are unable

to say beyond a reasonable doubt that no juror could reasonably have found this circumstance to exist and to be mitigating.

The sixth possible mitigating circumstance was "[a]ny other circumstance or circumstances arising from the evidence" which the jury deemed to have mitigating value. The defendant argues that, among other circumstances in mitigation, one or more jurors could have found that the defendant's demeanor at trial showed regret and remorse or otherwise had mitigating value. The defendant contends that, under *McKoy*, any such jurors should not have been prevented from finding and weighing such circumstances in their sentencing decision. "[E]vidence is not only what [jurors] hear on the stand but [is also] what they witness in the courtroom." *State v. Brown*, 320 N.C. 179, 199, 358 S.E.2d 1, 15, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). Given the evidence at trial and our inability to assess the defendant's demeanor from the written record, we are unable to say beyond a reasonable doubt that the defendant's contentions in this regard are without merit.

The State argues that no reasonable juror would have found any of the possible mitigating circumstances to exist with regard to either murder. However, the jury in this case in fact unanimously found as to each murder that "one or more" of the mitigating circumstances existed. Further, for reasons already indicated, we are unable to say beyond a reasonable doubt that one or more jurors could not reasonably have found all of the possible mitigating circumstances submitted to exist and to have mitigating value.

The State also argues that even if found to exist by one or more jurors, none of the mitigating circumstances could have influenced the jury's sentencing recommendation as to either murder. The State's arguments in this regard do not establish beyond a reasonable doubt that no juror might find the mitigating circumstances, however weak, both to *exist* and to have *some* mitigating value. While we express no opinion as to the existence of any of these circumstances, we are unable to say that a reasonable juror could not have found each of them to exist and to have some mitigating value.

From the written forms returned by the jury, we can only know that the jury found "one or more" mitigating circumstances as to each murder. Therefore, we are unable to determine how many of the possible mitigating circumstances submitted by the trial court the jury unanimously found to exist and considered

during sentencing. We do not know whether the trial court's instructions, which violated *McKoy* by requiring jury unanimity as to any mitigating circumstance, prevented any individual juror from finding an additional mitigating circumstance, not found by the other jurors, and giving it weight in mitigation in voting upon the jury's recommendations as to whether the defendant should live or die. Given this situation, we are required by the holding of the Supreme Court of the United States in its *McKoy* opinion to vacate the sentences of death against the defendant McNeil, previously upheld by this Court, and remand this case to the Superior Court, Wake County, for a new capital sentencing proceeding.

IV.

On this remand by the Supreme Court of the United States for reconsideration in light of its decision in *McKoy*, the death sentences entered against the defendant and previously upheld by this Court must be and are vacated. This case is remanded to the Superior Court, Wake County, for a new capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000.

Death sentences vacated; remanded for resentencing.

STATE OF NORTH CAROLINA v. RICKY LEE SANDERSON

No. 374A86

(Filed 29 August 1990)

1. Criminal Law § 1352 (NCI4th)— capital sentencing—McKoy error

Instructions in a capital sentencing proceeding contained *McKoy* error in that they required the jury to find each mitigating circumstance unanimously before any juror could consider that circumstance favorably to defendant and the State failed to demonstrate that the error was harmless in that there was evidence from which some jurors might have found the existence of mitigating factors submitted but not found.

Am Jur 2d, Homicide § 513.

2. Criminal Law § 1352 (NCI4th)— McKoy error—review under Appellate Rule 2

At least for all trials conducted after *State v. Kirkley*, 308 N.C. 196 (1983), and before *Mills v. Maryland*, 486 U.S. 367 (1988), the Supreme Court declines to require that a *McKoy* error be reviewed under the plain error standard when defendant failed to object at trial. The purpose of Appellate Rule 10(b)(2) was to place on parties the obligation of calling perceived errors to the trial court's attention at a time when the error could effectively be corrected, but objection at trial to the unanimity instruction would have been in vain before *Mills*. North Carolina Rules of Appellate Procedure, Rule 2.

Am Jur 2d, Appeal and Error §§ 548, 549.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment sentencing him to death imposed by *Allen, J.*, presiding at the 27 May 1986 Criminal Session of Superior Court, IREDELL County. Heard in the Supreme Court on 14 November 1988.

Lacy H. Thornburg, Attorney General, by William N. Farrell, Jr., Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant appellant.

EXUM, Chief Justice.

Defendant argues he is entitled to a new sentencing proceeding, listing several assignments of error. Because of the decision in *McKoy v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 369 (1990), we order a new sentencing proceeding.

Defendant pleaded guilty to charges of first degree murder and first degree kidnapping at arraignment at the 7 April 1986 Criminal Session of Superior Court, Davidson County, Ross, J., presiding. Venue for sentencing was changed, and sentencing proceedings were conducted at the 27 May 1987 Criminal Session of Superior Court, Iredell County, Allen, J., presiding. Judge Allen sentenced defendant to forty years' imprisonment in the kidnapping case (86CRS7161). After a capital sentencing proceeding in the murder

case (86CRS7160) and pursuant to the jury's recommendation, Judge Allen imposed the death penalty.[1]

I.

Evidence presented by the State at the capital sentencing proceeding tended to show as follows: The victim, sixteen-year-old Sue Ellen Holliman, was last seen in her family's home on the afternoon of 14 March 1985. On 15 April 1985 a farmer plowing a field just east of Lexington found a sunken grave and contacted the sheriff's department. The victim's body was discovered in the grave. Three stab wounds were found in the chest area and were identified by a medical examiner as being the cause of death. The body was clothed with panties pulled down to the upper thighs, a partially torn bra, a T-shirt and sweat pants pulled down to the ankles. There was no evidence of sexual molestation. Approximately sixty-six feet from the grave site police found a smaller digging, apparently made with a shovel.

In May 1985 police arrested Elwood "Woody" Jones, an employee of a business managed by the victim's family, for the murder. Police initially questioned Jones on 15 May 1985. After two hours of interrogation Jones asked to take a polygraph test. Before taking the test Jones confessed to murdering Holliman. After confessing, Jones was taken to the field where the victim was found, and he showed officers where she had been buried and described how he had killed her.[2] Police officers then took Jones to a motel room where he gave a formal, written, signed confession consistent with the information he provided at the murder scene. Jones was formally arrested and charged with the murder of Sue Ellen Holliman.

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1. Although this Court allowed defendant's motion to bypass the Court of Appeals in the kidnapping case, defendant has assigned no error nor made any argument in his brief concerning the sentence imposed in this case. Since defendant pleaded guilty to the kidnapping charge, he could only appeal issues relating to the sentence. N.C.G.S. § 15A-1444. It is not clear from defendant's notice of appeal that he ever intended to appeal the kidnapping case. In any event defendant has placed no issue before the Court relating to the kidnapping case, and we find no error in defendant's plea or sentence in this case.

2. Jones was taken to the farm adjoining the field and was asked by the officers to show them the exact location of the grave. After indicating two incorrect locations, Jones took the officers to the site of the smaller digging and explained he had started digging there, then moved to the exact location of the grave site and said he could "feel Suzi's presence." An officer testified nobody led Jones to the grave site or suggested how to locate it.

While in jail awaiting trial, Jones admitted his guilt to two inmates and an SBI informer.[3]

In January 1986 defendant was in Central Prison serving a sentence of life imprisonment plus 110 years for other crimes when he requested to speak to the sheriff investigating the Holliman murder case. On 21 January 1986 defendant spoke with four officers in Central Prison and confessed to this crime. Defendant's confession was videotaped on 22 January, and the tape was introduced as evidence at his sentencing proceeding.

On this tape defendant described getting up on the morning of 14 March 1985, injecting drugs, and driving to a neighborhood where he had previously worked. He approached a house intending to break inside. Defendant thought the house was unoccupied and was surprised upon opening an outer glass door to be confronted by the victim opening an inner door. Defendant asked to use the telephone, was refused, then rushed inside and covered the victim's mouth. Defendant asked the victim whether the house contained any money and she indicated "no." Defendant pulled the victim to his vehicle, put her in the front passenger side floorboard, and drove for over two hours. He was frightened and unable to determine what to do. Defendant drove down a rough dirt road, injected more drugs, and convinced himself that he was going to kill the victim. He removed a shovel from the trunk of the car and forced the victim into the trunk. He began digging, moved to an area with softer dirt, and dug a grave. After injecting more drugs defendant removed the victim from the trunk, choked her, laid her on the ground and stabbed her twice with a knife.[4] Defendant

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3. Testimony from police officers suggests Woody Jones had knowledge of details of the murder that had not been made public and provided officers with descriptions of the crime consistent with physical evidence collected by the investigators. Defendant and Jones, however, were together in the Davidson County Jail in May 1985 after Jones' arrest for the murder and while defendant was incarcerated on unrelated charges. They also met again at Dorothea Dix Hospital where both were incarcerated and after Jones had given a detailed confession. Although the two men spent time together while at the hospital for twelve days, defendant claimed he never spoke to anyone of the murder and did not know how Jones knew of details about the crime provided by Jones in his confession.

4. Defendant described pulling down the victim's pants, seeing blue panties and finding she wore no bra. This description, and defendant's insistence that he stabbed the victim only twice, are inconsistent with the physical evidence State introduced at the sentencing proceeding.

buried the victim and drove home, throwing the murder weapon off a bridge.[5]

The State also introduced physical evidence tending to link defendant with the murder. A pubic hair consistent with that of the victim was found in defendant's vehicle, and several polymer fibers and paint samples found on the victim's clothing matched material found both in the passenger compartment and the trunk of defendant's vehicle.

Defendant introduced evidence tending to show he had become more interested in religion while in prison. A church pastor testified defendant requested visits from him and sought information to better understand the Scriptures. The pastor also testified defendant had adjusted as well as anyone could to prison life.

Pursuant to N.C.G.S. § 15A-2000, the jury found as aggravating circumstances that defendant had committed murder to avoid lawful arrest and that the killing was done in commission of a kidnapping. It rejected the aggravating circumstance that the crime was especially heinous, atrocious or cruel. Four of six mitigating circumstances were found: Defendant's confession was responsible for Woody Jones' release, defendant's plea relieved the State of having to prove guilt, defendant's conduct in jail was good, and defendant had adjusted well to prison life. The jury rejected the mitigating circumstances that defendant's capacity to appreciate the criminality of his conduct or conform his conduct to law was impaired, and failed to find the existence of any unspecified circumstances arising from the evidence deemed to have mitigating value. The jury determined the mitigating circumstances were insufficient to outweigh the aggravating circumstances and the aggravating circumstances, when considered with the mitigating circumstances, were sufficiently substantial to warrant the death penalty. The jury recommended and the trial court accordingly entered judgment sentencing defendant to death.

II.

[1] Defendant is entitled to a new sentencing proceeding pursuant to the recent decision of the United States Supreme Court in *McKoy*

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5. Defendant said he saw no hope and did not want to serve a life sentence. He admitted telling a deputy sheriff that he believed he would go to hell if he committed suicide, but if he were put to death he would have a chance of going to heaven. He reiterated his guilt, however, and could offer no explanation as to how Jones knew about the crime.

v. North Carolina, 494 U.S. ---, 108 L. Ed. 2d 369. *See also State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990).

In its sentencing instructions to the jury the trial court addressed each mitigating circumstance submitted to the jury and instructed for each, "If you do not so find unanimously, then, [that] this is a mitigating circumstance by a preponderance of the evidence, you will also indicate by having your foreman write 'no' in that space." Regarding the weighing of aggravating and mitigating circumstances for the ultimate sentencing decision, the trial court instructed the jury that the State had to prove to the jury "that any mitigating circumstance[s] you have found are insufficient to outweigh any aggravating circumstance you have found; and third, that any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances that you have found."

In *McKoy* the United States Supreme Court held unconstitutional North Carolina's capital sentencing jury instructions which required the jury to find the existence of a mitigating circumstance unanimously in order for any juror to consider that circumstance when determining the ultimate recommendation as to punishment. The Court reasoned that North Carolina's "unanimity" requirement was constitutionally infirm because it "prevent[ed] the sentencer from considering all mitigating evidence" in violation of the eighth and fourteenth amendments. *McKoy*, 494 U.S. at ---, 108 L. Ed. 2d at 376. *See also State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426.

The instructions at defendant's trial contained *McKoy* error. They required the jury to find each mitigating circumstance unanimously before any juror could consider that circumstance favorably to defendant in the ultimate sentencing decision. Defendant is therefore entitled to a new sentencing proceeding unless the error was harmless. *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426.

For constitutional error not to be reversible, the State must demonstrate it is harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443.

The State has failed to meet this burden. The jury failed to find unanimously the mitigating circumstance that defendant's capacity to appreciate the criminality of his act or to conform his behavior to law was impaired. There was evidence from which at least some jurors might have found the existence of this circumstance.

Defendant's videotaped confession tended, in part, to support the circumstance that defendant's capacity to appreciate the criminality of his act or to conform his behavior to law was impaired. Defendant described himself as having taken large amounts of drugs on the day the murder was committed and said he injected two syringes of "dope" just before stabbing the victim. When asked by the interrogating officers why he committed the crime, defendant responded, "Why did I do it all? I don't know. I am going to say drugs. I would not . . . I feel like in my heart I would not go out and do this if I was not on some kind of drugs." This evidence tends to support the diminished capacity mitigating circumstance.

We cannot say beyond a reasonable doubt that the erroneous unanimity jury instruction did not preclude one or more jurors from considering in mitigation defendant's drug intoxication as diminishing his capacity to appreciate the criminality of his act or to conform his behavior to law. Neither can we say beyond a reasonable doubt that had such jurors been permitted under proper instructions to consider this circumstance, they would nevertheless have voted for the death penalty rather than life imprisonment. *See State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426; *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990).

[2] The State argues that defendant did not object to the instructions at trial; therefore, under Appellate Rule 10(b)(2) this assignment of error must be addressed under the plain error rule. Rule 10(b)(2) precludes a party from assigning error to any portion of a jury instruction unless that party objected at trial before the jury retired to deliberate and stated "distinctly that to which he objects and the grounds of his objection." Error in instructions, however, may nevertheless be assigned on appeal if it is "plain error," that is, error that had a probable impact on the jury's determination. *State v. Hannah*, 316 N.C. 362, 341 S.E.2d 515 (1986); *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).[6] To determine that an instructional error amounts to plain error, "the appellate court 'must be convinced that absent the error the jury probably would have reached a different verdict.' " *Hannah*, 316 N.C. at 367-68, 341 S.E.2d at 517 (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)).

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6. See also App. R. 10(c), which incorporates the common law "plain error" rule but which was not effective until after appeal was taken in this case.

At least for all trials conducted after *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), and before *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384 (1988), we decline to require that a *McKoy* error be reviewed under the plain error standard when the defendant failed to object at trial to the error. The purpose of Appellate Rule 10(b)(2) was to place on parties the obligation of calling perceived errors to the trial court's attention at a time when the error could be effectively corrected. Both the parties and the judicial system could thereby be saved from the time and expense of a new trial because of instructional error which the parties perceived in silence at the first trial. *Kirkley* held there was no constitutional or other error in North Carolina's jury instructions requiring jury unanimity in the finding of mitigating circumstances. At least until *Mills*, which cast some doubt on the validity of *Kirkley*, objection at trial to the unanimity instruction would have been in vain insofar as it would have given the trial judge an opportunity to "correct" the instructional "error" because during the period between *Kirkley* and *Mills* no lawyer or judge in North Carolina had reason to believe there was error in the instruction which needed correcting. The purpose of Appellate Rule 10(b)(2) would not have been served even if defendant had timely objected to the unanimity instruction.

This case was tried after *Kirkley* and before *Mills*. We have elected, therefore, in the interest of fair proceeding, not to apply Appellate Rule 10(b)(2) and to apply, instead, Appellate Rule 2,[7] and we have considered the *McKoy* error as if defendant had timely objected to the error at trial.

In the kidnapping case we find no error. The murder case is remanded for a new sentencing proceeding.

Case No. 86CRS7161—No error.

Case No. 86CRS7160—Remanded for new sentencing proceeding.

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7. Appellate Rule 2 provides:

> "To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions."

STATE OF NORTH CAROLINA v. JOHN QUINTON SHANK

No. 260A89

(Filed 29 August 1990)

1. **Criminal Law § 460 (NCI4th)— murder—closing arguments—amnesia—permissible inference**

The prosecutor did not misstate the evidence during his closing argument in a murder prosecution when he argued that an expert in psychology had testified that a telephone call fifteen minutes after the killing during which defendant stated that he had killed his wife would tend to show that his claim of amnesia might not be valid. Although the psychologist continued to draw the conclusion that defendant suffered from amnesia, he did testify that the telephone call conflicted with the whole notion of amnesia. The prosecutor did not misstate the evidence but simply drew a permissible inference from it.

Am Jur 2d, Trial § 260.

2. **Criminal Law §§ 463, 468 (NCI4th)— murder—closing arguments—matters not outside record**

The prosecutor in a murder prosecution did not improperly argue matters outside the record when he referred to newspapers and television and contended that defendant's motive for killing his wife was an affair he was having with another woman. The prosecutor was engaged in rebutting arguments made by defense counsel, and, while he would have been better advised to make his appeal directly to the jury's own common sense and knowledge drawn from life experiences without reference to outside sources, the argument was not so improper as to require a new trial. Furthermore, it was uncontroverted that defendant was having an affair and that he left his lover's bed to kill his wife.

Am Jur 2d, Trial § 251.

APPEAL of right by the defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment sentencing him to life imprisonment entered by *Martin, J.*, on 27 January 1989 in Superior Court, CLEVELAND County. Heard in the Supreme Court on 14 February 1990.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Appellate Defender, by Teresa A. McHugh, Assistant Appellate Defender, for the defendant-appellant.

MITCHELL, Justice.

The defendant, John Quinton Shank, was indicted for the first-degree murder of his estranged wife, Dellarie Shank. He was convicted of first-degree murder at the 15 September 1986 Criminal Session of Superior Court, Cleveland County, and sentenced to life imprisonment. On his appeal of that conviction and sentence, this Court awarded a new trial. *State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). After a retrial of the defendant at the 23 January 1989 Criminal Session of Superior Court, Cleveland County, the defendant was again convicted of the first-degree murder of his wife, and the trial court entered judgment sentencing him to life imprisonment. From that judgment, the defendant appealed to this Court as a matter of right.

Some of the evidence introduced upon the retrial of this case tended to show that a little after 8:30 a.m. on 6 January 1986, the defendant went to the Cleveland County Health Department, where his estranged wife worked. Shortly thereafter, he and the victim came out of the building and stood outside the main entrance talking. The defendant reached into his jacket and pulled out a pistol, and the victim began running and screaming. The victim fell as the defendant fired the pistol at her three times. The defendant then ran over to the victim and fired twice more. He then got into his truck and left the scene. The victim died of multiple gunshot wounds.

At approximately 9:15 a.m., the defendant called his brother Clifford and told him that he had done "something stupid," that he had "shot Dellarie." Clifford Shank then left his place of employment in King's Mountain and drove to Shelby, where he located the defendant along the highway and picked him up. The defendant asked Clifford Shank to take him to South Carolina, but Clifford declined and left the defendant at a shopping center in Gastonia.

Evidence was introduced tending to show that the defendant purchased a pistol and ammunition on 3 January 1986. He bought a shoulder holster from a gun shop on 4 January 1986. At approx-

imately 1:30 p.m. on 6 January 1986, the date the defendant's wife was killed, police found the gun and holster the defendant had bought in plain view on the bed in Carolyn Lawrence's house where the defendant had slept the previous night. The gun had been fired recently.

Carolyn Lawrence testified that she met the defendant at work and at some point began seeing him regularly. After October of 1985, the defendant occasionally spent the night with her. She testified that the defendant came to her home on the night of 5 January 1986 wearing a holster and pistol. He spent the night with her and was still in bed when she left for work the next day.

Additional evidence introduced at trial is discussed, where pertinent to the defendant's arguments, at other points in this opinion.

The defendant assigns error to the trial court's failure, upon objection by the defendant, to intervene and prevent or correct certain arguments made by the prosecutor in his closing arguments to the jury. In support of these assignments, the defendant contends that the prosecutor's arguments misstated critical evidence or traveled outside the record and were unsupported by the evidence.

[1] The defendant first contends that the prosecutor misstated or mischaracterized certain testimony to the effect that, at the time of trial, the defendant suffered from amnesia concerning the events surrounding the killing of his wife. "It is well settled that arguments of counsel are left largely to the control and discretion of the trial judge and that counsel will be granted wide latitude in the argument of hotly contested cases." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). Counsel may argue the facts which have been presented, "as well as reasonable inferences which can be drawn therefrom." *Id.* However, counsel may not argue facts which are not supported by the evidence. *Id.*

In the present case, Dr. William Varley, a psychologist, testified as an expert in psychology for the defendant. Dr. Varley testified that he had interviewed the defendant and administered various tests to him. Dr. Varley testified, *inter alia*, that the defendant suffered from amnesia concerning the killing of his wife.

During his closing arguments to the jury, the prosecutor argued that:

> Dr. Varley said, "I supported Dr. Ballinsky's findings of amnesia." What is amnesia, Doctor? "It is a person's claim that he doesn't remember." Is there any absolute test to show that he's telling the truth about his amnesia? "No, it's his word." Dr. Varley, when you supported in your writings on this case that you believed John Shank had amnesia, did you know that fifteen minutes after he killed her and says he doesn't remember it, that he called his brother and told him that he had killed her? He said, "No, I did not know that." Would that have any effect on the claim of amnesia? *I believe he said it would tend to show that maybe it was not valid.*

The defendant contends specifically that the prosecutor misstated the evidence by arguing that Dr. Varley had testified that the defendant's telephone call fifteen minutes after the killing, in which the defendant stated he had killed his wife, would tend to show that the defendant's claim of amnesia might not be valid. We do not agree.

That part of Dr. Varley's testimony which is pertinent to this argument by the defendant, was as follows:

> Q. Did you know at the time of your evaluation, Dr. Varley, that within fifteen minutes after [the defendant had shot his wife], during a period of time when he claimed to have no memory, that he dialed his brother by memory and said, "I shot Dellarie, I did a stupid thing, I shot Dellarie?"
>
> A. At the time that I tested him I was not aware of that.
>
> Q. And you concluded in your report that that was consistent with amnesia and reported that to Dr. Ballinsky and to his attorney a long time ago, is that correct?
>
> A. That's correct.
>
> Q. So you had reached that conclusion before you knew that he had, in fact, called his brother and told him, "I shot Dellarie?"
>
> A. That's true.
>
> Q. So that in effect shows as to his shooting Dellarie he could not have amnesia, did it not?
>
> A. Not necessarily.

Q. Then how did he know he shot her?

A. He performed an action and the memory loss can, for something along these lines, can come either suddenly or gradually, and based on what you have told me, clearly the memory loss came gradually. Or he may have, he may have done something but later forgotten that he had done it.

Q. He did it and forgot it and remembered it, all in fifteen minutes?

A. No, that's not what I'm saying.

Q. Then what—there's no other time span, is there?

A. Well, there is quite a bit of time span here in terms of when the act occurred, what he did after the act, where he ended up, and what's happened since then. And all the while the mental processes were at work coping with this experience.

Q. Dr. Varley, there is no absolute test to determine whether or not a patient's claim of amnesia is, in fact, real or not, is there?

A. That's correct.

Q. And in that regard, Dr. Varley, you would have to look at the things that happened during the claimed period by the patient of amnesia to determine whether or not that claim was valid, wouldn't you?

A. Not necessarily, because, like I say, amnesia can have gradual onset. *I mean this is information.* I understand what you're saying, *it does conflict with the whole notion of amnesia.* But when I evaluated John, his report to me was that he had no memory for the events after he heard his wife say, you know, "You're not going to see the kids." So when I evaluated him, he was showing symptoms of amnesia and there were signs in the psychological tests which indicate to me that he was, to the best of his ability, telling me the truth at the time, that he was not fabricating this.

Taken in context, we conclude that Dr. Varley's testimony was to the effect that the defendant's telephone call stating that he had killed his wife, made approximately fifteen minutes after he had done so, did "conflict with the whole notion of amnesia."

We further conclude that the prosecutor did not misstate the evidence, but simply drew a permissible inference from it, when he argued that Dr. Varley had testified that the telephone call would *tend* to show that the defendant's claim of amnesia *might* not be valid. It is true, of course, that despite any such possibility, Dr. Varley continued to draw the conclusion that the defendant suffered from amnesia at the time of trial concerning the events surrounding the killing of his wife. Nevertheless, the prosecutor's argument did not mischaracterize the evidence and, at most, drew a permissible inference from Dr. Varley's testimony. Therefore, we find this argument by the defendant to be without merit.

[2] The defendant next contends that the prosecutor improperly argued incompetent matters outside the record when he made the argument that:

> They say, "Oh, John Shank is a good man. It's not in his nature to kill people." Ladies and gentlemen, good people don't get one free killing. John Shank's life had been going downhill ever since he met Carolyn Lawrence over there at Eaton. He was running around with her and going by her house while he was still living with his wife. Downhill, downhill, downhill.
>
> You read newspapers, you watch television. How many killings do you know of where a man is involved with a couple of women and the only thing left is to kill one of them?
>
> MR. PAKSOY: OBJECTION.
>
> . . . That's as good a motive as any. We don't have to prove motive. Listen to the Judge. He won't say the State of North Carolina has to prove motive. But you as reasonable people can find that that was pretty much on his mind, too. "What am I going to do with this mistress and this wife and try and get my children back and all of this?"

Initially, we note that much of the prosecutor's argument tended to rebut arguments that counsel for the defendant had made in his closing argument to the jury; those arguments were to the effect that the defendant would not have killed his wife in order to get custody of his children and that his affair with Carolyn Lawrence did not mean that he was guilty of murder. Further, the prosecutor's argument was based upon reasonable inferences from the evidence and was otherwise proper.

The prosecutor's reference in his argument to newspapers and television, while not desirable or well advised, did not amount to an improper argument in the context in which it was made. Taken in context, we conclude that this argument merely called upon the jurors to draw upon their common sense and life experiences in order to recognize that a heightened likelihood of, and motive for, violence and even killing arises in a situation in which a married man has an affair with another woman. In this regard, the prosecutor's argument simply called upon the jury to apply the "commonsense judgment of the community." *Taylor v. Louisiana*, 419 U.S. 522, 530, 42 L. Ed. 2d 690, 698 (1975). This is a proper function for the jury and one of the reasons for the jury system. *State v. Scott*, 314 N.C. 309, 311-12, 333 S.E.2d 296, 297-98 (1985). Although the prosecutor would have been better advised to make his appeal directly to the jury's own common sense and knowledge drawn from life experiences without reference to any outside sources, we do not believe that the argument was so improper as to require a new trial, particularly in light of the fact that the prosecutor was engaged in rebutting the prior closing argument of counsel for the defendant. *See State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974), *vacated in part on other grounds*, 428 U.S. 902, 49 L. Ed. 2d 1205 (1976) (mem.).

The defendant further contends that this part of the prosecutor's argument went beyond the evidence and was improper because "there was no evidence presented to support the inference that John Shank killed his wife to make room for his relationship with Carolyn Lawrence." We find this argument without merit. First, the prosecutor's argument in this regard was directly responsive to the closing argument of counsel for the defendant to the effect that the fact that the defendant was having an affair with Carolyn Lawrence did not prove that he had planned to kill anyone. The prosecutor was entitled to rebut that argument by counsel for the defendant. *See id.* Additionally, it appears from the record to be uncontroverted that the defendant was having an affair with Carolyn Lawrence and left her bed on the morning of 6 January 1986 to go to kill his wife. Therefore, the prosecutor's argument that the defendant's affair with Lawrence was a motive for the killing was one legitimate inference to be drawn from the evidence, and the prosecutor's argument to that effect was not improper.

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

No error.

RUBY D. LAMM v. BISSETTE REALTY, INC., AND DANIEL P. WETHERINGTON AND JUDY A. WETHERINGTON

No. 280A89

(Filed 29 August 1990)

1. **Negligence §§ 1.3, 47 (NCI3d)— violation of State Building Code—knowledge by owner—negligence per se**

The owner of a building may not be found negligent per se for a violation of the State Building Code unless: (1) the owner knew or should have known of the Code violation; (2) the owner failed to take reasonable steps to remedy the violation; and (3) the violation proximately caused injury or damage.

Am Jur 2d, Premises Liability § 53.

2. **Negligence § 47 (NCI3d)— violation of State Building Code—absence of knowledge—no negligence per se**

The owners and manager of an office building cannot be held negligent per se based on a violation of the State Building Code where there was no evidence that they knew or should have known of the Code violation.

Am Jur 2d, Premises Liability § 53.

3. **Negligence § 47.1 (NCI3d)— invitee—fall on steps—variation in heights of risers—failure to provide handrail**

In an action to recover for injuries received when plaintiff invitee slipped and fell while stepping from the bottom step of the stairway leading from defendants' office building, plaintiff's forecast of evidence was sufficient to make out a prima facie case of common law negligence by defendants in failing to warn plaintiff of a variation in the heights of the risers and in failing to provide a handrail for the steps where it tended to show that the downward slope of the asphalt ramp leading from the bottom step makes the height of the last

step some two inches greater than the top two steps. Further, the questions of proximate cause and plaintiff's contributory negligence are properly jury questions.

Am Jur 2d, Premises Liability §§ 583, 585, 591, 686.

ON appeal and discretionary review of the decision of the Court of Appeals, 94 N.C. App. 145, 379 S.E.2d 719 (1989), reversing an order entered by *Watts, J.*, in the Superior Court, WILSON County, on 14 June 1988, granting summary judgment for the defendants. Heard in the Supreme Court 12 March 1990.

Mast, Morris, Schulz & Mast, P.A., by Bradley N. Schulz and George B. Mast, for plaintiff-appellee.

Poyner & Spruill, by J. Phil Carlton, George L. Simpson, III, and Mary Beth Johnston, for defendant-appellants.

James B. Maxwell, Alice Neece Moseley and Michael K. Curtis, for Amicus Curiae North Carolina Academy of Trial Lawyers.

FRYE, Justice.

Plaintiff brought suit against defendants Daniel and Judy Wetherington and Bissette Realty, Inc. (Bissette), for injuries she sustained as a result of slipping and falling as she stepped off the bottom step of the porch of an office building owned by the Wetheringtons and managed by Bissette. The trial court entered summary judgment for defendants, and the Court of Appeals reversed, concluding that defendants violated the North Carolina State Building Code (Code) and therefore were negligent *per se*. *Lamm v. Bissette Realty*, 94 N.C. App. 145, 148, 379 S.E.2d 719, 721 (1989). The Court of Appeals further concluded that the questions of whether defendant's negligence was the proximate cause of the accident and whether plaintiff was contributorily negligent could not be decided as a matter of law and were therefore jury questions. *Id.* Defendants appealed from the Court of Appeals' decision based on Judge Lewis' dissent and filed a petition for discretionary review as to additional issues. This petition was allowed by this Court on 6 September 1989.

The issues presented by defendants' appeal are whether the Court of Appeals erred: (1) in finding that defendant's failure to comply with the Code constituted negligence *per se*; (2) in failing to affirm the trial court's grant of summary judgment to defendants

because the place where plaintiff fell was an open and obvious condition for which defendants had no duty to warn, assuming that defendants were not negligent *per se*; (3) in concluding that the matter of plaintiff's contributory negligence could not be decided as a matter of law; and (4) in concluding that the question of whether defendants' negligence was the proximate cause of plaintiff's injuries could not be decided as a matter of law. We conclude that summary judgment was improperly granted in favor of defendants because, while defendants were not negligent *per se* for violating the Code, there is enough evidence of common law negligence to survive defendants' motion for summary judgment on the issue of whether defendants were negligent in failing to provide a handrail for the steps and in not warning about the variation in riser heights. We affirm the Court of Appeals' holding that the issues of proximate cause and contributory negligence in this case are questions for the jury.

The evidence before the court on the motion for summary judgment disclosed that on 3 February 1987, plaintiff, who was sixty-nine years old at the time, went to pay an insurance bill at the building owned by the Wetheringtons and managed by Bissette. The building was built in 1978, and the steps used by plaintiff are the only exit from the building. The building, porch, and steps are constructed of brick, and the steps lead to an asphalt parking lot by way of an asphalt ramp or apron. There are three risers from the ramp to the top of the porch. The first two steps coming down from the porch are six and one-half inches high. The bottom riser, which is the last step down to the ramp, is seven and one-half inches high at the point of contact between the steps and the asphalt. The distance from the last brick step down to the level of the parking lot is eleven and one-half inches, but during construction the asphalt was sloped upward from the parking lot toward the bottom step in order to make the distance from the step to the asphalt closer to the six and one-half inches of the other risers. This asphalt ramp or apron slopes at a rate of one inch per running foot. Because of this slope and the fact that a person of normal gait, when descending the stairs, would step about one running foot out on the ramp, the effective height of the last step down is eight and one-half inches. The stairs do not have a handrail on either side.

As she was leaving the building, plaintiff fell while stepping off the bottom step onto the sloping asphalt. In her deposition,

plaintiff stated, "as I stepped off the bottom step with my right foot, it slipped. That pavement—the asphalt—did not look slick to me, but my foot slipped. It was so—and I tried to catch, and I couldn't. And it was slanting as I slipped." Plaintiff presented no evidence that the asphalt was "slick" at the time she fell.

[1] The Court of Appeals concluded that defendants were negligent *per se* because they violated two sections of the State Building Code, Section 1007.3(b) which provides, "[a]ll exit stairs . . . shall have a handrail on at least one side," and Section 1115.3(b) which provides, "[t]reads shall be of uniform width and risers of uniform height in any one flight of stairs." *Lamm v. Bissette Realty*, 94 N.C. App. at 146, 379 S.E.2d at 721. "The violation of a statute which imposes a duty upon the defendant in order to promote the safety of others, including the plaintiff, is negligence *per se*, unless the statute, itself, otherwise provides, and such negligence is actionable if it is the proximate cause of injury to the plaintiff." *Ratliff v. Power Co.*, 268 N.C. 605, 610, 151 S.E.2d 641, 645 (1966). However, the owner of a building may not be found negligent *per se* for a violation of the Code unless: (1) the owner knew or should have known of the Code violation; (2) the owner failed to take reasonable steps to remedy the violation; and (3) the violation proximately caused injury or damage. *See Olympic Products Co. v. Roof Systems*, 88 N.C. App. 315, 363 S.E.2d 367, *disc. rev. denied*, 321 N.C. 744, 366 S.E.2d 862 (1988).

[2] In the present case, plaintiff has not shown that defendants are negligent *per se* for a violation of the Code because plaintiff made no showing that either the Wetheringtons, who are the second owners of the building, or Bissette knew or should have known of the violation of the Code.[1] Therefore, the Court of Appeals erred in holding that defendants were negligent *per se* for violation of the Code.

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1. We note that if defendants did have knowledge of a Code violation, the only Code provision which appears to be applicable to the present situation is Section 1115.3 dealing with the allowed variation of riser heights. The record in this case is not clear as to whether the 1967 or the 1978 version of the Code applies; however, the risers in this case are of uneven height which appears to violate both versions of the Code. *See* North Carolina State Building Code, Section 1115.3 (1978 ed.) and (1967 ed.).

If the building was constructed before the 1978 version of the Code became effective in April 1978, Section 1007.3(b) of that Code, requiring handrails on all existing buildings, appears to be subject to the Section 1007.1 requirement that a building official give written notice to the owner to bring the building into compliance with Chapter 10. There is no evidence of such notice in the present case. *See* North Carolina State Building Code, Sections 1007.1 and 1007.3(b) (1978 ed.).

[3] Since defendants cannot be found negligent *per se* based on a violation of the Code because the forecast of evidence is insufficient to show that defendants knew or should have known of a Code violation, we must examine whether the forecast of evidence is sufficient to show that defendants were negligent in failing to provide a handrail on the steps and in not warning about the variation in height of the risers. As the Court of Appeals correctly stated, to survive defendants' motion for summary judgment in the present case, plaintiff must allege a *prima facie* case of negligence—defendants owed plaintiff a duty of care, defendants' conduct breached that duty, the breach was the actual and proximate cause of plaintiff's injury, and damages resulted from the injury. *Lamm v. Bissette Realty*, 94 N.C. App. at 146, 379 S.E.2d at 721. We conclude that plaintiff's forecast of evidence was sufficient to make out a *prima facie* case of defendants' common law negligence in failing to warn of the variation in height of the risers and failing to provide a handrail.

The Court of Appeals is correct that plaintiff is a business invitee of defendants, who are the owners and manager of the building. *Id.* at 147, 379 S.E.2d at 721. The owner owes a duty to a business invitee to keep "entrances to his business in a reasonably safe condition for the use of customers entering or leaving the premises." *Id.* at 146, 379 S.E.2d at 721 (citing *Garner v. Greyhound*, 250 N.C. 151, 155, 108 S.E.2d 461, 464 (1959)). An owner also has a duty to warn invitees of hidden dangers about which the owner knew or should have known. *Branks v. Kern*, 320 N.C. 621, 359 S.E.2d 780 (1987); *Mazzacco v. Purcell*, 303 N.C. 493, 278 S.E.2d 583 (1981); *Hedrick v. Tingiere*, 267 N.C. 62, 147 S.E.2d 550 (1966).

Defendants contend that the sloping asphalt where plaintiff fell is an open and obvious condition which plaintiff should have seen, and therefore defendants had no duty to warn her of the danger. As discussed earlier in this opinion, the asphalt ramp or apron slopes away from the bottom brick step at a rate of one inch per running foot, creating a two-inch differential between the height of the top two steps and the height of the bottom step at the point where plaintiff would place her foot when descending the stairs. While the fact that the asphalt slopes away from the steps may be obvious to someone walking down the stairs, the fact that the last step down is some two inches deeper than the other two steps, partly as a result of this sloping, is not so

obvious to someone descending the stairs. The combination of the slope and the variation of the height cannot be said as a matter of law to be an open and obvious defect of which plaintiff, an invitee, should have been aware. A jury could find that this variation in riser height, in part caused by the slope of the asphalt, was a hidden defect which defendants should have known about and that defendants had a duty to warn plaintiff that the last step down was deeper than the previous two steps. Summary judgment for defendants, thus foreclosing jury consideration of this issue, was error.

Defendants contend that plaintiff's forecast of evidence shows only that the sloping of the asphalt ramp and not the riser height was the cause of her accident, and therefore the accident was caused by an open and obvious condition of which defendants had no duty to warn plaintiff. However, in her statement to a representative of the insurance company shortly after the accident, plaintiff stated, "the step was deeper than I thought it was." While in her deposition plaintiff kept referring to the "slope" as the cause of her fall, plaintiff never denied that the variation in the riser height contributed to her fall. This ostensible conflict regarding causation is not properly settled by summary judgment; it is a question for the jury. Thus, summary judgment for defendants on the issue of whether defendants were negligent in not warning plaintiff of the variation in height was error.

Since owners owe a duty to business invitees to keep the entrance in a reasonably safe condition, a jury could find that defendants were negligent for not attempting to correct what defendants themselves called an open and obvious condition—the sloping asphalt—by adding a handrail to make it reasonably safe. As noted earlier, plaintiff stated in her deposition, "I tried to catch, and I couldn't." A jury could reasonably find that failure to provide such a handrail constitutes negligence on the part of defendants given the downward slope of the asphalt ramp and the fact that the slope makes the height of the last step some two inches greater than the top two steps. Whether the failure to provide a handrail under these conditions constitutes negligence is a question of fact for a jury rather than an issue of law for the court to decide. Therefore, the Court of Appeals correctly reversed the trial court's grant of summary judgment in favor of defendants because plaintiff's forecast of evidence was sufficient to survive defendants' motion for summary judgment on the issue of whether defendants

were negligent in not providing a handrail at the steps where plaintiff fell.

The Court of Appeals was also correct in concluding that the questions of proximate cause and plaintiff's contributory negligence in this case are properly jury questions. *Lamm v. Bissette Realty*, 94 N.C. App. at 148, 379 S.E.2d at 721. The issues of proximate cause and contributory negligence are usually questions for the jury. *See Collingwood v. G.E. Estate Equities*, 324 N.C. 63, 376 S.E.2d 425 (1989); *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 268 S.E.2d 190 (1980). As the Court of Appeals noted, "[p]laintiff may not know exactly why she fell, but she did fall." *Id.* at 148, 379 S.E.2d at 722. Whether her fall and subsequent injuries were the result of defendants' negligence or the result of plaintiff's own negligence is a jury question not suitable, under the evidence here, for summary judgment.

We hold that the trial court erred in granting summary judgment in favor of defendants, not for the reason, as held by the Court of Appeals, that the defendants were negligent *per se* for violating the State Building Code, but because plaintiff has forecast sufficient evidence of common law negligence to survive defendants' motion for summary judgment. We affirm the Court of Appeals' holding that the questions of proximate cause and contributory negligence are in this case properly jury questions rather than questions for the court to decide as a matter of law. For these reasons, we modify and affirm the decision of the Court of Appeals.

Modified and affirmed.

JAMES EUGENE WILSON, JEANNETTE WILSON BY HER GUARDIAN AD LITEM, RONALD J. SHORT, AND CHRISTOPHER WILSON BY HIS GUARDIAN AD LITEM, RONALD J. SHORT v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 45PA89

(Filed 29 August 1990)

1. **Insurance § 87 (NCI3d)— automobile liability insurance—wife's policy—husband living in same household—insured driver**

The evidence was sufficient to support a jury finding that the driver of an automobile involved in a collision was a resident of the same household as his wife where it showed that the driver told the investigating officer on several occasions in his wife's presence without denial by her that his residence was at his wife's address, and the wife gave this address for her husband when reporting the accident, notwithstanding there was other evidence that the parties were separated and living apart at the time of the accident. Therefore, the husband was covered by the wife's automobile liability policy under the provisions of N.C.G.S. § 20-279.21(b)(3)b without regard to whether he had the wife's permission to drive her automobile.

Am Jur 2d, Automobile Insurance §§ 189, 247.

2. **Insurance § 87 (NCI3d)— automobile liability insurance—wife's policy—husband living in same household—reasonable belief of entitlement to drive**

The driver of an automobile owned by his wife who resides in the same household as his wife cannot be excluded from coverage under the wife's automobile liability policy by a provision of the policy excluding coverage for a person using the automobile "without a reasonable belief that [he] is entitled to do so" since the exclusion of the driver for that reason would conflict with the statute providing that a spouse of a policyholder living in the same household is a person insured. N.C.G.S. § 20-279.21(b)(3)b.

Am Jur 2d, Automobile Insurance §§ 189, 247.

3. Insurance § 100 (NCI3d)— automobile liability insurance— insurer's failure to defend insured—payment over policy limits not required

Defendant automobile liability insurer's refusal to defend plaintiffs' claim against its insured did not entitle plaintiffs to recover from the insurer damages which exceeded the policy limits where plaintiffs were not damaged by defendant insurer's failure to defend in that such failure did not put plaintiffs in a worse position than if the insurer had defended the claim.

Am Jur 2d, Automobile Insurance § 389.

ON discretionary review of the decision of the Court of Appeals, 92 N.C. App. 320, 374 S.E.2d 446 (1988), affirming a judgment entered by *Freeman, J.*, in the Superior Court, FORSYTH County on 16 November 1987. Heard in the Supreme Court 9 October 1989.

This is a civil action to determine which of the two defendant insurance companies is liable to the plaintiffs for damages the plaintiffs recovered from Eddie Darrell Fields. The plaintiffs were injured in a collision between an automobile in which they were riding and an automobile being driven by Fields. Fields was driving an automobile owned by his wife which was covered by a liability policy issued by North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau). The policy limits were $25,000 per person and $50,000 per occurrence. State Farm Mutual Automobile Insurance Company (State Farm) covered the plaintiffs for uninsured and underinsured motorists with policy limits of $50,000 per person and $100,000 per occurrence.

The plaintiffs brought an action against Fields and his wife. Farm Bureau defended the claim against the wife but refused to defend the claim against Fields. The claim against the wife was dismissed. After this dismissal, Fields, who was not represented by counsel, settled the cases against him by consenting to judgments awarding $35,000 to James Eugene Wilson, $5,000 to Jeannette Wilson, and $11,000 to Christopher Wilson. Both insurance companies refused to pay these judgments.

The plaintiffs brought this action for a determination as to which of the two insurance companies is liable. The plaintiffs alleged that Fields was in lawful possession of his wife's automobile at the time of the accident and he was a resident of the same

household as his wife at the time of the accident. The plaintiffs introduced testimony by George F. Purvis, a police officer for the City of Winston-Salem who investigated the accident. Mr. Purvis testified that at that time he arrested Fields for driving while impaired. He testified without objection that Fields told him his address was 2916 Hondo Drive, which was the address of Fields' wife. Mr. Purvis testified that two days after the accident Fields and his wife came to the police station and Fields told him he was staying with his wife. He testified that neither Fields nor his wife told him Fields did not have permission to drive her automobile. Mr. Purvis testified that he wrote the address of Fields on several forms as 2916 Hondo Drive and neither Fields nor his wife gave a different address. Shirley Griffin, who worked for Farm Bureau, testified that she took an automobile loss notice from Fields' wife and it showed Fields' address as 2916 Hondo Drive.

Mr. Fields testified that he and his wife had separated two or three months before the accident and that he was not living with her at the time of the accident. He testified further that he did not have a driver's license at the time of the accident and that he did not receive his mail at 2916 Hondo Drive. He testified he did not have any clothes at that address. He said that he came to his wife's house in the late evening before the date of the accident and she agreed to let him sleep on the couch because he had been drinking. He had done this on previous occasions. His wife left with their child that morning and he found the keys to her automobile. He drove the automobile without his wife's permission, first to a store and then to a friend's house where he drank some alcoholic beverages. He was driving the automobile back to his wife's house when the accident occurred. He said he told the officer his address was 2916 Hondo Drive because he did not want to be charged with stealing an automobile.

Mrs. Fields testified that she and her husband were separated at the time of the accident. She testified further that her husband did not have permission to drive her automobile. She said she let him in her home because he had been drinking. She testified that he spent the night after the accident at her house. She testified that she told the officer that her husband did not have permission to drive her automobile but the question of her having him prosecuted for stealing the automobile "never came up."

The court submitted two issues to the jury. The first issue was whether Eddie Darrell Fields had permission to drive his wife's automobile, and the second was whether he was a resident of the same household as his wife at the time of the accident. The jury answered both issues in the affirmative.

The court entered a judgment in which it found that Eddie Darrell Fields was covered by his wife's liability policy with Farm Bureau, that Farm Bureau breached its contract by wrongfully failing to defend Fields, and that Farm Bureau's failure to defend was unjustified and in bad faith regardless of any mistaken belief that the claim was outside the policy coverage. The court entered judgment against Farm Bureau for $51,000. The Court of Appeals affirmed and we allowed discretionary review.

William Z. Wood for plaintiff appellees.

Hutchins, Tyndall, Doughton & Moore, by Richard Tyndall and Laurie L. Hutchins, for defendant appellee State Farm Mutual Automobile Insurance Company.

Petree Stockton & Robinson, by Richard J. Keshian, for defendant appellant North Carolina Farm Bureau Mutual Insurance Company.

Nichols, Caffrey, Hill, Evans & Murrelle, by Paul D. Coates, for National Association of Independent Insurers, amicus curiae.

Smith Helms Mulliss & Moore, by Douglas W. Ey, Jr. and L. D. Simmons, II, for Royal Insurance Company of America, Jefferson-Pilot Fire & Casualty Company, North Carolina Association of Defense Attorneys and American Insurance Association, amici curiae.

WEBB, Justice.

Defendant first argues that there was not sufficient evidence to submit either of the issues to the jury. N.C.G.S. § 20-279.21(b)(2) provides in part:

> (b) Such owner's policy of liability insurance:
>
> . . . .
>
> (2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied

> permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle[.]

N.C.G.S. § 20-279.21(b)(3)b provides in part:

> For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either[.]

If Fields was driving his wife's vehicle with the permission of his wife or was a resident of the same household with his wife, he was covered by his wife's policy. Farm Bureau argues that there was not sufficient evidence that Fields was driving the motor vehicle with the permission of his wife or that he was residing in the same household with her to submit either issue to the jury. As to the issue of Fields' driving with his wife's permission, Farm Bureau, relying on *Bailey v. Insurance Co.*, 265 N.C. 675, 144 S.E.2d 898 (1965), and *Ins. Co. of North America v. Aetna Life & Casualty Co.*, 88 N.C. App. 236, 362 S.E.2d 836 (1987), *rev. denied*, 321 N.C. 743, 366 S.E.2d 860 (1988), argues that the evidence showed Mr. Fields' wife had specifically forbidden him from driving her automobile. It also argues that there was no course of conduct by Mr. Fields from which permission to drive the automobile could be inferred. As to the issue of Fields' residency in the same household with his wife, Farm Bureau, relying on *Marlowe v. Insurance Co.*, 15 N.C. App. 456, 190 S.E.2d 417, *cert. denied*, 282 N.C. 153, 191 S.E.2d 602 (1972), argues that all the evidence shows that Fields had moved from the home and had not lived there for several months.

[1] We hold that the evidence that Fields several times told the officer, including occasions in which his wife was present without denial by her, that his residence was 2916 Hondo Drive, which was his wife's address, together with his wife's giving this address for her husband when reporting the accident, is sufficient evidence for the residency issue to go to the jury. Farm Bureau argues that this does not resolve the question of coverage under the policy. It says residency does not satisfy the requirements for lawful possession set forth under the policy. Farm Bureau does not cite any authority for this proposition. The plain words of the statute say a person insured includes the spouse of an insured living in the

same household. The question of lawful possession does not arise when an automobile is driven by a spouse of the insured who lives in the same household. The driver is then a person insured. *See Heins Telephone Co. v. Grain Dealers Mutual Ins. Co.*, 57 N.C. App. 695, 292 S.E.2d 281 (1982); *Insurance Co. v. Allison*, 51 N.C. App. 654, 277 S.E.2d 473 (1981).

[2] Farm Bureau also argues that although Fields may have been a resident of the same household as his wife, he is excluded under the policy provision which excludes coverage for any person using the automobile "without a reasonable belief that [he] is entitled to do so." Farm Bureau says that all the evidence shows Fields could not have had a reasonable belief that he was entitled to drive the automobile, and he is excluded from coverage by the terms of the policy. The provisions of N.C.G.S. § 20-279.21 are written into every automobile policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail. *Insurance Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977); *Insurance Co. v. Casualty Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973). To exclude Fields from coverage under the policy because he did not have a reasonable belief that he was entitled to drive the automobile would conflict with the statutory provision of the policy that a spouse of the policyholder living in the same household is a person insured.

Because we have held that Fields was covered by the policy as a spouse living in the household of the policyholder, we do not pass on the question of whether he was driving with the permission of his wife.

[3] The next question presented is whether the plaintiffs may recover from Farm Bureau damages which exceeded the liability coverage for the Fields. We hold that they may not. Farm Bureau argues that the plaintiffs are not parties to the insurance contract between Farm Bureau and the Fields. Relying on authority from other jurisdictions, *Scroggins v. Allstate Ins. Co.*, 74 Ill. App. 3d 1027, 393 N.E.2d 718 (1979); *Bean v. Allstate Ins. Co.*, 285 Md. 572, 403 A.2d 793 (1979), and *Moradi-Shalal v. Firemen's Fund Ins. Co.*, 250 Cal. Rptr. 116, 758 P.2d 58 (1988), Farm Bureau says the plaintiffs have no claim for a breach of this contract.

The purpose of compulsory motor vehicle liability insurance is to compensate victims who have been injured by financially irresponsible motorists, and in some cases the injured party has

a claim against the motorists' insurance carrier. *Insurance Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597; *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 324 N.C. 221, 376 S.E.2d 761 (1989). In this case we do not find it necessary to determine whether the plaintiffs, although they are not parties to the insurance contract, may proceed against Farm Bureau. We hold that the plaintiffs were not damaged by the failure of Farm Bureau to defend Fields. If Farm Bureau had defended the claim against Fields and the plaintiffs had recovered more than the policy limits, the plaintiffs could not have recovered this excess from Farm Bureau. The failure to defend did not put the plaintiffs in a worse position than if Farm Bureau had defended Fields. If it had any effect, the failure of Farm Bureau to defend should have helped the plaintiffs gain a recovery. Plaintiffs were not damaged by this failure to defend.

This is not the same as a case in which a carrier wrongfully refuses to defend its insured or wrongfully refuses to settle the claim and damages are recovered against the insured in excess of the coverage. In such a case the insured has been damaged and has a claim against the insurer. *Thomas v. Insurance Co.*, 277 N.C. 329, 177 S.E.2d 286 (1970); *Lumber Co. v. Insurance Co.*, 173 N.C. 269, 91 S.E. 946 (1917). The plaintiffs in this case were not damaged by Farm Bureau's failure to defend or settle. The two cases upon which the Court of Appeals relied to sustain the judgment against the defendant, *Indiana Lumbermen's Mutual Ins. Co. v. Champion*, 80 N.C. App. 370, 343 S.E.2d 15 (1986), and *Ames v. Continental Casualty Co.*, 79 N.C. App. 530, 340 S.E.2d 479, *disc. rev. denied*, 316 N.C. 730, 345 S.E.2d 385 (1986), involved actions by the insured. They have no application to this case.

For the reasons stated in this opinion we affirm that part of the opinion of the Court of Appeals which holds that Farm Bureau is liable for damages within its policy limits. We reverse that part of the opinion of the Court of Appeals which holds Farm Bureau is liable for payment in excess of its coverage. We remand for further proceedings consistent with this opinion.

Affirmed in part; reversed in part and remanded.

ALEXANDER v. WILKERSON

No. 354P90

Case below: 99 N.C.App. 340

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990. Petition by plaintiff for writ of supersedeas and temporary stay denied 6 August 1990.

BOOHER v. FRUE

No. 298P90

Case below: 98 N.C.App. 570

Petition by defendant (William C. Frue) for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

CARSON v. MOODY

No. 430P90

Case below: 99 N.C.App. 724

Petition by defendant (Moody) for temporary stay allowed 24 August 1990 pending determination of his petition for discretionary review.

CHICOPEE, INC. v. SIMS METAL WORKS

No. 260PA90

Case below: 98 N.C.App. 423

Petition by defendant (Insurance Co.) for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990. Petition by defendant (Sims Metal Works) for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 29 August 1990.

CLARK v. BROWN

No. 317P90

Case below: 99 N.C.App. 255

Petition by defendant for writ of supersedeas denied and temporary stay dissolved 29 August 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

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

DUNN v. PATE

No. 238P90

Case below: 98 N.C.App. 351

Motion by plaintiffs to dismiss appeal for lack of substantial constitutional question allowed 29 August 1990. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

FIELDS v. WHITEHOUSE AND SONS CO.

No. 224P90

Case below: 98 N.C.App. 395

Petition by defendant (Whitehouse and Sons Co.) for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

GILLIKIN v. PIERCE

No. 249P90

Case below: 97 N.C.App. 332

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

GLATZ v. GLATZ

No. 231P90

Case below: 98 N.C.App. 324

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

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

HAAS v. CALDWELL SYSTEMS, INC.

No. 295P90

Case below: 98 N.C.App. 679

Petition by third-party defendants for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

HARRIS v. TEMPLE

No. 288P90

Case below: 99 N.C.App. 179

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

HEATH v. CRAIGHILL, RENDLEMAN, INGLE & BLYTHE

No. 97P90

Case below: 97 N.C.App. 236

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

HOME INDEMNITY CO. v. HOECHST-CELANESE CORP.

No. 380P90

Case below: 99 N.C.App. 322

Motion by defendant (Hoechst-Celanese Corp.) to dismiss appeal by plaintiffs and several defendants for lack of substantial constitutional question allowed 29 August 1990. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990. Petition by several defendants for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

IN RE TRUST OF JACOBS

No. 315P90

Case below: 99 N.C.App. 221

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

IN RE WHITE

No. 266P90

Case below: 98 N.C.App. 514

Petition by respondents for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

INGLES MARKETS, INC. v. TOWN OF BLACK MOUNTAIN

No. 234P90

Case below: 98 N.C.App. 372

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

JOHNSON v. IBM

No. 186P90

Case below: 97 N.C.App. 493

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

JOHNSON v. SKINNER

No. 323A90

Case below: 99 N.C.App. 1

Petition by defendants (Skinner and Green) for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 29 August 1990. Petition by defendant (Concepts) for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 29 August 1990.

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

KIRKMAN v. WILSON

No. 242A90

Case below: 98 N.C.App. 242

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 29 August 1990. Petition by defendants (Zeno M. Everette, Jr. and wife, Carol H. Everette) for discretionary review pursuant to G.S. 7A-31 allowed 29 August 1990.

LEE v. DUKE POWER

No. 236P90

Case below: 98 N.C.App. 340

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

LENOIR MEM. HOSP. v. N.C. DEPT. OF HUMAN RESOURCES

No. 222P90

Case below: 98 N.C.App. 178

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

MAY v. MARTIN

No. 300P90

Case below: 99 N.C.App. 216

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

MEDLEY v. N.C. DEPT. OF CORRECTION

No. 360PA90

Case below: 99 N.C.App. 296

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 29 August 1990.

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

MEDLIN v. ARCADIAN SHORES, INC.

No. 235P90

Case below: 98 N.C.App. 341

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

NATIONAL SERVICE INDUSTRIES v. POWERS

No. 263P90

Case below: 98 N.C.App. 504

Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 29 August 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

N.C. CHIROPRACTIC ASSN., INC. v.
AETNA CASUALTY & SURETY CO.

No. 262P90

Case below: 98 N.C.App. 514

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

NORTH BUNCOMBE ASSN. OF
CONCERNED CITIZENS v. RHODES

No. 434A90

Case below: 100 N.C.App. 24

Petition by plaintiffs for temporary stay allowed 29 August 1990.

NORTHWESTERN FINANCIAL GROUP v.
COUNTY OF GASTON

No. 307PA90

Case below: 98 N.C.App. 515

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 29 August 1990.

ONE NORTH McDOWELL ASSN. v.
McDOWELL DEVELOPMENT CO.

No. 203P90

Case below: 98 N.C.App. 125

Petition by defendants (B. D. Rodgers and Rodgers Builders, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990. Petition by defendant (P.C. Godfrey) for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990. Petition by defendant (MDC) for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

POSTON v. MORGAN-SCHULTHEISS, INC.

No. 106P90

Case below: 97 N.C.App. 142

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 29 August 1990.

RAGAN v. COUNTY OF ALAMANCE

No. 277PA90

Case below: 98 N.C.App. 636

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 29 August 1990.

RICH v. SHAW

No. 255P90

Case below: 98 N.C.App. 489

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

R. L. COLEMAN & CO. v. CITY OF ASHEVILLE

No. 281P90

Case below: 98 N.C.App. 648

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

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

SIMMONS v. DENNY

No. 169P90

Case below: 98 N.C.App. 339

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

SISK v. JONES

No. 250P90

Case below: 98 N.C.App. 339

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

SOUTHERN QUILTERS—CAROLINA COMFORTERS, INC. v. TEX-NOLOGY SYSTEMS, INC.

No. 254P90

Case below: 98 N.C.App. 515

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

STATE v. ANDERSON

No. 154P90

Case below: 97 N.C.App. 509

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

STATE v. BUCKOM

No. 335PA90

Case below: 99 N.C.App. 222

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 29 August 1990. Supplemental petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 31 August 1990.

STATE v. CINEMA BLUE OF CHARLOTTE

No. 267P90

Case below: 98 N.C.App. 628 and 327 N.C. 142

Motion by defendants for reconsideration of dismissal of notice of appeal and denial of petition for discretionary review dismissed 20 August 1990. Motion by defendants for reinstatement of a writ of supersedeas, or in the alternative, petition for writ of supersedeas pending application to the U. S. Supreme Court denied 20 August 1990.

STATE v. CLEMMONS

No. 161P90

Case below: 97 N.C.App. 502

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 29 August 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

STATE v. GOLDMAN

No. 178P90

Case below: 97 N.C.App. 589

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

STATE v. HOLMES

No. 261P90

Case below: 98 N.C.App. 515

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 29 August 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

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

STATE v. HUANG

No. 396P90

Case below: 99 N.C.App. 658

Petition by Attorney General for temporary stay allowed 16 August 1990.

STATE v. LINER

No. 297P90

Case below: 98 N.C.App. 600

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

STATE v. NOBLES

No. 342PA90

Case below: 99 N.C.App. 473

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 29 August 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 29 August 1990.

STATE v. SHUTT

No. 326P90

Case below: 93 N.C.App. 344

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 29 August 1990.

STATE v. SIMPSON

No. 328P90

Case below: 99 N.C.App. 363

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

STATE v. STRICKLAND

No. 290P90

Case below: 98 N.C.App. 693

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 29 August 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

STATE v. TREADWELL

No. 400P90

Case below: 99 N.C.App. 769

Petition by defendant for writ of supersedeas and temporary stay denied 24 August 1990.

STATE v. TUGGLE

No. 319A90

Case below: 99 N.C.App. 164

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 29 August 1990.

STATE v. WALSH

No. 187P90

Case below: 98 N.C.App. 156

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

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

STATE v. WHITTED

No. 358P90

Case below: 99 N.C.App. 502

Petition by defendant for temporary stay allowed 7 August 1990.

STATE v. WISE

No. 172P90

Case below: 97 N.C.App. 667

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

SUNSET BEACH TAXPAYERS ASSN. v. SUNSET BEACH AND TWIN LAKES, INC.

No. 289P90

Case below: 98 N.C.App. 700

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

SYKES v. HIATT

No. 293P90

Case below: 98 N.C.App. 688

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

THEOKAS v. THEOKAS

No. 205P90

Case below: 97 N.C.App. 626

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

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

TROTTIER v. CAMPBELL

No. 259P90

Case below: 98 N.C.App. 517

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

WEBSTER CONSTR. v. GREENSBORO CITY BD. OF ED.

No. 270P90

Case below: 98 N.C.App. 341

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 August 1990.

WITHEROW v. WITHEROW

No. 324A90

Case below: 99 N.C.App. 61

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed as to issue of defendant's interest in corporation and other estate; otherwise denied 29 August 1990.

STATE OF NORTH CAROLINA v. WILLIAM QUENTIN JONES

No. 570A87

(Filed 3 October 1990)

1. **Criminal Law § 84 (NCI3d) — interval between coerced confession and second confession — second confession admissible**

The trial court did not err in a prosecution for robbery, assault, and murder by admitting a confession into evidence where defendant was given his *Miranda* warnings shortly after arrest; he was interviewed at 12:25 a.m. on 8 March by three officers, one of whom made statements such as "it's gas chamber time"; defendant was interviewed twice more in the period before 8:45 a.m. and made various statements which were more or less incriminating; defendant was again interviewed at 11:25 a.m. on 9 March by different detectives in a different interview room after new *Miranda* warnings; and defendant made the statement offered against him at trial. While there is evidence that the earlier statements were coerced, that coercion did not impermissibly taint the last confession because the intervening factors were sufficient to purge any taint left by the threats and promises of the prior interrogations.

Am Jur 2d, Evidence §§ 537, 588.

2. **Criminal Law § 1352 (NCI4th) — murder — sentencing — McKoy error**

There was prejudicial *McKoy* error in the sentencing proceeding for a murder prosecution where defendant presented substantial evidence to support some of the significant mitigating circumstances submitted to but not unanimously found by the jury.

Am Jur 2d, Criminal Law §§ 598, 599, 628.

3. **Constitutional Law § 80 (NCI3d) — death penalty — prosecutorial discretion — not arbitrary or capricious**

The prosecutor did not seek to impose the death penalty arbitrarily or capriciously in a murder prosecution where the prosecutor in a subsequent case argued to the jury that life imprisonment was appropriate despite evidence of aggravating

circumstances. There were differences in the two cases which negate the suggestion of prosecutorial arbitrariness.

Am Jur 2d, Criminal Law §§ 598, 599, 628.

4. **Criminal Law §§ 1339, 1341 (NCI4th)— murder—aggravating circumstances—commission of another crime—pecuniary gain—no error**

The trial court did not err in a sentencing proceeding for first degree murder by submitting to the jury as aggravating circumstances both that the murder was committed for pecuniary gain and that it was committed during a course of conduct which involved commission of other crimes of violence against other persons. The two aggravating circumstances were not supported by the same evidence and were not inherently duplicative.

Am Jur 2d, Criminal Law §§ 598, 599, 628.

5. **Criminal Law § 1110 (NCI4th)— sentencing—aggravating factor—other criminal offenses—no trial or conviction**

The trial court did not err when sentencing defendant for robbery and assault by finding as nonstatutory aggravating factors that defendant had previously committed other criminal offenses punishable by more than sixty days' imprisonment where there was evidence that defendant had committed the offenses but had never been tried or convicted for them.

Am Jur 2d, Criminal Law §§ 598, 599, 628.

6. **Criminal Law §§ 1222, 1230 (NCI4th)— sentencing—mitigating factor—defendant's limited mental capacity and immaturity—not found**

The trial court did not err when sentencing defendant for robbery and assault by failing to find that his immaturity, mental condition, and mental capacity were mitigating circumstances which substantially reduced his culpability where the evidence supporting those factors was contradicted and not inherently credible.

Am Jur 2d, Criminal Law §§ 598, 599, 628.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing sentence of death for murder in the first degree entered by *Farmer, J.*, at the 19 October 1987

Criminal Session of Superior Court, WAKE County. Defendant's motion to bypass the Court of Appeals on his related robbery and assault convictions was allowed on 14 December 1988. Heard in the Supreme Court 9 October 1989.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Linda Anne Morris, Assistant Attorney General, for the State.

J. Randolph Riley for defendant-appellant.

EXUM, Chief Justice.

This case arises from a robbery and shootings at a convenience store. On charges of first degree murder, robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury, defendant entered conditional pleas of guilty which preserved his right to appeal the trial court's order denying his motion to suppress a confession. The jury impaneled at the sentencing hearing for the murder conviction recommended a sentence of death. The trial court entered judgment accordingly and also sentenced defendant to consecutive prison terms of forty years on the robbery conviction and twenty years on the assault conviction.

Defendant argues that his confession should not have been admitted because it was involuntary and that the judgments should therefore be vacated. He also assigns error to both the capital and noncapital sentencing proceedings. We hold that the trial court properly denied defendant's motion to suppress, and we find no error in the sentencing proceeding in the robbery and assault cases. We remand the murder case for a new sentencing proceeding in light of *McKoy v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 369 (1990), and *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990).

I.

At the capital sentencing proceeding, the State's evidence tended to show the following:

Shortly before midnight on 7 March 1987, several employees and customers were in a Raleigh Fast Fare. Defendant, wearing a ski mask and red sweatshirt, entered and fired an Uzi 9mm pistol three to six times. Two bullets struck Orlando Watson, who, after surgery, survived the wounds he suffered. Defendant then

said "this is a stickup," turned, and twice shot Ed Peebles, who was standing in the corner of the store. The bullets ruptured Peebles' aorta and a large vein, causing massive hemorrhaging and ultimately death.

Defendant then directed Charles Taylor, the man behind the counter, to open the cash register. Defendant threatened to kill him. When Taylor was unable to open the register defendant grabbed it and pulled it by the cord out the front door, around the fence, and to the side of the building.

Police Officer Tony Wisniewski, who was patrolling the area, was summoned. He entered the Fast Fare and radioed for assistance, transmitting a description of the gunman given to him by those in the store. Within minutes several other officers arrived at the scene and secured the area. There were scratches and gouges along the sidewalk where defendant had dragged the cash register. At a low wall, Sergeant Inman observed the silhouette of someone's head, chambered a round in his shotgun and ordered the person to freeze. The figure fled, and the police gave chase, ultimately apprehending him at a ball park within several blocks of the Fast Fare. The fleeing person was defendant. Pursuing officers testified that defendant was not appreciably mentally impaired when they arrested him.

The police found a ski mask, a red N. C. State sweatshirt, the cash register,[1] and an Uzi semiautomatic weapon near the low wall where Sgt. Inman had first observed defendant. At the crime scene, the police discovered shell casings and bullets fired from a semiautomatic weapon. A mounted video camera recorded much of the robbery and its tape was played several times at the sentencing hearing to illustrate testimony for the State and to cross-examine one of defendant's witnesses.

Defendant was arrested, taken to the police station, and interrogated. Over the next two days he was questioned several more times by different officers and at different places.

Defendant's evidence tended to show the following:

Dr. Billie Corder, a clinical psychologist, examined and tested defendant three times. She obtained information about defendant

1. Subsequent analysis of the cash register revealed at least one of defendant's fingerprints.

from his family and about the offenses from the police. In her opinion defendant was not psychotic but his social functioning and his problem-solving ability were impaired. His emotional responses to the world were unstable. Dr. Corder stated that defendant could be characterized as a borderline personality with antisocial tendencies. His full scale I.Q. was 92; the majority of the population has an I.Q. between 90 and 110. Defendant functioned much like an adolescent. He had no vocational skills and relied on others for financial support.

Dr. Corder learned that defendant's father had been diagnosed as a paranoid schizophrenic and was admitted to Dorothea Dix Hospital at least fifteen times since 1973. Defendant's mother has had a drug abuse problem since defendant was a child.

Dr. Corder also learned that shortly before the crime defendant had been staying with his girlfriend and her mother. The girlfriend, who was carrying defendant's child, broke up with him three days prior to the killing. Her mother made defendant move out of the home. Dr. Corder believed that these and other stressful occurrences exacerbated defendant's personality disorder. She also believed that defendant showed remorse, shame, and guilt during her interviews. In her opinion, defendant's ability to conform his conduct to the requirements of the law was impaired on 7 March 1987 because of his disorder exacerbated by stress.

On cross-examination, Dr. Corder admitted that at the time of the shootings defendant had the mental capacity to know the difference between right and wrong. She stated that defendant does not accept societal norms like law-abiding people.

Dr. Selwyn Rose, a psychiatrist, also testified. Dr. Rose had interviewed defendant, reviewed a transcript of his confession, and viewed the videotape of the crime. Dr. Rose believed that defendant knew the difference between right and wrong and was able cognitively to know what he was doing at the time of the crimes. Dr. Rose believed defendant had the specific intent to commit a robbery and to kill "in the primitive sense of knowing that when you squeeze a trigger somebody is going to get hit." However, as far as "thinking about, planning or wanting to kill somebody," defendant was not capable of that type of intent at the time of the shootings. Dr. Rose believed defendant had a "borderline personality disorder" with a fragile ego. He displayed mixed traits such as immaturity, impulsiveness, substance abuse, and passive aggressive

characteristics. However, none of these traits were strong enough to become diagnoses. Defendant told Dr. Rose that he had been using a substantial amount of drugs in the three days prior to the crimes and had been assaulted on the day of the robbery for the alleged disappearance of $200 worth of "reefer."

Viewing the videotape of the crime during cross-examination, Dr. Rose testified that defendant's stride and the manner in which he walked into the store could not be described as unusual. In Dr. Rose's opinion, defendant's ability to conform his conduct to the requirements of the law was impaired at the time of the crimes. Dr. Rose believed that defendant's use of a mask showed planning for the robbery, but that defendant did not plan the killing.

Some of defendant's friends testified in his behalf. They stated that in the evening before the robbery, defendant had snorted cocaine, smoked marijuana, and drunk beer. According to Toni Lannette Herring, defendant was "very high" and "hyper." Ms. Emily May stated that defendant was "jittery," "nervous," and "crying" that evening. Other of defendant's friends testified in a like manner.

Defendant's parents testified about the circumstances of his upbringing. In his early life, defendant was both the victim of and a witness to domestic violence. Both his parents had suffered alcohol and drug abuse problems, and his father was a schizophrenic.

The State's rebuttal evidence tended to show the following:

On 20 February 1987, defendant and two others broke into the Triangle Jewelry and Pawn in Cary. The three men stole seven firearms, including an Uzi 9mm gun which carries up to twenty-two rounds of ammunition.

Other evidence showed that defendant continued to receive financial support from his mother, who was then living in Baltimore, and his father, who was living in Raleigh.

The State then introduced defendant's confession, which was obtained from him on 9 March 1987 at approximately 11:25 a.m. In it, defendant claimed that for purposes of scaring some people he obtained the Uzi on the day of the crime from someone named Lamont. Defendant thought the gun had blanks. He went into the Fast Fare to steal a 12-pack of beer, wearing the ski mask because of the video camera. When defendant entered, everyone

hit the floor. Peebles made a fast turn toward him and defendant "freaked." He held the gun up to scare Peebles and it started shooting. Defendant then saw the cashier on the floor, asked him if he was all right, and told him to open the cash register. When the cashier could not get it open, defendant told him to get out of the way. Defendant pushed the cashier, then picked up the register and dragged it away by the electrical cord. Within two or three minutes the police were everywhere.

After arguments by defense counsel and defendant himself, the trial court instructed the jury. These instructions required the jury to find unanimously the existence of any mitigating circumstance before the jury could consider that circumstance when balancing the mitigating and aggravating circumstances in determining whether death or life imprisonment was the appropriate punishment.

The jury unanimously found beyond a reasonable doubt the following aggravating circumstances: (1) that the murder was committed for pecuniary gain; and (2) that the murder was part of a course of conduct in which defendant committed other crimes of violence against other persons.

The jury unanimously found the following mitigating circumstances:

[1] The defendant acknowledged his guilt early on in the criminal process by admitting he was the one responsible for the death of Mr. Peebles and the other crimes he committed. . . .

[2] The defendant acknowledged his guilt in open court to all the charges for which he was indicted.

[3] The defendant has no prior history of violent behavior against people.

[4] The defendant was exposed to bad influences and terrible conditions of which he had no control at an early age.

[5] The defendant's conduct in jail has been good.

[6] The defendant has continued to improve himself by achieving his GED despite his incarceration and uncertainty of his sentence in this case. . . . .

[7] The defendant's parents did not provide proper role models for him during his formative years.

The jury failed to find unanimously the following proposed mitigating circumstances:

[1] This murder was committed while the defendant was under the influence of mental or emotional disturbance.

[2] The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

[3] The age of the defendant at the time of this murder is a mitigating circumstance.

[4] The defendant is remorseful about his actions and has sympathy for Mr. Peebles, his family and friends.

[5] The defendant provided law enforcement agents helpful information concerning crimes committed by other people.

[6] The defendant was exposed to "ghetto type" living conditions during his entire life prior to being arrested for his involvement in this matter.

[7] The defendant has had a history of alcohol and drug abuse which prevented his development of proper coping skills.

[8] Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

The jury unanimously concluded beyond a reasonable doubt that the mitigating circumstances found by it were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty when considered with the mitigating circumstances found by it. The jury recommended a sentence of death and the trial court entered judgment accordingly on the first degree murder conviction.

The trial court sentenced defendant under the Fair Sentencing Act to consecutive terms of forty years' imprisonment for robbery with a dangerous weapon and twenty years' imprisonment for assault with a deadly weapon with intent to kill inflicting serious injury.

II.

[1] Defendant contends the trial court committed reversible error by admitting his 9 March 1987 confession into evidence because

it was tainted by the coercion surrounding prior interrogations. We disagree.

Police compliance with *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), does not necessarily render a confession admissible. If officers follow the procedural requirements of *Miranda* but their conduct remains sufficiently coercive, the confession may be excluded on the grounds that it was not voluntarily and understandably given. *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982); *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982). The United States Supreme Court has long held that obtaining confessions involuntarily denies a defendant's fourteenth amendment due process rights. *See, e.g., Ashcraft v. Tennessee*, 322 U.S. 143, 88 L. Ed. 1192 (1944) (use of confession obtained after thirty-six hours of continuous interrogation violated the defendant's due process rights).

Before a confession may be admitted into evidence over a defendant's motion to suppress, the State must show to the trial judge by a preponderance of the evidence that the confession was voluntary. *State v. Johnson*, 304 N.C. 680, 285 S.E.2d 792 (1982); *Lego v. Twomey*, 404 U.S. 477, 30 L. Ed. 2d 618 (1972). The trial court's findings of fact on this issue are binding on appeal if supported by competent evidence. *State v. Booker*, 306 N.C. 302, 293 S.E.2d 78 (1982). "Conclusions of law drawn from these findings are fully reviewable on appeal." *Id.*

In determining whether a confession was voluntary, the court must examine the totality of the circumstances. *State v. Schneider*, 306 N.C. 351, 293 S.E.2d 152 (1982); *Davis v. North Carolina*, 384 U.S. 737, 16 L. Ed. 2d 895 (1966). These circumstances include the presence of threats or promises, *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975), the length of questioning, *Ashcraft*, 322 U.S. 143, 88 L. Ed. 1192, periods of incommunicado detention, *Davis v. North Carolina*, 384 U.S. 737, 16 L. Ed. 2d 895 (1966), and the characteristics and status of the suspect. *See, e.g., Culombe v. Connecticut*, 367 U.S. 568, 6 L. Ed. 2d 1037 (1961); *Spano v. New York*, 360 U.S. 315, 3 L. Ed. 2d 1265 (1959); *Gallegos v. Colorado*, 370 U.S. 49, 8 L. Ed. 2d 325 (1962); *Jackson v. Denno*, 378 U.S. 368, 12 L. Ed. 2d 908 (1964). The court must examine both the conduct of the police and the defendant's particular circumstances.

Applying these governing principles, we conclude that the trial court did not err by denying defendant's motion to suppress his 9 March confession.

The trial court on supporting evidence found that after being given his *Miranda* warnings shortly after arrest, defendant signed a waiver of his right to an attorney and agreed to talk with officers. At 12:25 a.m. on 8 March 1987, he was interviewed by Sgt. W. H. Payne and Officer D. R. Lane of the Raleigh Police Department. Officer R. H. Strickland joined them. During the interview, Officer Payne made such statements as "it's gas chamber time," "it's a big time felony," "it's not the straight story," "you can go to the gas chamber," "I'm going to help you," and "you are gonna fry." This interview lasted about two hours. From about 4 a.m. to 4:53 a.m. on 8 March, Sgt. Payne and Officer Strickland again interviewed defendant. This time, they gave no *Miranda* warnings. From about 8:15 a.m. to 8:45 a.m. the same day, Officers Strickland, Harrel, and Payne interviewed defendant without *Miranda* warnings. A warrant for defendant was served and he was taken to the Wake County Jail. During these interrogations defendant made various statements, more or less incriminating, which the State did not offer against him.

The trial court also found that on 9 March 1987 at 11:25 a.m., Detectives A. C. Monday and J. C. Holder interviewed defendant at the Raleigh Police Department. The interview room was different from the one used on 8 March and defendant had been brought there from the Wake County Jail. These officers had not previously talked to defendant and he had not been interviewed in over twenty-six hours. Defendant was read his *Miranda* rights and signed a waiver of his right to have an attorney present. He agreed to talk to the officers and made the statement offered against him at trial, which included his admission that he had killed Mr. Peebles.

Based on these findings of fact and assuming that all statements prior to the one given at 11:25 a.m. on 9 March were coerced, the trial court concluded as a matter of law that the last statement was voluntary. The time elapsed between statements, the change in place, the different interrogators, and "other relevant circumstances" led Judge Farmer to conclude that "the last confession was an act independent of earlier confessions; and that any previous coercion if such existed did not carry over in the confession at

11:25 a.m. on March 9, 1987." The "break in the stream of events [was] sufficient to insulate the last confession from any damning impact of any previous confessions." Concluding that "defendant's constitutional rights have not been violated," the trial court denied the motion to suppress.

We affirm the trial court's order. While there is evidence that the earlier statements were coerced and the trial court assumed as much, the question is, did this coercion impermissibly taint the last 9 March confession? We agree with the trial court's conclusion that it did not. Defendant had the opportunity to reconsider any statements he made during the twenty-six hours between the earlier interviews and the last one on 9 March. The two detectives, with whom defendant had not previously spoken, advised him of his right to counsel and his right to remain silent. The last interview was conducted at a different site than the prior ones. Defendant, a person of average intelligence, knowingly and intelligently waived his rights. These intervening factors were sufficient to purge any taint left by the threats and promises of the prior interrogations.

Concluding that the trial court did not err in ruling that defendant's confession was admissible, we find no error in defendant's conviction entered upon his conditional pleas of guilty.

III.

We now turn to capital sentencing issues.

A.

[2] Because the trial court required the jury to find unanimously each mitigating circumstance before that circumstance could be considered in the ultimate sentencing decision, defendant's sentence runs afoul of *McKoy v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 369 (1990). The *McKoy* error here is not harmless because defendant presented substantial evidence to support at least some of the significant mitigating circumstances submitted to but not unanimously found by the jury. One or more jurors may have believed some or all of these circumstances existed and that the nonstatutory circumstances had mitigating value. Yet, the erroneous instructions prohibited these jurors from considering the mitigating circumstances not unanimously found when the jury made its ultimate sentencing decision. Had each juror been allowed to consider the circumstances that he or she believed to exist while engaging in the final weighing process, we cannot say beyond a reasonable

doubt that there would not have been a different result as to sentence. N.C.G.S. § 15A-1443; *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990); *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990). We therefore vacate the sentence of death and remand to Superior Court, Wake County, for a new sentencing proceeding in the first degree murder case.

B.

[3] We next address defendant's assignments of error in the capital sentencing phase which are likely to recur at his new hearing. Defendant argues first that the capital proceedings against him should be dismissed because the District Attorney for the Tenth Prosecutorial District seeks to impose the death penalty arbitrarily and capriciously. Defendant points to the prosecutor's argument in *State v. Douglas Earl Black*, 85CRS9026 & 27, 568A88, a case tried approximately nine months after defendant at the 11 July 1988 Regular Criminal Session of Superior Court, Wake County, before Herring, J.

Despite evidence of aggravating circumstances in *Black*, the prosecutor argued to the jury that life imprisonment was the appropriate punishment. The jury so recommended and Mr. Black was sentenced accordingly. Because the prosecutor in *Black* asked for a life sentence despite evidence of aggravating circumstances, while asking that defendant be given the death penalty in the case at bar, defendant contends that the death penalty is being applied arbitrarily and capriciously in District 10. Therefore, he argues that he is entitled to have capital sentencing questions dismissed. We disagree.

In *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346 (1972) (per curiam), the United States Supreme Court effectively invalidated many capital sentencing statutes, including North Carolina's, on the basis that the death penalty was being imposed arbitrarily and capriciously. *See, e.g.*, White, J., concurring: "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not," 408 U.S. at 313, 33 L. Ed. 2d at 392; Stewart, J., concurring: "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." 408 U.S. at 310, 33 L. Ed. 2d at 390.

It is not necessarily arbitrary and capricious under the federal constitution for a prosecutor to ask the jury for the death penalty in one case and not in another despite evidence of an aggravating circumstance in both. "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the constitution." *Gregg v. Georgia*, 428 U.S. 153, 199, 49 L. Ed. 2d 859, 889 (1976) (Stewart, J., announcing the judgment of the Court and the opinions of Stewart, Powell, and Stevens, JJ.).

Under North Carolina law, it is improper for a prosecutor to argue that a life sentence is appropriate when there is evidence of at least one aggravating circumstance. *See, e.g., State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981); *State v. Jones*, 299 N.C. 298, 261 S.E.2d 860 (1980); *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979). To do so is error favorable to the defendant in that case.

Despite this prohibition the conflict in the prosecutor's arguments in *Black* and the case at bar does not per se justify a conclusion that the prosecutor is being arbitrary or capricious in seeking the death penalty or that this penalty is being arbitrarily and capriciously imposed in this prosecutorial district under federal or state law.

There are, indeed, differences in the two cases that negate the suggestion of prosecutorial arbitrariness. Douglas Black was allegedly the accomplice of Mack Lee Nichols, who was convicted of first degree murder and sentenced to life imprisonment. We found no error in Nichols' trial. *State v. Nichols*, 321 N.C. 616, 365 S.E.2d 561 (1988). Had Douglas Black been given the death sentence, he would have received harsher punishment for the same crime than did Nichols. This outcome would arguably have run afoul of *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987). There, we held on similar facts that the death penalty was disproportionate as applied to Mr. Stokes when his accomplice was sentenced to life imprisonment and there was no indication that Stokes had greater culpability.

In prosecuting Black, the district attorney could have believed that the death penalty would have been disproportionate as applied to Black, despite evidence of the aggravating circumstances which required him otherwise to try the case capitally. There is no showing that the prosecutor's actions in asking for life imprisonment in *Black* and the death penalty here were arbitrary or that defendant here was prejudiced by the district attorney's seeking life imprisonment in *Black*. This assignment of error is overruled.

C.

[4] Defendant next contends that the trial court erred by submitting to the jury as aggravating circumstances both that the murder was committed for pecuniary gain and that it was committed during a course of conduct which involved commission of other crimes of violence against other persons. We conclude that both issues were properly submitted.

For this argument defendant relies on *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987). In *Quesinberry* defendant was found guilty of murder by premeditation and deliberation. We held that the trial court erred by submitting as aggravating circumstances both that the murder was committed while the defendant was engaged in the commission of an armed robbery and that it was committed for pecuniary gain. On the facts in *Quesinberry* we concluded that submission of both issues was impermissibly duplicative. "Although the pecuniary gain factor addresses motive specifically, the other cannot be perceived as conduct alone, for . . . the motive of pecuniary gain provided the impetus for the robbery itself." *Id.* at 238, 354 S.E.2d at 452. In *Quesinberry*, "[n]ot only [was] it illogical to divorce the motive from the act . . . but the same evidence [was underlying] proof of both factors." *Id.* at 239, 354 S.E.2d at 452.

Quesinberry is not applicable here. The two aggravating circumstances are not supported by the same evidence.

Evidence that the murder was committed for pecuniary gain is that defendant stated he went into the Fast Fare to steal; he said "this is a stickup" after entering; he ordered the manager to open the cash register and to give him the money; and he took the cash register out of the store.

Evidence that defendant engaged in a violent course of conduct is that he not only killed Peebles, he shot and seriously wounded Watson, fired shots endangering others, and committed an armed robbery against the clerk Taylor, whose face was struck by bullet fragments.

Neither are the aggravating circumstances inherently duplicative. Defendant need not have engaged in the violent course of conduct against others in order to have had pecuniary gain as a motive for the murder, and vice versa. This assignment of error is overruled.

IV.

A.

[5] We turn now to defendant's assignments of error regarding the robbery and assault convictions. These noncapital issues are subject to the Fair Sentencing Act and are unaffected by *McKoy v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 369.

On both the robbery and the assault convictions, the trial court found as nonstatutory aggravating factors that defendant had previously committed other criminal offenses punishable by more than sixty days' confinement. There was evidence to support the finding that defendant had *committed* these offenses, but defendant argues that because he had never been tried or convicted of them, it was improper for the trial court to find his mere commission of them as an aggravating factor. This argument was rejected in *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986), and *State v. Moore*, 317 N.C. 275, 345 S.E.2d 217 (1986).

This assignment of error is overruled on the authority of *Barts* and *Moore*.

B.

[6] Defendant argues the trial court erred in not finding that his immaturity, mental condition, and mental capacity were mitigating circumstances which significantly reduced his culpability for the robbery and assault offenses. We conclude there was no error in the trial court's failure to find these mitigating factors.

Under the Fair Sentencing Act, a defendant must prove the existence of a mitigating circumstance by a preponderance of the evidence. *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78, *aff'd after remand*, 318 N.C. 395, 348 S.E.2d 798 (1986). The trial court is responsible for determining whether a mitigating factor exists. N.C.G.S. § 15A-1340.4. "When evidence in support of a particular mitigating or aggravating factor is uncontradicted, substantial, and there is no reason to doubt its credibility," the trial court commits error if it does not find that factor. *State v. Jones*, 309 N.C. 214, 218-219, 306 S.E.2d 451, 454 (1983). Because the evidence supporting finding these mitigating factors is contradicted and is not inherently credible, and because the trial court's findings were not clearly erroneous, we overrule defendant's assignment of error.

Defendant presented expert testimony that he suffered from a personality disorder and that he had poor self-esteem. He also presented evidence that he was under the influence of drugs and had suffered stressful occurrences just prior to the crimes. This evidence tended to support defendant's position.

However, other evidence tended to rebut testimony about diminished capacity. One of his own experts, Dr. Rose, believed defendant had the capacity to formulate and execute robbery plans. The videotape did not conclusively reveal that defendant was intoxicated. An I.Q. test showed defendant to have average intelligence.

Given the conflicting evidence, the trial court's refusal to find that the defendant had proven existence of these mitigating circumstances was not error.

V.

In summary, we conclude there was no error in accepting defendant's conditional pleas of guilty on all charges. Because of error in the capital sentencing phase of his murder conviction (87CRS12629), defendant is entitled to a new capital sentencing proceeding under N.C.G.S. § 15A-2000. There was no error in the Fair Sentencing Act proceedings culminating in defendant's sentences for robbery with a dangerous weapon (87CRS9751) and felonious assault (87CRS9752).

No. 87CRS9751—no error.

No. 87CRS9752—no error.

No. 87CRS12629—new sentencing proceeding.

BLANCHE LOUISE HARTMAN BRITT v. YVONNE G. UPCHURCH

No. 551PA89

(Filed 3 October 1990)

1. Wills §§ 28.4, 56 (NCI3d)— devise of residence—inclusion of adjoining lot—latent ambiguity

A devise of "my residence at 2615 Cooleemee Street" created a latent ambiguity as to whether the description re-

ferred only to the lot on which testator's house was located or included an adjoining lot so that extrinsic evidence was admissible to ascertain testator's intent.

Am Jur 2d, Wills §§ 1281, 1282, 1331, 1349.

2. **Wills § 28.4 (NCI3d)— latent ambiguity—testator's direct declarations of intent—inadmissibility of attorney's affidavit**

A testator's direct declarations of intent as to which particular beneficiary will receive each parcel of land are not admissible to remove a latent ambiguity. Therefore, an affidavit of the attorney who drafted testator's will containing the attorney's impressions as to testator's intent concerning who was to receive a lot adjoining the lot on which testator's house was located was not admissible on the issue of what was meant by a devise of "my residence at 2615 Cooleemee Street."

Am Jur 2d, Wills §§ 1281, 1282, 1331, 1349.

3. **Wills § 56 (NCI3d)— devise of residence—inclusion of adjoining lot—summary judgment**

Plaintiff's forecast of evidence showed that testator's family used both lot 36, on which their house was located, and adjoining lot 37 as their "residence" and that testator's devise of "my residence at 2615 Cooleemee Street" thus referred to both lots 36 and 37 where plaintiff presented evidence that at the time testator purchased the house on lot 36, testator's mother purchased lot 37 on testator's behalf; testator's family cleared lot 37 and landscaped it; testator built a garage on lot 37 and partially paved a driveway from the garage across lot 36 to the street; testator built a tool shed on lot 37 and used it to park the family's second car; testator built a concrete sidewalk from the house on lot 36 to the garage on lot 37; and the family dog was housed in a pen constructed on lot 37. Defendant's forecast of evidence that lots 36 and 37 were purchased at different times, were listed separately on the tax records, and had different street addresses was insufficient to raise a genuine issue of material fact as to whether testator considered "my residence at 2615 Cooleemee Street" to include both lots 36 and 37, and the trial judge was correct in granting

plaintiff's motion for summary judgment declaring her the owner of both lots 36 and 37.

Am Jur 2d, Summary Judgment § 10.

ON discretionary review of the decision of the Court of Appeals, 96 N.C. App. 257, 385 S.E.2d 366 (1989), reversing a judgment entered by *Bailey, J.*, in the Superior Court, WAKE County, 8 February 1989, and remanding the action for trial. Heard in the Supreme Court 16 May 1990.

Nichols, Miller & Sigmon, P.A., by R. Bradley Miller, for plaintiff-appellee.

Merriman, Nicholls & Crampton, P.A., by William W. Merriman, III, and Elizabeth Anania, for defendant-appellant.

FRYE, Justice.

The issues presented in this appeal are whether the Court of Appeals erred (1) in holding that the affidavit of the attorney who drafted the testator's will was admissible at trial to show the testator's intent; and (2) in reversing the trial court's grant of summary judgment for plaintiff. We conclude that the trial court was correct in refusing to consider the affidavit and in granting summary judgment for plaintiff. We therefore reverse the decision of the Court of Appeals.

Walter Hartman, the father of plaintiff, executed his will on 12 March 1979. At that time Mr. Hartman was married to Ada Cassie Hartman, his second wife, who was the mother of the defendant in this action. Mr. Hartman's will provided in Article IV: "I give, devise and bequeath unto my said wife my residence at 2615 Cooleeme (sic) Street, Raleigh, North Carolina, for the term of her natural life. I give and devise the remainder interest in said property to my daughter, BLANCHE LOUISE HARTMAN BRITT." Article VIII, the residuary clause of the will, provided: "All of the remainder and residue of my property, I give, devise, and bequeath to my wife, ADA CASSIE HARTMAN in fee simple. If my wife shall predecease me, I give, devise and bequeath said residue to my daughter BLANCHE HARTMAN BRITT."

At the time of his death, Mr. Hartman was living in the same home he had lived in since he purchased it in 1948. The house itself is located on lot 36 which is shown on the county tax records

as 2615 Cooleemee Street. At the same time Mr. Hartman purchased lot 36, his mother purchased the adjoining lot 37, a vacant lot which is shown on the tax records as 2613 Cooleemee Street. Mr. Hartman's mother conveyed lot 37 to him by deed in 1956. Thus, at the time of execution of the will and at the time of his death, Mr. Hartman owned lots 36 and 37.

Mr. Hartman died on 24 February 1983, and Ada Cassie Hartman, his widow, died on 5 April 1988. Ms. Hartman's will provided in Article III: "I give and bequeath to my daughter, Yvonne G. Upchurch, all my personal and real property." Yvonne G. Upchurch, the defendant, attempted to sell lot 37, claiming title to lot 37 under her mother's will, contending that it passed to her mother under the residuary clause of Mr. Hartman's will.

On 6 October 1988, plaintiff brought this action in the Superior Court of Wake County to quiet title to lot 37. Plaintiff claimed title to lot 37 under Article IV of her father's will. On 1 November 1988, plaintiff filed a motion in limine to exclude any evidence, oral or written, of Thomas F. Adams, Jr., regarding Mr. Hartman's testamentary intent. Thomas F. Adams, Jr., was the attorney who drafted Mr. Hartman's will. On 13 January 1989, the trial judge granted the motion. On that same day, defendant moved for summary judgment. In support of this motion, defendant filed copies of the deeds to lots 36 and 37 as well as affidavits from employees of the tax offices of both the City of Raleigh and Wake County showing that lots 36 and 37 were listed separately in the tax records in both offices, lot 36 as a vacant lot identified as 2613 Cooleemee Street and lot 37 as a house and lot identified as 2615 Cooleemee Street. Plaintiff filed her own affidavit in opposition to defendant's motion for summary judgment, and on 8 February 1989 the trial judge granted plaintiff's motion for summary judgment, declaring her to be the owner of lots 36 and 37.

[1] Defendant appealed to the Court of Appeals, both from the order granting summary judgment in favor of plaintiff and from the order excluding evidence from Mr. Adams concerning Mr. Hartman's testamentary intent. The Court of Appeals held that the description of the property in the will, "my residence at 2615 Cooleemee Street," created a latent ambiguity and that extrinsic evidence, including an affidavit signed by Mr. Adams, was admissible to show Mr. Hartman's intent when he executed the will. *Britt v. Upchurch*, 96 N.C. App. 257, 260, 385 S.E.2d 366, 368

(1989). The Court of Appeals further held that since the evidence in Mr. Adams' affidavit was admissible, and since plaintiff's affidavit presented evidence of contrary intent, material issues of fact were presented, and summary judgment was inappropriate. *Id.*

We agree with the Court of Appeals that the description of the property in the will creates a latent ambiguity and that extrinsic evidence is admissible in order to ascertain the testator's intent. We do not agree that Mr. Adams' affidavit should be admitted as evidence of Mr. Hartman's intent.

The general rule in North Carolina is that a latent ambiguity presents a question of identity and that extrinsic evidence may be admitted to help identify the person or the thing to which the will refers. *Redd v. Taylor*, 270 N.C. 14, 22, 153 S.E.2d 761, 766 (1967). This extrinsic evidence is admissible "to identify a person or thing mentioned therein." *Id.* This evidence is not admissible "to alter or affect the construction" of the will. *Id.* at 23, 153 S.E.2d at 767 (quoting *McLeod v. Jones*, 159 N.C. 74, 76, 74 S.E. 733, 734 (1912)). "Surrounding circumstances as well as the declarations of the testator are relevant to the inquiry." *Id.* "Surrounding circumstances" do not refer to the intent of the testator, rather these circumstances mean the "*facts* of which the testator *had knowledge* when she made her will." *Wachovia Bank and Trust Co. v. Wolfe*, 245 N.C. 535, 540, 96 S.E.2d 690, 694 (1957) (emphases in the original). "Declarations of *intent* by a testator . . . are not admissible to control the construction of his will or to vary, contradict, or add to its terms." *Redd v. Taylor*, 270 N.C. at 23, 153 S.E.2d at 767 (emphasis added). *See also Holmes v. York*, 203 N.C. 709, 166 S.E. 889 (1932) (objection properly sustained to proffered testimony of witness that testatrix "told him she did not intend the land to go to O.C. York under her will," *id.* at 711, 166 S.E. at 890); and *Reynolds v. Trust Co.*, 201 N.C. 267, 159 S.E. 416 (1931) (objection properly sustained to deposition testimony of attorney that "[w]ill as drafted by me was drawn strictly in accordance with [testator's] instructions, and I recall very clearly that we discussed the difference between the two paragraphs mentioned," *id.* at 277, 159 S.E. at 420).

The reasoning behind these rules is succinctly stated in *Thomas v. Houston*, 181 N.C. 91, 106 S.E. 466 (1921), "[w]ills are made by testators, not by witnesses." *Id.* at 94, 106 S.E. at 468. By allowing testimony from someone else of what testator *intended*

to say in his will, the will could be altered, revoked or annulled by verbal testimony, and this would conflict with the requirement that wills be in writing. *In re Will of Cobb*, 271 N.C. 307, 311, 156 S.E.2d 285, 289 (1967). Allowing extrinsic evidence of what the testator said he intended to do "would open a door for frauds and perjuries of the most alarming character." *Id.* (quoting *Harrison v. Morton & Brown*, 32 Tenn. (2 Swan) 461, 469 (1852)).

In his affidavit, Mr. Adams stated:

> It is my best recollection that Mr. Hartman mentioned to me on the day he came to execute his Will that he owned a vacant lot adjacent to the lot on which the residence was located.
>
> It is also my best recollection that I suggested that the Will be redrawn to clarify that this lot was or was not deemed to be part of the lot on which his residence was located. My best recollection of his response was to the effect that he had had one or more heart attacks and was very ill; that he wanted to sign his Will without waiting for it to be rewritten; that he wanted his Wife to have the vacant lot and the residuary clause was sufficient to devise it to her; that everyone knew that it was not a part of his residence lot and had never been cleared and made a part of the yard (he said that it was covered by trees and undergrowth); and that the residence lot and the vacant lot were purchased at separate times.

This affidavit is not a factual account of what Mr. Hartman said or did which might shed light on how he used the term "my residence at 2615 Cooleemee Street." Rather, it is a statement of the attorney's "best recollections" of his suggestions to the testator and "the effect" of the testator's response. The affidavit does purport to set forth some facts of which the testator had knowledge, such as, the lot was covered by trees and undergrowth. When viewed in its entirety, however, the affidavit is, in essence, only the attorney's conclusions or impressions of what the testator meant or intended to say in his will. Such evidence is not admissible.

Defendant argues that the attorney's affidavit should be admitted in evidence because case law provides that declarations of the testator are allowed where a latent ambiguity is present. For this proposition, defendant cites *Thomas v. Summers*, 189 N.C. 74, 126 S.E. 105 (1925); *Redd v. Taylor*, 270 N.C. 14, 153 S.E.2d

761; and *Fulwood v. Fulwood*, 161 N.C. 601, 77 S.E. 763 (1913). While defendant is correct that these cases hold that "declarations" of the testator are admissible, the "declarations" in these cases do not appear to be declarations of testamentary *intent*; rather they are testator's declarations which cast light upon the testator's usage of particular terms in the will.

In *Thomas*, the testatrix left a will devising "my home place on McIver Street." *Thomas*, 189 N.C. at 74, 126 S.E. at 106. Evidence was introduced which showed that at the time of her death, the testatrix owned two adjacent lots on McIver Street which were purchased at separate times. Lot 4 where testatrix' house was located was purchased in October 1915, and lot 5, which was a vacant lot adjoining lot 4, was purchased in November 1915. *Id.* at 74-75, 126 S.E. at 106. Further evidence showed that testatrix planted flowers on lot 5, although it had no building located on it, and she put a fence between lot 5 and lot 6, which she once owned but later sold. She also planted fruit trees and grapevines on lot 5.

When plaintiffs and defendants in *Thomas* both claimed lot 5, the court allowed testimony from a witness that testatrix, before her death, had asked the witness to build an iron fence around lots 4 and 5. The witness was allowed to testify further that testatrix had asked the witness three or four more times if he had put up the fence, to which he replied that he had not been able to get the proper materials to proceed with the construction. *Id.* at 75, 126 S.E. at 106. Further evidence was admitted that testatrix, claiming that it was her home place, refused to sell lot 5. This Court concluded that the language used in the will presented a latent ambiguity and that all of the evidence discussed above was admissible to show what the testatrix meant by the term "my home place on McIver Street." *Id.* at 76, 126 S.E. at 107. While in *Thomas* the Court clearly stated, "the *declarations* of the testator at the time of making the will and at other times . . . were competent evidence," *id.* at 77, 126 S.E. at 107 (emphasis added), the "declarations" were not direct declarations of testamentary intent; rather, they were declarations of the testatrix which showed what she considered to be her home place.

In *Redd*, the testatrix left a will which provided in part: "If Warren & Jane Redd take care of my beloved husband F. M. Redd and me . . . They are to have the part of the Farm on

the Albemarle Road that they want in fee Simple. The rest of the farm to go with the rest of my estate." *Redd*, 270 N.C. at 17, 153 S.E.2d at 763. This Court held that the devise of "the part of the Farm on Albemarle Road that they want in fee Simple" created a latent ambiguity. *Id.* at 22, 153 S.E.2d at 766.

When the Redds claimed the entire farm, the trial court admitted other claimants' evidence which showed that the Redds had sought to purchase from the testatrix the part of the farm which they leased from her for a nursery. *Id.* at 19, 153 S.E.2d at 765. The trial court also admitted evidence from witnesses that the testatrix told them that she did not want to sell the land to the Redds but that they would get it in her will. *Id.* at 20, 153 S.E.2d at 765. In its opinion, the Court did not say whether the testimony regarding the testatrix' intention to leave the property to the Redds was properly admitted. The Court held, "Parole evidence of testatrix' declarations that the Redds had sought to buy the land they had leased from her since 1951 was sufficient and competent to identify it as the land they wanted when she wrote the codicil." *Id.* at 24, 153 S.E.2d at 768. In view of the Court's earlier statement of the general rule, "[d]eclarations of intent by a testator . . . are not admissible to control the construction of his will," *id.* at 23, 153 S.E. at 767, *Redd* does not stand for the proposition that direct declarations of testamentary intent are admissible to explain a latent ambiguity.

Fulwood involved a will which devised "the homestead tract of land." *Fulwood*, 161 N.C. at 602, 77 S.E. at 764. This Court again found that the language of the will presented a latent ambiguity. *Id.* However, the Court did not specify which declarations of the testator were allowed to help fit the description found in the will to the land owned by the testator. *Id.* Thus, *Fulwood* only provides the statement of the general rule that declarations of the testator at the time of making the will are admissible without explaining the nature of these declarations or whether they were declarations of testamentary intent.

[2] None of the cases cited by defendant for the proposition that declarations of the testator at the time of making the will are admissible to remove a latent ambiguity stand for the extension of that rule to include the testator's direct declarations of intent as to which particular beneficiary will receive each parcel of land.

To allow such declarations of intent would allow a will to be made by a witness rather than by the testator.

Since the affidavit contains the impressions of the attorney as to Mr. Hartman's intent concerning who was to get lot 37, it is inadmissible as extrinsic evidence to explain the latent ambiguity in the will. Therefore, the trial judge was correct in not allowing this affidavit to be considered on the issue of what was meant by the phrase "my residence at 2615 Cooleemee Street."

[3] We now address whether the trial judge was correct in granting summary judgment in favor of plaintiff. The Court of Appeals held that material issues of fact exist in this case, and therefore summary judgment is inappropriate. *Britt v. Upchurch*, 96 N.C. App. at 260, 385 S.E.2d at 368. However, this holding was dependent upon the Court of Appeals' holding that Mr. Adams' affidavit was admissible to show Mr. Hartman's intent, thus creating a material conflict with the extrinsic evidence offered by plaintiff.

Summary judgment is properly granted only if the evidence before the court indicates that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, 247 S.E.2d 206 (1981). Since we have held that the attorney's affidavit was properly excluded by the trial judge when ruling on defendant's summary judgment motion, we must look at the evidence which was properly before the judge when ruling on the motion. The evidence before the trial judge on the summary judgment motion included: (1) the copies of the deeds for lots 36 and 37 as well as affidavits attesting to the genuineness of these documents; (2) affidavits concerning the tax records for lots 36 and 37 in the Wake County Tax Office and the City of Raleigh Tax Office; and (3) plaintiff's affidavit explaining how the two lots were acquired and used by the Hartman family.

In her affidavit, plaintiff asserted that at the same time her parents purchased the house on lot 36 her grandmother purchased the adjoining lot 37 on behalf of her father. She further stated that, when the family moved into the house located on lot 36, lot 37 was overgrown with honeysuckle, poison ivy, and other weeds. According to plaintiff, the Hartman family cleared lot 37 and landscaped it by planting various trees, bushes, and other plants. As noted earlier, the affidavit contained the information that Mr. Hartman built a garage on lot 37 and partially paved a driveway

from the door of the garage across lot 36 to the street. Mr. Hartman also built a tool shed on lot 37 and used it to park the family's second car. Plaintiff stated that her father built a concrete sidewalk from the house on lot 36 to the garage on lot 37 and built several slate walkways across the property. The family dog was housed in a doghouse and dog pen constructed on lot 37. Plaintiff provided other facts in the affidavit which tended to show that the Hartman family used both lots 36 and 37 as their "residence."

To support her theory that "my residence at 2615 Cooleemee Street" refers only to lot 36, defendant offered evidence that the two lots (1) were purchased at different times; (2) were listed separately on the tax records; and (3) had different street addresses. Nothing else appearing, the fact that the lots were purchased at different times would explain why they were listed separately on the tax records. We also attach little significance to the different street addresses since there is no evidence that the testator used a different street address for lot 37 or was even aware that it carried an address other than 2615 Cooleemee Street. We conclude that defendant's forecast of evidence is not sufficient to raise a genuine issue of material fact as to whether Mr. Hartman considered "my residence at 2615 Cooleemee Street" to include both lots 36 and 37.

The question is really what Mr. Hartman considered to be his residence, and details of how Mr. Hartman and his family used the two lots are helpful in answering that question. Defendant has offered no admissible evidence to counter the evidence presented by plaintiff in her affidavit as to the facts showing that the family used both lots 36 and 37 as their residence. When viewed as a whole, the forecast of evidence points without contradiction to both lots 36 and 37 being used as a single residence by the Hartman family and that "my residence at 2615 Cooleemee Street" refers to both lots 36 and 37 rather than just to lot 36. There being no genuine issue of material fact, the trial judge was correct in granting plaintiff's motion for summary judgment.

The decision of the Court of Appeals is reversed, and the judgment of the trial court is reinstated.

Reversed.

EDWARD ALAN BOLICK v. SUNBIRD AIRLINES, INC., AND MOUNTAIN AIRLINES, INC.

No. 11A90

(Filed 3 October 1990)

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported at 96 N.C. App. 443, 386 S.E.2d 76 (1989), finding no error in a trial by *Beaty, J.*, at the 8 August 1988 Session of Superior Court, FORSYTH County, which resulted in a verdict and judgment for defendant Sunbird Airlines, Inc. Heard in the Supreme Court 5 September 1990.

Smiley & Mineo, by Robert R. Smiley III and Robert A. Mineo, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by William F. Womble, Jr., Donald F. Lively, and Mary J. Davis, for defendant-appellees.

PER CURIAM.

Affirmed.

UNIVERSITY OF NORTH CAROLINA A/K/A THE NORTH CAROLINA MEMORIAL HOSPITAL, AND THE UNIVERSITY OF NORTH CAROLINA A/K/A THE MEDICAL FACULTY PRACTICE PLAN OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL'S SCHOOL OF MEDICINE v. DONALD W. HILL, JR. AND ALAMANCE COUNTY

No. 20PA90

(Filed 3 October 1990)

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 96 N.C. App. 673, 386 S.E.2d 755 (1990), reversing summary judgment entered for defendant Alamance County against plaintiff Hospital by *Stephens, J.*, at the 9 November 1988 Session of Civil Superior Court, ALAMANCE County, and remanding for further proceedings. Heard in the Supreme Court 6 September 1990.

Lacy H. Thornburg, Attorney General, by J. Charles Waldrup, Assistant Attorney General, for plaintiff-appellees.

S. C. Kitchen, County Attorney, for defendant-appellant Alamance County.

James B. Blackburn III, General Counsel, for North Carolina Association of County Commissioners and North Carolina Sheriffs' Association, amici curiae.

Wendell H. Ott and Laurie S. Truesdell for The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center, Duke University Medical Center, Memorial Mission Hospital, Inc., The Moses H. Cone Memorial Hospital, North Carolina Baptist Hospitals, Inc., and The North Carolina Hospital Association, amici curiae.

PER CURIAM.

Affirmed.

STATE OF NORTH CAROLINA v. JOHNNIE L. HARRINGTON

No. 46PA90

(Filed 3 October 1990)

ON discretionary review of a unanimous, unpublished opinion of the Court of Appeals reported at 97 N.C. App. 143, 388 S.E.2d 246 (1990), affirming the order of *Bowen, J.*, entered 15 December 1988 in Superior Court, LEE County. Heard in the Supreme Court 5 September 1990.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr., for defendant-appellant.

PER CURIAM.

We conclude that defendant's petition for discretionary review was improvidently allowed. This judgment is entered without prejudice to defendant's right to refile in the superior court a motion for appropriate relief alleging ineffective assistance of counsel.

Discretionary review improvidently allowed.

STATE OF NORTH CAROLINA v. JAMES LLOYD DAVIS, JR.

No. 83A90

(Filed 3 October 1990)

APPEAL by the defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 97 N.C. App. 259, 388 S.E.2d 201 (1990), finding no error in the judgment entered by *Helms, J.*, on 14 September 1988 in Superior Court, GUILFORD County, and pursuant to N.C.G.S. § 7A-31 as to additional issues. Heard in the Supreme Court on 4 September 1990.

Lacy H. Thornburg, Attorney General, by Henry T. Rosser, Special Deputy Attorney General, for the State.

Robert O'Hale, Assistant Public Defender, for the defendant-appellant.

PER CURIAM.

Affirmed.

IN THE MATTER OF: THE APPEAL OF ELE, INC., FROM THE DENIAL OF PRESENT USE VALUE TREATMENT FOR CERTAIN OF ITS REAL PROPERTY BY THE BERTIE COUNTY BOARD OF COMMISSIONERS FOR 1986

No. 93A90

(Filed 3 October 1990)

APPEAL of right by appellant Bertie County pursuant to N.C.G.S. § 7A-30(2) (1989) from the decision of a divided panel of the Court of Appeals, 97 N.C. App. 253, 388 S.E.2d 241 (1990), affirming the Final Decision of the Property Tax Commission, sitting as the State Board of Equalization and Review, dated 10 March 1988, which reversed the decision of the Bertie County Board of Commissioners denying present use value assessment and taxation for certain property for the years 1984, 1985, and 1986. Heard in the Supreme Court 4 September 1990.

Smith, Daly & Skinner, P.A., by Lloyd C. Smith, Jr., and Roswald B. Daly, Jr., for respondent-appellant.

Baker, Jenkins & Jones, P.A., by Robert C. Jenkins and W. Hugh Jones, Jr., taxpayer-appellee.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

STATE v. ALLEN

[327 N.C. 469 (1990)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
TIMOTHY LANIER ALLEN	)	

No. 70A86

(Filed 3 October 1990)

UPON consideration of the order of the Supreme Court of the United States vacating the judgment of this Court and remanding this cause for further consideration in light of its decision in *McKoy v. North Carolina*, 494 U.S. ---, 108 L.Ed.2d 369 (1990), the following order is entered:

> Defendant shall have up to and including 5 November 1990 to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *McKoy* and, if so, whether any such error can be found to be harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31 (26 July 1990). The State may file its brief in response within 30 days after service of defendant's brief upon it. By order of the Court in conference this the 3rd day of October 1990.

WHICHARD, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ROSCOE ARTIS	)	

No. 504A84

(Filed 3 October 1990)

UPON consideration of the order of the Supreme Court of the United States vacating the judgment of this Court and remanding this cause for further consideration in light of its decision in *McKoy v. North Carolina*, 494 U.S. ---, 108 L.Ed.2d 369 (1990), the following order is entered:

> Defendant shall have up to and including 5 November 1990 to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *McKoy* and, if so, whether any such error can be found to be harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31 (26 July 1990). The State may file its brief in response within 30 days after service of defendant's brief upon it. By order of the Court in conference this the 3rd day of October 1990.

WHICHARD, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ELWELL BARNES	)	

No. 5A86

(Filed 3 October 1990)

UPON consideration of the order of the Supreme Court of the United States vacating the judgment of this Court and remanding this cause for further consideration in light of its decision in *McKoy v. North Carolina*, 494 U.S. ---, 108 L.Ed.2d 369 (1990), the following order is entered:

> Defendant shall have up to and including 5 November 1990 to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *McKoy* and, if so, whether any such error can be found to be harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31 (26 July 1990). The State may file its brief in response within 30 days after service of defendant's brief upon it. By order of the Court in conference this the 3rd day of October 1990.

WHICHARD, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
JERRY RAY CUMMINGS	)	

No. 65A87

(Filed 3 October 1990)

UPON consideration of the order of the Supreme Court of the United States vacating the judgment of this Court and remanding this cause for further consideration in light of its decision in *McKoy v. North Carolina*, 494 U.S. ---, 108 L.Ed.2d 369 (1990), the following order is entered:

> Defendant shall have up to and including 5 November 1990 to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *McKoy* and, if so, whether any such error can be found to be harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31 (26 July 1990). The State may file its brief in response within 30 days after service of defendant's brief upon it. By order of the Court in conference this the 3rd day of October 1990.

WHICHARD, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
MICHAEL LEE FULLWOOD	)	

No. 37A86

(Filed 3 October 1990)

UPON consideration of the order of the Supreme Court of the United States vacating the judgment of this Court and remanding this cause for further consideration in light of its decision in *McKoy v. North Carolina*, 494 U.S. ---, 108 L.Ed.2d 369 (1990), the following order is entered:

> Defendant shall have up to and including 5 November 1990 to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *McKoy* and, if so, whether any such error can be found to be harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31 (26 July 1990). The State may file its brief in response within 30 days after service of defendant's brief upon it. By order of the Court in conference this the 3rd day of October 1990.

WHICHARD, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
GARY DEAN GREENE	)	

No. 456A87

(Filed 3 October 1990)

UPON consideration of the order of the Supreme Court of the United States vacating the judgment of this Court and remanding this cause for further consideration in light of its decision in *McKoy v. North Carolina*, 494 U.S. ---, 108 L.Ed.2d 369 (1990), the following order is entered:

> Defendant shall have up to and including 5 November 1990 to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *McKoy* and, if so, whether any such error can be found to be harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31 (26 July 1990). The State may file its brief in response within 30 days after service of defendant's brief upon it. By order of the Court in conference this the 3rd day of October 1990.

WHICHARD, J.
For the Court

STATE v. HUFF

[327 N.C. 475 (1990)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
EVERETT RANDOLPH HUFF	)	

No. 372A87

(Filed 3 October 1990)

UPON consideration of the order of the Supreme Court of the United States vacating the judgment of this Court and remanding this cause for further consideration in light of its decision in *McKoy v. North Carolina*, 494 U.S. ---, 108 L.Ed.2d 369 (1990), the following order is entered:

> Defendant shall have up to and including 5 November 1990 to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *McKoy* and, if so, whether any such error can be found to be harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31 (26 July 1990). The State may file its brief in response within 30 days after service of defendant's brief upon it. By order of the Court in conference this the 3rd day of October 1990.

WHICHARD, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
HENRY LEE HUNT	)	

No. 5A86

(Filed 3 October 1990)

UPON consideration of the order of the Supreme Court of the United States vacating the judgment of this Court and remanding this cause for further consideration in light of its decision in *McKoy v. North Carolina*, 494 U.S. ---, 108 L.Ed.2d 369 (1990), the following order is entered:

> Defendant shall have up to and including 5 November 1990 to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *McKoy* and, if so, whether any such error can be found to be harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31 (26 July 1990). The State may file its brief in response within 30 days after service of defendant's brief upon it. By order of the Court in conference this the 3rd day of October 1990.

WHICHARD, J.
For the Court

STATE v. LLOYD

[327 N.C. 477 (1990)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
OSCAR LLOYD	)	

No. 577A85

(Filed 3 October 1990)

UPON consideration of the order of the Supreme Court of the United States vacating the judgment of this Court and remanding this cause for further consideration in light of its decision in *McKoy v. North Carolina*, 494 U.S. ---, 108 L.Ed.2d 369 (1990), the following order is entered:

> Defendant shall have up to and including 5 November 1990 to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *McKoy* and, if so, whether any such error can be found to be harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31 (26 July 1990). The State may file its brief in response within 30 days after service of defendant's brief upon it. By order of the Court in conference this the 3rd day of October 1990.

WHICHARD, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ELTON OZELL McLAUGHLIN	)	

No. 637A84

(Filed 3 October 1990)

UPON consideration of the order of the Supreme Court of the United States vacating the judgment of this Court and remanding this cause for further consideration in light of its decision in *McKoy v. North Carolina*, 494 U.S. ---, 108 L.Ed.2d 369 (1990), the following order is entered:

> Defendant shall have up to and including 5 November 1990 to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *McKoy* and, if so, whether any such error can be found to be harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31 (26 July 1990). The State may file its brief in response within 30 days after service of defendant's brief upon it. By order of the Court in conference this the 3rd day of October 1990.

WHICHARD, J.
For the Court

STATE v. PRICE

[327 N.C. 479 (1990)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
RICKY LEE PRICE	)	

No. 585A87

(Filed 3 October 1990)

UPON consideration of the order of the Supreme Court of the United States vacating the judgment of this Court and remanding this cause for further consideration in light of its decision in *McKoy v. North Carolina*, 494 U.S. ---, 108 L.Ed.2d 369 (1990), the following order is entered:

> Defendant shall have up to and including 5 November 1990 to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *McKoy* and, if so, whether any such error can be found to be harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31 (26 July 1990). The State may file its brief in response within 30 days after service of defendant's brief upon it. By order of the Court in conference this the 3rd day of October 1990.

WHICHARD, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
MICHAEL RAY QUESINBERRY	)	

No. 95A88

(Filed 3 October 1990)

UPON consideration of the order of the Supreme Court of the United States vacating the judgment of this Court and remanding this cause for further consideration in light of its decision in *McKoy v. North Carolina*, 494 U.S. ---, 108 L.Ed.2d 369 (1990), the following order is entered:

> Defendant shall have up to and including 5 November 1990 to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *McKoy* and, if so, whether any such error can be found to be harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31 (26 July 1990). The State may file its brief in response within 30 days after service of defendant's brief upon it. By order of the Court in conference this the 3rd day of October 1990.

WHICHARD, J.
For the Court

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

AFRO-GUILD, INC. v. MOORING

No. 285P90

Case below: 98 N.C.App. 698

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

BEATTY v. CHARLOTTE-MECKLENBURG BD. OF EDUCATION

No. 444P90

Case below: 99 N.C.App. 753

Petition by plaintiff for temporary stay allowed 10 September 1990. Petition by plaintiff for writ of supersedeas allowed 3 October 1990. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 3 October 1990.

BISHOP v. N.C. DEPT. OF HUMAN RESOURCES

No. 465PA90

Case below: 100 N.C.App. 175

Petition by defendant for writ of supersedeas allowed 18 September 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 18 September 1990.

CARSON v. MOODY

No. 430PA90

Case below: 99 N.C.App. 724

Petition by defendant (Jimmy Berry) for writ of certiorari to the North Carolina Court of Appeals allowed 3 October 1990. Petition by defendant (Moody) for writ of supersedeas allowed 3 October 1990. Petition by defendant (Moody) for discretionary review pursuant to G.S. 7A-31 allowed 3 October 1990.

DAVIS v. TOWN OF CAROLINA BEACH

No. 320P90

Case below: 99 N.C.App. 221

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

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

FLOYD v. N.C. DEPT. OF COMMERCE

No. 337P90

Case below: 99 N.C.App. 125

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

GADSON v. N.C. MEMORIAL HOSPITAL

No. 318P90

Case below: 99 N.C.App. 169

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

GARVIN v. MALONE & HYDE, INC.

No. 211P90

Case below: 98 N.C.App. 339

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

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

No. 194PA90

Case below: 98 N.C.App. 120

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 October 1990.

HARTSELL v. HARTSELL

No. 405A90

Case below: 99 N.C.App. 380

Motion by plaintiff to dismiss appeal (except issues presented in dissent) for lack of substantial constitutional question allowed 3 October 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 3 October 1990.

IN RE FORECLOSURE OF GREEN

No. 474P90

Case below: 99 N.C.App. 773

Petition by Logan W. Green for temporary stay denied 3 October 1990. Petition by Logan W. Green for writ of certiorari to the North Carolina Court of Appeals denied 3 October 1990.

INDUSTRIAL INNOVATORS, INC. v. MYRICK-WHITE, INC.

No. 404P90

Case below: 99 N.C.App. 42

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

IVERSON v. TM ONE, INC.

No. 331P90

Case below: 99 N.C.App. 221

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

LAMB v. McKESSON CORP.

No. 257P90

Case below: 98 N.C.App. 698

Motion by the Attorney General to dismiss appeal by Lamb for lack of significant public interest allowed 3 October 1990. Petition by Lamb for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

LAWTON v. COUNTY OF DURHAM

No. 338P90

Case below: 99 N.C.App. 222

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

METRO. SEWERAGE DIST. v.
N.C. WILDLIFE RESOURCES COMM.

No. 442P90

Case below: 100 N.C.App. 171

Petition by defendant for temporary stay allowed 10 September 1990. Petition by defendant for writ of supersedeas allowed 3 October 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 October 1990.

NORTH BUNCOMBE ASSN. OF
CONCERNED CITIZENS v. RHODES

No. 434A90

Case below: 100 N.C.App. 24

Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 3 October 1990. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990. Stay dissolved and petition by plaintiffs for writ of supersedeas denied 3 October 1990.

OHIO CASUALTY GROUP v. OWENS

No. 332P90

Case below: 99 N.C.App. 131

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 13 September 1990.

RICKS v. TOWN OF SELMA

No. 309PA90

Case below: 99 N.C.App. 82

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 October 1990.

STATE v. ARNOLD

No. 245A90

Case below: 98 N.C.App. 518

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 October 1990.

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

STATE v. BAUCOM

No. 339P90

Case below: 99 N.C.App. 222

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

STATE v. BLACKWELL

No. 374P90

Case below: 99 N.C.App. 359

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

STATE v. CHANDLER

No. 389P90

Case below: 98 N.C.App. 155

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 October 1990.

STATE v. CLARK

No. 407P90

Case below: 99 N.C.App. 584

Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

STATE v. GRIMES

No. 391P90

Case below: 96 N.C.App. 489

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 October 1990. Motion by the Attorney General to dismiss allowed 3 October 1990.

STATE v. HAIRSTON

No. 373P90

Case below: 99 N.C.App. 362

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

STATE v. HALL

No. 201PA90

Case below: 98 N.C.App. 1

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 October 1990.

STATE v. McKINNEY

No. 392P90

Case below: 96 N.C.App. 680

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 October 1990.

STATE v. McMILLAN

No. 417P90

Case below: 99 N.C.App. 585

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

STATE v. SCOTT

No. 330PA90

Case below: 99 N.C.App. 113

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 October 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 October 1990.

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

STATE v. STEPHENS

No. 402P90

Case below: 95 N.C.App. 455

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 October 1990.

STATE v. THORPE

No. 321P90

Case below: 99 N.C.App. 223

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

STATE v. TREADWELL

No. 400P90

Case below: 99 N.C.App. 769

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 October 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

STATE v. TURNAGE

No. 441A90

Case below: 100 N.C.App. 234

Petition by the Attorney General for temporary stay allowed 11 September 1990.

STATE v. VALLIERE

No. 348P90

Case below: 99 N.C.App. 223

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

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

STATE v. WHETSTINE

No. 352P90

Case below: 99 N.C.App. 363

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 October 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

VAUGHN v. VAUGHN

No. 440P90

Case below: 99 N.C.App. 574

Notice of appeal by defendant dismissed 3 October 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

WATKINS v. CITY OF ASHEVILLE

No. 361P90

Case below: 99 N.C.App. 302

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

YOUNG v. MASTROM, INC.

No. 333P90

Case below: 99 N.C.App. 120

Petition by Mastrom for discretionary review pursuant to G.S. 7A-31 denied 3 October 1990.

PETITION TO REHEAR

IN RE ADOPTION OF CLARK

No. 395A89

Case below: 327 N.C. 61

Petition by petitioner-appellees to rehear denied 3 October 1990.

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

No. 185A90

(Filed 8 November 1990)

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 98 N.C. App. 61, 389 S.E.2d 640 (1990), awarding plaintiff a new trial in a condemnation action tried by *Read, J.*, at the 23 January 1989 Civil Session of Superior Court, PERSON County, in which judgment was entered on 8 February 1989 awarding defendants damages in the sum of $150,000.00 plus interest and costs. Heard in the Supreme Court 11 October 1990.

Lacy H. Thornburg, Attorney General, by Thomas B. Wood and David R. Minges, Assistant Attorneys General, for plaintiff-appellee.

Maxwell & Hutson, P.A., by James B. Maxwell and John C. Martin, for defendant-appellants.

PER CURIAM.

For the reasons stated in the opinion by Arnold, J., for the Court of Appeals, relating to the issue arising under *Power Co. v. Winebarger*, 300 N.C. 57, 265 S.E.2d 227 (1980), the decision of the Court of Appeals is affirmed.

Affirmed.

WILLIAM W. FLIPPO v. RICHARD JONES HAYES, JR.

No. 197A90

(Filed 8 November 1990)

APPEAL of right by the defendant Richard Jones Hayes, Jr. pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 98 N.C. App. 115, 389 S.E.2d 613 (1990), reversing in part the judgment entered by *Ferrell, J.*, at the 8 November 1988 session of Superior Court, CATAWBA County. Heard in the Supreme Court 8 October 1990.

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

Thomas N. Hannah for defendant-appellant.

PER CURIAM.

Affirmed.

WILSON v. McLEOD OIL CO.

[327 N.C. 491 (1990)]

RONALD T. WILSON AND MARILYN WILSON, INDIVIDUALLY, AND RONALD T. WILSON AS GUARDIAN AD LITEM FOR WARREN CRAIG WILSON, CHRISTOPHER THOMAS WILSON, AND MATTHEW REID WILSON, MINOR CHILDREN; AND WENDELL SCOTT WILSON, GUY HILL AND MARIE HILL, INDIVIDUALLY, AND GUY HILL AS GUARDIAN AD LITEM FOR EMILY GWEN HILL, MINOR CHILD, AND CRAIG FREDERICK HILL, AND C. N. WHITE, PLAINTIFFS, AND WALTER PAGURA, SHELIA PAGURA, AND BEVERLY C. PAGURA, INDIVIDUALLY, AND SHELIA PAGURA AS GUARDIAN AD LITEM FOR BENTLY PAGURA, MINOR CHILD, INTERVENOR-PLAINTIFFS v. McLEOD OIL COMPANY, INC., A NORTH CAROLINA CORPORATION, LOREN A. TOMPKINS, ADRIAN SIMMONS, GEORGE RIGGAN, AND AMOCO OIL COMPANY, A MARYLAND CORPORATION, DEFENDANTS v. ALAMANCE OIL COMPANY, INC., A NORTH CAROLINA CORPORATION, AND HILDA M. BAXTER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE FOR CLIFTON E. BAXTER, DECEASED; WILLIAM THOMAS WARREN, CLYDE H. WARREN, ROBERT C. WARREN, JAMES PAUL WARREN, ODIS H. WARREN, OTIS A. WARREN AND WIFE, GLENDA FAYE WARREN, THIRD-PARTY DEFENDANTS

No. 506A89

(Filed 5 December 1990)

1. **Trespass § 3 (NCI3d); Waters and Watercourses § 3.2 (NCI3d) — gasoline contamination of well water — no continuing trespass — statute of limitations — damages recoverable**

Where plaintiff was informed in September 1979 that testing revealed the presence of gasoline in her well water, plaintiff brought a trespass action on 10 July 1986 for contamination of her well water from leaking underground storage tanks on defendants' lands, and plaintiff forecast sufficient evidence that there was ongoing seepage of gasoline onto her property at the time she filed the action, the ongoing seepage created a renewing rather than a continuing trespass, and her claim is not barred by the three-year statute of limitations for a continuing trespass set forth in N.C.G.S. § 1-52(3). However, since plaintiff filed this action more than three years after she first discovered the contamination of her well, she may collect damages only for the three years immediately preceding the date she filed the action.

Am Jur 2d, *Limitation of Actions* §§ 86, 87; *Trespass* § 65.

2. **Nuisance § 4 (NCI3d); Waters and Watercourses § 3.2 (NCI3d) — gasoline contamination of well water — nuisance — statute of limitations**

Plaintiff's nuisance claim for gasoline contamination of well water from leaking underground storage tanks was governed

by the same statute of limitations as her action for trespass and was not barred by the statute of limitations where she forecast evidence that there was ongoing seepage of gasoline onto her property at the time she filed the action.

Am Jur 2d, Nuisances §§ 307, 308.

Gasoline or other fuel storage tanks as nuisance. 50 ALR3d 209.

3. Limitation of Actions § 4.2 (NCI3d); Waters and Watercourses § 3.2 (NCI3d)— gasoline contamination of well water—strict liability—negligence—statute of limitations

Plaintiff's claims for gasoline contamination of her well water from leaking underground storage tanks based on strict liability under N.C.G.S. § 143-215.93 and on negligence were barred by the three-year statute of limitations of N.C.G.S. §§ 1-52(2) and 1-52(5), respectively, where she waited longer than three years after discovering the contamination to file her action.

Am Jur 2d, Pollution Control §§ 575, 576.

4. Limitation of Actions § 5 (NCI3d); Waters and Watercourses § 3.2 (NCI3d)— gasoline contamination of well water—statute of limitations

The claims of two families for gasoline contamination of their well water from leaking underground storage tanks on defendants' lands were not barred by the statute of limitations where they filed this action less than three years after they were notified by government agents in May 1984 that test results proved that their water was contaminated by gasoline. The statute of limitations did not begin to run from the time the families first began to notice that something was wrong with their water where they were doing everything they could do to get NRCD to continue to test their water even though NRCD was telling them that the tests did not indicate gasoline contamination, they then asked the county health department to retest their water, and it was this agency which finally detected the gasoline contamination in 1984, since they did not know that they had a claim for contamination of their water prior to testing by the health department.

Am Jur 2d, Pollution Control §§ 575, 576.

5. Limitation of Actions § 5 (NCI3d); Waters and Watercourses § 3.2 (NCI3d)— gasoline contamination of well water— intervenor plaintiffs—statute of limitations

The claims of the intervenor plaintiffs for gasoline contamination of their well water were not barred by the statute of limitations where their forecast of evidence clearly showed that they did not have any notice of any contamination until 1985, and they filed a motion to intervene in the action against defendants in December 1987.

Am Jur 2d, Pollution Control §§ 575, 576.

6. Limitation of Actions § 5 (NCI3d); Waters and Watercourses § 3.2 (NCI3d)— gasoline contamination of well water—ten-year statute of repose

Claims against one defendant individually and as personal representative of the estate of her husband for gasoline contamination of well water from leaking underground storage tanks were barred by the ten-year statute of repose of N.C.G.S. § 1-52(16) where defendant and her husband sold their property containing the storage tanks more than 10 years before plaintiffs filed this action.

Am Jur 2d, Pollution Control §§ 575, 576.

7. Negligence § 5 (NCI3d); Waters and Watercourses § 3.2 (NCI3d)— gasoline contamination of well water—strict liability claims—statute of repose

Strict liability claims for gasoline contamination of well water under N.C.G.S. § 143-215.93 against an oil company which serviced gasoline tanks on one piece of property and which owned another piece of property containing gasoline storage tanks and later serviced those tanks for a subsequent owner were barred by the ten-year statute of repose of N.C.G.S. § 1-52(16) where the oil company's last acts with respect to both properties occurred more than ten years prior to the filing of this action by plaintiffs and the oil company thus had no "control" over the gasoline within the meaning of the strict liability statute at any time less than ten years before the action was filed.

Am Jur 2d, Pollution Control §§ 575, 576.

8. Fixtures § 1 (NCI3d); Waters and Watercourses § 3.2 (NCI3d)—underground storage tanks—not improvements to realty—contamination of well water—statute of repose inapplicable

The installation of underground gasoline storage tanks did not constitute improvements to real property within the meaning of the six-year statute of repose of N.C.G.S. § 1-50(5) where the tanks were installed by an oil company which provided gasoline for the owner of a store on the property; the presumption that the tanks were to become a part of the real property did not arise because they were not installed by the owner of the land; the installation contract provided that the tanks would remain personal property and not become a part of the real estate; the store owner was not responsible for the repair and maintenance of the tanks; and the tanks were removed from the land at the termination of the contract. Therefore, the shortened liability period of § 1-50(5) did not apply in an action against the oil company president for gasoline contamination of well water.

Am Jur 2d, Fixtures §§ 42, 43; Pollution Control §§ 570, 575, 576.

9. Fixtures § 1 (NCI3d); Waters and Watercourses § 3.2 (NCI3d)—underground storage tanks—contamination of well water—statute of repose exclusion

Assuming arguendo that the installation of underground gasoline storage tanks constituted improvements to real property, the six-year statute of repose of N.C.G.S. § 1-50(5) for a defect or unsafe condition of an improvement to real property did not apply to an action against former owners of the property for contamination of well water because of the exclusion set forth in subsection (d) where the forecast of evidence shows that, although the tanks were already in place when the former owners bought the property, they knew that the tanks were on the property and reasonably should have known that the tanks were leaking if they had performed their duty to inspect the tanks.

Am Jur 2d, Fixtures §§ 42, 43; Pollution Control §§ 570, 575, 576.

10. Corporations § 15 (NCI3d); Waters and Watercourses § 3.2 (NCI3d)— contamination of well water—liability of corporate president

The president of a corporation could be sued in his individual capacity for the torts of nuisance and trespass arising from the contamination of plaintiffs' well water by gasoline leaking from underground storage tanks installed and maintained by the corporation at a convenience store where the president personally participated in the activities surrounding the delivery and sale of gasoline at the store property in that he signed the contract which allowed the corporation to install the tanks on the property; he generally oversaw the conducting of business there by the corporation as well as by another company which serviced the tanks and equipment and performed repairs; and he signed the papers arranging for deliveries of gasoline to the property, supervised the account, and was the person contacted about a loss of gasoline from the tanks. Furthermore, conflicting explanations as to whether the loss of gasoline resulted from a spill or theft were sufficient to withstand a motion for summary judgment as to the president's personal liability for nuisance and trespass.

Am Jur 2d, Corporations §§ 1877, 1878.

11. Corporations § 15 (NCI3d); Waters and Watercourses § 3.2 (NCI3d)— contamination of well water—statutory strict liability—liability of corporate president

Defendant corporate president may be liable to plaintiffs for gasoline contamination of their well water under the statute providing strict liability for any "person having control over oil or other hazardous substances," N.C.G.S. § 143-215.93, where plaintiffs' forecast of evidence tended to show that the contamination was caused by gasoline leaking from underground storage tanks installed by the corporation on property formerly used for a convenience store, and that defendant had "control" over gasoline placed in the tanks in that he arranged the contracts, oversaw the business dealings, and personally participated in the activities surrounding the delivery of gasoline to the convenience store property.

Am Jur 2d, Corporations §§ 1877, 1878.

12. Waters and Watercourses § 3.2 (NCI3d)— gasoline contamination of well water—evidence of three sources—sufficient forecast of causation

Where plaintiffs' forecast of evidence in an action to recover for gasoline contamination of their well water shows that there are three sources of contamination, the forecast is sufficient to survive summary judgment as to each source. Plaintiffs in this case forecast sufficient evidence of causation through an NRCD report that their wells are contaminated by gasoline and that defendants' underground storage tanks are probable sources of the contamination.

Am Jur 2d, Pollution Control §§ 580, 583-585.

13. Waters and Watercourses § 3.2 (NCI3d)— gasoline contamination of well water—forecast of evidence of sources—flow direction of aquifer

The forecast of evidence of two families was sufficient to show that underground storage tanks on one piece of property could be a source of gasoline contamination of their well water where a groundwater contour map of the area prepared by NRCD indicates that the flow direction of the upper aquifer goes from this property directly toward plaintiffs' properties. However, plaintiffs' forecast of evidence was insufficient to support a finding that underground storage tanks on a second piece of property could be a source of the gasoline contamination where it tended to show that their wells are located uphill from the tanks on this property, and there was no forecast of evidence tending to support plaintiffs' theory that there may be a lower aquifer with a different flow direction than the upper aquifer shown on the NRCD map and that this lower aquifer might have brought gasoline to their wells.

Am Jur 2d, Pollution Control §§ 580, 583-585.

14. Rules of Civil Procedure § 15.1 (NCI3d)— denial of motion to amend to add defendants—misapprehension of law—remand for reconsideration

Where the appellate court has held that several of plaintiffs' claims survived summary judgment, and it appears that the trial court denied plaintiffs' motion to amend the complaint to include as defendants certain persons who were already third-party defendants under the mistaken belief that none

of plaintiffs' claims were valid and that granting the amendment would result in unnecessary delay and additional expense to the parties, the court's order will be vacated and the cause remanded for reconsideration of plaintiffs' motion to amend.

Am Jur 2d, Parties §§ 182, 196, 198, 202.

Justice MEYER dissenting.

ON appeal pursuant to N.C.G.S. § 7A-30(2) and discretionary review of the decision of the Court of Appeals, 95 N.C. App. 479, 383 S.E.2d 392 (1989), setting aside orders entered by *Allen, J.*, in the Superior Court, ALAMANCE County, on 8 April 1988 granting summary judgment for defendant Adrian Simmons, on 11 April 1988 granting summary judgment for defendant Loren A. Tompkins, on 12 April 1988 granting summary judgment for the Warren third-party defendants, and on 14 April 1988 entering summary judgment for the estate of George Riggan; and affirming the orders entered by *Allen, J.*, in the Superior Court, ALAMANCE County, on 8 April 1988 granting summary judgment for third-party defendant Alamance Oil Company, on 11 April 1988 denying plaintiffs' motion for partial summary judgment, on 12 April 1988 denying plaintiffs' motion to amend their complaint, and on 12 April 1988 granting summary judgment for Hilda Baxter, individually and as personal representative for Clifton E. Baxter, deceased. Heard in the Supreme Court 10 April 1990.

Smith, Patterson, Follin, Curtis, James, Harkavy & Lawrence, by Byran E. Lessley, for plaintiff and intervenor plaintiff-appellants.

Hatch, Little & Bunn, by Lucy W. Everett and David H. Permar, for defendant-appellants and appellees McLeod Oil Company, Inc., and Loren A. Tompkins.

Glover & Peterson, P.A., by James R. Glover, for defendant-appellant and appellee Estate of George Riggan.

Mark E. Fogel for defendant-appellant and appellee Adrian F. Simmons.

Henson Henson Bayliss & Sue, by Jack B. Bayliss, Jr., for third-party defendant-appellee Alamance Oil Company, Inc.

Carruthers & Roth, P.A., by Kenneth R. Keller and Grady L. Shields, for third-party defendant-appellees Otis A. Warren and Glenda Faye Warren.

FRYE, Justice.

Due to the large number of plaintiffs and defendants in this case, we will begin with a short procedural history to briefly explain the positions of the parties involved in this appeal. The original plaintiffs in this action, the Wilson family, the Hill family, and Ms. White, filed a complaint on 10 July 1986 against McLeod Oil Company, Inc., Loren A. Tompkins, Adrian Simmons, George Riggan, and Amoco Oil Company. This complaint alleged that defendants were liable for the contamination of plaintiffs' wells with gasoline. Defendants filed third-party complaints against Hilda Baxter, individually and as representative of the Estate of Clifton E. Baxter; Alamance Oil Company, Inc. (Alamance); and the Warren family.

On 1 December 1987, the Pagura family filed a motion to intervene as plaintiffs in the action, and this motion was granted in an order entered on 7 March 1988. On 22 March 1988, the original plaintiffs and intervenor plaintiffs filed a motion to amend their complaints to include third-party defendants, the Warrens and Alamance, as defendants. This motion was denied. Plaintiffs and intervenor-plaintiffs voluntarily dismissed their claims against McLeod Oil and Amoco Oil after discovering that these companies had not serviced the property in question. Midway Oil Company (Midway), which is a sister company to McLeod Oil, provided gasoline to some of the tanks, but Midway is not a defendant in this action. Midway is a defendant in a separate action.

Defendants and third-party defendants all filed motions for summary judgment. Plaintiffs and intervenor-plaintiffs filed a motion for partial summary judgment. The trial judge denied plaintiffs' motion for partial summary judgment and granted summary judgment as to all defendants and third-party defendants.

Defendants and third-party plaintiffs McLeod Oil Company and Loren Tompkins gave notice of appeal to the Court of Appeals as to the orders granting summary judgment in favor of Hilda Baxter, Otis and Glenda Warren, and Alamance. Adrian Simmons gave notice of appeal to the Court of Appeals as to summary judgment granted in favor of Alamance and Hilda Baxter. Defendant George Riggan died during the course of this action, and his estate was substituted as a defendant and third-party plaintiff. The Estate of George Riggan appealed the grant of summary judgment in favor of Loren Tompkins, Adrian Simmons, Hilda Baxter, the Warrens, and Alamance. The Riggan Estate later withdrew

its appeal as to the Warrens except for Otis and Glenda Warren. Plaintiffs and intervenor plaintiffs gave notice of appeal as to the summary judgments in favor of Loren Tompkins, Adrian Simmons, George Riggan, Alamance, and Otis and Glenda Warren. Plaintiffs and intervenor-plaintiffs also gave notice of appeal of the denial of their motion to amend their respective complaints.

In its majority opinion, the Court of Appeals held that the trial court correctly entered summary judgment for the third-party defendants. The majority of the panel further held that the trial court correctly entered summary judgment in favor of all defendants as to Ms. White's claims against them. The Court of Appeals reversed the summary judgment granted in favor of defendants Loren Tompkins, Adrian Simmons, and the Estate of George Riggan. *Wilson v. McLeod Oil Co.*, 95 N.C. App. 479, 493, 383 S.E.2d 392, 400 (1989). Judge Wells, dissenting in part, concluded that summary judgment was properly entered for Loren Tompkins and that summary judgment was improperly entered in favor of Otis and Glenda Warren, third-party defendants. *Id.* at 494, 383 S.E.2d at 400 (Wells, J., dissenting). Plaintiffs and intervenor-plaintiffs and defendants Adrian Simmons, McLeod Oil Company, Loren Tompkins, and the Riggan Estate all filed notices of appeal from the decision of the Court of Appeals and petitioned this Court for discretionary review of additional issues. This Court granted all the petitions for discretionary review on 7 December 1989.

This case was before the trial judge on motions for summary judgment filed by defendants and third-party defendants and on plaintiffs' motion to amend the complaint and motion for partial summary judgment. Summary judgment is properly granted only if the evidence before the court indicates that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, 274 S.E.2d 206 (1981). In ruling on defendants' and plaintiffs' motions for summary judgment, the trial judge had before him, in addition to the pleadings, fifteen affidavits, several exhibits, and the depositions of fifteen witnesses. We will review the forecast of evidence as revealed in the materials before the trial judge to determine if the Court of Appeals was correct in reversing in part and affirming in part the orders of summary judgment granted by the trial court in favor of defendants and third-party defendants. We will also consider whether the Court of Appeals erred in affirming the denial of the motion to amend as to the Warrens and Alamance.

The four plaintiff families (the Wilsons, Hills, Ms. White and the Paguras) reside in Alamance County near the intersection of State Road 1735, known as Sandy Cross Road, and State Road 1737, known as Hopedale Road. What was once a convenience store known as the Mini-Mart is located on a tract of land at the southwest corner of this intersection. This tract of land has had several owners since 1965 and is presently owned by the Estate of George Riggan. Clifton and Hilda Baxter purchased this property on 7 May 1965 and owned it until they sold it to Adrian Simmons, one of the original defendants in this action, on 26 January 1976. Ms. Baxter is a third-party defendant in this action both as an individual and as personal representative of her late husband, Clifton Baxter.

At the time the Baxters purchased the property, three underground storage tanks, a five-hundred-and-fifty-gallon tank, a one-thousand-gallon tank, and a two-thousand-gallon tank, were located on the northwest side of the building. In her affidavit, Ms. Baxter asserts that Alamance owned the tanks at the time she and her husband bought the property, and in her deposition, she stated that she thought that Alamance owned the tanks. The Baxters operated an automobile repair garage and body shop in the basement of the building and a grocery store on the main floor of the building. The Baxters sold gasoline from the site until 1974, and they did not purchase any gasoline from Alamance after its last delivery to the site on 5 April 1974. At that time, Alamance removed the pumps, but the three underground storage tanks were not removed. Alamance claims that it did not own the tanks on the Baxter property, rather the tanks were a part of the real property when the Baxters bought it. From the evidence presented with the motion for summary judgment, it appears that these tanks were not used for selling gasoline again after the Baxters stopped selling gasoline from them in 1974. The subsequent owners of the property, Adrian Simmons and George Riggan, did not sell gasoline from these tanks.

When Adrian Simmons purchased this property from the Baxters, he operated a convenience store on the main floor of the building and rented the basement, where the Baxters had operated the garage, to a company which made plastic parts. On 15 March 1976, Simmons entered into an agreement with Midway whereby Midway would install underground storage tanks as well as pumps on the property, and Simmons would lease the tanks and pumps from Midway. Loren Tompkins, one of the original

defendants in this action, signed this contract as Midway's representative. The agreement further provided, "Title to all gasoline so delivered shall remain in SUPPLIER until the gasoline is withdrawn from the underground storage tanks by DEALER." These tanks were located on the southwest side of the building. Simmons sold gasoline from the Midway tanks until 26 January 1979 when he closed the store on the property. Midway removed its underground storage tanks shortly after Simmons stopped selling gasoline.

While Simmons owned the property, Midway suffered a loss of some of the gasoline from the tanks at the Simmons property. In her deposition, Marie Hill, a former employee at Simmons' convenience store and one of the original plaintiffs, related that sometime in the fall of 1978 there was a loss of some one thousand to two thousand gallons of gasoline from one of the underground storage tanks. Ms. Hill related that she had seen some people digging around one of the Midway tanks after she heard about the loss and that the dirt around the tank was wet and smelled of gasoline.

Tompkins testified in his deposition that he remembered the report of an unaccounted for loss of gasoline at the Mini-Mart property, but he did not remember the details. He recalled that they locked the pumps, which entails putting a lock device on the surface opening for the tanks, and did not have any other problem with loss from the tanks after that measure was taken.

At the time this action was filed, this property was owned by George Riggan and is presently owned by his estate, which is still a defendant in this action. George Riggan bought this property in July 1981 from Adrian Simmons. By the time Riggan purchased this property, Midway had already removed its tanks, and the only underground storage tanks remaining on the property were those which had been used when the Baxters were selling gasoline. Riggan never sold gasoline from this site.

The other real estate of concern in this case is called the Warren property. This property is located on the north side of Sandy Cross Road and to the east of the intersection of Sandy Cross Road and Hopedale Road. Alamance, which also provided gasoline to the Baxters, purchased this site in January 1968 and sold it 21 September 1971 to J. R. Warren who died later that year. When Alamance purchased the property, two underground storage tanks were already in place on the property, but Alamance did not sell gasoline from the site while it owned the property.

At his death, J. R. Warren left the property to his six sons, William Thomas Warren, Robert C. Warren, James Paul Warren, Otis A. Warren, Odis H. Warren, and Clyde L. Warren. Five of the brothers conveyed their interest in the property to their brother Odis Warren. Odis Warren leased the property, which included a convenience store, to J. K. Saunders who sold gasoline from the site. This gasoline, supplied to Saunders by Alamance, was stored in the tanks which were already present on the property. Saunders stopped selling gasoline and operating the convenience store in March 1973. Alamance did not deliver gasoline to that site after March 1973. Alamance removed the pumps from the site but did not remove the underground storage tanks. Odis Warren conveyed his interest in the property to Otis and Glenda Warren on 26 September 1974. Otis and Glenda Warren have used the building on the site for storage and have never sold gasoline from that location.

The four plaintiff families all live in the vicinity of the intersection of Sandy Cross Road and Hopedale Road. Ms. White's land is located on the south side of Sandy Cross Road and is adjacent to the property currently owned by the Riggan Estate, which is located at the intersection. The Wilsons' property is located on the west side of Hopedale Road south of the property currently owned by the Riggan Estate. The Wilsons' property is adjacent to both Ms. White's property and the property owned by the Riggan Estate. The Hills' property is located on the south side of Sandy Cross Road directly across from the property currently owned by Otis and Glenda Warren. The Hills' property is located east of the intersection of Sandy Cross Road and Hopedale Road. The Paguras' property is located adjacent to and on the east side of the Hills' property.

In September 1979, plaintiff White contacted the Alamance County Health Department (ACHD) concerning possible contamination of the well water which supplied her home. ACHD took samples from Ms. White's well and found the presence of gasoline-like hydrocarbons in the samples. In November 1980, ACHD contacted the Groundwater Section of the Winston-Salem Regional Office of the Division of Environmental Management of the North Carolina Department of Natural Resources and Community Development (NRCD). The Winston-Salem office began an investigation of the two wells on the site of the property then owned by Adrian Simmons and at the well located on Ms. White's property. All were found to be contaminated, the suspected source being the tanks located

on the then Simmons property. In July 1985, as a result of this investigation, a Notice of Violation of the Oil Pollution and Hazardous Substances Control Act was issued to Adrian Simmons, George Riggan, and Loren Tompkins.

By 1982, the Hills and the Wilsons had begun to notice that their well water was smelling like gasoline. Both families contacted the Winston-Salem office to have their wells tested, but the first report which they received from NRCD informed them that the water contained grease and oil, but it was not contaminated with gasoline. Since the gasoline odor and taste did not go away, both families requested additional testing. The subsequent reports also related that the well water samples taken from these homes did not contain gasoline. The Wilsons and the Hills contacted ACHD which also sampled the well water. In June 1984, ACHD notified the Hills and the Wilsons that their well water contained gasoline.

In September 1986, the Winston-Salem office began another investigation of the area for possible sources of the contamination. This investigation involved the drilling of nine monitor wells on the sites of the property now owned by the Riggan Estate and the property now owned by Otis and Glenda Warren as well as the property owned by Ms. White, the Hills, and the Wilsons. After the wells were dug and the data collected, a Report of Investigation was written which included the following information under the heading "RESULTS":

Groundwater Monitor Wells

> A total BTX (Benzene, Toluene, Xylene)[1] concentration of 5,230 ug/1 (ppb) was present in monitor well B7, located in front of the abandoned store on the O. A. Warren property. A total BTX concentration of 65,600 ug/1 was present in monitor well B10, located on the Mini-Mart property at the site of the McLeod Oil Company USTs. No BTX was detected in the other monitor wells. Slight concentrations of petroleum hydrocarbons were detected in monitor well B2, located behind the Mini-Mart; monitor well B3, located on the Wilson property; monitor well B11, located on the Long property and intended to be the upgradient monitor well; and monitor well B13, located in the front yard of the Hill home. No volatile

1. Benzene, Toluene, and Xylene are liquid aromatic hydrocarbons used as blending agents in gasoline.

organic compounds were detected in monitor well B5, located on the Long property near the intersection of SR 1735 and SR 1737; monitor well B4, located in the front of the Mini-Mart; and monitor well B12, located on the Mini-Mart property at the site of the excavated Alamance Oil Company USTs. Laboratory results are summarized in Table 1, with copies of laboratory analyses provided in Appendix 4.

There are two primary groundwater flow directions at the investigation site: from northwest to southeast (from the Warren property to the Hill property) and from north-northeast to south-southwest (from the mini-mart to the Wilson and White properties) (Figure 5).

The hydraulic gradient is 1309 feet/mile between monitor wells B7 and B13, and 239 feet/mile between B4 and B3.

Water Supply Wells

Fluctuating concentrations of varying gasoline constituents were detected in VOA samples collected from the White, Wilson, and Hill water supply wells in February, 1985, June 1986, and April, 1987. The concentration of volatile organic compounds in these samples varied from 0.06 ppb to 490 ppb in the White well, from 0.14 ppb to 580 ppb in the Wilson well, and from 0.11 ppb to 14 ppb in the Hill well. Specific compounds identified and concentrations detected are summarized in Table 1.

The following information was in the report under the heading "CONCLUSIONS":

The results of this investigation indicate multiple contamination sources for this incident:

1. USTs at the abandoned store on the O.A. Warren property, evidenced by 5,230 ppb BTX in MW-B7;

2. McLeod Oil Company USTs at Simmons Mini-Mart, evidenced by 65,600 ppb BTX in MW-B10;

3. Alamance Oil Company USTs at Simmons Mini-Mart, evidenced by 1,670 ppb BTX in HA-3 and 5,700 ppb BTX in HA-4.

As noted earlier, the tanks which were owned by Midway were taken out of the ground shortly after Midway stopped selling

gasoline to the site on 26 January 1979. The three underground storage tanks on the northwest side of the property presently owned by the Riggan Estate, which we will refer to as the Alamance tanks, were removed in July 1987. Stephen Kay, who works for NRCD, arrived at the site shortly after these tanks were removed. After he arrived, he noticed a gasoline odor near the hole from which the tanks had been removed. In his deposition, he stated, "You could notice it [odor of gasoline] at the land surface, approximately five to ten feet before you got to the edge of the pit."

Kay reported that he used a Hnu photo-ionizer to perform several soil analyses in the hole where the tanks had been. These tests found between three parts per million (ppm) to one hundred seventy-two ppm of volatile organic vapors in the tank excavation pit. The laboratory analyses of these soil samples showed that they contained between 1670 ppm[2] and 6270 ppm of petroleum hydrocarbons. In an attempt to find the edge of the contamination, other pits were dug about fifteen feet away from where the tanks had been removed, but the soil around these pits still contained an odor of gasoline. In his report, Kay further stated that the contamination "is strongly associated with the seasonal high H_2O table." He observed that the seasonal high water table was located approximately six feet below the surface of the ground.

Laboratory analyses of the contents of the tanks which were removed revealed diesel fuel in the five-hundred-and-fifty-gallon tank, leaded gasoline in the two-thousand-gallon tank, and an undetermined gasoline product in the one-thousand-gallon tank. However, as noted earlier in the results of the testing from the monitor wells which were dug at the site, the well which was closest to the location of these particular tanks, monitor well 12, did not show the presence of any BTX at the time it was tested. When the tanks were removed, Kay made a brief visual inspection of the tanks. He found a hole about an inch and a quarter long and about a quarter inch to three-eighths inches wide in the five-hundred-and-fifty-gallon tank. The one-thousand-gallon tank had a hole in it that was approximately an eighth of an inch round. Kay did not observe a hole in the two-thousand-gallon tank.

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2. The Report of Investigation filed by NRCD reports this figure in terms of parts per million in one part of the report and in terms of parts per billion in another part of the report.

The two underground storage tanks were removed from the Warren property on 10 October 1987. Kay was present when these tanks were removed. When he arrived, workers were pumping a liquid from the tanks before they were extracted from the ground, but Kay did not determine what that liquid was. As the tanks were unearthed, Kay noticed a gasoline odor in the soil where the tanks were being removed, but he did not test the soil samples taken from this site. Kay made a visual inspection of these two tanks, and he did not find any visible holes, but he did not inspect the entire tank because the tanks had dirt covering them after they were unearthed. No other pits were dug at this site. As noted earlier in the "Conclusions" found in the report issued by the NRCD, the monitor well at the Warren site was contaminated with BTX.

In addition to being present when the underground storage tanks were unearthed at the two sites, Kay also constructed a groundwater contour map of the area. This map shows the flow direction of the top level of the water table in the area based on the data collected from the monitor wells and the topography of the area.

While plaintiffs and intervenor plaintiffs have presented five issues in their brief on appeal, the issues in general are whether the Court of Appeals was correct in reversing the trial court's grant of summary judgment in favor of Simmons, Tompkins, and the Riggan Estate and in affirming the trial court's grant of summary judgment in favor of the third-party defendants, Alamance, Otis and Glenda Warren, and Hilda Baxter, individually and as the personal representative of her husband's estate. We must also consider whether the Court of Appeals correctly found no abuse of discretion on the part of the trial court in denying plaintiffs' and intervenor plaintiffs' motion to amend their complaints to include Alamance and Otis and Glenda Warren as defendants. In examining these issues, we look to the appropriate statutes of limitations and repose as well as the statutory basis for plaintiffs' and intervenor plaintiffs' complaints, N.C.G.S. § 143-215.93, and all of the plaintiffs' common law claims of negligence, trespass, and nuisance.

As the Court of Appeals correctly noted, the appropriate place to begin is with the issues concerning the statute of limitations and the statute of repose. We conclude that the Court of Appeals

erred in holding that Ms. White's common law claims of trespass and nuisance are barred by the statute of limitations. However, Ms. White's statutory claim based on N.C.G.S. § 143-215.93 is barred by the statute of limitations found in N.C.G.S. § 1-52(2), and her common law negligence claim is barred by the statute of limitations found in N.C.G.S. § 1-52(5).

> The statute of limitations is three years for the following actions:
>
> (2) Upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it.
>
> (3) For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.
>
> . . . .
>
> (5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.
>
> . . . .
>
> (16) Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent to the claimant or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

N.C.G.S. § 1-52 (1983).

[1] Ms. White was told by ACHD in September 1979 that its testing revealed the presence of gasoline in her well water. Ms. White did not bring this action until 10 July 1986 which is more than three years from the time she found out about the contamination. The Court of Appeals held that the presence of gasoline in Ms. White's water was a continuing trespass, the statute of limitations found in § 1-52(3) began to run when she first discovered the gasoline in her water in 1979, and therefore her claim was barred by the running of the statute of limitations. *Wilson v. McLeod Oil Co.*, 95 N.C. App. at 488, 383 S.E.2d at 397. In support of this conclusion, the Court of Appeals cited *Matthieu v. Gas Co.*,

269 N.C. 212, 152 S.E.2d 336 (1967), for the proposition that the presence of the gasoline was a continuing trespass because it has continued patently and without interruption since it was discovered by testing in 1979. *Id.* The Court of Appeals concluded that the presence of the gasoline was not a recurring trespass as defined in *Galloway v. Pace Oil Co.*, 62 N.C. App. 213, 302 S.E.2d 472 (1983); and *Oakley v. Texas Co.*, 236 N.C. 751, 73 S.E.2d 898 (1953).

We first note that *Matthieu* does not involve the issue of when the statute of limitations begins to run in a trespass case because *Matthieu* concerns a cause of action for negligence rather than trespass. *Matthieu*, 269 N.C. 212, 152 S.E.2d 336. We also note that while N.C.G.S. § 1-52(3) uses the term "continuing trespass," the statute does not define this term. *See* N.C.G.S. § 1-52 (1983). Thus, we must look to other case law to ascertain the meaning of the term "continuing trespass."

Oakley, cited by the Court of Appeals as defining recurring trespass, was similar to the present case in that it involved an action for pollution of a well caused by leaking underground storage tanks. *Oakley*, 236 N.C. 751, 73 S.E.2d 898. However, it does not provide much guidance for the present case because in *Oakley* the owner of the tanks dug them up and replaced them on three different occasions in an effort to correct the leak. *Id.* at 752, 73 S.E.2d at 898. This Court concluded that digging up the tanks and replacing them with new leaking tanks constituted "recurring acts of negligence or wrongful conduct on the part of the defendant . . . each causing renewed injury to his property." *Id.* at 753, 73 S.E.2d at 899. *Oakley* did not specifically address the issue of whether the seepage of gasoline from one piece of property to another for a period of years, as in this case, constitutes a continuing trespass.

Since we find no cases in our jurisdiction which deal directly with the question of whether this seepage of gasoline, which may last for an extended period of time causing gasoline to accumulate in the underground water supply of another, is a continuing trespass, we look to the common law of trespass involving similar, but not identical, situations. Several older cases have addressed the issue of whether an action was barred by a statute of limitations for a continuing trespass involving the diversion of water onto the land of another. *See Duval v. Atlantic Coast Line Railroad Co.*, 161 N.C. 448, 77 S.E. 311 (1913); *Roberts v. Baldwin*, 151 N.C.

407, 66 S.E. 346 (1909); and *Spilman v. Navigation Co.*, 74 N.C. 675 (1876). In *Spilman*, for example, defendant had built a canal which deteriorated to the point that water from the canal oozed through the canal banks and over plaintiffs' land. *Spilman*, 74 N.C. at 676. The jury awarded damages to plaintiffs for the three years prior to filing the lawsuit. However, defendant argued that the first flooding occurred more than three years before the action was filed, and therefore the action was barred by the statute of limitations. *Id.* at 678. This Court held that plaintiffs' claims were not barred by the statute of limitations. *Id.* In so holding, the Court gave the following explanation of why the action was not barred:

> The defendant's illustration is worth preserving for its amusing fallacy: "Suppose he had lamed the plaintiff's horse more than three years ago, and he had continued lame ever since; the action would be barred. So, as he first injured the plaintiff's land more than three years age, and it has continued injured ever since, the action is barred." The fallacy is in not drawing the distinction between a *single* act of injury and *continuous* acts. In our case, he flooded the land more than three years ago, it is true; and for that the action is barred; but he has also continued to flood it anew every day within three years, and for that the action lies.

Id. (emphasis in original).

This Court again addressed the issue of whether a trespass on land is barred by the three-year statute of limitations for continuing trespass in *Roberts v. Baldwin*, 151 N.C. 407, 66 S.E. 346. In *Roberts*, defendant constructed a ditch which diverted water on plaintiff's land, and plaintiff brought an action to recover annual damages for the loss of crops and for permanent damages to the land. *Roberts*, 151 N.C. at 408, 66 S.E. at 346. Defendant pleaded the three-year statute of limitations for a continuing trespass as a defense to plaintiff's claim. *Id.* This Court concluded that while the ditch was dug more than three years before plaintiff brought his claim and while the ditch had been continuously there, this was not a continuing trespass because the ditch was on defendant's land and because "[t]he trespass is the pouring down of water upon the plaintiff's land, which comes down at regular periods." *Id.* at 409, 66 S.E. at 346. *Roberts* relied on *Spilman* even though the water in *Spilman* continuously dripped on plaintiff's land and

the water in *Roberts* was a problem only after each rain. This Court held, "[t]he trespass is not a continuing one, for it does not accrue from a completed act done more than three years ago but by floodings repeatedly occurring within that time." *Id.* at 409, 66 S.E. at 347.

Duval v. Atlantic Coast Line Railroad Co., 161 N.C. 448, 77 S.E. 311, stated the general rule for trespass which involves diversion of water onto another's property.

> As a general rule . . . the injury caused by wrongfully causing ponding or diverting water on the land of another, causing damage, is regarded as a renewing rather than a continuing trespass, and, unless sustained in a manner and for sufficient length of time to establish an easement, damages therefor, accruing within three years next before actions brought, can be recovered, though the injury may have taken its rise at a more remote period.

Id. at 449-50, 77 S.E. at 311. *Duval* was relied upon in *Whitfield v. Winslow*, 48 N.C. App. 206, 268 S.E.2d 245, *disc. rev. denied*, 301 N.C. 405, 273 S.E.2d 451 (1980). In *Whitfield* the defendant constructed a dam on his property in 1968 and modified it in 1970, causing the creation of a pond on plaintiff's property. *Whitfield*, 48 N.C. App. at 207, 268 S.E.2d at 246. Plaintiff did not file an action against defendant until 1979, and the issue before the Court of Appeals was whether plaintiff's claim was barred by the statute of limitations in § 1-52(3). *Id.* The Court of Appeals concluded, "[s]ince a portion of plaintiff's property is alleged to have remained submerged even at the commencement of this action, his cause of action is not barred on the face of the pleadings." *Id.* at 208, 268 S.E.2d at 247.

In the present case, tests revealed that Ms. White's well remained contaminated with gasoline as of the filing of this action in 1986. Gasoline was found in the dirt surrounding the Alamance tanks and the tanks on the Warren property when they were unearthed, indicating that the seepage from the Warren property and the property owned by the Riggan Estate had not stopped at the time this suit was filed. The seepage of gasoline into Ms. White's underground water is more like the oozing of water from the deteriorating canal in *Spilman* than the laming of a horse used in *Spilman* as an example of a continuing trespass. The tanks here, like the ditch in *Roberts*, were located on defendants' land, and

the ongoing seepage of gasoline into plaintiff's water supply is the trespass in the present case just as the "pouring down of water upon the plaintiff's land" was the trespass in *Roberts*. *Roberts*, 151 N.C. at 409, 66 S.E. at 346. As with the cases where the diversion of water caused water to accumulate on another's property, the ongoing seepage of the gasoline into Ms. White's water creates, in the language of *Duval*, "a renewing rather than a continuing trespass." *Duval*, 161 N.C. at 450, 77 S.E. at 311.

We conclude that Ms. White has forecast sufficient evidence that there was ongoing seepage onto her property at the time she filed this action, and thus the trespass was not a continuing trespass as that term is used in N.C.G.S. § 1-52(3). Therefore, her cause of action is not barred by the statute of limitations for a continuing trespass found in N.C.G.S. § 1-52(3). However, we note that since she filed this action more than three years after she first discovered the contamination of her well, she may only collect damages for the three years immediately preceding the date she filed this action. *See Duval v. Atlantic Coast Line Railroad Co.*, 161 N.C. at 450, 77 S.E. at 311.

[2] Ms. White's action for nuisance is governed by the same statute of limitations as her action for trespass. *See Anderson v. Waynesville*, 203 N.C. 37, 164 S.E. 583 (1932). "Continuous injuries caused by the maintenance of a nuisance are barred only by the running of the statute against the recurrent trespasses; and mere inaction on the part of the plaintiff will not defeat his right unless it has continued long enough to effect a change of title." *Id.* at 45, 164 S.E. at 587. Thus, as with her action for trespass, Ms. White's action for nuisance is not barred by the three-year statute of limitations.

[3] While Ms. White does have a cause of action for trespass and nuisance, she has waited too long to bring an action under N.C.G.S. § 143-215.93. The "Oil Pollution and Hazardous Substances Control Act of 1978" found in Article 21A of Chapter 143 of our General Statutes does not contain a provision for a statute of limitations within the act itself. *See* N.C.G.S. § 143-215.75 to § 143-215.104 (1987 & Cum. Supp. 1989). Therefore, the three-year statute of limitations found in § 1-52(2) applies to Ms. White and bars her claim against all the defendants under the statute because she waited longer than three years after discovering the contamination to file her action.

Ms. White's negligence claim is likewise barred by the statute of limitations found in § 1-52(5). Once again, she waited more than three years after discovering the contamination to file an action for negligence, and the statute provides that an action must be filed within three years of discovery of the damage. *See Matthieu v. Gas Co.*, 269 N.C. 212, 152 S.E.2d 336.

[4] Defendants argue that the claims of the Hills and the Wilsons are barred by pertinent subsections of N.C.G.S. § 1-52. Defendants base this argument on statements made in the depositions of family members in both families that they stopped using the water from their well before they were officially told that their well water was contaminated. Defendants claim that the statute of limitations should begin to run from the time the families first began to notice that something was wrong with their water. However, the forecast of evidence is clear that they were assured by agents of the state on several occasions prior to May 1984 that their water was not contaminated by gasoline. Furthermore, the Hills and the Wilsons were doing everything that they could do to get NRCD to continue to test their water even though NRCD was telling them that the tests did not indicate gasoline contamination. Dissatisfied with the reports that they were getting from NRCD testing, the families asked ACHD to retest their water, and it was this agency which finally detected the gasoline contamination in 1984. Prior to the determination by the ACHD that their water was contaminated, the Hills and the Wilsons did not know that they had a cause of action for contamination of their water. The Hills and the Wilsons filed this action on 10 July 1986 which was less than three years after they were notified by government agents in May 1984 that test results proved that their water was contaminated with gasoline. We agree with the Court of Appeals that none of the claims of the Hills and Wilsons are barred by the statute of limitations.

[5] As for the claims of the Pagura family, the intervenor-plaintiffs, the forecast of evidence is clear that they did not have any notice of any gasoline contamination until 1985. They filed a motion to intervene in December 1987, clearly within the three-year statute of limitations found in § 1-52. Thus, the claims of the Pagura family are not barred by the statute of limitations.

[6] The Court of Appeals was also correct in dismissing the third-party complaint against Hilda Baxter, individually and in her capacity as personal representative of the estate of her husband, and

the third-party complaint against Alamance. These claims are barred by the statute of repose found in § 1-52(16), which bars an action filed "more than 10 years after the last act or omission of the defendant giving rise to the cause of action." N.C.G.S. § 1-52(16) (1983). The Baxters sold their property to Adrian Simmons on 26 January 1976, and plaintiffs' original complaint was not filed until 10 July 1986, more than ten years after the Baxters last owned the property. Therefore, the last act or omission by the Baxters, based on the forecast of evidence presented on the motion for summary judgment, was when they sold the property on 26 January 1976, more than ten years before plaintiffs filed this action. Thus, the Court of Appeals correctly upheld the lower court's order dismissing the third-party complaint against the Baxters.

[7] Alamance was involved with both pieces of property. Until 5 April 1974, Alamance serviced tanks at the property where the Baxters sold gasoline, and from January 1968 to 21 September 1971 Alamance owned the property referred to as the Warren property. Alamance also provided gasoline for the tanks on the Warren property until March 1973 when the tenant there stopped selling gasoline. Thus, Alamance's last act of providing gasoline to the Mini-Mart property was on 5 April 1974, and Alamance's last act with regard to the Warren property was in March 1973. Both of these dates are more than ten years prior to the filing of this action by the plaintiffs, and, as with the case of the Baxters, the action is therefore barred by the statute of repose found in § 1-52(16).

Third-party plaintiffs argue that Alamance is liable under the strict liability provisions of N.C.G.S. § 143-215.93. That statute provides:

> Any person having control over oil or other hazardous substances which enters the waters of the State in violation of this Part shall be strictly liable, without regard to fault, for damages to persons or property, public or private, caused by such entry, subject to the exceptions enumerated in G.S. 143-215.83(b).

N.C.G.S. § 143-215.93 (1987). "Having control over" is defined in N.C.G.S. § 143-215.77(5) as follows:

> "Having control over oil or other hazardous substances" shall mean, but shall not be limited to, any person, using, transferring, storing, or transporting oil or other hazardous substances

> immediately prior to a discharge of such oil or other hazardous substances onto the land or into the waters of the State and specifically shall include carriers and bailees of such oil or other hazardous substances.

N.C.G.S. § 143-215.77(5) (1987). Assuming *arguendo* that Alamance fits the definition of one "having control over" the gasoline, the forecast of evidence does not show that Alamance had "control" over the gasoline, in the language of the statute, less than ten years prior to the time this action was filed. Thus, Alamance had no "control" over the tanks at the Mini-Mart property after it was sold to Simmons on 26 January 1976, more than ten years before plaintiffs filed this action. The forecast of evidence shows that Alamance had no ownership of the tanks at the Warren property after it sold the property to J. R. Warren on 21 September 1971. Since Alamance had no ownership of the tanks at the Warren property, its last act was its last delivery of gasoline in March 1973, more than ten years before plaintiffs filed this action.

Plaintiffs and intervenor-plaintiffs in this case attempted to amend their complaints to include an action against Alamance. Since we have concluded that any action by the third-party plaintiffs against Alamance is barred by the statute of repose found in N.C.G.S. § 1-52(16), we also conclude that the trial court correctly denied plaintiffs' and intervenor-plaintiffs' motions to amend their original complaints to include Alamance.

Defendants Tompkins, Simmons, the Warrens, and the Estate of Riggan contend that the six-year statute of repose found in N.C.G.S. § 1-50(5) bars plaintiffs' actions against them. This statute provides in part:

> 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.

N.C.G.S. § 1-50(5)a (1983). Defendants claim that the installation of these underground storage tanks constituted improvements to real property and therefore plaintiffs' claims are barred by this statute because the six-year period passed before these claims were filed. Thus, the crucial question is whether the installation of the

tanks constituted improvements to real property within the meaning of § 1-50(5).

In *Little v. National Service Industries, Inc.*, 79 N.C. App. 688, 340 S.E.2d 510 (1986), the Court of Appeals considered whether the redesigning and repair of a chair lift at an amusement park constituted an improvement to real property within the meaning of § 1-50(5). *Id.* at 692, 340 S.E.2d at 512. In doing so, the court had to determine whether the chair lift was considered real or personal property. If the chair lift was considered real property, N.C.G.S. § 1-50(5), the six-year statute of repose would apply, and if the chair lift was considered personal property, the statute would not apply because the improvements to the chair lift would not be considered improvements to real property.

In deciding whether the chair lift was real or personal property, the court looked to the law of fixtures and quoted the definition of a fixture found in 1 Thompson on Real Property, " '[a] fixture has been defined as that which, though originally a moveable chattel, is, by reason of its annexation to land, or association in the use of land, regarded as a part of the land, partaking of its character . . . .' " *Id.* (quoting 1 Thompson on Real Property, 1980 Replacement, § 55 at 179 (1980)). The Court of Appeals then looked at the tests which are useful in resolving the issue of when a chattel attached to the real property becomes real property or remains personal property. The factors to be examined include: "(1) the manner in which the article is attached to the realty; (2) the nature of the article and the purpose for which the article is attached to the realty; and (3) the intention with which the annexation of the article to the realty is made." *Little v. National Service Industries, Inc.*, 79 N.C. App. at 692, 340 S.E.2d at 513 (citations omitted). In addition to these tests, "when additions are made to the land by its owner, it is generally viewed that the purpose of the addition is to enhance the value of the land, and the chattel becomes a part of the land." *Id.* at 692, 340 S.E.2d at 513 (citing *Belvin v. Paper Co.*, 123 N.C. 138, 31 S.E. 655 (1898); *Moore v. Valentine*, 77 N.C. 188 (1877)). "On the other hand, where the improvement is made by one who does not own the fee, such as a tenant, the law is indulgent and, in order to encourage industry, the tenant is permitted 'the greatest latitude' in removing equipment which he has installed upon the ground." *Little v. National Service Industries, Inc.*, 79 N.C. App. at 693, 340 S.E.2d at 513 (citing *Overman v. Sasser*, 107 N.C. 432, 12 S.E. 64 (1890)). When

the rights of a third party, who is unconnected to the land or the original transaction involving the annexation of the chattel, are concerned, the question is how the intent of the parties to the transaction is manifested to the third party through "physical facts and outward appearances." *Little v. National Service Industries, Inc.*, 79 N.C. App. at 693, 340 S.E.2d at 513.

[8] We now consider whether § 1-50(5) applies to Tompkins so as to bar plaintiffs' claims against him. When the Midway tanks at the Mini-Mart property were installed, Simmons, not Tompkins or Midway, owned the property. Thus, the presumption that the tanks were to become a part of the real property did not arise because the tanks were not installed by the owner of the land. The tanks were installed on Simmons' property pursuant to a contract which provided, "It is agreed that the title to all of the above described equipment shall remain in the Seller, and the same shall at all times remain personal property and shall not be or become a part of the real estate, notwithstanding its being affixed to the premises." The contract further provided, "It is understood and agreed that the Seller shall have the absolute rifht (sic), at any time within thirty (30) days after the termination of this contract, to remove the . . . storage tanks."

The intention of the contracting parties was that the tanks would remain personal property. This intention was evidenced by the terms of the contract between the parties, by the actions of the parties while the contract was in effect, and by the actions of the parties at the termination of the contract. During the term of the contract, Simmons, the owner of the property, was not responsible for the repair and maintenance of these tanks even though they were on his property. Furthermore, when the contract terminated, the tanks were removed from the ground and were taken away from Simmons' property. The terms of the contract and the actions of the parties both during the term of the contract and at its termination indicate that the parties never intended for the tanks to become a part of the land so as to pass with the real property; the tanks were to remain personal property. The fact that the tanks were removed from the land at the termination of the contract and were not a part of the real property at the time this action was filed is a manifestation of intent by "physical facts and outward appearances" that the tanks were not a part of the real property. Therefore, the installation of the tanks was not an improvement to real property within the meaning of § 1-50(5),

and the shortened liability period set out in that statute does not apply to Tompkins. Accordingly, the actions against Tompkins are not barred by the six-year statute of repose.

[9] We now consider whether plaintiffs' actions against the Warrens are barred by § 1-50(5). When the Warrens bought the property, the tanks were already in place, having been installed prior to the time Alamance purchased the property in January 1968. However, assuming *arguendo* that the installation of these tanks constituted improvements to real property, § 1-50(5) does not apply to the Warrens due to an exclusion found in § 1-50(5)d. The statute contains the following exclusion:

> The limitation prescribed by this subdivision shall not be asserted as a defense by any person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control either knew, or ought reasonably to have known, of the defective or unsafe condition.

N.C.G.S. § 1-50(5)d (1983).

The exception found in this section is based on the continued duty of owners and tenants to inspect and maintain the premises. *Gillespie v. Coffey*, 86 N.C. App. 97, 356 S.E.2d 376 (1987). Furthermore, § 1-50(5) was not intended to limit the liability of persons in the Warrens' situation because it was "designed to limit the potential liability of architects, contractors, and perhaps others in the construction industry for improvements made to real property." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 427-28, 302 S.E.2d 868, 873 (1983) (interpreting similar language in an earlier version of the statute). This statute limits the liability for certain groups who might otherwise be subject to a longer statute of limitation. *Id.* at 427, 302 S.E.2d at 873. The exception in this statute indicates that the limited period of liability was not intended to apply to those in actual possession or control of the land if they knew or had reason to know of the defect.

The forecast of evidence shows that the Warrens were aware that these underground tanks were on their property. Since there is evidence that the Warrens knew about the tanks and since they have a duty to inspect these tanks to determine if they are leaking,

they "ought reasonably to have known[] of the defective or unsafe condition" if they had inspected the tanks. N.C.G.S. § 1-50(5)d. Therefore, there is a sufficient forecast of evidence as to what the Warrens knew or should have known so that the six-year statute of repose does not bar an action against the Warrens, and the applicable statute of limitations is found in N.C.G.S. § 1-52. We have already determined that § 1-52 does not preclude an action against the Warrens. This same analysis may be applied to both Simmons and the Estate of Riggan as to the Alamance tanks on the Mini-Mart property so that the six-year statute of repose does not apply to them either.

[10] Defendant Tompkins argues that he is not personally liable in this action because he was only acting in his capacity as corporate officer for Midway which is not a party to this action. Tompkins claims that this action is not the proper place to decide his personal liability as a corporate officer since the plaintiffs did not file suit against Midway because they did not find out until later that it was actually Midway which owned the tanks at the Mini-Mart. Tompkins' arguments fail for several reasons. A corporate officer can be held personally liable for torts in which he actively participates. *Minnis v. Sharpe*, 198 N.C. 364, 367, 151 S.E. 735, 737 (1930). "Corporate officers are liable for their torts, although committed when acting officially." *Id.* The forecast of evidence shows that Tompkins personally participated in the activities surrounding the delivery and sale of gasoline at the Mini-Mart property. He signed the contract which allowed Midway to install the tanks on the property; he generally oversaw the conducting of business there by Midway as well as by McLeod, which serviced the tanks and equipment and performed any repairs; and he signed the papers arranging for the deliveries of the gasoline to the property, supervised the account, and was the person contacted about the loss of gasoline from the tanks in 1978. The conflicting explanations for the loss of gasoline, i.e., whether the result of a spill or a theft, were sufficient to create a material question of fact sufficient to withstand a motion for summary judgment as to Tompkins' personal liability for the torts of nuisance and trespass even though he was acting in his corporate capacity. Furthermore, corporate officers "are liable for their torts regardless of whether the corporation is liable." *Id.* The fact that Midway is not in this action does not mean that Tompkins cannot be sued in his individual capacity even though he was president of Midway when the events leading to this action took place.

[11] Tompkins may also be liable to plaintiffs in his individual capacity under N.C.G.S. § 143-215.93 (1987). The statute provides strict liability for any "person having control over oil or other hazardous substances." N.C.G.S. § 143-215.93. *See also Biddix v. Henredon Furniture Industries, Inc.*, 76 N.C. App. 30, 331 S.E.2d 717 (1985). "Person" is defined in the statute to mean "any and all natural persons" as well as businesses. N.C.G.S. § 143-215.77(13) (1987). By defining "person" to include individuals as well as companies, the legislature provided for individual as well as corporate liability for those who had "control" over the source of the contamination. The evidence that Tompkins arranged the contracts, oversaw the business dealings, and personally participated in the activities surrounding the delivery and sale of gasoline to the Mini-Mart property permits a reasonable inference that Tompkins had "control" over the gasoline which was placed in the Midway tanks at the Mini-Mart property. The forecast of evidence concerning Tompkins' personal involvement in providing gasoline to the Mini-Mart property is sufficient to withstand a motion for summary judgment based on his liability under this statute. Thus, the Court of Appeals correctly reversed the trial court's grant of summary judgment in favor of Tompkins.

Defendants all contend that plaintiffs have not shown the proper causation between defendants' actions and the contamination. Each defendant claims that the plaintiffs have not demonstrated that the contamination in their wells was caused specifically by the leaking from that defendant's tanks. Plaintiffs contend that according to *Masten v. Texas Co.*, 194 N.C. 540, 140 S.E. 89 (1927), to survive summary judgment, all they must show is that their wells are contaminated and that defendants' tanks were sources of the contamination. Plaintiffs claim that under this rule, they do not have to show that each defendant was the actual cause of the contamination when there are multiple sources of contamination as in this case.

Masten involved contamination of plaintiff's well from an underground gasoline storage tank installed by defendant. Defendant's tank was the only gasoline tank within half a mile of plaintiff's home. *Masten*, 194 N.C. at 540, 140 S.E. at 89. While the evidence that defendant's tank contaminated plaintiff's well was only circumstantial because all the plaintiff could prove was that his well was contaminated and that defendant's tank was the only possible source of contamination in the vicinity of the well, this Court found

that the evidence was "more than a scintilla, and sufficient to be submitted to a jury." *Id.* at 541, 140 S.E. at 90. In *Broughton v. Standard Oil Company*, 201 N.C. 282, 159 S.E. 321 (1931), this Court discussed the requirements set out in *Masten* and stated, "In the action for the pollution of his well, all that the plaintiff was required to allege and prove was that his well was polluted by gasoline from the tank owned and maintained by the defendant." *Broughton v. Standard Oil Company*, 201 N.C. at 288, 159 S.E. at 324.

[12] While *Masten* did concern only one possible source of contamination, we hold that where, as here, plaintiffs' forecast of evidence is that there are three sources of contamination, the forecast is sufficient to survive summary judgment as to each source. In holding that plaintiffs had failed to show any causation between the acts of the Warrens and the contamination of plaintiffs' wells, our Court of Appeals cited *Dedham Water Co. v. Cumberland Farms, Inc.*, 689 F. Supp. 1223 (D. Mass. 1988). We note that after our Court of Appeals' decision was filed, the First Circuit Court of Appeals overruled the federal district court decision. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146 (1st Cir. 1989). While *Dedham* deals with interpretation of a different statute, it is a case which involved more than one possible source of contamination. Quoting a district court case affirmed by the Third Circuit, the First Circuit explained in *Dedham* that it would be doubtful that the plaintiff could prove that the contamination came directly from one of the two potential sources of contamination. "To impose such a requirement might permit the owners and operators of both facilities to avoid financial responsibility for the cleanup, and would thus eviscerate [the statute]." *Id.* at 1154 (quoting *Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269, 1282 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988). The First Circuit vacated the district court's judgment in favor of the defendant and awarded plaintiff a new trial as to liability and damages under the statute in question. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d at 1157.

We conclude that plaintiffs have forecast sufficient evidence of causation through the NRCD report that their wells are contaminated and that defendants' tanks were probable sources of the contamination.

[13] Defendants all contend that they are not responsible for any contamination in the Hills' and Paguras' wells because the forecast

of evidence indicates that these wells are located uphill from all of the underground tanks. The Hills contend that the map of the topography of the area indicates that the flow direction of the upper aquifer goes from the Warren property directly toward the Hill property. The flow directions on this map did not include the Pagura property because the map was drawn before the contamination in the Paguras' well was discovered. The Hills and the Paguras also contend that even though their property is uphill from the Mini-Mart property, there could be a lower aquifer below the upper aquifer with a different flow direction from that of the upper aquifer whose flow direction has been pinpointed by the NRCD studies. These plaintiffs claim that the depositions of the experts do not foreclose the possibility of the existence of this lower aquifer whose flow direction might bring the contamination to the Hill and Pagura properties from the Mini-Mart property which is a greater distance away from the Hill and Pagura properties than the Warren property and which is "downhill" from the Hill and Pagura properties.

We agree that the flow direction from the Warren property to the Hill property suggests that the Warren tanks are a source of the contamination for the Hill and Pagura wells. Even though the flow lines were not completed on the map to include the Pagura property, there is enough circumstantial evidence, when location is considered, to constitute a sufficient forecast of evidence that the Warren tanks were a source of contamination for the Pagura well. The evidence is clear that the Pagura well is contaminated and that the Pagura property, which is adjacent to the Hill property, is not located at a higher elevation than the Hill property. The flow direction indicated on the map is also a sufficient forecast of evidence to indicate that the Warren tanks could also be a source of the contamination in the Wilson and White wells. However, plaintiffs have not presented a sufficient forecast of evidence to support their theory of the lower aquifer which would have made the Mini-Mart tanks a source of contamination for the Hill and Pagura wells.

In her deposition, Brenda Smith, an employee with the NRCD group which prepared the data on the possible sources of contamination and the flow directions of the underground aquifer, was asked, "as you go down the water table, does the water flow in different directions?" Her response was, "[i]t's possible." The questioning continued:

Q. Therefore, if the contamination from any of the sources that you've identified had reached a depth lower than the ten feet that you're testing—

A. Right.

Q. —your flow directions may not be accurate; is that what you're saying?

A. No that's not what I'm saying.

Q. The flow directions at the depth where the contamination is may not correspond to the flow direction you have on that map?

A. That's possible—yes.

Without more data in support of it, the answer, "that's possible," when asked if the flow direction could be different below the level where the NRCD had tested, is a slender reed upon which to base causation. It is not a sufficient forecast of evidence to survive the summary judgment motion by Tompkins, Simmons, and the Riggan Estate as to the Hills and the Paguras, especially in view of Ms. Smith's deposition testimony that her office would have to dig more monitor wells and perform further tests to be able to answer questions of causation beyond what was in the NRCD report. Further deposition testimony indicated that NRCD had no plans to dig additional monitor wells or to perform further tests. To allow a jury to consider the question of whether there is a lower aquifer flowing in a different direction, when the only expert testifying on this matter refuses to answer that very question based on the data collected, is improper. Since there was no forecast of evidence tending to show the existence of a lower aquifer flowing in a different direction, summary judgment for Tompkins, Simmons, and the Riggan Estate, as against the Hills and the Paguras, was properly granted by the trial court, and the Court of Appeals' holding to the contrary is reversed.

[14] The Court of Appeals held that the trial judge's denial of plaintiffs' motion to amend their complaint to include as defendants the Warrens, who were already third-party defendants, was not an abuse of discretion. *Wilson v. McLeod Oil Co.*, 95 N.C. App. at 491, 383 S.E.2d at 399. Plaintiffs contend that the Court of Appeals erred in upholding the trial court's denial of their motion to amend their complaint. As the Court of Appeals correctly noted,

"[a] motion to amend [made after responsive pleadings have been filed] is addressed to the sound discretion of the trial court and should be reversed only upon a finding of abuse of discretion." *Wilson v. McLeod Oil Co.*, 95 N.C. App. at 491, 383 S.E.2d at 399 (citing *Carolina Garage Co. v. Holston*, 40 N.C. App. 400, 253 S.E.2d 7 (1979)). After hearing various motions filed by the numerous parties in this case on 29 March 1988, the trial judge notified counsel by letter dated 4 April 1988 of his rulings on all of the motions, including the motion to amend the complaint. The effect of the judge's rulings was to grant summary judgment to all defendants, thus disposing of the case in the superior court. We have now held that several of plaintiffs' claims survived summary judgment. We believe that the trial court denied the motion to amend as to the Warren third-party defendants under the mistaken belief that none of plaintiffs' claims were valid and that granting the amendment would indeed result in unnecessary delay and additional expense to the parties. Since the judge's order was signed under a misapprehension of the law, we believe the better approach is to vacate the order and remand for reconsideration of plaintiffs' motion to amend as to the Warren third-party defendants in light of our opinion in this case relating to the validity of the various causes of action.

For the reasons stated above, the Court of Appeals' holdings that (1) Ms. White's trespass and nuisance claims are barred by the statute of limitations is reversed; (2) Ms. White's negligence and statutory claims are barred by the statute of limitations is affirmed; (3) the trial judge did not abuse his discretion in denying plaintiffs' motion to amend their complaint to include the Warrens is modified as stated herein; (4) there was no abuse of discretion by the trial judge in denying plaintiffs' motion to amend their complaint to include Alamance is affirmed; (5) summary judgment was properly granted in favor of Alamance is affirmed; (6) summary judgment was improperly granted in favor of Tompkins, Simmons, and the Estate of George Riggan as to the Hills and the Paguras is reversed but is affirmed as to the Wilsons; (7) summary judgment was properly granted in favor of the Warrens as against Tompkins, Simmons, and the Estate of George Riggan is reversed; and (8) summary judgment was properly granted in favor of Hilda Baxter, individually and as personal representative of her husband's estate, is affirmed.

The decision of the Court of Appeals is affirmed in part, reversed in part, modified in part, and remanded to that court for

further remand to the Superior Court, Alamance County, with directions to vacate that portion of the order of the trial court dated 4 April 1988 denying plaintiffs' and intervenor-plaintiffs' motion to amend complaint to include the Warren third-party defendants as defendants, and for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, modified in part, and remanded.

Justice MEYER dissenting.

First, I cannot agree with the majority that summary judgment was improperly entered for the defendant Loren A. Tompkins. Even if, as between the parties, the tanks were to be considered as personal property, they were nevertheless "an improvement to real property" within the meaning of N.C.G.S. § 1-50(5), the six-year statute of repose, and any action against Tompkins is barred by that statute. The applicability of the statute is not determined by whether the tanks became "fixtures" or remained, for purposes of contract, personal property. Statutes of repose operate inexorably without regard to the intent or agreement of the parties. Tompkins' last action with regard to the tanks in question occurred, and indeed those tanks had been removed from the property, more than six years before this action was begun.

More importantly, I believe the majority has erred in its reliance on *Masten v. Texas Co.*, 194 N.C. 540, 140 S.E. 89 (1927), and *Broughton v. Standard Oil Company*, 201 N.C. 282, 159 S.E. 321 (1931). The holding in both of those cases was that the plaintiff must "allege *and prove* that his well was polluted by gasoline from the tank *owned and maintained by the defendant*." *Broughton*, 201 N.C. at 288, 159 S.E. at 324 (emphasis added). Plaintiffs' forecast of evidence fails in this respect. The NRCD report did not fix the source of the contamination. Any fair reading of that report reveals that it merely identifies the three tank locations in question as "potential" sources.

This is not a case where, as in *Masten*, there is only one possible source of the contamination. Plaintiffs' forecast of evidence produces only speculation that one or more of three "potential" sources was the cause of the contamination.

The majority also errs in its reliance on *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146 (1st Cir. 1989). That case, as the majority concedes, involved an entirely different statute. It, in fact, involved an entirely different concept of liability. There, the plaintiff was attempting to recover "response" costs under a federal statute under which it was not necessary in order to support a recovery that the contamination actually reach the plaintiff's land. That is not the case under the statutory and common law theories upon which these plaintiffs are proceeding.

Like Judge Wells in his dissent below, I wish to emphasize that, in my opinion:

> (1) there remain issues of fact as to the identity of the actors in the alleged escape or leakage of oil or gasoline, and (2) that only those actors responsible for escape or leakage may be liable under the theories advanced in this case. I do not accept the possible inference that a subsequent owner of facilities from which a *previous* escape or leakage has occurred may be liable for continued seepage resulting from the previous escape or leakage over which he had no control.

Wilson v. McLeod Oil Co., 95 N.C. App. 479, 494, 383 S.E.2d 392, 400 (1989) (Wells, J., dissenting).

FRANK O. ALFORD, WILKIE P. BEATTY, AS EXECUTRIX OF THE ESTATE OF PAUL B. BEATTY, CARSON INSURANCE AGENCY, INC., PATRICIA A. EDLUND, STANLEY EDLUND, JAMES M. GILFILLIN, LARRY G. GOLDBERG, RAQUEL T. GOLDBERG, BETTY F. RHYNE, ROBERT R. RHYNE AND NORMAN V. SWENSON, DERIVATIVELY IN THE RIGHT OF ALL AMERICAN ASSURANCE COMPANY, PLAINTIFFS v. ROBERT T. SHAW, AMERICAN COMMONWEALTH FINANCIAL CORPORATION, GREAT COMMONWEALTH LIFE INSURANCE COMPANY, ICH CORPORATION, CHARLES E. BLACK, S. J. CAMPISI, ROY J. BROUSSARD, TRUMAN D. COX, FRED M. HURST, C. FRED RICE, AND PEGGY P. WILEY, DEFENDANTS, AND ALL AMERICAN ASSURANCE COMPANY, BENEFICIAL PARTY

No. 545PA89

(Filed 5 December 1990)

1. **Pleadings § 8 (NCI3d); Appeal and Error § 147 (NCI4th)— shareholders' derivative action—failure to verify complaint—raised for first time on appeal**

Plaintiffs' failure to verify the complaint did not divest the trial court of subject matter jurisdiction in a shareholders' derivative action where defendants raise the issue for the first time during this appeal. Plaintiffs' failure to comply with the verification requirement in this case was not a jurisdictional defect because N.C.G.S. § 1A-1, Rule 23(b) addresses the procedure and not the substantive elements of a shareholders' derivative suit. Defendants waived their objection by failing to timely raise the issue until the fourth time the case has been heard in the appellate division.

Am Jur 2d, Appeal and Error §§ 593, 600; Pleading §§ 341, 349, 391.

2. **Corporations § 6 (NCI3d)— shareholders' derivative action—subsequent merger—no loss of standing**

Plaintiffs in a shareholders' derivative action did not lose their standing after a corporate merger in which all of their shares in All American Assurance Company (AAA), on whose behalf the suit was instituted, were converted into shares of defendant ICH Corporation. There is no requirement in N.C.G.S. § 55-55 (1982) that a shareholder bringing suit remain a shareowner after the time of the transaction complained of or after suit is filed. Even if there was a continuous ownership requirement under the statute, if in the course of a

shareholders' derivative suit defendants' actions terminate plaintiffs' shareholder status and these actions are closely related to the grounds for the derivative suit, plaintiffs would retain standing to continue prosecution of the suit.

Am Jur 2d, Corporations §§ 2328, 2341, 2401.

3. Corporations § 6 (NCI3d); Rules of Civil Procedure § 56.5 (NCI3d)— shareholders' derivative action—summary judgment—findings of fact

A summary judgment in a shareholders' derivative action complied with the mandate of N.C.G.S. § 55-55(c) (1982) despite the court's findings of fact.

Am Jur 2d, Corporations § 2464.

4. Corporations § 6 (NCI3d)— shareholders' derivative action—settlement—procedure

The trial court is required by N.C.G.S. § 55-55(c) (1982) to approve or disapprove any proposed discontinuance, settlement, dismissal or compromise of the suit in a shareholders' derivative action. The trial court is to first decide whether the proposal for disposition of the case was reached by qualified, independent, disinterested decision-makers who in good faith thoroughly investigated and evaluated the claims in the complaint. The trial judge may allow discovery and hear evidence, and the burden is on the movant, usually the corporation, to prove the independence, disinterestedness, and appropriate qualifications of the committee and the reasonableness of its investigation. The trial court must then exercise its own independent business judgment as to whether the case is to be discontinued, dismissed, compromised, or settled. The court is to balance any legitimate corporate claims as brought forward in the suit against the corporation's best interests as determined in part by the committee and must consider such ethical, commercial, promotional, public relations, and physical factors as may be involved in a given situation. The corporation as the party seeking final disposition of the case under N.C.G.S. § 55-55(c) (1982) has a burden of going forward with evidence and showing that continuing the action is more likely than not to be against the interests of the corporation. The

shareholders initiating the suit are also entitled to present evidence and arguments as to their contentions.

Am Jur 2d, Corporations §§ 2452-2454, 2456.

5. **Bills of Discovery § 1 (NCI3d); Corporations § 6 (NCI3d)— shareholders' derivative action—remand—discovery**

Discovery was correctly permitted upon remand of a shareholders' derivative action where an order was entered granting summary judgment for some defendants and partial summary judgment for All American Assurance Company (AAA) on 14 November 1983; that order was vacated by the Court of Appeals; the trial court on remand permitted discovery, conducted a lengthy hearing, and entered a judgment approving a proposed settlement of several matters, entered judgment for defendants on certain other issues, and dismissed the case; and defendants contend that the trial court erroneously permitted discovery on the step-one issues under the *Alford* analysis in 320 N.C. 465 because plaintiffs failed to contest those issues on the prior appeal. Although the primary focus of the court's opinion was to reject the approach of *Auerbach v. Bennett*, 393 N.E.2d 994, and to explain a two-step approach, the opinion also acknowledged that a stay on discovery and the erroneous application of the *Auerbach* approach had resulted in an incomplete record and that discovery would be permitted on remand. It was noted that the Court of Appeals' decision vacated the summary judgment, which had the effect of rendering the judgment null and void so that no part of it could thereafter be the law of the case.

Am Jur 2d, Appeal and Error §§ 744, 746; Corporations § 2453.

6. **Corporations § 6 (NCI3d)— shareholders' derivative action—written statement of issues required—burden of proof not shifted—no right to jury trial**

The trial court's requirement that plaintiffs file a written statement of the issues they plan to contest at a hearing on the disposition of a shareholders' derivative action was not error. In the exercise of his authority to control the proceedings under N.C.G.S. § 55-55(c) (1982), the trial judge proceeded properly in requiring a definition of the contested issues. Moreover, the hearing was appropriately held by the trial court sitting

without a jury. A litigant has no right to the determination of factual issues by a jury during proceedings occurring pursuant to N.C.G.S. § 55-55(c) (1982) and there is nothing in the record to indicate that the trial court shifted any burdens of proof to plaintiffs during this hearing.

Am Jur 2d, Corporations §§ 2373, 2465.

7. **Rules of Civil Procedure § 56.5 (NCI3d); Corporations § 6 (NCI3d)— shareholders' derivative action—summary judgment—no error**

The trial court appropriately resolved contested issues of fact during a hearing on the disposition of a shareholders' derivative action. Although it was erroneous to have entered summary judgment with respect to step one of the Alford analysis, the trial court's findings were supported by competent evidence, are thus conclusive on appeal, and the trial court properly denied plaintiffs' motion to suppress the committee report. Plaintiffs stated at the hearing that they agreed to the trial court's making findings of fact and conclusions of law with respect to step two of the Alford analysis and cannot now complain on appeal.

Am Jur 2d, Corporations § 2464.

ON discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of a summary judgment entered by *Lewis, J.*, on 19 June 1989 in Superior Court, MECKLENBURG County. Heard in the Supreme Court on 17 May 1990.

Cansler, Lockhart, Burtis & Evans, P.A., by Thomas Ashe Lockhart; Blakeney, Alexander & Machen, by J. W. Alexander, Jr., for the plaintiff-appellants, cross-appellees.

Casstevens, Hanner, Gunter & Gordon, P.A., by Nelson M. Casstevens, Jr. and Teresa L. Conrad, for defendant-appellees, cross-appellants, Shaw and Rice.

Womble, Carlyle, Sandridge & Rice, by H. Grady Barnhill, Jr., Robert E. Fields, III, and Anderson D. Cromer; Johnson & Gibbs, by Stuart M. Reynolds, Jr., for defendant-appellees, cross-appellants, ICH Corporation, Great Commonwealth Life Insurance Company and American Commonwealth Financial Corporation.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Daniel W. Fouts and Peter G. Pappas, for defendant-appellees, cross-appellants, Black, Campisi, Broussard, Cox, Hurst and Wiley.

Petree, Stockton & Robinson, by Ralph M. Stockton, Jr. and Daniel R. Taylor, Jr., for All American Assurance Company, defendant-appellant.

MARTIN, Justice.

This case is before the Court following proceedings which occurred after the remand ordered in the opinion reported in 320 N.C. 465, 358 S.E.2d 323 (1987). A summary of the proceedings occurring before remand may be found in that opinion. Upon remand the trial court permitted discovery and then conducted a lengthy hearing pursuant to N.C.G.S. § 55-55(c) (1982) to receive evidence and hear arguments on various motions of the parties regarding disposition of this shareholders' derivative action. After completion of the hearing, the trial judge entered a judgment in which he approved a proposed settlement of several matters which were raised by plaintiffs' complaint, entered judgment for defendants on certain other issues, and dismissed the case. Additional facts necessary for an understanding of the issues decided will be discussed below.

I. *Jurisdictional Issues.*

A number of defendants in this case argue that the trial court erred by failing to dismiss the case for lack of subject matter jurisdiction. *See* N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(h)(3) (1983). Because they are logically prior to the matters brought forward for review by plaintiffs, we address these jurisdictional issues first.

A. *Lack of verification of the complaint.*

[1] Plaintiffs filed an unverified complaint initiating this suit on 4 November 1982. On 17 November 1982, one of the plaintiffs signed and filed with the clerk of superior court a paper intended to verify the complaint. This paper writing was notarized by Bruce M. Simpson, who was at that time one of the attorneys of record in the case. Defendants argue first that in order for the trial court to have had subject matter jurisdiction over this shareholders' derivative suit the complaint was required to be verified when originally filed, and that it is not sufficient to verify the complaint after it is filed. *See* N.C.G.S. § 1A-1, Rule 23(b) (1983) (requiring

complaint initiating shareholder derivative action to be verified by oath); *Boyd v. Boyd*, 61 N.C. App. 334, 300 S.E.2d 569 (1983). Secondly and alternatively, defendants argue that if verification of a pleading is sufficient to vest subject matter jurisdiction in the trial court *nunc pro tunc* to the date the original pleading was filed, the purported verification in the instant case was improperly executed and thus void because it was notarized by an attorney of record in the case. *See* N.C.G.S. § 47-8 (1984) ("No practicing attorney-at-law has power to administer any oaths to a person to any paper-writing to be used in any legal proceedings in which he appears as attorney."). *Cf.* N.C.G.S. § 1A-1, Rule 11(b) (1983) (pleadings which must be verified "shall be [verified] by affidavit . . . ."); *Ogburn v. Sterchi Brothers Stores, Inc.*, 218 N.C. 507, 508, 11 S.E.2d 460, 461 (1940) (an affidavit must be "taken before an officer having authority to administer such oath"). Therefore, defendants argue, because the complaint has not been properly verified the trial court never obtained subject matter jurisdiction at any point.

Plaintiffs respond to defendants' contentions by arguing that because defendants raised the verification issue for the first time on 9 January 1990 in the appellate briefs now before this Court, over seven years after the complaint was filed, and after many years of active litigation of this suit, defendants have waived their right to complain about verification. *See Sisk v. Perkins*, 264 N.C. 43, 46-47, 140 S.E.2d 753, 755-56 (1965).

We agree with defendants that the complaint in this case has not been properly verified. However, we hold that because N.C.G.S. § 1A-1, Rule 23(b) addresses the procedure to be followed in, and not the substantive elements of, a shareholder's derivative suit, plaintiffs' failure to comply with the verification requirement at the time the complaint was filed is not a jurisdictional defect. *See Venner v. Great Northern Railway*, 209 U.S. 24, 34-35, 52 L. Ed. 666, 669-70 (1908); *Weisfeld v. Spartans Industries, Inc.*, 58 F.R.D. 570 (S.D.N.Y. 1972). In the present case, the defendants have waived their objection by failing to raise the issue of verification until this, the fourth time the case has been heard in the appellate division.

Both the North Carolina Rules of Civil Procedure and the Federal Rules of Civil Procedure contain a requirement that the complaint initiating a shareholder derivative action be verified under

oath. N.C.G.S. § 1A-1, Rule 23(b); Fed. R. Civ. P. 23.1 (1981). Because the present federal rule and its predecessors (which also contained a verification requirement) have been interpreted and discussed widely, we turn to federal cases to elucidate the purpose behind this requirement. We emphasize that certain aspects of our rule and the procedures in our State governing derivative suits may differ from the federal approach. However, insofar as the purposes of certain of the federal and state rules are congruent, we find cases explaining federal rules helpful.

> The verification requirement at issue here:
>
> [u]nquestionably . . . was originally adopted and has served since in part as a means to discourage 'strike suits' by people who might be interested in getting quick dollars by making charges without regard to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them. On the other hand, however, derivative suits have played a rather important role in protecting shareholders of corporations from the designing schemes and wiles of insiders who are willing to betray their company's interests in order to enrich themselves.

Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 371, 15 L. Ed. 2d 807, 812-13 (1966). *Accord, e.g., Halsted Video, Inc. v. Guttillo*, 115 F.R.D. 177 (N.D. Ill. 1987) (adding that the requirement is also to insure that the plaintiff has investigated the charges and found them to be of substance). Because the rule containing the verification requirement is not jurisdictional in nature, *see Venner v. Great Northern Railway*, 209 U.S. 24, 34-35, 52 L. Ed. 2d 666, 669-70; *Weisfeld v. Spartans Industries, Inc.*, 58 F.R.D. 570, where the purposes behind the rule have been fulfilled by the time the objection to a defective or absent verification is lodged, dismissal or summary judgment in favor of defendants is not appropriate. *E.g., Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 15 L. Ed. 2d 807; *Weisfeld v. Spartans Industries, Inc.*, 58 F.R.D. 570; *Deaktor v. Fox Grocery Company*, 332 F. Supp. 536, 541 (W.D. Pa. 1971), *aff'd*, 475 F.2d 1112 (3d Cir. 1973), *cert. denied*, 414 U.S. 867, 38 L. Ed. 2d 86 (1973). In the instant case the vigor with which both plaintiffs and defendants have litigated this case over the span of seven years, and the massive amount of discovery conducted—even before defendants have yet to file answers—are indications that the purposes behind the verification rule have been met.

Thus, we hold that in this case plaintiffs' failure to properly verify the complaint initiating this shareholder derivative action is merely a procedural defect which ordinarily would be curable by amendment to the pleadings. *E.g., Halsted Video, Inc. v. Guttillo*, 115 F.R.D. 177. However, in the instant case because defendants raised this issue for the first time during this appeal, addressing it as a jurisdictional challenge, plaintiffs were apparently unaware until briefs were filed in this Court in January 1990 of the problems with the purported verification paper filed 17 November 1982. Thus, they have had no opportunity since learning of defendants' challenge to move to amend the complaint in the trial court. Were we remanding the case to the trial division it would be appropriate for plaintiffs to move to amend to verify the complaint properly. *See, e.g., Weisfeld v. Spartans Industries, Inc.*, 58 F.R.D. 570. In light of our disposition of the case on this appeal, however, this is unnecessary. It suffices to say that plaintiffs' failure to verify the complaint did not divest the trial court of subject matter jurisdiction over this matter.

B. *Plaintiffs' alleged loss of standing during litigation of this suit.*[1]

[2] A number of defendants also argue that the trial court lost subject matter jurisdiction over this derivative suit when, pursuant to a corporate merger occurring after the suit was filed, all of the plaintiffs' shares in All American Assurance Company ("AAA"), the corporation on whose behalf this suit was initiated, were converted into shares of defendant ICH Corporation. Because none of the plaintiffs remained shareholders of AAA, defendants argue, the plaintiffs lost their standing to sue derivatively on behalf of AAA once the merger was consummated.[2] Thus, as none of the

1. We note that the stipulation by some of the defendants not to *raise* the issue of standing is not sufficient to confer subject matter jurisdiction. Parties cannot stipulate to give a court subject matter jurisdiction when such jurisdiction does not exist. *E.g., Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953).

2. Several of the defendants go on to argue that plaintiffs have no standing to sue them particularly. However, once we determine that plaintiffs retain standing to bring suit in the name of AAA, the question is not raised again with respect to each defendant. Once the trial court is determined to have subject matter jurisdiction over the case, challenges as to the status of plaintiffs' claims against a given party would properly be evaluated pursuant to motions under Rules 12, 56 and other rules of civil procedure. *Cf. Texfi Industries v. City of Fayetteville*, 44 N.C. App. 268, 269-70, 261 S.E.2d 21, 23 (1979), *aff'd on other grounds*, 301 N.C. 1, 269 S.E.2d 142 (1980) ("The gist of standing is whether there is a justiciable con-

plaintiffs retained standing, defendants continue, the trial judge's jurisdiction to decide the case was also taken away.

We reject defendants' arguments. Plaintiffs filed their complaint pursuant to N.C.G.S. § 55-55, the only provision of the North Carolina corporation statutes then in effect that spoke to the question of standing to maintain a derivative suit. Section (a) of this statute provides:

> (a) An action may be brought in this State in the right of any domestic or foreign corporation by a shareholder or holder of a beneficial interest in shares of such corporation; provided that the plaintiff or plaintiffs must allege, and it must appear, that each plaintiff was a shareholder or holder of a beneficial interest in such shares at the time of the transaction of which he complains or that his shares or beneficial interest in such shares devolved upon him by operation of law from a person who was a shareholder or holder of a beneficial interest in such shares at such time.

N.C.G.S. § 55-55(a) (1982). Defendants' argument assumes that a plaintiff who has filed suit pursuant to this statute is required to retain his shares throughout the course of litigation. However, there is no requirement in N.C.G.S. § 55-55 that a shareholder bringing suit remain a share owner "after" the time of the transaction complained about or "after" suit was filed.[3] Reading this statute in a reasonable light and giving it an ordinary meaning, we find there is no requirement of continuing share ownership in order for an individual who is a shareholder at the time of the transaction about which he is complaining and at the time the action is filed, to proceed with a derivative action.[4] *Cf. Gaillard v. Natomas Co.*, 173 Cal. App. 3d 410, 219 Cal. Rptr. 74 (1985), *rev. den.* (1986). Had the legislature intended to include such a requirement in the corporate statutes it would have done

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troversy being litigated among adverse parties with substantial interest affected so as to bring forth a clear articulation of the issues before the court.").

3. This statute was amended effective 1 July 1990 and is now codified as N.C.G.S. § 55-7-40 (1990). We note that the new statute, while elaborating some of the procedures set forth in N.C.G.S. § 55-55, does not contain a continuing share ownership requirement.

4. To the extent the Court of Appeals' opinion in *Ashburn v. Wicker*, 95 N.C. App. 162, 381 S.E.2d 876 (1989), conflicts with the instant opinion the *Ashburn* case is no longer authoritative.

so. *Cf., e.g., Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987) (the statutory inclusion of certain things implies the exclusion of others). This Court declines defendants' invitation to engraft a continuous share ownership requirement onto the statute. As one court stated when interpreting a California statute with similar language to N.C.G.S. § 55-55(a):

> To [read a continuous ownership requirement into the statute] would create an anomalous result. We could well have a situation where a shareholder files a derivative action, navigates laboriously through the pleading stage, undertakes extensive discovery, incurs sizeable monetary obligations, and then, after an elapse of several years, is precluded from proceeding further because his or her corporation has just merged with another. It could not have been the intention of the Legislature that the adjudication of an alleged wrong be concluded in this manner.

Gaillard v. Natomas Co., 173 Cal. App. 3d 410, 414, 219 Cal. Rptr. 74, 76. *See also, e.g., Miller v. Steinbach*, 268 F. Supp. 255, 267 (S.D.N.Y. 1967).

Moreover, although many jurisdictions do require plaintiffs who initiated a derivative suit to maintain continuous share ownership during the course of litigation, an exception to this general rule allows shareholders who initiate a derivative suit to retain standing when their share ownership is terminated through an allegedly fraudulent merger or one occurring as a result of breaches of fiduciary duties by those in control of the corporation. *See, e.g., Lewis v. Anderson*, 477 A.2d 1040, 1046, n. 10 (1984); *Keyser v. Commonwealth Nat. Financial Corp.*, 120 F.R.D. 489 (M.D. Pa. 1988); *Eastwood v. National Bank of Commerce, Altus, Okl.*, 673 F. Supp. 1068, 1077 (W.D. Okl. 1987); *Arnett v. Gerber Scientific, Inc.*, 566 F. Supp. 1270 (S.D.N.Y. 1983); Balotti and Finkelstein, *Del. Law of Corps. & Bus. Orgs.*, § 13.7 (1988 and Supp. 1989). *See generally* Kane and Wadsworth, *The "Entry Requirements" for Shareholder Derivative Litigation*, 25 Tort & Ins. L.J. 880, 884-85 (1990); Note, *The Continuous Ownership Requirement: A Bar to Meritorious Shareholder Derivative Actions?*, 43 Wash. & Lee L. Rev. 1013 (1986); Note, *Survival of Rights of Action After Corporate Merger*, 78 Mich. L. Rev. 250, 258-59 & n. 44 (1979). The facts of the instant case also fit within this equitable exception to the continuous ownership principle.

Here, plaintiffs learned of plans for the merger at issue before filing the instant suit. In their complaint plaintiffs alleged that the intended merger was one of numerous unfair or fraudulent acts by defendants resulting, or that would result, in damage to AAA and its shareholders. Upon filing their complaint plaintiffs also obtained a temporary restraining order prohibiting consummation of the merger. After a hearing on plaintiffs' motion for a preliminary injunction, the trial court entered an order staying all proceedings in the derivative suit until a special investigation committee (hereinafter "the committee") established by AAA submitted a report containing its recommendations regarding settlement or compromise of the matters raised by the plaintiffs' complaint; however, the court did permit the merger to be carried out. The trial court's order recites, *inter alia*, that:

> defendants ICH Corporation, American Commonwealth Financial Corporation and Great Commonwealth Life Insurance Company stipulate that:
>
> 1. They are subject to the jurisdiction of this Court in this action.
>
> 2. They shall not raise the issue that plaintiffs lose their standing to maintain this action by virtue of the merger.
>
> 3. They shall maintain the Special Investigative Committee in existence in accordance with the terms of the Agreement which is Exhibit A attached hereto, and there will be no amendment or modification of the Agreement without the Court's approval.
>
> 4. The Court retains jurisdiction of the cause and the parties.

The court also ordered that:

> (3) Minority shareholders of All American Assurance Company who are now entitled to perfect their dissenter rights under the law do not have to take further action to preserve their dissenter rights until the Court has ruled on the report of the Special Investigative Committee.

The merger occurred shortly thereafter pursuant to an "Agreement and Plan of Merger" which contained the following provision:

> MANNER AND BASIS OF CONVERTING SHARES
>
> The mode of carrying into effect the merger and the manner and basis of converting shares of Surviving Corporation

Common Stock into shares of ICH Common Stock and the manner and basis of converting shares of Company Capital Stock into shares of Surviving Corporation Common Stock shall be as follows:

4.1 *Surviving Corporation Common Stock.* Each issued share of Surviving Corporation Common Stock (other than shares of Surviving Corporation Common Stock owned by Parent) outstanding on the Effective Date and all rights in respect thereof, by virtue of the merger provided for herein, on the Effective Date shall be cancelled and shall be converted into and become .5441 of one share of ICH Common Stock, which shares of ICH Common Stock shall be duly authorized, validly issued and outstanding, fully paid and nonassessable; provided however, that such outstanding shares of Surviving Corporation Common Stock, if any, held by dissenting shareholders who have ultimately perfected their statutory rights, if any, of appraisal shall not be deemed by virtue of the merger provided for herein to represent whole shares of ICH Common Stock or the right to receive cash for fractional shares of ICH Common Stock under the terms and subject to the conditions of this Agreement, *but shall be relegated to such statutory rights*, if any, as are provided therefor. No stock or other securities of ICH are to be issued in respect of any of the shares of Surviving Corporation Common Stock owned by Parent on the Effective Date, all of which shall, by virtue of the merger provided for herein and without any further action on the part of Surviving Corporation or ICH, continue to be outstanding on and after the Effective Date. All shares of surviving Corporation Common Stock which are held in the treasury of Surviving Corporation immediately prior to the Effective Date shall automatically be cancelled on the Effective Date and cease thereafter to exist.

(Emphasis supplied.) Under an assumption that the continuous ownership rule obtains in North Carolina, defendants argue that because the plaintiffs in this suit did not pursue their statutory dissenters' rights, *see* N.C.G.S. § 55-113 (1982), they necessarily acquiesced in the conversion of their AAA shares into ICH stock as a result of the merger. Having "voluntarily" complied with the terms of the allegedly fraudulent merger engineered by defendants, plaintiffs are argued to have lost their authority to continue the derivative

suit on behalf of AAA, because of the extinguishment of their share ownership in AAA.

However, defendants' argument that plaintiffs had a real choice with respect to the merger and their ability to continue to have standing in the instant case is not credible. Defendants argue that if plaintiffs were unhappy with the merger they should have pursued their statutory dissenters' rights under N.C.G.S. § 55-113. While it may be true that plaintiffs had an opportunity to take that route, to have done so would have also allowed defendants an even stronger argument that plaintiffs thereby lost standing to maintain a suit on behalf of AAA. *See* N.C.G.S. § 55-113(e) (1982) (upon surrender of his share certificates and payment pursuant to the dissent procedure "the shareholder shall cease to have any interest in [such] shares or in the corporation"). Offered the two horns of a dilemma created by defendants, the plaintiffs chose the one less apparently likely to deprive them of standing to continue the suit on behalf of AAA. The courts of North Carolina will not permit this transparent attempt by defendants to unilaterally undermine this shareholder derivative suit to result in dismissal of the case. *See* N.C.G.S. § 55-55(c) (1982).

Under these facts, even were continuous ownership a requirement under the statute, we hold that if in the course of a shareholder derivative suit defendants' actions terminate the plaintiffs' shareholder status and these actions are closely related to the grounds for the derivative suit, the plaintiffs would retain standing to continue prosecution of the suit they initiated. To hold otherwise, that is to hold that a merged corporation or its shareholders loses standing to sue in a situation in which the allegedly wrongful activities of the defendants forced the plaintiffs to lose their status as shareholders, would be highly inequitable. *See Miller v. Steinbach*, 268 F. Supp. 255, 267 (S.D.N.Y. 1967); *Keyser v. Commonwealth Nat. Financial Corp.*, 120 F.R.D. 489.

Having addressed defendants' claims concerning subject matter jurisdiction, we turn to the matters brought forward by the plaintiff-appellants for review. A preliminary remark as to the scope of the remaining matters presented for review is appropriate.

II. *Scope of Review.*

[3] The sole contention advanced by plaintiff-appellants during this appeal is "the Superior Court erred in granting summary judg-

ment." While normally the question of whether a motion for summary judgment was properly granted is resolvable by examining the record to see whether North Carolina Rule of Civil Procedure 56 and standard summary judgment principles as set forth in case law have been followed, the instant case is not so easily determinable. Here, summary judgment was decreed on pages 190-91 of a 193-page judgment, virtually every page of which was filled with findings of fact. While limited findings of fact are occasionally found not to sound the death-knell for a summary judgment, *e.g.*, *Singleton v. Stewart*, 280 N.C. 460, 186 S.E.2d 400 (1972), generally if a review of the record leads the appellate court to conclude that the trial judge was resolving material issues of fact rather than deciding whether they existed, the entry of summary judgment is held erroneous. *E.g.*, *Stonestreet v. Motors, Inc.*, 18 N.C. App. 527, 197 S.E.2d 579 (1973). An examination of the form of the judgment and the substance of the proceedings leading to its entry is necessary to determine whether the judgment complies with summary judgment principles, or whether in fact it is more accurate to characterize what occurred in the trial division as a bench trial. *Cf. Walton v. Meir*, 14 N.C. App. 183, 188 S.E.2d 56, *cert. denied*, 281 N.C. 515, 189 S.E.2d 35 (1972). In the instant case we have undertaken this examination and, as explained below, hold that despite the court's findings of fact the judgment entered complies with the mandate of N.C.G.S. § 55-55(c).

III. *Procedure under N.C.G.S. § 55-55(c) (1982).*

[4] Under N.C.G.S. § 55-55(c), after a derivative suit is filed, the trial court is required to approve or disapprove any proposed discontinuance, settlement, dismissal or compromise of the suit. Pursuant to this Court's decision in *Alford*, 320 N.C. 465, 358 S.E.2d 323, the trial court is to undertake a two-step review of motions brought under N.C.G.S. § 55-55(c): First, it is to decide whether the proposal for disposition of the case which is submitted to the court was reached by qualified independent disinterested decision-makers who in good faith proceeded to thoroughly investigate and evaluate the claims set forth in the complaint. In so doing, the trial judge may allow discovery to enable him to assess the committee of decision-makers, the investigation made by the committee, the findings of the committee, and the recommendation of the committee. After hearing evidence on these matters, the trial court is to determine the independence, disinterestedness, and good faith of the committee in making its investigation, in addition to the reason-

ableness of the bases relied upon by the committee in concluding and recommending that the cause of action on behalf of the corporation be disposed of as recommended.

The burden is on the movant, usually the corporation on whose behalf the suit was initiated, to prove the independence, disinterestedness, and appropriate qualifications of the committee and that it conducted a reasonable investigation in good faith of the matters alleged in the complaint. *See Kaplan v. Wyatt*, 484 A.2d 501 (Del. Ch. 1984), *aff'd*, 499 A.2d 1184 (1985). The committee is not entitled to a presumption of independence, disinterestedness, good faith, or reasonableness.

The second step required under N.C.G.S. § 55-55(c) and our decision in 320 N.C. 465 requires the trial court to exercise its own independent business judgment as to whether the case is to be discontinued, dismissed, compromised or settled. At this stage the court is to balance (1) any legitimate corporate claims as brought forward in the derivative shareholder suit against (2) the corporation's best interests as determined in part by the committee which evaluated the derivative complaint. Factors to be considered in this second step process include: costs to the corporation of litigating the suit (including attorneys' fees, out-of-pocket expenses related to the litigation, time spent by corporate personnel preparing for and participating in litigation, and indemnification) and the benefits to the corporation in continuing the suit. *See generally Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981); *Joy v. North*, 692 F.2d 880, 891-93 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051, 75 L. Ed. 2d 930 (1983); *Abella v. Universal Leaf Tobacco Co., Inc.*, 546 F. Supp. 795, 801 & n.13 (E.D. Va. 1982); Solovy, Levenstam, and Goldman, *Shareholder Derivative Litigation: Role of Special Litigation Committees*, 25 Tort & Ins. L.J. 864, 867-75 (1990). In exercising its own independent business judgment, the court must consider "such ethical, commercial, promotional, public relations and fiscal factors as may be involved in a given situation." *Kaplan v. Wyatt*, 484 A.2d 501, 509. The corporation as the party seeking final disposition of the case under N.C.G.S. § 55-55(c) has the burden of going forward with evidence on such items, and to show that continuing the action is "more likely than not to be against the interests of the corporation." *Joy*, 692 F.2d at 892. Of course, the shareholders initiating the suit are also entitled to present evidence and arguments as to their contentions. Ultimately, however, while "the review contemplated does not lend itself

to any formula-like approach," it is for the court to decide whether the case begun in the Superior Court will continue. Cox, *Heroes in the Law: Alford v. Shaw*, 66 N.C.L. Rev. 565, 580 (1988).

We turn now to the proceedings which occurred in the present case after the remand ordered by this Court in 320 N.C. 465. Before reaching the question of the propriety of the judgment entered, an initial question is whether the trial court erred in allowing discovery with respect to certain "step one" issues.

IV. *Discovery Ordered upon Remand.*

[5] A number of defendants argue that upon remand pursuant to the opinion reported in 320 N.C. 465, the trial court erroneously permitted discovery with respect to the so-called step one issues. Defendants argue that plaintiffs should have been foreclosed from reopening these issues for the following reasons: On 14 November 1983 an order was entered in the present case granting summary judgment to defendants Wiley, Campisi, Hurst, Broussard, Black, and Cox, and granting partial summary judgment to All American Assurance Company. Plaintiffs appealed from this order, and it was later vacated by the Court of Appeals. *Alford v. Shaw*, 72 N.C. App. 537, 324 S.E.2d 878 (1985), *modified and aff'd*, 320 N.C. 465, 358 S.E.2d 323 (1987). It is defendants' contention now that plaintiffs failed to contest during this prior appeal a part of the 14 November 1983 order which stated: "The Court is further of the opinion that there is no genuine issue of a material fact as to the disinterestedness, independence, and good faith of the Special Committee, or as to the scope of the investigation or the appropriateness of the procedures adopted and followed by the Special Committee in investigating the claims asserted . . . ." Defendants argue that because plaintiffs failed to contest this aspect of the 1983 order, it is the law of the case, and therefore plaintiffs should not have been permitted to reopen these issues when the case was remanded to the trial division after the vacation of the summary judgment order.

The 1983 judgment and notice of appeal therefrom are properly part of the record on appeal in the instant case. Further, taking judicial notice of the briefs filed in this Court upon appeal from that judgment, *Swain v. Creasman*, 260 N.C. 163, 164, 132 S.E.2d 304, 305 (1963); *In re Byrd*, 72 N.C. App. 277, 324 S.E.2d 273 (1985), it is apparent that plaintiffs did argue that the trial court erroneously entered summary judgment because the report of the committee

itself indicated the committee members' lack of independence from the directors whose alleged malfeasance was a subject of plaintiffs' complaint.

Notably, however, at the time the motions for summary judgment were heard in 1983 all parties had been operating under an order entered on 17 November 1982 staying discovery pending further orders to be issued after submission of the committee's report to the trial court. Although the report was filed with the clerk of superior court on or about 29 July 1983, the stay on discovery was not lifted prior to the entry of the 1983 summary judgment. In opposition to defendants' motions, plaintiffs argued that the committee report was not sufficient to justify entry of summary judgment. In support of this, plaintiffs submitted an affidavit of an insurance industry executive criticizing the report, as well as argument that the use of a report such as the one tendered by the committee should not, as a matter of law, be available as a defense to a shareholder derivative suit. In deciding the motions, though, the trial court rejected plaintiffs' argument as to the propriety of the committee report as a defense, instead reasoning that the approach set forth in *Auerbach v. Bennett*, 47 N.Y.2d 619, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979), was the most appropriate way to resolve the question of whether a shareholder derivative suit should be dismissed or settled.

When this Court filed the opinion reported at 320 N.C. 465, we not only rejected the *Auerbach* approach that had been applied by the trial court in deciding the motions for summary judgment (and which would have limited judicial review of the committee and its recommendation of settlement or dismissal to certain narrow issues), but we also stated that:

> Upon remand plaintiffs shall be permitted to develop and present evidence on this issue, such as: (1) that the committee, though perhaps disinterested and independent, may not have been *qualified* to assess intricate and allegedly false tax and accounting information supplied to it by those within the corporate structure who would benefit from decisions not to proceed with litigation, (2) that, in fact, false and/or incomplete information was supplied to the committee because of the nonadversarial way in which it gathered and evaluated information, and therefore (3) in light of these and other problems which arise from the structural bias inherent in the use of

> the board-appointed special litigation committees, that the committee's decision with respect to the litigation eviscerates plaintiffs' opportunities as minority shareholders to vindicate their rights under North Carolina law. *Cf.* Dent, *The Power of Directors to Terminate Shareholder Litigations: The Death of the Derivative Suit*, 75 Nw. U.L. Rev. 96 (1981).

Alford v. Shaw, 320 N.C. at 473, 358 S.E.2d at 328. This directive gave the plaintiffs an opportunity to investigate the susceptibility of the committee in the present case to structural bias, and to examine adversarially whether the committee was misled because it had either gathered or was supplied information insufficient to prepare a balanced and thorough report to the court in support of AAA's motion for partial summary judgment and for approval of settlement.[5]

Thus, although the primary focus of this Court's opinion was to reject the trial court's use of the *Auerbach* approach and instead to explain that a two-step approach deriving from the case of *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), is more consistent with Chapter 55 of the North Carolina General Statutes, the opinion also acknowledged that in this particular case the combination of the stay on discovery, and the erroneous application of the *Auerbach* approach at the trial court level resulted in an incomplete record. On remand, in order to properly evaluate the committee and the committee recommendation pursuant to the two-step approach, discovery would be permitted to enable the trial court to have the benefit of plaintiffs' chance to test the legitimacy of the committee and its report via the gauntlet of an adversarial discovery process. In conclusion, we hold that the trial court properly allowed discovery, and that the 1983 summary judgment which was properly vacated[6] by the Court of Appeals, 72 N.C. App. 537, 324 S.E.2d 878, *modified and aff'd*, 320 N.C. 465, 358 S.E.2d 323, did not establish

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5. Technically, the first two items listed in the above quotation fall under step one; the third is within the ambit of step two.

6. We further note that the Court of Appeals' decision *vacating* the summary judgment, 72 N.C. App. 537, 324 S.E.2d 878, rendered the judgment null and void. "Vacate" means "[t]o annul; to set aside; to cancel or rescind. To render an act void; as, to vacate an entry of record, or a judgment. As applied to a judgment or decree it is not synonymous with 'suspend' which means to stay enforcement of judgment or decree." Black's Law Dictionary 1388 (rev. 5th ed. 1979). *See generally* 49 C.J.S. *Judgments* § 306 (1947). Once the judgment was vacated, no part of it could thereafter be the law of the case.

the good faith, independence and lack of bias of the committee as the law of this case.

Having determined that discovery was correctly permitted upon remand in this case, we now consider appellants' challenges to the post-discovery procedures followed below.

V. *Post-discovery Procedure.*

[6] Prior to the hearing resulting in the judgment which is the subject of the present review, the trial judge sent a letter to counsel for all parties in which he made the following statements:

> 1. [T]he modified *Zapata* rule of law adopted by our Supreme Court, opinion by Martin, J., is really a G.S. 55-55(c) inspired overlay on the Rules of Civil Procedure interposed, as a hybrid, somewhere between Rule 12(b) and Rule 56, in which the Court, in its discretion and using it [sic] own "business judgment", decides whether or not the derivative suit should proceed to jury trial. Since the complaint, as in 12(b) motions, and matters outside the complaint, Rule 56, are considered, the procedure is not unlike a probable cause hearing in a criminal case except the burden of proof is on the defendant.
>
> 2. [A] fortiorari [sic], the rule requires a judicial assessment of the "report of the special committee, along with all the other facts and circumstances in the case" to determine in its discretion, applying its own independent business judgment, whether or not the "defendants will be able to show that the transaction . . . . . was just and reasonable to the corporation;" and, if the Court does not so find, the case can be dismissed if the "amount of the recovery would not be sufficient to outweigh the detriment to the corporation," i.e. "it would still not be in the best interest of the corporation to pursue the derivative action."

See Kaplan v. Wyatt, 484 A.2d 501, 506-07. After all counsel had an opportunity to comment and present argument on these statements, the trial judge adopted them as parts of a prehearing order which, as he later stated, "sets forth the road map for the procedure to be followed."

Apparently because he likened the N.C.G.S. § 55-55 hearing to a preliminary or probable cause hearing, the trial judge decided to treat the committee's report akin to an item of evidence in

a criminal hearing: because the plaintiff-shareholders challenged the reliability of the report on grounds that it was the fruit of an illegitimate process of investigation by the committee, the trial court directed these plaintiffs to file a "motion to suppress" the report. Plaintiffs argue that by having to file this motion, the burden of proof as to the step one issues was shifted to plaintiffs. We disagree.

Although denominated a motion "to suppress" the committee report, it is evident from the record that the trial court intended this motion to serve the function of defining the issues that plaintiffs intended to contest at the step one hearing. When, pursuant to the court's directive to file this motion, plaintiffs filed a 95-page document captioned "Motion to suppress and further response in opposition to motions for summary judgment," the court ordered plaintiffs to refile the motion. In so doing the court stated:

> The materials you filed 30 January 1989, while informative, are unacceptable as a "notice pleading".
>
> What the Court requires is a motion, not exceeding two pages, in "clear and concise" language setting forth your contentions about the special committee report and/or its authors. The Supreme Court opinion sets forth possible areas of inquiry, as does Paragraph 4 of my 11 January 1989 letter. But the parties are entitled to know your contentions in order that they may file a response and to prepare their presentations.

Plaintiffs complied with this by filing a two-page motion on 7 February 1989, listing four contentions which defined their objections to the committee report and the process by which it came into being. Defendants subsequently filed responses to plaintiffs' motion, and as a result the trial judge was able to issue a prehearing order which defined the parameters of the hearing to be held on step one. The pretrial order provided as follows:

> Based on the motion filed by plaintiffs, 7 February, 1989, and responses by defendants, and in order to settle the issues presented for the court by the motion, the court enters the following prehearing order with respect to the "first step" inquiry required by *Zapata*.
>
> A. *The following facts are uncontroverted*:
>
> 1. Judge Frank M. Parker and Marion G. Follin were independent and unbiased when selected, and their selection

as members of the special committee was proper in all respects; and

2. Plaintiffs do not question or contest the good faith of the special committee, individually and collectively.

B. *Plaintiffs contend and defendants deny*:

1. During the investigative process, the special committee abandoned its independence, as follows:

(a) The special committee was improperly influenced by structural bias, peer pressure, and group loyalty toward defendant directors and their lawyers; and

(b) The committee improperly submitted to directives and suggestions of defendants' attorneys; and

(c) The committee improperly assisted defendants in consummation of the merger; and

(d) The committee failed to make a reasonable investigation of the plaintiff's [sic] claims; and

2. The committee based its recommendations on false and incomplete information given to them by the defendants.

Although the burden of proof is on the defendants to prove by the greater weight of the evidence that the special committee report was the product of the independent judgment of the committeemen, formed after a reasonable investigation, and based on true and complete information, in order to expedite the resolution of the *Zapata* "first step" inquiry:

1. Plaintiffs shall file a trial brief with the court on or before 1 March, 1989, setting forth with particularity, by admissible documents, references to depositions, or other admissible offerings, the evidence upon which they rely to support their contentions set forth in section "B." above, and

2. In the event the plaintiff [sic] expects to call a witness or witnesses to present oral testimony during the hearing, plaintiff [sic] shall designate the name or names of such witness or witnesses in the trial brief.

3. Defendants shall file a trial brief with the court on or before 8 March, 1989, setting forth with particularity, by reference or otherwise, the evidence upon which they rely

in support of their contentions that there was a reasonable investigation by the independent committee utilizing true and complete information; and

4. Defendants should also include the names of witnesses or of a witness they expect to call, if any, for oral testimony.

NOTE: Parties may reference tabs in notebooks filed previously in lieu of duplicate referencing.

Additions, corrections, or objections to this prehearing order shall be timely filed or deemed waived.

Plaintiffs neither objected nor offered any corrections to this order, although defendants filed objections to the phrase requiring "true and complete" information.

We hold that while perhaps inartfully labeled, the trial judge's requirement that plaintiffs file a written statement of the issues they planned to contest at the hearing was not error. Without such a definition of issues the resulting hearing might have turned into an unmanageably chaotic theatre of accusations. In the exercise of his authority to control the proceedings under N.C.G.S. § 55-55(c), the trial judge proceeded properly in requiring a definition of the contested issues.[7] *Cf.* Fed. R. Civ. P. 23.1, Notes of Advisory Committee on Rules (1983) ("The court has inherent power to provide for the conduct of the proceedings in a derivative action, including the power to determine the course of the proceedings . . . ").

Having successfully navigated the partially charted waters of the *Alford* odyssey thus far, the trial court proceeded with the hearing. We next take up plaintiffs' contentions (1) that the trial judge erroneously shifted the burden of proof concerning the step one issues to plaintiffs during the hearing; and (2) that the trial court erroneously resolved contested issues of fact instead of submitting the case on the merits to a jury.

VI. *The Hearing.*

The hearing on the motions filed under N.C.G.S. § 55-55(c) was appropriately held by the trial judge sitting without a jury. *See Houle v. Low*, 407 Mass. 810, 824, 556 N.E.2d 51, 59 (1990)

7. Needless to say, plaintiffs' objections to the committee or the report would not have appeared in the complaint initially, as the committee was formed after the complaint was filed.

(remanding shareholder derivative suit "for an evidentiary hearing before a judge without a jury to determine whether the [special investigation] committee (McKee) was independent and unbiased"). To anticipate several of plaintiffs' arguments with regard to the conduct of the hearing, we hold now that a litigant has no right to the determination of factual issues by a jury during proceedings occurring pursuant to N.C.G.S. § 55-55(c). This statute provides in part that a derivative action "shall not be discontinued, dismissed, compromised or settled without the approval of the court." In this section of the statute, it is clear that the word "court" refers to the trial judge and not to a jury. The remaining sentences of N.C.G.S. § 55-55(c) refer to discretionary decisions exercisable properly only by the trial judge; clearly the legislature did not intend that a jury be involved in the procedures required under N.C.G.S. § 55-55(c). To have so required would have had the effect of disturbing the balance between the right of shareholders to initiate a derivative suit and the ability of the corporation to address the concerns raised by the suit expeditiously. Thus, the trial judge in the present case proceeded properly insofar as he did not involve a jury in the decision whether to allow the case to be discontinued, dismissed, compromised or settled.[8]

The crux of the question now is whether the trial judge's proceedings at the hearing and his entry of judgment comported with N.C.G.S. § 55-55(c) and with this Court's opinion in 320 N.C. 465. When the trial judge conducted the hearing on the plaintiffs' motion to suppress, he also heard arguments and received evidence on a number of other motions which sought settlement and dismissal of the suit, namely, motions to dismiss and motions for summary judgment. From our review of the record, including the transcript of this hearing, it is apparent that the trial judge did not shift the burden of proof on step one issues to the plaintiffs. After preliminary discussion, the hearing began with a presentation of evidence by AAA, followed by additional evidence submitted by the defendants. Then, plaintiffs put on evidence as to their conten-

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8. We note, too, that although a litigant's right to have a jury try issues of fact concerning the *merits* of the action initiated by the filing of a derivative suit complaint is guaranteed by the Constitution of North Carolina, *Faircloth v. Beard*, 320 N.C. 505, 358 S.E.2d 512 (1987), the procedure required by N.C.G.S. § 55-55(c) did not exist before the adoption of the Constitution of 1868, and therefore no State constitutional right exists to a trial by jury of factual issues that might arise during the course of the proceedings required under this statute. *Kiser v. Kiser*, 325 N.C. 502, 385 S.E.2d 487 (1989).

tions. We see nothing in the record to indicate that the trial court shifted any burdens of proof to the plaintiffs during this hearing. Accordingly, we reject the contention that such burdens were shifted to the plaintiffs.

[7] The question then becomes whether the trial judge appropriately resolved contested issues of fact during the hearing. As discussed below, we hold that he did.

For reasons not fully apparent from the record, the trial judge stated near the outset of the motion hearing which began on 13 March 1989 that "[the] issue which I've narrowly defined is whether or not a genuine issue of material fact exist [sic] as to the Committee's independence and procedural fairness in conducting a reasonably complete investigation. Now, that is our point of departure. I'll hear from Triple A." However, the hearing was also concerned with the plaintiffs' "motion to suppress," and thus the court also received numerous items of evidence relevant to the determination of that motion. Because the plaintiffs' motion raised virtually the same issues that were the subject of the motions for summary judgment, much of the evidence submitted was relevant to all of these motions. However, the fact that the motion for summary judgment was determinable on a "material issue of fact" standard and the motion to suppress was brought under the aegis of N.C.G.S. § 55-55(c), resulted in an unusual judgment.

At the conclusion of the presentation of evidence and arguments concerning the step one issues, the court announced that, having determined that there was no material issue of fact, summary judgment was thereupon granted for defendants on step one. He also denied plaintiffs' motion. However, the written judgment entered on 19 June 1989 with respect to this step-one stage of the proceedings granting summary judgment to defendants also contains 108 pages of findings of facts which were made "in deciding Plaintiffs' Motion to Suppress and pursuant to the Court's authority and duties under Chapter 55 of the General Statutes of North Carolina and *Alford v. Shaw*, 320 N.C. 465, 358 S.E.2d 323 (1987)." Following these findings the judgment recites ten conclusions of law, each addressing step one issues, and then under a heading captioned "Ruling" states: "The Motion to Suppress is DENIED." In light of the fact that the court found it necessary to make these findings in order to resolve issues which were common to the summary judgment motions and to the plaintiffs' motion challeng-

ing the committee and its report, we hold that the court erroneously entered partial summary judgment in favor of defendants with respect to step one. *See, e.g., Stonestreet v. Motors, Inc.*, 18 N.C. App. 527, 197 S.E.2d 579. This does not by itself, however, determine the outcome of the present appeal. We further hold that in deciding whether to grant plaintiffs' motion the trial judge properly resolved issues of fact which arose during the hearing.

As discussed earlier, proceedings under N.C.G.S. § 55-55(c) are held before a trial judge sitting without a jury. When a party challenges the recommendation of the corporation in whose name a lawsuit was initiated derivatively, it is the court's responsibility first, to require the party taking issue with the recommendation to outline his contentions so he may receive an appropriate response from the other parties to the suit, and then secondly, to hear evidence on these contentions, in order to be able to determine whether the lawsuit is to be discontinued, dismissed, settled, or turned over to the plaintiff-shareholders or the corporation for litigation. As the judicial official charged under N.C.G.S. § 55-55(c) with this authority, the trial judge may well have to resolve issues of fact to decide whether to permit the suit to go forward, be settled, or be dismissed. In the instant case, the trial judge did so valiantly.

In this appeal, the only issue plaintiffs have properly brought forward for review is whether the trial court properly entered summary judgment in the context of the 200-page judgment in this case. Although we have determined that it was erroneous to have entered summary judgment with respect to step one, the record is clear that all parties were given a full opportunity to present evidence relevant to the determination of the issues defined by plaintiffs' motion (and the responses thereto). The hearing on these step one issues proceeded for six days, with the fruit of many months of discovery being presented for consideration. Given the fact that all parties were aware that this hearing was to address not only defendants' motions for summary judgment but the plaintiffs' objections to the committee and its report, we hold that the trial judge properly entered findings of fact which supported his determination, under N.C.G.S. § 55-55(c), that the committee report was the result of a proper investigation conducted by individuals who did not lose their independent perspective during the course of their investigation.

In their brief to this Court plaintiffs do not contend that the findings made by the trial judge are not supported by competent evidence. *See Higgins v. Simmons*, 324 N.C. 100, 376 S.E.2d 449 (1989); *Smith v. Butler Mtn. Estates Property Owners Assoc.*, 324 N.C. 80, 375 S.E.2d 905 (1989). Instead, plaintiffs argue that assuming all of their evidence was credible, the trial court should have determined that there were material issues of fact and thus it should have granted plaintiffs' motion to suppress the committee report and denied defendants' motions for summary judgment. While we agree that summary judgment was improperly ordered on step one, upon a careful examination of the record, we have determined that the trial court's findings are supported by competent evidence, and thus are conclusive on appeal. *E.g., Higgins v. Simmons*, 324 N.C. 100, 376 S.E.2d 449. Because these findings support the conclusions of law with respect to the issues framed by plaintiffs' "motion to suppress" and defendants' responses thereto, we hold that the trial court properly denied plaintiffs' motion to suppress the committee report.

Having resolved the issues arising under step one, the trial court turned to the second step of the procedure enunciated in 320 N.C. 465. The hearing on step two issues was held over the course of a number of days, during which all parties had the opportunity to present extensive evidence, including the live testimony of witnesses. As with step one, the court made numerous findings of fact before entering judgment in favor of defendants with respect to step two. While plaintiffs' appellate brief assigns as error the granting of summary judgment at both step one and step two, their argument for both is that the trial court inappropriately made findings of fact. However, the transcript of the hearing reveals that during this proceeding, counsel for the plaintiffs stated that they consented to the trial court's making findings of fact and conclusions of law with respect to step two. Having agreed to this procedure at the trial level, they cannot now complain about it upon appeal. *Cf. Higgins v. Simmons*, 324 N.C. 100, 103, 376 S.E.2d 449, 452 ("A party may not exchange his trial horse for what he perceives to be a steadier mount on appeal."). Further, as with step one, plaintiffs do not challenge the sufficiency of the findings nor do they allege that the findings are not supported by competent evidence.[9] Such findings are thus conclusive on this appeal.

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9. In fact, plaintiffs state that "[i]n the interest of time and space, plaintiffs will not argue in this brief the merits of the committee report eviscerating plaintiffs'

As we stated in *Alford*, 320 N.C. 465, 473, 358 S.E.2d 323, 328, if the trial court determines that the committee report is the product of an independent and thorough investigation, the court "must make a fair assessment of the report of the special committee, along with all the other facts and circumstances in the case, in order to determine whether the defendants will be able to show that the transaction complained of was just and reasonable to the corporation." In this case we find no reviewable assignments of error with respect to the second step of the proceedings. Insofar as there may be any inadvertent potential traps which have been set in the instant case, they are not before us in this appeal to unspring.

The judgment entered by the trial court is

Affirmed.

CELIA McNEILL, CHARLES L. McNEILL, OBIE L. McLEAN, EUNICE M. MATTHEWS, GENEVIEVE BRYANT, RONALD BRYANT, ETHEARL MORRIS, JOSEPH MORRIS, HENRY SMITH, GENETTE SMITH, ESTERBELLE McALISTER, LOIS MORRIS, AND DELLA RAY v. HARNETT COUNTY; THE HARNETT COUNTY BOARD OF COMMISSIONERS; BILL SHAW, LLOYD G. STEWART, RUDY COLLINS, MAYO SMITH, AND MACK REID HUDSON, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE HARNETT COUNTY BOARD OF COMMISSIONERS; THE BUIES CREEK-COATS WATER AND SEWER DISTRICT; AND THE NORTHEAST METROPOLITAN WATER DISTRICT

No. 100PA90

(Filed 5 December 1990)

1. Sanitary Districts § 2 (NCI3d)— sewer district—scope of authority

Pursuant to an interlocal cooperative agreement and pursuant to the authority granted in article 15 of Chapter 153A,

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claims, and the [trial] Court's rulings supporting the committee report, but in case the Court is interested, the plaintiffs invite the Court's attention to [various items in the record]." We assume that the plaintiffs have presented argument with respect to the alleged errors which they deem most important. This Court will not engage in "a judicial Easter egg hunt," *State v. Kirby*, 276 N.C. 123, 133, 171 S.E.2d 416, 423 (1970), on behalf of a litigant.

a county may among other things operate a water and/or sewer system for and on behalf of another unit of local government. In addition to those powers granted to the sewer district in N.C.G.S. § 162A-88, Harnett County, as operator of a public enterprise, is clothed with those powers set forth in Chapter 153A, article 15 of the General Statutes, including the power to mandate connections and to fix charges for those connections under N.C.G.S. § 153A-284.

Am Jur 2d, Drains and Drainage Districts §§ 2-4, 20, 40; Municipal Corporations, Counties, and Other Political Subdivisions §§ 573, 574.

2. **Constitutional Law § 13 (NCI3d)— sewer district—mandated connection, charges and user fees—no federal constitutional violation**

N.C.G.S. § 153A-284 (1987) and local ordinances, which were passed without notice or an opportunity to be heard and which mandate connections to sewer lines as well as the payment of related charges and user fees, are consistent with federal due process protections and are a valid exercise of the police power.

Am Jur 2d, Drains and Drainage Districts §§ 2-4, 20, 40; Municipal Corporations, Counties, and Other Political Subdivisions §§ 573, 574.

3. **Constitutional Law § 13 (NCI3d)— sewer district—establishment of sewer system—mandated connection and charges—no violation of North Carolina Constitution**

The establishment and operation of a sewer system by a sewer district in a county is a valid exercise of the police power under the law of the land clause of the North Carolina Constitution. Moreover, N.C.G.S. § 153A-284 and the ordinance mandating connection to the system are also valid exercises of the police power under the North Carolina Constitution. Article I, § 19 of the Constitution of North Carolina.

Am Jur 2d, Drains and Drainage Districts §§ 2-4, 20, 40; Municipal Corporations, Counties, and Other Political Subdivisions §§ 573, 574.

4. Sanitary Districts § 3 (NCI3d)— sewer district—method of financing

In an action arising from the construction of a sewer system, the Supreme Court held that the General Assembly intended that a local government may choose between financing a project using a procedure which would result in an assessment and doing so by other methods not involving a lien-producing assessment. If the requirements of Chapter 153A, Article 9 are met, the county then has certain remedies otherwise not available to it; however, if the county does not elect to acquire the statutory benefits by following the procedural requirements which would culminate in a lien on the property, the plaintiffs do not receive the statutory protections of notice and hearing as set out in N.C.G.S. § 153A-191. The mandate of N.C.G.S. § 153A-276 applies only where restrictions, limitations, procedures, and regulations otherwise provided by law are themselves mandatory; there is no statute or law that mandates notice and hearing requirements for ordinances requiring mandatory connections and fixing related connection charges and user fees.

Am Jur 2d, Drains and Drainage Districts §§ 20, 40-42, 48, 54; Municipal Corporations, Counties and Other Political Subdivisions §§ 573, 574.

Validity and construction of regulations by municipal corporation fixing sewer-use rates. 61 ALR3d 1236.

5. Sanitary Districts § 3 (NCI3d)— sewer district—user fees—no service then existing

In an action arising from the construction of a new sewer system, it was held that the provisions of N.C.G.S. § 162A-88 authorizing user fees for services to be furnished is not limited to the financing of maintenance and improvements of existing customers. Moreover, language in a bond order to the effect that taxes would be levied does not limit the county's ability to finance the project solely to the imposition of taxes.

Am Jur 2d, Drains and Drainage Districts §§ 20, 40-42, 48, 54; Municipal Corporations, Counties and Other Political Subdivisions §§ 573, 574.

Validity and construction of regulations by municipal corporation fixing sewer-use rates. 61 ALR3d 1236.

6. Sanitary Districts § 2 (NCI3d)— sewer district—failure to pay sewer fees—termination of water services

Water services were properly terminated without notice or opportunity for hearing for failure to pay sewer fees even though the plaintiffs were not yet on the sewer system because the water service furnished by the county here did not rise to the level of property protected by due process requirements. N.C.G.S. § 153A-283 states specifically that in no case may a county be held liable for damages for failure to furnish water or sewer services; in light of this provision, a citizen of a county of North Carolina may not assert a claim of entitlement to water services. Assuming that such a property interest exists, the McNeills were given adequate notice and opportunity to be heard.

Am Jur 2d, Drains and Drainage Districts §§ 20, 40-42, 48, 54; Municipal Corporations, Counties and Other Political Subdivisions §§ 573, 574.

Validity and construction of regulations by municipal corporation fixing sewer-use rates. 61 ALR3d 1236.

7. Attorneys at Law § 64 (NCI4th)— sewer district—civil rights action—attorneys' fees

An award of attorneys' fees under 42 U.S.C. 1983 was reversed where the underlying decision was reversed and plaintiffs did not prevail in their cause.

Am Jur 2d, Civil Rights § 278.

Construction and application of Civil Rights Attorney's Fees Awards Act of 1976 (amending 42 USCS sec. 1988), providing that court may allow prevailing party, other than United States, reasonable attorney's fees in certain civil rights actions. 43 ALRFed 243.

ON appeal as of right pursuant to N.C.G.S. § 7A-30 and on discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 97 N.C. App. 41, 387 S.E.2d 206 (1990), affirming in part and reversing in part a judgment entered by *Bowen, J.*, at the 25 July 1988 Civil Session of Superior Court, HARNETT County, and awarding attorneys' fees for plaintiffs' attorneys. Heard in the Supreme Court 6 September 1990.

East Central Community Legal Services, by Leonard G. Green, for plaintiff-appellees McNeills, McLean, McAlister, and Ray; Jeffrey M. Seigle for plaintiff-appellees Matthews, Bryants, Ethearl and Joseph Morris, Smiths, and Lois Morris.

Woodall, Felmet & Phelps, P.A., by E. Marshall Woodall and John M. Phelps, II, for defendant-appellants.

MEYER, Justice.

As a result of a petition from citizens of the area of Buies Creek and Coats, North Carolina, and the Town of Coats Board of Commissioners, the Harnett County Board of Commissioners (hereinafter the "County Commissioners") held a public hearing on 20 October 1980 and subsequently created the Buies Creek-Coats Water and Sewer District (hereinafter "Sewer District") pursuant to chapter 162A of the North Carolina General Statutes. On 12 February 1982, the North Carolina Environmental Management Commission found unsanitary conditions to exist and gave the Sewer District permission to proceed to construct a sewer system to serve the district.

The County Commissioners, after notice by newspaper, held a public hearing concerning the financing of the proposed construction of the sewer system on 15 March 1982 and approved the Sewer District's application to the Local Government Commission for the financing of the construction of the system. Funds for construction were to come from governmental grants, loan proceeds from the sale of general obligation bonds, and local funds. Since the expenditure of local funds was required to be made prior to expending any grant or loan funds, the County Commissioners, acting on behalf of the Sewer District, considered various methods of raising the local funds, including the use of a special assessment. Initially, the County Commissioners expressed their intention to raise the local funds by levy of a special assessment authorized under chapter 162A and pursuant to chapter 153A, article 9 of the General Statutes. The County Commissioners offered to waive the user's connection charge if the landowner would pay immediately to the Sewer District the sum of $250.00 for a residential user or $500.00 for a commercial user, these sums being referred to as "anticipated assessments." When all needed funds were received from this source, the Board of Commissioners abandoned its original idea of making "assessments" as authorized by chapter 162A, and

the funds so collected were thereafter referred to as "connection" charges.

In April 1982, a referendum was held on the proposed general obligation bond issue needed to finance the project. The voters in the Sewer District approved the bond issue, and the County Commissioners financed the project with general obligation bonds. Since these bonds pledge the full faith and credit of the County, the bond order stated that the County agreed to tax to the extent necessary to pay the bonds.

The Sewer District eventually constructed a sewer system to serve the district, which is composed of the Town of Coats, the Village of Buies Creek, and some densely populated areas west of Buies Creek. After construction of the collection lines, the Sewer District entered into an agreement in July 1984 with Harnett County, which was operating its own sewage disposal plant at Buies Creek. The agreement provided for the County to operate the newly constructed collection system as a county-operated system. In July 1984, the County adopted an ordinance mandating connection to the system. A separate ordinance establishing rules and regulations for the use of the system to include a schedule of monthly user fees and connection charges for connections to the system was adopted in August 1984. Although the record is not entirely clear, apparently a portion of the fees and charges collected is used to pay principal and interest on the debt.

Thereafter, the County served notice upon the plaintiffs requiring them to connect their improved properties to the county-operated collection system as required by the county ordinance passed pursuant to N.C.G.S. § 153A-284. The plaintiffs were also required to pay the connection charge and monthly user fees as set forth in the county ordinance establishing rules and regulations for operation of the system.

The plaintiffs refused to connect their properties to the system and brought this action for a declaratory judgment and injunction. Most of the plaintiffs have refused to make any payment of charges and fees. The County cut off the water services to one of the plaintiffs for refusal to pay fees due. The Sewer District and the County counterclaimed for an order requiring plaintiffs to connect their properties to the county-owned sewer system and for recovery of the connection charges and monthly user fees as authorized by the County's ordinance setting fees and rates. The trial court

ordered plaintiffs to connect their improved properties to the sewer line but refused to grant judgment for the connection charges.

On appeal, the Court of Appeals noted the compulsory character of the county ordinance requiring connection to the sewer system and construed the charges as an "assessment" for which there had been no notice by first-class mail to each owner of property subject to the assessment and no opportunity to be heard as required by N.C.G.S. §§ 153A-191 and -192. As a result, the Court of Appeals partially reversed the trial court. It held the County ordinance requiring connection to the sewer system to be void, ordered the County to reimburse with interest any sums paid by plaintiffs, dissolved the monetary judgments entered, and ordered attorneys' fees for plaintiffs' attorneys. The Court of Appeals affirmed the trial court's holding which relieved the plaintiffs of liability for the connection charge. *McNeill v. Harnett County*, 97 N.C. App. at 48, 387 S.E.2d at 210-11. We conclude that the Court of Appeals erred and reverse.

I.

[1] Before turning to the validity of the local government action, it is first helpful to review the scope of authority of the Sewer District and the County. The Sewer District is a county water and sewer district created pursuant to chapter 162A, article 6 of the General Statutes, and the Harnett County Board of Commissioners is the governing body of that Sewer District. The legislature has granted broad powers to water and sewer districts, some of which are set forth in N.C.G.S. § 162A-88:

> The inhabitants of a county water and sewer district created pursuant to this Article are a body corporate and politic by the name specified by the board of commissioners. Under that name they are vested with all the property and rights of property belonging to the corporation; have perpetual succession; may sue and be sued; *may contract and be contracted with*; may acquire and hold any property, real and personal, devised, bequeathed, sold, or in any manner conveyed, dedicated to, or otherwise acquired by them, and from time to time may hold, invest, sell, or dispose of the same; may have a common seal and alter and renew it at will; *may establish, revise and collect rates, fees or other charges and penalties for the use of or the services furnished or to be furnished* by any sanitary sewer system, water system or sanitary sewer and water system

of the district; and may exercise those powers conferred on them by this Article.

N.C.G.S. § 162A-88 (1987) (emphasis added).

Other sections of chapter 162A grant additional powers to county water and sewer districts, including the power to issue various types of bonds and notes (N.C.G.S. § 162A-90 (1987)), the power to levy taxes without approval of the voters of the district (N.C.G.S. § 162A-91 (1987)), and the power to make special assessments (N.C.G.S. § 162A-92 (1987)). Each of these grants of authority is permissive and not mandatory.

Water and sewer districts may contract with counties to carry out their purposes. N.C.G.S. § 153A-275 (1987); N.C.G.S. § 162A-88 (1987). The use of interlocal cooperative agreements is sanctioned with respect to public enterprises in N.C.G.S. § 153A-278, which provides that "two or more counties, cities, or other units of local government may cooperate in the exercise of any powers granted by this Article [article 15 of chapter 153A]." A public enterprise includes sewage collection and disposal systems of all types. N.C.G.S. § 153A-274(2) (1987). Specifically, the County is authorized to operate a public enterprise in order to furnish services to its citizens. N.C.G.S. § 153A-275 (1987).

Therefore, pursuant to an interlocal cooperative agreement and pursuant to authority granted in article 15 of chapter 153A, a county may, among other things, operate a water and/or sewer system for and on behalf of another unit of local government, such as a water and sewer district, and in conjunction therewith may exercise those rights, powers, and functions granted to water and sewer districts as found in N.C.G.S. § 162A-88 and those rights, powers, and functions granted to counties in N.C.G.S. ch. 153A, art. 15.

In this case, the Sewer District and Harnett County entered into a contract on 23 July 1984 wherein it was agreed that the Sewer District's sewer system, which had been completed that year, would be operated by Harnett County through its Department of Public Utilities. Such units of local government may contract with each other to execute undertakings such as public enterprises, which would include a sewer system. N.C.G.S. § 153A-274(2) (1987).

In addition to those powers granted to the Sewer District in N.C.G.S. § 162A-88, Harnett County, as operator of a public

enterprise, is clothed with those powers set forth in chapter 153A, article 15 of the General Statutes, including the power to mandate connections and to fix charges for those connections under N.C.G.S. § 153A-284. The plain wording of N.C.G.S. § 153A-284 clearly supports this conclusion. It provides that a county may mandate connections to a sewage collection line "owned or operated" by the county. The use of the word "or," indicating the alternative, is dispositive of this issue. Had the legislature intended that a county could mandate connections only when it both owned *and* operated a sewage collection line, the language of the statute would have so provided. The interlocal cooperative agreement in this case provides that the Sewer District's sewer system will be operated by the County on a continuing basis as a county-operated sewer and waste water system.

II.

[2] The statute entitled "Power to require connections" states:

> A county may require the owner of improved property located so as to be served by a water line or sewer [sic] collection line owned or operated by the county to connect his premises with the water or sewer line and may fix charges for these connections.

N.C.G.S. § 153A-284 (1987).

The plaintiffs contend that this statute is unconstitutional because it does not provide for notice and an opportunity to be heard before connection is ordered and therefore violates plaintiffs' due process rights. The County responds that the public policy behind the mandatory connection order is to promote the common good of the community and is an appropriate exercise of the police power.

We must first decide whether the statute and the ordinances which the County relied upon to mandate connections, as well as the payment of related fees and charges, meet due process requirements of the state and federal Constitutions.

A. *Federal Due Process*

The principal case on point is *Hutchinson v. City of Valdosta*, 227 U.S. 303, 57 L. Ed. 520 (1913). In *Hutchinson*, the aggrieved citizen lived in a sparsely populated part of the city, about three quarters of a mile from the main business district. The City of

Valdosta passed an ordinance requiring property owners living along streets where sewage collection lines had been laid to install toilets in their homes and to connect them to the city sewer. Mrs. Hutchinson, in order to comply with the ordinance, would have been required to build an addition to her house, as there was no space for the toilet facilities in the existing dwelling. There was, according to the Court, no necessity on account of health to force Mrs. Hutchinson to comply with the ordinance.

Having had neither notice nor opportunity to be heard before the commencement of proceedings to force her to comply with the ordinance, Mrs. Hutchinson argued that the enabling statute violated the fourteenth amendment to the United States Constitution because it provided for neither notice nor an opportunity to be heard. The Court held that the ordinance did not violate the fourteenth amendment. The Court stated:

> It is the commonest exercise of the police power of a State or city to provide for a system of sewers and to compel property owners to connect therewith. And this duty may be enforced by criminal penalties.

Id. at 308, 57 L. Ed. at 523.

In *Hutchinson*, the complaints of the property owner were, in some respects, much more significant as to potential monetary costs than the complaints of the plaintiffs here. Additionally, unlike the case at bar, where defendants had received a determination from the North Carolina Environmental Management Commission that a public sewer system was needed as a result of unsanitary conditions, no such situation existed in *Hutchinson*. Yet, even under such facts, the United States Supreme Court found no constitutional violation.

Furthermore, in *Alperstein v. Three Lakes Water & Sanitation Dist.*, 710 P.2d 1186 (Colo. Ct. App. 1985), *cert. denied*, 475 U.S. 1140, 90 L. Ed. 2d 336 (1986), an act of the Colorado General Assembly authorized the defendant water and sanitation district to compel connection of inhabited properties to the sewer system of the district. Before a connection could be compelled, a finding that such connections were necessary for the protection of public health was required. The plaintiffs alleged that the language of the enabling act required personal notice and an evidentiary hear-

ing before each owner could be ordered to connect. The Colorado court disagreed, finding that the law set forth no such requirement.

The plaintiffs in *Alperstein* also contended that if the statute did not require such personal notice and hearing, the due process clauses of the United States and Colorado Constitutions did. The *Alperstein* court, citing *Hutchinson*, went on to hold that due process does not require personal notice and an opportunity to be heard before issuance of a mandatory connection order. The court also stated that "[n]umerous state courts have followed [*Hutchinson*'s] holding that personal notice and a hearing are not required prior to ordering connection to a public sewer system." *Id.* at 1189.

Other courts have considered the constitutionality of ordinances mandating connections apparently enacted without notice and an opportunity to be heard and have upheld them. In *Weber City Sanitation Comm'n v. Craft*, 196 Va. 1140, 87 S.E.2d 153 (1955), the Virginia court held that both the statute which created the sanitary district and established its commission and the commission's resolution requiring that abutting property owners connect with the district's waterworks and abandon private subsurface water for personal use and consumption were within the police power and did not constitute an unconstitutional deprivation of property as measured by the Virginia and United States Constitutions.

In *Nourse v. City of Russellville*, 257 Ky. 525, 78 S.W.2d 761 (1935), the Kentucky court upheld the city's action in compelling the property owners to connect to the city sewer system. The city did not have a specific statutory directive, but the court recognized the city's authority to abate nuisances at common law under the police power. Specifically, the court held that the state statute authorizing the city to build and operate sewers and to abate nuisances, as well as the city's action to compel connection, were all constitutional.

In *Township of Bedford v. Bates*, 62 Mich. App. 715, 233 N.W.2d 706 (1975), the court found that even absent a showing that a particular septic tank system is inadequate, an owner of property on which "sanitary sewage originates" may be forced to connect to the public sewer system. *Id.* at 716, 233 N.W.2d at 707. The court cited numerous court decisions upholding such mandatory connections against constitutional attack.

The establishment and operation of a sewer system is usually regarded as an exercise of a local government's police power, and "so is an ordinance requiring property owners to make connections therewith." E. McQuillin, *Municipal Corporations* § 31.10 (3d ed. 1983). In a case in which the owner of a lodging house in New York City was required to expend considerable sums to install a sprinkler system in his building, which had been built four years earlier in full compliance with all city building requirements, the United States Supreme Court made the observation that "[t]he police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights." *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 83, 90 L. Ed. 1096, 1098 (1946).

We conclude that the statute and the ordinances in question, which were passed without notice and an opportunity to be heard and which mandate connections to the sewer lines as well as the payment of related connection charges and user fees, are consistent with federal procedural due process protections and are a valid exercise of the police power.

B. *North Carolina Due Process*

[3] Section 19 of article I of the Constitution of North Carolina, which contains the law of the land clause, provides as follows: "No person shall be . . . deprived of his life, liberty, or property, but by the law of the land." This clause is synonymous with the fourteenth amendment due process clause of the federal Constitution. *Watch Co. v. Brand Distributors and Watch Company v. Motor Market*, 285 N.C. 467, 206 S.E.2d 141 (1974). Decisions by the federal courts as to the construction and effect of the due process clause of the United States Constitution are binding on this Court; however, such decisions, although persuasive, do not control an interpretation by this Court of the law of the land clause in our state Constitution. *Id.* We must therefore make an independent determination of the constitutional rights of the plaintiffs under the law of the land provision of our state Constitution.

This Court has held that the establishment and maintenance of a sewer system by a city is ordinarily regarded as an exercise of its police power. *Covington v. City of Rockingham*, 266 N.C. 507, 146 S.E.2d 420 (1966). The Court has also noted with approval certain "well-established general principles" that relate to the exercise of police power, specifically, "[t]hat the police power is subject to all the constitutional limitations which protect basic property

rights, and therefore must be exercised at all times in subordination to Federal and State constitutional limitations and guarantees." *Winston-Salem v. R.R.*, 248 N.C. 637, 642, 105 S.E.2d 37, 40 (1958).

An excellent discussion of the relationship between the due process clause and the police power is found in *State v. McCleary*, 65 N.C. App. 174, 308 S.E.2d 883 (1983), *aff'd*, 311 N.C. 397, 316 S.E.2d 870 (1984), where the Court of Appeals said:

> The Fifth and Fourteenth Amendments to the United States Constitution, together with the Law of the Land Clause of Article I, § 19 of the North Carolina Constitution, provide that no person shall be deprived of life, liberty or property without due process of law. These provisions, however, do not have the effect of overriding the power of state and local governments to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community. An exertion of the police power inevitably results in a limitation of personal liberty[,] and legislation in this field is justified only on the theory that the social interest is paramount. *Whether it is a violation of the Law of the Land Clause (Article I, § 19) or a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it.*

Id. at 180, 308 S.E.2d at 888 (citations omitted) (emphasis added).

The state possesses the police power in its capacity as sovereign, and in that capacity, the legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society. *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976). This Court stated in *State v. Whitaker*, 228 N.C. 352, 45 S.E.2d 860 (1947), *aff'd sub nom. Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 93 L. Ed. 212 (1949), that the law of the land imposes flexible restraints on the exercise of state police power which are satisfied if the act in question is not " 'unreasonable, arbitrary or capricious, and . . . the means selected shall have a real and substantial relation to the object sought to be obtained.' " *Id.* at 360, 45 S.E.2d at 866 (quoting *Nebbia v. New York*, 291 U.S. 502, 525, 78 L. Ed. 940, 950 (1934)).

This Court, in *Winston-Salem v. R.R.*, stated:

> [W]hen the exercise of the police power is challenged on constitutional grounds, the validity of the police regulation primarily depends on whether under all the surrounding circumstances and particular facts of the case the regulation is . . . reasonably calculated to accomplish a purpose falling within the legitimate scope of the police power, without burdening unduly the person or corporation affected.

248 N.C. at 642, 105 S.E.2d at 40.

In *Currituck County v. Willey*, 46 N.C. App. 835, 836, 266 S.E.2d 52, 53, *disc. rev. denied*, 301 N.C. 234, 283 S.E.2d 131 (1980), the Court of Appeals, in responding to an equal protection clause claim, quoted *Strong's* as follows:

> 'A municipal ordinance is presumed to be valid, and the burden is upon the complaining party to show its invalidity or inapplicability. And a municipal ordinance promulgated in the exercise of the police power will not be declared unconstitutional unless it is clearly so, and every intendment will be made to sustain it.' 5 Strong, N.C. Index 2d, Municipal Corporations, § 8, p. 626.

In the case at bar, the County, prompted by citizen petition and after public hearing, created the Sewer District. The North Carolina Environmental Management Commission, upon a finding that sewage collection facilities were necessary for the protection of the public health, ordered the Sewer District to arrange financing and plans for a sewage collection system and to proceed as rapidly as possible to begin construction. The Sewer District obtained funding and constructed the needed sewage collection system. After an agreement was entered for the County to operate the system through its experienced utility department personnel, the County adopted mandating ordinances under the authority of N.C.G.S. § 153A-284 to assure the payment of expenses for operation and maintenance and debt service for the bonded indebtedness.

We hold that the establishment and operation of a sewer system by the Sewer District and the County is a valid exercise of the police power under the law of the land clause of the North Carolina Constitution. Moreover, we find that N.C.G.S. § 153A-284 and the ordinance mandating connection to the system are valid exercises of the police power under the North Carolina Constitution. To require notice and opportunity for hearing to all individual property

owners prior to the adoption of an ordinance mandating connection of improved properties pursuant to the enabling act would be burdensome, costly to local governments, and not consistent with procedures employed in the exercise of other police powers. The law of the land clause does not require notice and opportunity for hearing prior to the passage of an ordinance mandating connection to a sewer system adopted under the authority of N.C.G.S. § 153A-284.

We also hold that these same principles apply with equal force to the portion of N.C.G.S. § 153A-284 authorizing a county to require payment of charges for mandated connections and implicitly to collect fees for services thereafter provided. We perceive no meaningful legal distinction between a mandated connection and mandated charges and fees for that connection. The latter naturally follow the former.

In *Farquhar v. Board of Supvrs. of Fairfax County*, 196 Va. 54, 82 S.E.2d 577 (1954), it was contended that the enforcement of sewer connections and the collection of related charges deprived landowners of their property without due process of law. The Virginia court found such provisions "necessary implements of a sanitary system" and held the provisions to be constitutional as "a reasonable exercise of the police power of the State and bearing a substantial relation to the protection and preservation of the public health." *Id.* at 71, 82 S.E.2d at 587.

Compelling the payment of sewer fees to local governments even when the property owner has not connected to the sewer system has also been upheld. In *Marnickas v. Tremont Mun. Auth.*, 67 Pa. Commw. 117, 445 A.2d 1383 (1982), it was held that the plaintiff had to pay the sewer fees even though he was not tapped into the sewer system. In *Marnickas*, residents, like the plaintiffs in this case, were notified that they were to connect to the sewer system and that sewer rentals would be charged as of a specified date. Marnickas did not connect to the system on the grounds that he had a working system and that he could not connect to the system by a gravity flow, but only by installation of a pump. He further argued that the system was of no value to him and refused to pay any fees. The Pennsylvania court stated that value must relate to the services actually consumed *or* readily available and that there is a rebuttable presumption that property is benefited by the construction of an adjacent sewer system.

The *Marnickas* court went on to require that the customer pay his sewer fees even though he was not connected and held the following reasoning to be controlling:

> "[T]o allow individual property owners to elect not to tap into a sewer system accessible to it [sic] would circumvent the statutory purpose behind the imposition of sewer rentals and undermine the financial soundness of a municipality's sewer system. The rental charges are utilized to meet many fixed costs incurred by the township, costs such as operation expenses, maintenance, repair, inspection and depreciation which are incurred whether or not a particular individual is tapped into the sewer system."

Id. at 120, 445 A.2d at 1385 (quoting *Coudriet v. Township of Benzinger*, 49 Pa. Commw. 275, 278, 411 A.2d 846, 848 (1980)).

Based upon the authority cited, this Court concludes that N.C.G.S. § 153A-284 and the mandating ordinances here meet the requirements of both the federal and state Constitutions in authorizing the imposition of connection charges and user/availability fees related to mandated connections.

III.

[4] The plaintiffs argue that the General Assembly intended that whenever a local government finances a project through connection charges and monthly user fees, the statutory procedures for creating an *assessment* must be complied with. The plaintiffs contend that the County's failure to follow the mandatory provisions of article 9 of chapter 153A of the North Carolina General Statutes relating to assessments which constitute a lien on the property was a circumvention of the statutory scheme for public project financing in North Carolina. The plaintiffs find a significant difference between the County's power to establish and collect fees and charges for the actual cost of operating the system and the power to collect fees and charges to pay the principal and interest for the financing of the project. Their contention is that the General Assembly intended that the special assessment procedures should apply whenever fees or charges are used to finance the construction of a public project. We find no basis for such a strained reading of these statutes and conclude that the General Assembly intended that the local government may choose between financing the project

using a procedure which would result in an assessment and doing so by other methods not involving a lien-producing assessment.

Pursuant to N.C.G.S. § 153A-190, when all or any portion of a public enterprise is to be financed by assessments, the county commissioners are required to adopt a preliminary assessment resolution. The resolution must contain information about the proposed project, a statement as to the percentage of the cost of the project that will be assessed, and an order setting a date for public hearing. The preliminary assessment resolution must be sent by first-class mail to each property owner in the project at least ten days prior to the public hearing. N.C.G.S. § 153A-191 (1987). In return, the county receives a specific lien; the delinquency of the assessed obligation authorizes a foreclosure of property without any exemptions allowed or the payment of prior recorded liens except local, state, and federal taxes. N.C.G.S. § 153A-200 (1987). Forced sale of land under a general lien, on the other hand, is subjected to exemptions and prior recorded liens. It is, therefore, the special assessment proceeding itself which creates the lien for the assessment. If the County Commissioners elect not to pursue the procedure which would establish the lien, then the special proceeding is not necessary.

The County notes that no such special assessment liens exist on the property and contends that the process invoked and completed, rather than the words used, is of paramount importance. We agree. If the requirements of chapter 153A, article 9 are met, the County then has certain remedies otherwise not available to it. However, if the County does not elect, as in this case, to acquire these statutory benefits by following the procedural requirements which would culminate in a lien on the property, the plaintiffs do not receive the statutory protections of notice and a hearing as set out in N.C.G.S. § 153A-191.

N.C.G.S. § 153A-276, "Financing public enterprises," provides as follows:

> Subject to the restrictions, limitations, procedures, and regulations otherwise provided by law, a county may finance the cost of a public enterprise by levying taxes, borrowing money, and appropriating any other revenues, and by accepting and administering gifts and grants from any source.

N.C.G.S. § 153A-276 (1987).

Plaintiffs assert that because N.C.G.S. § 153A-276 provides that the financing of public enterprises is "[s]ubject to the restrictions, limitations, procedures, and regulations otherwise provided by law," that statute should be interpreted to require the notice and hearing requirements of N.C.G.S. § 153A-191 to apply to N.C.G.S. § 153A-284.

The operation of the sewer system is a public enterprise, and as such, the method of financing the system is subject to N.C.G.S. § 153A-276. However, the mandate of this section applies only where such "restrictions, limitations, procedures, and regulations otherwise provided by law" are themselves *mandatory*. N.C.G.S. § 153A-276 (1987). For instance, when an ordinance regulating a public enterprise is adopted by a local government to finance the public enterprise, the procedures supplied in the General Statutes for adopting such an ordinance must likewise be followed; when a general obligation bond is issued by a local government, the provisions of chapter 159 of the General Statutes must be followed; and when a local government purchases equipment, the applicable statutes regarding competitive bidding, where applicable, must likewise be followed. There is no statute or law that mandates notice and hearing requirements for ordinances requiring mandatory connections and fixing related connection charges and user fees. *See Hutchinson v. City of Valdosta*, 227 U.S. 303, 57 L. Ed. 520, and its progeny.

IV.

[5] The plaintiffs also contend that the Sewer District, acting before entering into the interlocal cooperative agreement which invoked the authority of mandatory connections pursuant to N.C.G.S. § 153A-284, was not authorized to charge user fees to customers for whom no service was then existing. The Sewer District, prior to entering into the interlocal cooperative agreement, relied on statutory authority in N.C.G.S. § 162A-88, which allows it to charge user fees for services "to be furnished." The Sewer District interpreted this language to allow them to charge user fees even before the project was built, effectively financing the local share of the project costs. Plaintiffs, on the other hand, contend that, without the benefit of N.C.G.S. § 153A-284, legislative intent supports a finding that the financing of public enterprises by a sewer district should require the Sewer District to follow the procedural re-

quirements of an assessment—specifically, personal notice and a hearing.

Plaintiffs assert that a broad reading of N.C.G.S. § 162A-88, whereby a sewer district can set fees "for the use of or the services furnished or to be furnished by any sanitary sewer system," would allow the Sewer District to evade the notice and hearing requirements of N.C.G.S. § 153A-191 (assessments) and render them meaningless. They contend that, like N.C.G.S. § 153A-277, N.C.G.S. § 162A-88 is a "rate setting statute," and in that context a more consistent interpretation of the "to be furnished" language is that it authorizes increases in the rates of *existing* customers in order to finance maintenance and improvements necessary for services to *existing* customers. We disagree and hold that the provisions of N.C.G.S. § 162A-88 authorizing user fees for services "to be furnished" is *not* limited to the financing of maintenance and improvements of *existing* customers.

V.

The plaintiffs further contend that language in the bond order to the effect that taxes would be levied limits the County Commissioners' ability to finance the project solely to the imposition of taxes. We disagree. By statute, the bond order must contain mandating language. N.C.G.S. § 159-54(3) (1987). A fair reading of the language indicates that the statute applies to general obligation bonds which pledge the faith and credit of the county. N.C.G.S. § 159-46 (1987). A tax *must* be levied only if revenue from other sources is inadequate to repay the principal and interest on the bonds outstanding. Moreover, the ballot that the voters in this case considered indicates that the voters were asked only to *authorize a tax* rather than to approve an order imposing a tax. The County Commissioners were not compelled to impose a tax and were free, under these facts, to charge reasonable fees and charges to repay the bonds in lieu of the levy of a tax.

VI.

[6] A separate issue in this case is the termination of water services by the defendant County as operator of the Water District's water system without notice of, or an opportunity for, a hearing. There are six plaintiffs (comprising three households) who receive water services from the defendant Water District. On 7 January 1985, the County Commissioners adopted an ordinance authorizing

its utility department to discontinue water service to customers who were more than ten days delinquent. This included discontinuance of water service based on nonpayment of sewer charges and fees, even if the resident was not connected to the County's sewer system. On 18 April 1984, the County's utilities director had sent the McNeills a letter stating that they had ten days to pay $132.64 in sewer fees. The letter further stated that their water service would be terminated if they did not pay the sewer fees. The McNeills refused to pay the sewer fees. Their water service was terminated by the County for nonpayment of the sewer fees. They had to pay the sewer fees, plus a $25.00 reconnection fee, in order to get their water service restored.

For the McNeills to prevail on the basis of lack of notice and an opportunity to be heard, they must establish a property interest or an entitlement to the water services. North Carolina law controls the existence or nonexistence of an entitlement. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9, 56 L. Ed. 2d 30, 39 (1978). We hold that the water service furnished by the County here does not rise to the level of "property" protected by due process requirements. While other statutes specifically authorize disconnections in certain situations, N.C.G.S. § 153A-283 states specifically that "[i]n no case may a county be held liable for damages for failure to furnish water or sewer services." In light of this statutory provision, a citizen of a county in North Carolina may not assert a claim of entitlement to water services. Assuming *arguendo*, however, that such a property interest exists, the McNeills were given adequate notice and opportunity to be heard. As early as June 1984 the McNeills were aware of the sewer fees charged to them. In June 1984, Harnett County notified the McNeills that they were required to connect their properties to the sewer system. The director of Harnett County Public Utilities knew the McNeills and had spoken with them as early as May 1983 about the sewer project, when he had talked with them about conveying an easement to the Sewer District. The McNeills' response was that their septic tank was working and that they did not want to connect to the sewer system. The utilities director's letter to the McNeills of 18 April 1985 alone fully explained the facts and the basis for a potential disconnection. There can be no doubt that the McNeills had sufficient contacts with the utilities director prior to the discontinuance of their water service "to afford reasonable assurance against erroneous or arbitrary withholding

of essential services." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. at 18, 56 L. Ed. 2d at 44 (citing *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18 (1976)).

VII.

[7] The Court of Appeals determined that the plaintiffs were the prevailing party and that they met the two-part test for attorneys' fees in claims under 42 U.S.C. § 1983 that was established in *Ward Lumber Co. v. Brooks*, 50 N.C. App. 294, 296-97, 273 S.E.2d 331, 333, *appeal dismissed*, 302 N.C. 398, 279 S.E.2d 356, *cert. denied*, 454 U.S. 1097, 70 L. Ed. 2d 638 (1981). However, for the above-stated reasons, we are reversing the decision of the Court of Appeals; therefore, plaintiffs have not prevailed in their cause, and we must also reverse the Court of Appeals' affirmance of the attorneys' fees awarded pursuant to 42 U.S.C. § 1988.

In conclusion, we hold that the statute in question, the ordinances mandating connection to the county-operated sewer system, and the payment of connection charges and monthly user fees for the sewer service are valid exercises of the police power and meet the due process requirements of the state and federal Constitutions. In addition, a local government is not required to use an assessment procedure to finance a project, and a sewer district may effectively finance a project through its authority to charge for services "to be furnished" pursuant to N.C.G.S. § 162A-88. Finally, we hold that the language of the bond order in this case did not require the County Commissioners to levy a tax.

For the above reasons, we reverse the decision of the Court of Appeals.

Reversed.

HCA CROSSROADS RESIDENTIAL CENTERS, INC. AND LAUREL WOOD OF HENDERSON, INC. v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION

No. 79PA90

(Filed 5 December 1990)

1. **Statutes § 5.10 (NCI3d)— qualifying words—doctrine of last antecedent**

Under the doctrine of the last antecedent, relative and qualifying words, phrases and clauses ordinarily are to be applied to the word or phrase immediately preceding and, unless context indicates a contrary intent, are not to be construed as extending to or including others more remote.

Am Jur 2d, Statutes § 230.

2. **Hospitals § 2.1 (NCI3d)— certificates of need—rejection within review period—construction of statute**

Under the doctrine of the last antecedent, the limiting phrase "within the review period" in N.C.G.S. § 131E-185(b) modifies only the phrase "reject the application." Therefore, the Department of Human Resources is required to reject applications for certificates of need within the review period or, when the review period ends without action by the Department, to issue the certificates.

Am Jur 2d, Hospitals and Asylums §§ 3, 4.

3. **Hospitals § 2.1 (NCI3d)— certificates of need—failure to act on applications within review period—issuance of certificates required**

When the Department of Human Resources failed to make a decision on applications for certificates of need for construction of chemical dependency treatment facilities within the maximum statutory review period of 150 days, the Department must be deemed as a matter of law to have decided in favor of issuing the certificates of need and lost subject matter jurisdiction to do anything thereafter but issue the certificates of need. Therefore, the Department's decision purporting to disapprove the pending applications after the maximum review period expired was a nullity and no legal consequence. N.C.G.S. §§ 131E-185(a1) and (c).

Am Jur 2d, Hospitals and Asylums §§ 3, 4.

Justice WHICHARD dissenting.

Justice FRYE joins in this dissenting opinion.

ON discretionary review pursuant to N.C.G.S. § 7A-31 (prior to a determination by the Court of Appeals) of the 21 November 1988 final decision of the Department of Human Resources denying the petitioner-appellants' applications for certificates of need for construction of chemical dependency treatment facilities. Heard in the Supreme Court on 4 September 1990.

Petree, Stockton & Robinson, by Noah H. Huffstetler, III, for petitioner-appellant HCA Crossroads Residential Centers, Inc.

Bode, Call & Green, by Robert V. Bode, Nancy O. Mason and Diana E. Ricketts, for petitioner-appellant Laurel Wood of Henderson, Inc.

Lacy H. Thornburg, Attorney General, by Richard A. Hinnant, Jr., and James A. Wellons, Assistant Attorneys General, for the respondent-appellee Department of Human Resources.

Johnson, Gamble, Hearn & Vinegar, by George G. Hearn and Samuel H. Johnson, for North Carolina Health Care Association, amicus curiae.

MITCHELL, Justice.

The controlling issue before this Court is whether the Department of Human Resources ("Department") lost subject matter jurisdiction when it failed to act, within the time prescribed by law, on applications for certificates of need for construction of chemical dependency treatment facilities. We conclude that when the prescribed statutory review period ended with the Department having failed to act, the Department was deemed as a matter of law to have decided in favor of issuing the certificates of need and it lost subject matter jurisdiction to do anything but issue those certificates of need. As a result, the agency had no authority to deny the applications.

On 16 May 1988, HCA Crossroads Residential Centers, Inc. ("Crossroads") submitted an application for a certificate of need to construct and operate a 48-bed freestanding chemical dependency treatment facility for adolescents in Buncombe County. On the

same date, Laurel Wood of Henderson, Inc. ("Laurel Wood") submitted its application to develop a 66-bed adolescent chemical dependency treatment facility in Henderson County. The Department, acting through the Certificate of Need Section of its Division of Facility Services, assigned both applications to a regularly scheduled 90-day review cycle beginning on 1 June 1988.

A time limit of 90 days is prescribed by statute for the Department's review of applications for certificates of need, running from the date upon which the assigned review period begins. N.C.G.S. § 131E-185(a1) (1988). The statute further provides that upon complying with certain requirements, the Department may extend this time limit for a period not to exceed 60 days. N.C.G.S. § 131E-185(c) (1988).

On 29 August 1988, the Department purported to extend the review period for the petitioner-appellants' applications until 28 October 1988. The petitioner-appellants contend that the Department's attempt to extend the applicable review period for 60 days did not comply with statutory requirements and was ineffective. We neither consider nor decide this disputed question. Instead, we assume for purposes of this opinion that the purported 60-day extension complied with the law in all respects and was proper.

For both the Crossroads and the Laurel Wood applications, the Department thereafter allowed the maximum 150-day period (90 days plus 60 days) prescribed by statute to expire on 31 October 1988, without acting on either application. On 21 November 1988, 173 days after the applicable review cycle began, the Department issued letters to Crossroads and Laurel Wood which purported to deny their applications for certificates of need.

In verified petitions for contested case hearings before the Office of Administrative Hearings filed by Crossroads on 30 November 1988 and by Laurel Wood on 21 December 1988, those parties asserted that the Department's purported denials of their applications exceeded its authority and jurisdiction. They contended that the Department was required by law to issue the certificates of need they sought when it failed to act on their applications within the statutorily prescribed maximum time limit of 150 days. By order of Chief Administrative Law Judge Robert A. Melott, dated 29 December 1988, the contested cases initiated by Crossroads and Laurel Wood were consolidated for hearing.

On 20 December 1988, Crossroads filed a motion for a recommended decision granting summary judgment in its favor, pursuant to N.C.G.S. § 1A-1, Rule 56, N.C.G.S. § 150B-34, and 26 NCAC 3 .0005. At the conclusion of a hearing on 6 January 1989, presiding Administrative Law Judge Beecher R. Gray issued a recommended decision concluding *inter alia* that the Department's denial of Crossroads' application was in excess of its authority and jurisdiction and recommending that the Department issue a certificate of need to Crossroads to develop its project.

On 10 January 1989, Laurel Wood filed a similar motion for a recommended decision granting summary judgment in its favor. On 27 January 1989, Administrative Law Judge Gray issued a decision recommending that the Department issue a certificate of need to Laurel Wood.

Under N.C.G.S. § 131E-188(a), the recommended decisions in favor of Crossroads and Laurel Wood were subject to further review by the Department before issuance of its final decisions on their applications. The Department issued final decisions on the applications of Crossroads and Laurel Wood on 8 March 1989 and 17 March 1989, respectively. In each instance the Department rejected the recommended decision of the Administrative Law Judge, reaffirmed its denial of the application, and informed the applicant of its right to appeal to the Court of Appeals. Crossroads and Laurel Wood filed notices of appeal to the Court of Appeals on 6 April 1989 and 14 April 1989, respectively. On 1 March 1990, this Court granted discretionary review, *ex mero motu*, prior to a determination by the Court of Appeals.

N.C.G.S. § 131E-185(a1) provides:

> Except as provided in subsection (c) of this section, there shall be a time *limit* of 90 days for review of the applications [for certificates of need], beginning on the day established by rule as the day on which applications for the particular service in the service area shall begin review.

(Emphasis added.)

An exception to the 90-day time limit mandated by the foregoing provision is contained in N.C.G.S. § 131E-185(c), which states:

> The Department shall promulgate rules establishing criteria for determining when it would not be practicable to complete a review within 90 days from the beginning date of the review

> period for the application. If the Department finds that these criteria are met for a particular project, it may extend the review period for a period *not to exceed* 60 days and provide notice of such extension to all applicants.

(Emphasis added.)

These statutory provisions clearly prescribe a mandatory maximum time limit of 150 days within which the Department must act on applications for certificates of need. To the extent it is applicable, this time limit is jurisdictional in nature. *See Snow v. Board of Architecture*, 273 N.C. 559, 569, 160 S.E.2d 719, 727 (1968) (administrative agency loses jurisdiction over the subject matter when it fails to make a decision within the time allowed by law); *see also* 2 Am. Jur.2d *Administrative Law* § 334 (the jurisdiction of administrative agencies "although once obtained, may be lost, and in such case proceedings cannot be validly continued beyond the point at which jurisdiction ceases").

[1, 2] We conclude that since it failed to make a decision as to either of the applications at issue here within the statutory review period, the Department must be deemed as a matter of law to have decided in favor of issuing certificates of need to Crossroads and Laurel Wood and that the Department lost subject matter jurisdiction to do anything thereafter but issue the certificates of need. Therefore, the Department's decision purporting to disapprove the pending applications after the maximum 150-day review period expired was a nullity and of no legal consequence. *See Charlotte Liberty Mut. Ins. Co. v. Lanier*, 16 N.C. App. 381, 384, 192 S.E.2d 57, 59 (1972) (action of board in excess of its jurisdiction "was without warrant in law and is a nullity").

N.C.G.S. § 131E-185(b) states:

> The Department shall issue as provided in this Article a certificate of need with or without conditions or reject the application within the review period.

The limiting phrase "within the review period" modifies only the phrase "reject the application," and, therefore, the Department loses subject matter jurisdiction to reject an application when the review period ends. Once the review period expires without action by the Department, it retains jurisdiction only for the purpose of issuing certificates of need.

By what is known as the doctrine of the last antecedent, relative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding and, unless the context indicates a contrary intent, are not to be construed as extending to or including others more remote. *See* 82 C.J.S. *Statutes* § 334 (1953); *see also* 73 Am. Jur.2d *Statutes* § 230 (1974) ("In construing statutes, qualifying words, phrases, and clauses are ordinarily confined to the last antecedent, or to the words and phrases immediately preceding"); *cf. State v. Cloninger*, 83 N.C. App. 529, 531, 350 S.E.2d 895, 897 (1986) (applying but not announcing the doctrine of last antecedent). This doctrine is not an absolute rule, however, but merely one aid to the discovery of legislative intent. As we find no contrary legislative intent expressed in N.C.G.S. § 131E-185(b) or elsewhere in our Certificate of Need Law, Article 9 of Chapter 131E, we apply the doctrine of the last antecedent and conclude that the Department is required to reject applications for certificates of need within the review period or, when the review period ends without action by the Department, to issue the certificates. N.C.G.S. § 131E-185(b) (1988).

The only other conceivable interpretation of the language of N.C.G.S. § 131E-185(b) is that it merely reiterates the time limits specified in N.C.G.S. § 131E-185(a1) and (c) without doing anything more. Under such an interpretation, N.C.G.S. § 131E-185(b) would be entirely redundant and meaningless. Such statutory construction is not permitted, because a statute must be construed, if possible, to give meaning and effect to all of its provisions. *See State v. Williams*, 286 N.C. 422, 431, 212 S.E.2d 113, 120 (1975); *see also Schofield v. Tea Co.*, 299 N.C. 582, 590, 264 S.E.2d 56, 62 (1980).

Our interpretation of N.C.G.S. § 131E-185(b) finds additional support when that statute is construed *in pari materia*, as it must be, with N.C.G.S. § 131E-186(a), which states: "*Within the prescribed time limits* in N.C.G.S. § 131E-185, the Department shall issue a *decision* to 'approve,' 'approve with conditions,' or 'deny,' an application for a new institutional health service." (Emphasis added.) As N.C.G.S. § 131E-186(a) makes clear, in cases in which the Department approves an application for a certificate of need, it is required to make and issue its *decision* to approve the application within the time limits prescribed by N.C.G.S. § 131E-185. However, the legislature also anticipated that the Department ordinarily would *not* actually *issue* the certificate of need within the time limits prescribed in N.C.G.S. § 131E-185(b), when the

legislature specifically provided in N.C.G.S. § 131E-187(a) that the Department must *issue the certificate* within 35 days of the Department's *decision* to approve it, and then only if "no request for a contested case hearing has been filed . . . and all applicable conditions of approval that can be satisfied before issuance of the certificate of need have been met." Construed *in pari materia*, as they must be, the foregoing sections of Article 9 must be read as providing that the Department shall exercise one of two options, within the review period, when dealing with an application for a certificate of need: (1) make a *decision* to deny or approve the application or (2) reject the application. In the present case, the Department failed to do either within the maximum 150-day review period.

When viewed in its entirety, Article 9 of Chapter 131E of the General Statutes, the Certificate of Need Law, reveals the legislature's intent that an applicant's fundamental right to engage in its otherwise lawful business be regulated but not be encumbered with unnecessary bureaucratic delay. The comprehensive legislative provisions controlling the times within which the Department must act on applications for certificates of need, set forth in Article 9, will be nullified if the Department is permitted to ignore those time limits with impunity. As a result, the provisions of Article 9 must be construed as expressing the legislature's intent that the Department be deemed as a matter of law to have rendered a *decision* to approve a certificate of need, if the Department fails to act upon an application within the applicable review period. Thereafter, the Department retains subject matter jurisdiction only for the purpose of issuing the certificate of need, which it is deemed to have decided to approve. A contrary interpretation of our Certificate of Need Law would leave the applicant with no effective remedy for the Department's failure to comply with the statute.

[3] For the foregoing reasons we have concluded that the Department was required, within the review period, either to reject the applications for certificates of need in the present case, or make a decision to deny or approve those applications. Further, we conclude that, having failed to act within the applicable review period, the Department is deemed as a matter of law to have decided to approve the certificates of need in question, and that it lost jurisdiction over the subject matter of the applications in question for all purposes except the issuance of the certificates of need. As a result, the Department must now issue the certificates of

need applied for by Crossroads and Laurel Wood. Accordingly, we vacate the final decision of the Department of Human Resources and remand this case to that Department for proceedings consistent with this decision.

Vacated and remanded.

Justice WHICHARD dissenting.

The majority concludes that "when the prescribed statutory review period ended with the Department [of Human Resources] having failed to act, the Department was deemed as a matter of law to have decided in favor of issuing the certificates of need and it lost subject matter jurisdiction to do anything but issue those certificates of need." This conclusion consists of two parts, neither of which furthers the legislative purpose underlying the certificate of need (CON) law. The first is that Department inaction should be deemed a decision in favor of issuing a certificate of need. The second is that the statutory time limit is jurisdictional in nature.

That the failure to decide within the statutory period compels approval is not self-evident. Rather, the majority is forced to rely on the doctrine of the last antecedent, a principle mentioned in a footnote in petitioners' brief and in only one North Carolina appellate opinion. *State v. Cloninger*, 83 N.C. App. 529, 350 S.E.2d 895 (1986). N.C.G.S. § 131E-185(b) states: "The Department shall *issue as provided in this Article* a certificate of need with or without conditions *or reject* the application *within the review period.*" (Emphasis supplied.) Only by applying the doctrine of the last antecedent can the majority limit application of the language "within the review period" to the "rejection" aspect of review, such that the Department is left with two choices—rejection within the period or automatic approval.

The dubiousness of this construction can be seen by comparing this language as so construed with language in section 131E-186. The majority reads section 185(b) to require *rejection within the review period* or automatic approval. Section 186(a), however, states that "[w]ithin the prescribed time limits in G.S. 131E-185, the Department shall issue a decision to 'approve,' 'approve with conditions,' or 'deny,' an application . . . ." I believe the language of section 186(a) sheds light on the proper interpretation of section 185(b).

It indicates that the limiting language "within the prescribed time" applies to all three options—approve, approve with conditions, or deny. It is doubtful that the General Assembly intended in one section to apply time limits only to the rejection option, when in a neighboring section it expressly applied time limits to all the decisional possibilities. It is more likely, especially when considered in light of the purpose behind the legislation, that the difference between the two sections reflects poor drafting rather than differing intent.

The doctrine of the last antecedent is an appropriate aid in discovering legislative intent in cases where intent is not clearly evident. This is not such a case, however. A plethora of expression of legislative intent, which is contrary to a conclusion favoring automatic approval of CON applications, is found in the findings set forth in N.C.G.S. § 131E-175. These findings indicate that the primary purpose of Article 9 (the CON law) is to review and evaluate the need for new health service facilities prior to their construction. The perceived evil sought to be remedied is the "geographical maldistribution . . . and proliferation of unnecessary health service facilities result[ing] in costly duplication and underuse of facilities . . . ." N.C.G.S. § 131E-175(3), (4) (1988). Because the majority decision compels issuance of certificates independent of proven need, it is inimical to the intent that the General Assembly pellucidly expressed in its findings.

Two other sections within current Article 9 also suggest a contrary intent that the Department must complete its review before a certificate of need is issued. Section 131E-186(b) states that "[w]ith[in] five days after it makes a decision on an application, the Department shall provide written notice of all the findings and conclusions upon which it based its decision . . . ." This section contemplates a *completed review*; otherwise, there would be no basis for the findings and conclusions the majority deems the Department to have made. Further, it is clear that Article 9 requires that "all applicable conditions of approval . . . be satisfied" before a certificate is issued. N.C.G.S. § 181E-187(b) (1988). The majority's conclusion that approval occurs after the expiration of the statutory period, regardless of whether the criteria establishing need are satisfied, obviates this provision.

It is important, when inferring legislative intent from legislative history, to look not only at the language of prior versions of the

relevant statute, but also at other models of the same types of legislation. With that in mind, I note that in order to assure federal assistance, North Carolina's CON law tracked federal law very closely. Prior to 1979, federal law required automatic denial in cases of delay. 42 C.F.R. § 123.407(a)(15) (1979). In 1979, however, Congress deleted the automatic denial provision and provided that an applicant could, in cases of delay, bring an action in an appropriate state court to require agency action. 42 U.S.C. § 300n-1(b)(12)(C)(ii) (Supp. 1979). In 1980, just eight months before North Carolina amended its CON law, the Department of Health and Human Services amended its CON regulations to provide that a certificate not be issued or denied "solely because the state agency failed to reach a decision." 42 C.F.R. § 123.410(a)(17) (1981).

The history of our section 185(b) followed a similar pattern. The 1977 session laws provided that: "The department shall issue as provided in this Article a certificate of need with or without conditions or reject the application within the review period. *If the department fails to act within such period, the failure to act shall constitute denial of the application.*" (Emphasis supplied.) 1977 N.C. Sess. Laws ch. 1182, § 2. This language was later codified as N.C.G.S. § 131-182(b) (1977). Thus, our CON law, like the federal law, contained a provision requiring automatic denial in cases of agency delay. Subsequently, in 1981, the General Assembly again followed the federal law and deleted the automatic denial provision. It *did not*, however, insert a provision requiring automatic approval, although it easily could have done so. In fact, other states had inserted an automatic approval provision prior to the North Carolina amendment. *See, e.g.*, R.S. Mo. § 197.330.2 (Supp. 1979).

In this case we are called upon to construe the meaning of section 185(b). The majority interprets the language that originally appeared in the 1977 session laws to require automatic approval of applications for certificates of need. In doing so, however, it ignores the fact that such an interpretation compels us to assume that the General Assembly intended to provide for "automatic approval" in the first sentence of then section 182(b), yet also intended to provide for "automatic denial" in the second sentence of that section. The reading of such a flagrant contradiction into the statute strongly suggests that the majority's interpretation is mistaken.

The majority also rests its interpretation of section 185(b) on another principle of statutory construction, *viz*, that statutes shall

be construed to avoid redundancy. It states that unless section 185(b) requires automatic approval, it is the exact equivalent of section 186. This is not the case, however. Section 131E-185 is entitled "Review Process" and section 131E-186 is entitled "Decision." The significant difference between the two sections is the language in section 185 that "[t]he Department shall issue *as provided in this Article* a certificate of need . . . ." (Emphasis supplied.) The import of this distinction is that *in the review process* the certificate of need is to be issued when it meets the review criteria established in Article 9. Section 186, the "Decision" section, is subtly different in that it merely describes the types of decisions the Department is authorized to make, *i.e.*, it may approve, approve with conditions, or deny. Thus, rather than being a redundancy, section 185(b) should more likely be viewed as yet another expression of legislative intent that certificates of need shall only be issued when the Department has completed its review and found that the application satisfies the need criteria for new health service facilities.

The majority also expresses concern that applicants frustrated by delay will have no remedy absent automatic approval. Applicants can, however, seek a common law writ of mandamus requiring the agency to comply with its statutory duties. N.C.G.S. § 150B-44 also provides a source of relief. It provides in pertinent part:

> Unreasonable delay on the part of any agency or administrative law judge in taking any required action shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency or administrative law judge.

N.C.G.S. § 150B-44 (1983). As noted above, when Congress deleted the automatic denial provision in its CON law it made specific reference to what is, in effect, a statutory provision for mandamus—*i.e.*, if an agency fails to act within the applicable period, the applicant may bring an action in state court to compel a decision on the application. *See* 42 U.S.C. § 300n-1(b)(12)(C)(ii). Our General Assembly deleted its automatic denial provision in the context of that federal law. Further, it has amended section 150B-44 to expand its applicability from situations involving a *final agency decision* to situations involving the *taking of any required action.* The statutory remedy is available in cases of unreasonable delay, and the failure of the Department to conduct its review and make

a decision within the statutory time period is prima facie an unreasonable delay. Thus, an applicant would have access to this provision in cases such as this. *See Bradbury Mem. Nursing Home v. Tall Pines Manor*, 485 A.2d 634 (Me. 1984). Clearly, then, automatic approval is not petitioners' only remedy.

Perhaps the motivating rationale for the majority decision is its expressed concern for the burden the CON program puts on "an applicant's fundamental right to engage in its otherwise lawful business," especially when the burden is delay beyond that provided by the statute. This Court has invalidated provisions of a CON law once before. In *In re Aston Park Hospital, Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973), the Court declared the CON law an unconstitutional deprivation of property without due process of law. The basis for that ruling, however, was the lack of a reasonable relation between the denial of a person's right to develop health service facilities and the promotion of public health. Since *Aston Park*, the General Assembly has re-enacted the CON law and made the explicit findings discussed above which describe the relation between the purposes behind the CON law and the effect it has on individual property rights. Thus, the constitutional infirmity identified in *Aston Park* is not at issue here. While concern over burdening an applicant's right to engage in business is appropriate, it is not a sufficient basis for interpreting legislative silence on the effect of noncompliance with time limits in a manner that effectively negates the entire purpose of the statute.

The second part of the majority's analysis, whether the statutory time limits are jurisdictional in nature, depends largely upon its interpretation of the legislative intent behind Article 9. This Court has stated that

> [i]n determining whether a particular provision in a statute is to be regarded as mandatory or directory[,] the legislative intent must govern, and this is usually to be ascertained not only from the phraseology of the provision, but also from the nature and purpose, and the consequences which would follow its construction one way or the other.

North Carolina Art Society v. Bridges, 235 N.C. 125, 130, 69 S.E.2d 1, 5 (1952). The majority looks to the purpose of the legislation, divines an inarticulate concern over bureaucratic delay, and concludes that the time limits are mandatory. It cites *Snow v. Board*

of Architecture, 273 N.C. 559, 160 S.E.2d 719 (1968), in support of its conclusion.

Snow, however, is readily distinguishable from this case. It involved a license revocation proceeding against an architect. The proceeding was penal in nature, and the rule in that case thus has no direct application to the situation here, where petitioners are two of many applicants seeking certificates allowing them to fill a designated need for health services in a particular geographic area.

Because the primary intent of Article 9 is to regulate the development of new health service facilities through a process of complete review in light of specified criteria, with the aim of avoiding unnecessary and duplicative health care service facilities, I would conclude that the time limits are not jurisdictional. In order to effectuate the purposes of the CON law the time limits should be considered directory only. As noted above, this interpretation does not leave petitioners without a remedy. Common law and statutory mandamus remain available.

In sum, the majority uses statutory construction maxims of tenuous applicability to slay a perceived dragon of bureaucratic delay. While such delay is indeed deplorable, the remedy adopted is overly draconian. Given that petitioners have an adequate remedy in mandamus, I would not interpret the legislature's silence on the effect of noncompliance with the prescribed time limitations, as does the majority, in a manner that is inconsistent with the nature and purpose of the statute and with the predominant phraseology of its provisions. The majority decision unnecessarily undermines the basic purpose of the law and compels consequences fundamentally at odds with its intent. I therefore respectfully dissent.

Justice FRYE joins in this dissenting opinion.

DURHAM MERIDIAN LIMITED PARTNERSHIP AND MERIDIAN HEALTHCARE, INC., PETITIONERS v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT, AND DURHAM LIMITED PARTNERSHIP AND NORTHWOOD NURSING CENTER, INC., INTERVENOR-RESPONDENTS

No. 80PA90

(Filed 5 December 1990)

ON discretionary review pursuant to N.C.G.S. § 7A-31 (prior to determination by the Court of Appeals) of the 1 May 1989 final decision of the Department of Human Resources, by I.O. Wilkerson, Jr., Director, Division of Facility Services. Heard in the Supreme Court on 4 September 1990.

Petree, Stockton & Robinson, by Noah H. Huffstetler, III, and Barbara Bosma Garlock, for petitioner-appellants.

Lacy H. Thornburg, Attorney General, by Richard A. Hinnant, Jr., Assistant Attorney General, and James A. Wellons, Assistant Attorney General, for respondent-appellee, Department of Human Resources.

Smith Helms Mullis & Moore, by Maureen Demarest Murray and William K. Edwards, for intervenor-respondent appellees.

MARTIN, Justice.

For the reasons set forth in *HCA Crossroads Residential Centers, Inc. and Laurel Wood of Henderson, Inc. v. North Carolina Department of Human Resources, Division of Facility Services, Certificate of Need Section*, 327 N.C. 573, 398 S.E.2d 466 (1990), the final decision of the Department of Human Resources entered 1 May 1989 in this cause is vacated.

In accordance with the reasoning and holding in *HCA Crossroads Residential Centers, Inc., et al. v. North Carolina Department of Human Resources*, above referred to, the department must now issue the certificates of need applied for by petitioners and intervenor-respondents.

The final decision of the Department of Human Resources is vacated, and this cause is remanded to that department for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Justice WHICHARD dissenting.

For the reasons stated in my dissenting opinion in *HCA Crossroads Residential Centers, Inc. v. N.C. Dept. of Human Resources,* filed simultaneously herewith, I respectfully dissent.

Justice FRYE joins in this dissenting opinion.

GAIL WEST MEDLIN, GUARDIAN AD LITEM FOR PAMELA LYNN MEDLIN v. VANN J. BASS, INDIVIDUALLY AND AS AGENT FOR FRANKLIN COUNTY BOARD OF EDUCATION; LUTHER BALDWIN, INDIVIDUALLY AND AS AGENT FOR FRANKLIN COUNTY BOARD OF EDUCATION; WARREN W. SMITH, FRANKLIN COUNTY BOARD OF EDUCATION; RUSSELL E. ALLEN, INDIVIDUALLY AND AS AGENT FOR FRANKLIN COUNTY BOARD OF EDUCATION; FRANKLIN COUNTY BOARD OF EDUCATION, DEFENDANTS

No. 7A90

(Filed 5 December 1990)

1. **Master and Servant § 33 (NCI3d); Schools § 11 (NCI3d)— school principal—sexual assault on student—insufficient forecast of negligent hiring or retention**

Plaintiffs' forecast of evidence was insufficient to establish a claim against defendant school superintendent and defendant school board for negligent hiring or retention of a school principal who allegedly sexually assaulted the minor plaintiff because the forecast was devoid of evidence that defendants knew or reasonably could have known of the principal's alleged pedophilic tendencies prior to the incident in question where evidence before the court tended to show: the principal's sexual assaults on the minor plaintiff allegedly occurred during the first few days of the 1984-85 school year when he called her to his office to discuss her attendance problems; the principal had previously worked as a teacher and principal in the Rocky Mount school system for ten years and had resigned in 1968 when a student's father alleged that he had sexually assaulted the student; the official explanation for his resignation was "health reasons"; before defendant school board hired him as a teacher in January 1969, an assistant superintendent's

telephone calls to two references who were educators in Rocky Mount did not reveal the previously alleged sexual assaults; subsequent written recommendations by the Rocky Mount educators contained no information indicating that the principal was a pedophile; an assistant superintendent of defendant school board interviewed the Rocky Mount superintendent in the Spring of 1969 about a rumor that the principal was a homosexual, but the superintendent said nothing during the interview about the alleged assault; defendant superintendent called the Rocky Mount superintendent before hiring the alleged assailant as a principal in June 1969; and the principal had performed his official duties in a satisfactory manner for approximately sixteen years.

Am Jur 2d, Assault and Battery §§ 131, 134; Municipal, County, School, and State Tort Liability §§ 524, 625, 633, 634, 639.

2. **Master and Servant § 34.1 (NCI3d); Schools § 11 (NCI3d)—principal's sexual assaults on student—school board not liable under respondeat superior**

A school principal's alleged sexual assaults on a student after he had summoned her to his office to discuss her truancy did not occur within the course and scope of his employment so as to subject defendant board of education to liability under a respondeat superior theory. While the principal was exercising authority conferred upon him by defendant board of education when he summoned the student to his office, he was advancing a completely personal object in proceeding to assault her sexually.

Am Jur 2d, Assault and Battery §§ 131, 132; Municipal, County, School and State Tort Liability §§ 534, 625, 633, 634, 639.

Justice MARTIN dissenting in part.

Justice FRYE joins in this dissenting opinion.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 96 N.C. App. 410, 386 S.E.2d 80 (1989), affirming summary judgment for defendants Franklin County Board of Education, Luther Baldwin, Warren W. Smith and Russell E. Allen, entered by *Crawley, J.*, on 26

April 1988 in Superior Court, FRANKLIN County. Heard in the Supreme Court 4 September 1990.

J. Wilson Parker and Kirk, Gay, Kirk, Gwynn & Howell, by Andy W. Gay and Katherine M. McCraw, for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by David H. Batten; Davis, Sturges & Tomlinson, by Charles M. Davis, for defendant appellee Franklin County Board of Education.

Young, Moore, Henderson & Alvis, by David P. Sousa, Theodore S. Danchi, and Knox Proctor, for defendant appellee Warren W. Smith.

J. Wilson Parker for the North Carolina Academy of Trial Lawyers, amicus curiae.

William G. Simpson, Jr., for the North Carolina Civil Liberties Legal Foundation, amicus curiae.

Charles M. Patterson for the North Carolina Civil Liberties Union Legal Foundation, amicus curiae.

Katherine Holliday for the Children's Law Center, amicus curiae.

WHICHARD, Justice.

Plaintiff, as guardian ad litem for her minor daughter, sought to recover from defendants compensatory and punitive damages allegedly sustained as the result of sexual assaults upon the minor plaintiff by defendant Vann J. Bass, principal of the school which the minor plaintiff attended. She alleged that on one occasion defendant Bass sexually assaulted the minor plaintiff by committing lewd and lascivious acts and taking immoral, improper and indecent liberties, and that on a second occasion defendant Bass sexually assaulted the minor plaintiff by the same acts and additionally by willfully carnally knowing and abusing the minor plaintiff. Plaintiff asserted claims against defendant Bass for assault and battery, false imprisonment, and intentional infliction of mental distress.

In an amended complaint plaintiff joined, as additional defendants, the Franklin County Board of Education (FCB), Warren W. Smith, Superintendent of FCB, Russell E. Allen, Assistant Superintendent of FCB, and Luther Baldwin, Truancy Officer for FCB. She alleged that defendants Smith and Allen were negligent

in hiring and retaining defendant Bass, and that defendant Baldwin inflicted severe emotional distress upon the minor plaintiff by causing issuance of a juvenile petition against her without proper investigation of all relevant facts. She alleged that all individual defendants at all relevant times were acting within the course and scope of their employment with defendant FCB and that their acts or omissions thus should be imputed to defendant FCB.

After consideration of the pleadings, affidavits, and deposition transcripts, including attachments and exhibits, the trial court denied defendant Bass' motion for summary judgment, but allowed motions for summary judgment filed on behalf of defendants Smith, Allen, Baldwin, and FCB. Plaintiff appealed, and the Court of Appeals affirmed. *Medlin v. Bass*, 96 N.C. App. 410, 386 S.E.2d 80 (1989). Judge Phillips dissented as to the summary judgments in favor of defendants FCB and Smith. Plaintiff exercised her right to appeal to this Court. N.C.G.S. § 7A-30(2) (1989).

Because this appeal is before us pursuant to N.C.G.S. § 7A-30(2), review is limited to the issues raised in Judge Phillips' dissent: (1) whether defendant Smith, as FCB Superintendent, negligently investigated defendant Bass before hiring him, and (2) whether defendant Bass' offenses occurred in the course and scope of his employment, thus subjecting FCB to liability under a respondeat superior theory. *Medlin*, 96 N.C. App. at 416-17, 386 S.E.2d at 83-84. *See* N.C.R. App. P. 16(b). We hold that plaintiff did not forecast evidence that defendant Smith was negligent in his investigation of defendant Bass or that defendant Bass was acting within the course and scope of his employment at the time he allegedly attacked the minor plaintiff. We thus affirm the Court of Appeals.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1990). "[I]ts purpose is to eliminate formal trials where only questions of law are involved." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

[1] North Carolina recognizes a claim for negligent employment or retention when the plaintiff proves:

> (1) the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) *either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in 'oversight and supervision,'* . . . ; and (4) that the injury complained of resulted from the incompetency proved.

Walters v. Lumber Co., 163 N.C. 536, 541, 80 S.E. 49, 51 (1913) (quoting Shearman & Redfield on Negligence § 190 (6th ed. 1913)) (emphasis added); *see also Pleasants v. Barnes*, 221 N.C. 173, 19 S.E.2d 627 (1942) (plaintiff must show employer's hiring or retention after actual or constructive knowledge of employee's incompetence).

Evidence before the trial court upon defendants' motions for summary judgment showed that before working in the Franklin County Schools, defendant Bass had worked as a teacher and principal in Rocky Mount, North Carolina, for ten years. In June 1968, a Rocky Mount student and the student's father alleged that Bass had assaulted the student sexually. Bass neither confirmed nor denied the incident when Rocky Mount Superintendent Fields asked him about it; instead, he resigned. The official explanation for the resignation was "health reasons"; Rocky Mount school personnel never investigated the incident beyond Fields' inquiry.

Bass moved to Franklin County in the summer of 1968 and did not work until FCB hired him in January 1969. Before FCB hired Bass, Margaret Holmes, FCB Associate Superintendent, telephoned one of his references, Millie Moore, Holmes' college friend and a respected educator. In early February, Holmes sent forms to two of the three references Bass listed on his application. FCB's policy at the time was to contact two of the three references. Holmes' inquiries to Millie Moore, a school supervisor in Rocky Mount, and Ella Moore, a principal there, two of Bass' three listed references, did not reveal the previous alleged sexual assault. Ella Moore commented that she knew of no "habit, [or] physical or mental peculiarities, likely to interfere" with Bass' success and described him as "one of the most promising men in education." Millie Moore wrote that Bass did "an excellent job" and that Rocky Mount "lost a very valuable educator when [the school system] lost Mr. Bass."

Holmes visited and interviewed Rocky Mount Superintendent Fields, Bass' third reference, later that spring after a FCB principal mentioned hearing a rumor that Bass was a homosexual. Bass was still a teacher at this time. According to Holmes' deposition, in that interview she specifically asked Fields about Bass' sexual proclivities. Fields does not recall whether Holmes questioned Bass' sexual proclivities specifically. Fields said nothing about the previous alleged assault during the interview. Before Bass became a FCB principal in June 1969, FCB Superintendent defendant Smith called Fields to ask whether Bass would be a good principal.

Although Holmes, who worked under defendant Smith, the FCB Superintendent, did not receive the written recommendations until after Bass was hired, it is clear that the recommendations contained no information indicating that Bass was a pedophile. It is equally clear that the only rumor relating to Bass' sexual tendencies was investigated and remained unconfirmed. Further, Bass performed his official duties in a satisfactory manner for approximately sixteen years. His alleged sexual assaults on the minor plaintiff occurred during the first few days of the 1984-85 school year, when, according to her forecast of evidence, he called her to his office ostensibly to discuss her attendance problems and then assaulted her.

The foregoing forecast is devoid of evidence that defendants FCB or Smith knew or reasonably could have known of defendant Bass' alleged pedophilic tendencies prior to the incident that is the subject of this lawsuit. It thus fails to establish an essential element of a claim for negligent hiring or retention, *Walters v. Lumber Co.*, 163 N.C. 536, 80 S.E. 49, and summary judgment for defendants on this claim was proper.

[2] Plaintiff also argues that there is a genuine issue of material fact regarding defendant FCB's liability under a respondeat superior theory. An employer will be liable under this theory when the employee's act is "expressly authorized; . . . committed within the scope of [the employee's] employment and in furtherance of his master's business—when the act comes within his implied authority; . . . [or] when ratified by the principal." *Snow v. DeButts*, 212 N.C. 120, 122, 193 S.E. 224, 226 (1937). In *Snow*, this Court found that an employer was not liable when its employee, a general manager, assaulted the plaintiff after the plaintiff expressed his views at a public hearing. It concluded that even though the manager

had broad implied authority, the assault was not within the scope of his authority. Thus, where the employee's action is not expressly authorized or subsequently ratified, an employer is liable only if the act is "committed within the scope of . . . *and* in furtherance of [the employer's] business." *Id.* (emphasis added); *see also Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 437, 378 S.E.2d 232, 235, *disc. rev. allowed*, 325 N.C. 270, 384 S.E.2d 513, *cert. granted*, 325 N.C. 704, 387 S.E.2d 55 (1989), *disc. rev. improvidently allowed*, 326 N.C. 356, 388 S.E.2d 769 (1990); *Troxler v. Charter Mandala Center*, 89 N.C. App. 268, 271, 365 S.E.2d 665, 668, *disc. rev. denied*, 322 N.C. 838, 371 S.E.2d 284 (1988) ("To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment.").

Where the employee's actions conceivably are within the scope of employment and in furtherance of the employer's business, the question is one for the jury. Thus, when a person assaulted plaintiff while defendant's employees were loading plaintiff's possessions on a truck, whether the attacker was defendant's employee and was acting in the course and scope of the employment was a question for the jury. *Robinson v. McAlhaney*, 214 N.C. 180, 198 S.E. 647 (1938). This Court noted that "proof that [the assailant] was authorized to assist in the removal of the furniture [does not] necessarily require the conclusion that he was about his master's business in committing the assault. This is a question for the jury." *Id.* at 183, 198 S.E. at 650.

Our Court of Appeals has held that when a parking attendant drew a gun on plaintiff after plaintiff refused to pay the posted parking fee, the question of whether the attendant was "about his master's business or whether he stepped aside from his employment to commit a wrong prompted by a spirit of vindictiveness or to gratify his personal animosity or to carry out an independent purpose of his own" was for the jury to determine. *Carawan v. Tate*, 53 N.C. App. 161, 164, 280 S.E.2d 528, 531, *modified*, 304 N.C. 696, 286 S.E.2d 99 (1981). In *Edwards v. Akion*, the plaintiff and a sanitation worker disagreed about the manner in which the worker collected plaintiff's refuse, and the worker knocked plaintiff to the ground, injuring her. There was some evidence that the dispute concerned whether the worker should pick up a certain type of garbage. The Court of Appeals stated that "[w]hen there is a dispute as to what the employee was actually doing at the

time the tort was committed, all doubt must be resolved in favor of liability and the facts must be determined by the jury." *Edwards*, 52 N.C. App. 688, 698, 279 S.E.2d 894, 900, *aff'd*, 304 N.C. 585, 284 S.E.2d 518 (1981).

Some acts, however, are so clearly outside the scope of employment that summary judgment is proper. As the Court of Appeals has noted, "[i]ntentional tortious acts are rarely considered to be within the scope of an employee's employment." *Brown*, 93 N.C. App. at 437, 378 S.E.2d at 235. This Court stated in *Robinson* that "[i]f an assault is committed by the servant, not as a means or for the purpose of performing the work he was employed to do, but in a spirit of vindictiveness or to gratify his personal animosity or to carry out an independent purpose of his own, then the master is not liable." *Robinson*, 214 N.C. at 183, 198 S.E. at 650. When a busboy offered to cut out plaintiff customer's eyes and subsequently attacked the customer, who had requested that the busboy clear his table, this Court held that the busboy "did not strike the plaintiff as a means or method of performing his duties as a busboy." Rather, "the assault . . . was not for the purpose of doing anything related to the duties of [the employee], but was for some undisclosed, personal motive. It cannot, therefore, be deemed an act of his employer." *Wegner v. Delicatessen*, 270 N.C. 62, 68, 153 S.E.2d 804, 809 (1967).

Clearly, the matters alleged and shown by the forecast of evidence here fall in the category of intentional tortious acts designed to carry out an independent purpose of defendant Bass' own, and they thus were not within the course and scope of his employment with defendant FCB or in furtherance of any FCB purpose. While Bass was exercising authority conferred upon him by defendant FCB when he summoned the minor plaintiff to his office to discuss her truancy problem, in proceeding to assault her sexually he was advancing a completely personal objective. The assault could advance no conceivable purpose of defendant FCB; defendant Bass acted for personal reasons only, and his acts thus were beyond the course and scope of his employment as a matter of law. There thus was no genuine issue of material fact regarding defendant FCB's derivative liability under a respondeat superior theory, and summary judgment for defendant FCB was proper.

Plaintiff's reliance on *Munick v. Durham*, 181 N.C. 188, 106 S.E. 665 (1921), is misplaced. In *Munick*, an employee of defendant city assaulted the plaintiff when plaintiff, a Jewish immigrant from Russia, paid a portion of his water bill in pennies. The Court noted that the employee "was acting in his capacity as agent" at the time of the assault. *Munick*, 181 N.C. at 193, 106 S.E. at 667. The same cannot be said of defendant Bass here. In *Munick*, the employee, charged with general supervision of the water system, was overseeing the collection of money for services rendered at the time he attacked the plaintiff. Bass' duties as principal included counseling a chronically truant student, but sexually assaulting the student was unrelated to counseling or any other function explicitly or implicitly authorized by defendant FCB and could not conceivably further any FCB purpose. Although *Wegner v. Delicatessen*, 270 N.C. 62, 153 S.E.2d 804, discussed above, cites *Munick*, it is significant that the holding in *Wegner* implicitly rejected the "while on duty" language of *Cook v. R.R.*, 128 N.C. 333, 38 S.E. 925 (1901), on which *Munick* relied. *See Munick*, 181 N.C. at 193, 106 S.E. at 667. In *Cook*, the Court had suggested that "in the scope of employment" was the same as "while on duty." *See id.* Yet, in *Wegner*, although the busboy was on duty at the time he assaulted the customer, the assault was held not to be in the scope of employment as a matter of law. The holding in *Wegner* represents a shift from a "while on duty" test to a less static "within the scope of employment and in furtherance of the employer's business" test stated in the later cases discussed above. Just as the busboy in *Wegner* stepped out of the course and scope of his employment when he assaulted the customer, defendant Bass here stepped out of the course and scope of his employment when he sexually assaulted the minor plaintiff.

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

Affirmed.

Justice MARTIN dissenting in part.

I respectfully dissent from the majority opinion on the issue of respondeat superior. The question of whether the defendant, Franklin County Board of Education, is liable for the actions of its employee, Vann Bass, is properly for the jury to decide. There is a material question of fact as to whether Bass was acting within

the scope of his employment. Therefore, summary judgment was improvidently allowed.

At the outset, it is to be noted that paragraph 38 of plaintiff's complaint alleges that Bass was acting within the course and scope of his employment with the defendant Board of Education. The defendant Board of Education merely denies the allegations of paragraph 38.

Bass in his affidavit simply denies that he assaulted Pamela. Nowhere in the record is there any evidence that Bass was not acting in the course and scope of his employment with the Board at the time in question.

To the contrary, viewing the evidence in the light most favorable to the non-movant, plaintiff has made a forecast showing:

(1) Pamela was a nine-year-old elementary school student.

(2) She had not been attending school regularly and had a truancy problem.

(3) Bass was the principal of the school attended by Pamela and was charged by the defendant Board of Education with the duty of counselling and disciplining students because of truancy.

(4) At the time in question, Bass ordered Pamela to come into his office. Upon arriving in Bass's office, Pamela sat in a chair on the opposite side from where Bass sat at his desk. Once inside the office, Pamela was completely within the power of Bass.

(5) During his counselling and disciplining of Pamela, Bass committed a sexual assault upon her.

In *Munick v. Durham*, 181 N.C. 188, 106 S.E. 665 (1921), this Court held that a city employee was acting within the scope of his employment when he committed an unprovoked assault upon a customer who was paying his water bill. Although the employee had no instructions to commit acts of violence, he was nevertheless acting as an agent for the city. "Acting within the scope of employment means while on duty." *Id.* at 193, 106 S.E. at 667 (quoting *Cook v. R.R.*, 128 N.C. 333, 38 S.E. 925 (1901)). Although the "while on duty" rule has since been abandoned, "the employer is not absolved from liability by reason of the fact that the employee was also motivated by malice or ill will toward the person injured, or even by the fact that the employer had expressly forbidden

him to commit such act." *Wegner v. Delicatessen*, 270 N.C. 62, 66, 153 S.E.2d 804, 808 (1967) (citations omitted). In *Wegner* the Court noted that the employee who assaulted a customer had no managerial responsibilities in his position as busboy. His job of clearing tables had nothing to do with his striking the plaintiff, although the original quarrel apparently arose while the employee was performing his duties. Had he assaulted the plaintiff while clearing the table, he would have been within the scope of his employment. *Id.* at 68, 153 S.E.2d at 809. Here the assault occurred while Bass was counselling and disciplining the child.

I do not agree with the majority's conclusion that the alleged sexual assault was beyond the course and scope of Bass's employment as a matter of law. Additional evidence gleaned from the materials before the court showed that Bass knew about Pamela's truancy problem and in the fall of 1984 had met with her mother to discuss the matter. Taken in the light most favorable to the plaintiff for summary judgment purposes, the evidence shows that Bass called the plaintiff to his office for disciplinary purposes. Discipline of students is clearly within the scope of a principal's employment. N.C.G.S. § 115C-288(c) (1987) ("The principal shall use reasonable force to discipline students"). There is a material question of fact as to whether Bass was acting within the course and scope of his employment. That the assault was sexual in nature should not preclude the case from going before a jury. Courts in other jurisdictions have not found sexual assaults to be necessarily outside the scope of employment. *See, e.g., Marston v. Minneapolis Clinic of Psychiatry*, 329 N.W.2d 306 (Minn. 1983) (whether sexual assaults committed by psychologist on a patient were within the scope of employment by medical center was a question of fact).

When the principal of a school, acting in that capacity and exercising the authority of that position, orders a nine-year-old girl into the confines of his office, she is completely subject to his control. The school board cannot escape liability by arguing that the assault was beyond the scope of the employment. This Court has long recognized that where an employee has committed a wrongful act, the loss should be borne by the employer, not the innocent victim:

> The principal may be perfectly innocent of any actual wrong or of any complicity therein, but this will not excuse him, for the party who was injured by the wrongful act is also

> innocent; and the doctrine is that where one of two or more innocent parties must suffer loss by the wrongful act of another, it is more reasonable and just that he should suffer it who has placed the real wrong-doer in a position which enabled him to commit the wrongful act, rather than the one who had nothing whatever to do with setting in motion the cause of such act.

Ange v. Woodmen, 173 N.C. 33, 35-36, 91 S.E. 586, 587 (1917) (quoting Reinhardt on Agency § 335). Sexual assaults are not only acts of personal gratification, but also acts of violence.

Here, the defendant Board of Education placed its employee, Bass, in the physical and authoritarian position that enabled him to commit the assault on Pamela. Under such circumstances the Board is liable for the torts of its agent. *See* Restatement (Second) Agency § 219(2)(d) (1957).

Moreover, the public policy of North Carolina demands that plaintiff should have at least an opportunity to present her case against the Board of Education to the jury. Our state has a compelling interest in protecting its school children from sexual assaults. This requires that such children have a meaningful remedy.

At the very least it is unclear what happened in Bass's office; he denies any assault occurred. Plaintiff's forecast of the evidence shows that she was ordered into Bass's office for counselling and discipline because of her truancy, and that she was sexually assaulted arising out of this encounter. This Court adopted the reasoning of our Court of Appeals in *Edwards v. Akion*, 52 N.C. App. 688, 279 S.E.2d 894, *aff'd*, 304 N.C. 585, 284 S.E.2d 518 (1981), which held:

> When there is a dispute as to what the employee was actually doing at the time the tort was committed, all doubt must be resolved in favor of liability and the facts must be determined by the jury. The doctrine should be applied liberally, especially where the business involves a duty to the public, and the courts should be slow to assume a deviation from the duties of employment.

Id. at 698, 279 S.E.2d at 900 (citations omitted). *Akion* involved an assault by a sanitation worker arising out of a dispute as to the collection of garbage.

With the increased prevalence of sexual assaults on children in our society, the courts should be the last to deny relief to the innocent.

Justice FRYE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. MELVIN CLAUDE ROSE, JR.

No. 408A89

(Filed 5 December 1990)

1. **Homicide § 18.1 (NCI3d)— murder—premeditation and deliberation—evidence of state of mind**

The trial court erred on the retrial of a first degree murder prosecution by allowing the State's expert to testify that defendant was capable of premeditating the killing. The opinion in the original appeal, *State v. Rose*, 323 N.C. 455 (*Rose I*), clearly held that a medical expert may not give his opinion as to whether the legal standard of premeditation has or has not been met. That decision is the law of the case, and the error in allowing the testimony in this case was not harmless.

Am Jur 2d, Appeal and Error §§ 746, 759; Homicide § 397.

2. **Criminal Law § 1149 (NCI4th)— second degree murder—aggravating factor—use of weapon hazardous to more than one person**

The trial court did not err when resentencing defendant for second degree murder by finding as an aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person where the victim was shot with a single-shot shotgun while sitting on a couch with two other people. A shotgun in its normal use may be considered a weapon hazardous to the lives of more than one person as those words are used in N.C.G.S. § 15A-2000(e)(10) and N.C.G.S. § 15A-1340.4(a)(i)g, and any reasonable person would know that firing a shotgun across the room would cause the shotgun pellets to scatter,

creating a great risk of death to the three people sitting on the couch.

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

3. **Criminal Law § 1186 (NCI4th)— second degree murder—aggravating factor—DWI conviction**

The trial court did not err when resentencing defendant for second degree murder by finding in aggravation that defendant had been convicted in 1984 of a level four driving while impaired offense, which carried a possible sentence of up to 120 days in prison. Although defendant contends that this conviction is not related to the purposes of sentencing for second degree murder, defendant's prior conviction meets the statutory standard set out in the statute. To say that an offense which is punishable by more than sixty days should not be used as an aggravating factor because it is not related to the purposes of sentencing for the crime charged would be to substitute the court's judgment for the judgment of the legislature.

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

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by *Small, J.*, at the April 1989 Special Session of Superior Court, TYRRELL County, upon a jury verdict of guilty of first degree murder. Defendant's motion to bypass the Court of Appeals as to the resentencing on the second degree murder conviction allowed by the Supreme Court 27 November 1989. Heard in the Supreme Court 10 April 1990.

Lacy H. Thornburg, Attorney General, by Joan H. Byers, Special Deputy Attorney General, for the State.

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

FRYE, Justice.

Defendant was indicted on 2 March 1987 for two counts of murder for the deaths of his cousin, Danny Ray Bateman, and Bateman's girlfriend, Jill Alexander, on 31 January 1987. The cases were joined and tried as capital cases. The jury returned a verdict of first degree murder for the death of Bateman and recommended a life sentence. The jury found defendant guilty of second degree

murder for the death of Ms. Alexander, and the trial court imposed a fifty-year sentence to commence at the expiration of the life sentence. Defendant appealed these convictions, and this Court awarded defendant a new trial for the murder of Bateman and ordered a new sentencing hearing for the murder of Ms. Alexander. *State v. Rose*, 323 N.C. 455, 373 S.E.2d 426 (1988) (*Rose I*).

At the new trial which proceeded in a non-capital fashion, defendant was found guilty of first degree murder and sentenced to life in prison. After the new sentencing hearing for the second degree murder conviction, the trial court imposed a consecutive fifty-year sentence. Defendant appeals from both his conviction of first degree murder and the fifty-year sentence for the second degree murder conviction.

Defendant contends that during the trial on the first degree murder charge, the trial court erred in allowing the State's rebuttal witness, Dr. Bob Rollins, to testify that in his opinion defendant was capable of premeditating on the day of the murder. Defendant contends that admission of this testimony over his objection violates our decision in *Rose I*. We agree and grant defendant a new trial on the first degree murder charge.

Defendant further contends that in the sentencing hearing for the second degree murder conviction the trial court erred in finding as statutory aggravating factors (1) that defendant employed a hazardous instrument endangering the life of more than one person; and (2) that defendant had a prior conviction. We find no error in the sentencing hearing for the second degree murder conviction. Defendant raises other issues on appeal relating to the guilt phase of his trial for first degree murder, but since these issues are unlikely to arise at the new trial, we find it unnecessary to discuss them.

The facts of this case are set out in *Rose I*, and we need not repeat them at this time. Additional facts will be discussed in the opinion as needed.

[1] During the course of the retrial on the first degree murder charge, defendant called Dr. Royal who testified that defendant neither knew right from wrong nor was capable of forming specific intent to commit this murder. The State called Dr. Bob Rollins to rebut Dr. Royal's testimony. Defendant objected to Dr. Rollins' testimony which included the following questions and answers:

Q. Have you an opinion satisfactory to yourself based upon your interviews and evaluation of the defendant and based upon the information which was furnished to you whether or not Mr. Rose was capable of premeditating on the 31st of January?

[Defendant's objection overruled]

A. I have an opinion.

Q. What is your opinion?

A. He was.

[Defendant's motion to strike denied]

In *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985), this Court considered some of the limits of expert testimony at trial and stated:

> The rule that an expert may not testify that . . . a particular legal conclusion or standard has or has not been met remains unchanged by the new Evidence Code, at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness.

Id. at 100, 337 S.E.2d at 849 (citations omitted).

This Court followed this same rule in *State v. Ledford*, 315 N.C. 599, 340 S.E.2d 309 (1986). In that case the State's pathologist was allowed to answer at trial, over defendant's objection, whether the injuries suffered by the victim were the "proximate cause" of her death. *Id.* at 618, 340 S.E.2d at 319. While concluding that the error was not so prejudicial as to warrant a new trial, this Court concluded that the testimony complained of "did purport to state that a legal standard had been met and its admission was therefore error." *Id.* at 620, 340 S.E.2d at 322.

In *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988), this Court addressed the issue of whether the trial court erred in refusing to admit certain testimony offered by defendant's expert witness concerning whether defendant could have acted with premeditation and deliberation. Defendant contended on appeal that his expert witness, a psychiatrist, should have been allowed to testify:

> that at the time of the killings defendant did not act in a cool state of mind, that he was acting under a suddenly aroused

> violent passion, that he did not act with deliberation, and that as a result of his mental disorder, his ability to conform his behavior to the requirements of law was impaired.

Id. at 166, 367 S.E.2d at 903 (footnote omitted). This Court held that testimony of this nature is not admissible because it "embraces legal terms, definitions of which are not readily apparent to medical experts." *Id.* at 166, 367 S.E.2d at 904 (footnote omitted). In explaining this holding, the Court further noted:

> What defendant sought to accomplish with this testimony was to have the experts tell the jury that certain legal standards had not been met. *See State v. Ledford*, 315 N.C. 599, 340 S.E.2d 309. We are not convinced that either the psychologist or the psychiatrists were in any better position than the jury to make those determinations. Having the experts testify as requested by defendant would tend to confuse, rather than help, the jury in understanding the evidence and determining the facts in issue. We, therefore, conclude that the trial court did not err in refusing to admit this testimony.

Id. at 166-67, 367 S.E.2d at 904.

In the appeal from his first trial, defendant contended that his expert witness should have been permitted to give his opinion "as to whether or not defendant 'under his state of mind' at the time of the killings could have 'premeditated or planned or deliberated' them." Defendant claimed that this testimony was admissible under N.C.G.S. § 8C-1, Rule 103. However, this Court rejected defendant's contention and stated:

> Assuming, arguendo, that the answer was apparent from the context within which the question was asked and that it would have been Dr. Royal's opinion that defendant could not have premeditated or deliberated the killings, such testimony would have been inadmissible as a conclusion that a legal standard had not been met.

Rose I, 323 N.C. at 459, 373 S.E.2d at 429 (citing *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833). The Court continued, *"[p]remeditation and deliberation are legal terms of art . . . . A medical expert's opinion as to whether these legal standards have or have not been met is inadmissible.* That determination is for the finder of fact." *Id.* at 460, 373 S.E.2d at 429-30 (emphasis added).

As this Court stated in *State v. Williams*, 224 N.C. 183, 29 S.E.2d 744 (1944), *aff'd*, 325 U.S. 226, 89 L. Ed. 1577, *reh'g denied*, 325 U.S. 895, 89 L. Ed. 2006 (1945), "Where a case is tried under a misapprehension of the law, the practice is to remand it for another hearing . . . . This then became the law of the case." *Id.* at 189, 29 S.E.2d at 748 (citations omitted). Our decision in *Rose I* is the law of the case, and at the new trial, the court below was bound to follow our holding in *Rose I*. *Rose I* clearly held that a medical expert may not give his opinion as to whether the legal standard of premeditation has or has not been met. However, the trial court allowed Dr. Rollins to testify over defendant's objection that in his opinion defendant was capable of premeditating on the day in question. Allowing this testimony at the second trial is in violation of our decision in *Rose I* and constitutes error entitling defendant to a new trial on the first degree murder charge.

The State concedes that Dr. Rollins' testimony was in error, but the State contends that the error does not render the result in this case unreliable. We disagree that the error was harmless. At defendant's first trial, he requested two special instructions. The first instruction was, "You may consider the Defendant's mental condition in connection with his ability to form the specific intent to kill." *Rose I*, 323 N.C. at 457, 373 S.E.2d at 428. We held that the trial judge erred in refusing to give this instruction because it "would have allowed the jury to focus on defendant's mental condition as it pertained to his ability to premeditate and deliberate." *Id.* at 458, 373 S.E.2d at 428.

In the present case, as in the first trial, defendant's state of mind at the time of the killing was the central issue of the case. Without the challenged testimony, the only testimony going to the *mens rea* of first degree murder was lay opinion testimony that defendant knew right from wrong, and the contradictory testimony of Drs. Royal, Lara, and Rollins regarding defendant's ability to plan or to form specific intent. From this evidence, a juror could reasonably have doubted that defendant formed the specific intent to kill after deliberation and premeditation. With the challenged testimony, the jury was assured by Dr. Rollins that defendant was capable of premeditating the killing. Drawing further attention to this testimony, the State, during its closing argument, also referred to Dr. Rollins' testimony concerning defendant's ability to premeditate. Thus, the error in allowing Dr. Rollins'

testimony that defendant was capable of premeditating was compounded by the State's argument to the jury and was not harmless error as the State contends. Accordingly, defendant is entitled to a new trial on the first degree murder charge.

[2] Defendant also brings forward two assignments of error relating to the new sentencing hearing he received for his conviction for the second degree murder of Ms. Alexander. Defendant first claims that the trial court erred in finding as a statutory factor in aggravation under the Fair Sentencing Act that "defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." Ms. Alexander was shot in the head and neck by a single-shot shotgun while she was sitting on a couch with Bud McGowan and Bateman, the other victim. After Ms. Alexander was shot, Bateman and McGowan ran from the house, and defendant ran after them, shooting Bateman with a .22 rifle. To impose this aggravating factor, the sentencing judge must focus on two considerations: (1) whether the weapon in its normal use is hazardous to the lives of more than one person; and (2) whether a great risk of death was knowingly created. *State v. Carver*, 319 N.C. 665, 356 S.E.2d 349 (1987). This Court has held that "a shotgun is a weapon which would normally be hazardous to more than one person if it is fired into a group of two or more persons in close proximity to one another." *State v. Moose*, 310 N.C. 482, 498, 313 S.E.2d 507, 518 (1984) (interpreting this same language as it is found in N.C.G.S. § 15A-2000(e)(10), a part of our capital sentencing statute).

Defendant contends that the weapons in this case—a single-shot shotgun and a .22 rifle—were not used in such a way as to create a great risk of death to more than one person. Defendant notes that the shotgun was fired directly into the body of Ms. Alexander from a distance of a few feet and that no one else was hit by the shots. Defendant further notes that the rifle was fired first after Bateman and McGowan fled from the house so that only Ms. Alexander's body was in the house, and thus no one else could have been endangered by the rifle shots. Defendant contends that only Bateman was endangered by the rifle shots which defendant fired outside the house as Bateman and McGowan were fleeing.

When finding an aggravating factor, the sentencing judge does not have to specify the specific evidence on which he relied to find that factor. *State v. Baucom*, 66 N.C. App. 298, 311 S.E.2d 73 (1984). The record, however, must contain sufficient evidence to support the aggravating factor. *Id.* The evidence in the present case supports the finding of this aggravating factor. As noted above, this Court has already held that a shotgun in its normal use may be considered a weapon hazardous to the lives of more than one person as those words are used in N.C.G.S. § 15A-2000(e)(10), one of the statutory aggravating circumstances which may be considered in a capital sentencing proceeding. *State v. Moose*, 310 N.C. at 498, 313 S.E.2d at 518. The language interpreted in *Moose* to hold that a shotgun is a weapon which would normally be hazardous to the lives of more than one person is identical to the language found in N.C.G.S. § 15A-1340.4(a)(1)g, which is the aggravating factor the sentencing judge found in the present case. *See* N.C.G.S. § 15A-1340.4(a)(1)g (1988) and N.C.G.S. § 15A-2000(e)(10) (1988). We find no justifiable reason for giving a different interpretation to the identical language found in the two statutes. Thus, we conclude that the record contains sufficient evidence to support the first part of the test—that the weapon in its normal use is hazardous to the lives of more than one person.

The evidence also indicates that when defendant fired a shotgun at Ms. Alexander, she was sitting on the couch with two other people. In *Moose*, defendant fired a shotgun into the cab of a truck where two people were sitting, and this Court held that this evidence was "sufficient evidence from which the jury could conclude that the defendant knowingly created a great risk of death [to more than one person]." *Moose*, 310 N.C. at 489, 313 S.E.2d at 511. While the living room in the present case was not as small as the cab of the truck in *Moose*, nevertheless, three persons were sitting close to each other on the same couch when defendant fired the shotgun from a distance of less than twelve feet away. Any reasonable person would know that firing a shotgun at a target across a room as was done in this case would cause the shotgun pellets to scatter, creating a great risk of death to the three people sitting on the couch. Thus, we conclude that the record contained sufficient evidence to support the sentencing judge's finding of this aggravating factor. Since there is evidence to support this factor from the evidence surrounding the firing of the shotgun, we find it unnecessary to discuss the risk created by firing the rifle.

[3] Defendant's final assignment of error is that the sentencing judge erred in finding as an aggravating factor for the second degree murder conviction that defendant had a prior conviction. Defendant contends that the sentencing judge erred in finding as an aggravating factor defendant's prior conviction in 1984 of driving while impaired. For this conviction defendant was sentenced to sixty days' imprisonment suspended for one year. Defendant contends that this conviction is not related to the purposes of sentencing for the second degree murder conviction and therefore was improperly considered as an aggravating factor.

The statutory provision at issue here provides for the following to be considered as an aggravating factor:

> The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement . . . .

N.C.G.S. § 15A-1340.4(a)(1)o (1988). Defendant was convicted of a level four driving while impaired offense which carries a possible sentence of up to one hundred and twenty days in prison. Thus, defendant's prior conviction meets the standard set out in the statute to find this conviction an aggravating factor.

In *State v. Parker*, 319 N.C. 444, 355 S.E.2d 489 (1987), defendant argued that the sentencing judge erred in finding as an aggravating factor that he had prior convictions when the convictions were for two counts of misdemeanor breaking or entering, misdemeanor larceny, and one count of damage or injury to personal property. *Id.* at 448, 355 S.E.2d at 491. Defendant in *Parker* contended that these convictions arose from the same episode and were relatively minor offenses. In response to that argument, this Court stated:

> The General Assembly has determined that a conviction of a criminal offense punishable by more than sixty days' confinement shall be an aggravating factor. N.C.G.S. § 15A-1340.4(a)(1)o. If we were to hold that such a factor should be of small weight in imposing a sentence if we determined the crime for which the defendant was convicted is a minor offense we would be substituting our judgment for the judgment of the Legislature, which we cannot do.

Id. In the present case, defendant is asking much the same thing as the defendant in *Parker* by asking us to find that a driving while impaired conviction is not related to the purposes of sentenc-

ing for second degree murder. We conclude, as we did in *Parker*, that to say that an offense which is punishable by more than sixty days should not be used as an aggravating factor because it is not related to the purposes of sentencing for the crime charged would be "substituting our judgment for the judgment of the Legislature." This we again decline to do.

For the reasons stated herein, we hold that defendant is entitled to a new trial for the murder of Bateman. We find no error in defendant's sentencing hearing on his conviction of the second degree murder of Ms. Alexander and therefore uphold defendant's fifty-year sentence for that conviction.

Case No. 87CRS28—new trial.

Case No. 87CRS27—affirmed.

STATE OF NORTH CAROLINA v. JAMES EARL MANNING

563PA89

(Filed 5 December 1990)

Criminal Law § 1140 (NCI4th)— nonstatutory aggravating factor— pecuniary gain—defendant not hired or paid

Pecuniary gain may be used as a nonstatutory aggravating factor under the Fair Sentencing Act in cases in which defendant was not hired or paid to commit the crime provided pecuniary gain is not an element essential to the establishment of the crime which is sought to be aggravated. Since pecuniary gain is not an essential element of the crimes of second degree murder, conspiracy to commit murder, and solicitation to commit murder, the trial court did not err in finding pecuniary gain as a nonstatutory aggravating factor for those crimes where there was plenary evidence that defendant and the victim's wife intended to live together after the victim's death and to share the proceeds of a life insurance policy on the victim as well as the land and mobile home belonging to the victim.

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

ON discretionary review of a unanimous opinion of the Court of Appeals, 96 N.C. App. 502, 386 S.E.2d 96 (1989), affirming in part and reversing in part a judgment of *Reid, J.*, entered 23 November 1988 in Superior Court, PITT County. Heard in the Supreme Court 11 October 1990.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State-appellant.

Robin L. Fornes for defendant-appellee.

MEYER, Justice.

Defendant pled guilty to solicitation to commit murder, second-degree murder, and conspiracy to commit murder in violation of N.C.G.S. §§ 14-3, 14-17, and 14-2.4(2) at the 6 September 1988 session of Superior Court, Pitt County, and prayer for judgment was continued. On 23 November 1988, the solicitation and conspiracy counts were consolidated for the purpose of judgment, and defendant was sentenced to a term of ten years for these offenses and a concurrent term of life imprisonment for murder. Defendant appealed, and the Court of Appeals affirmed the trial court in part and reversed it in part. That court affirmed the action of the trial court in refusing to find as a mitigating factor that, on the evidence presented, defendant was a passive participant. The Court of Appeals remanded the case for resentencing on the grounds that the trial court had erred in considering pecuniary gain as a nonstatutory aggravating factor under the Fair Sentencing Act when no evidence was presented that defendant had been hired or paid to commit the offense. The State filed a petition for discretionary review with this Court, which we allowed on 7 February 1990. We now reverse the decision of the Court of Appeals and remand for reinstatement of the judgment of the trial court.

For some months prior to 19 March 1988, defendant, James Earl Manning, was involved in an affair with Sandra White, who was still living with her husband, Bobby White, during the course of her involvement with defendant. At one point during the relationship, defendant resided at the residence of Sandra White with the consent and knowledge of her husband, who was also living in the house.

During the latter part of 1987, Sandra White began making statements to defendant and others that she desired to have her

husband killed. She stated to an acquaintance and friend, Linda Colville, that she would like to have her husband killed so that she and "Doodle" (referring to defendant) could share in insurance proceeds and other assets of the estate of Bobby White. In December 1987, Sandra White, along with defendant, went to the residence of Michael Ray Rogers in Greenville. Rogers was an acquaintance of defendant, and at one time, the two had worked together. While at the residence, Sandra stated that she desired to have her husband killed and that she was willing to pay Rogers anywhere from $500 to $5,000 to accomplish this. When she was leaving Rogers' residence, Sandra turned and said, "I'm serious about what I said to you now."

In February 1988, defendant, Sandra White, and defendant's first cousin, James Alton Mobley, were riding around together in a car near Grimesland. A discussion ensued about the possibility of Mobley being paid the sum of $35,000 to kill Bobby White. This money was to come from insurance proceeds that Sandra White would receive upon the death of her husband.

On Saturday afternoon, 19 March 1988, defendant and Mobley were in the vicinity of the "Hard Times" nightclub near Greenville. Defendant phoned Sandra White and asked her to leave her residence and meet them at the sand pits behind the nightclub. She met them at this location, and while there, the three of them discussed and planned how Bobby White would be killed that night. Both defendant and Mobley made statements concerning this meeting. According to defendant, Sandra White made the offer directly to Mobley to pay him to kill her husband. According to Mobley, defendant sought Mobley out on that particular day, asked him to kill Bobby White, and stated that Sandra would pay Mobley $35,000. Both defendant's and Mobley's statements indicated that later that evening defendant drove to a location outside of Greenville, according to the plan discussed earlier at the sand pits; picked up Mobley; and drove him to within a mile of Bobby White's residence. Defendant let Mobley out of the car and then drove directly to his parents' house nearby to establish an alibi. Mobley walked to Bobby White's residence, at which point he killed White by stabbing him numerous times and cutting his throat.

On 19 March 1988, deputies of the Pitt County Sheriff's Department were called to the White residence where they found the body of Bobby White.

After the murder, officers from the Pitt County Sheriff's Department and the State Bureau of Investigation interviewed William Nanny, an acquaintance and friend of defendant and Mobley. He told them that a few weeks before the actual murder defendant and Mobley had, in his presence, discussed Mobley killing Bobby White for $35,000.

A few weeks after Bobby White's murder, Sandra White was arrested and charged with solicitation to commit murder. Shortly thereafter, Mobley and defendant were arrested and charged with conspiracy to commit murder.

Approximately a week after defendant was arrested, he made a confession about his involvement in the murder of Bobby White. As part of a plea bargain arrangement, he was allowed to plead guilty to second-degree murder in exchange for his agreement to cooperate with the State and to testify against the codefendants.

Mobley pled guilty to second-degree murder, felonious breaking and entering, and conspiracy to commit murder and, as part of the plea arrangement, received a sentence of life plus twenty years. Mobley agreed to testify against Sandra White, which resulted in her plea to second-degree murder, solicitation, and conspiracy, with an agreed-upon life sentence with twenty years running concurrently.

After White and Mobley were sentenced, the State prayed judgment on defendant, and after evidence was presented by the State and defendant, defendant was sentenced to life imprisonment for his part in the murder of Bobby White. As to the charge of second-degree murder, the trial judge found the statutory aggravating factor that defendant had prior convictions of criminal offenses punishable by more than sixty days' confinement. N.C.G.S. § 15A-1340.4(a)(1)(o) (1988). He also found the nonstatutory aggravating factors that the murder was committed with premeditation and deliberation and that the murder was committed for pecuniary gain. As to the mitigating factors, the trial judge found that defendant aided in the apprehension of another felon, N.C.G.S. § 15A-1340.4(a)(2)(h) (1988), and that defendant, in the early stages of the criminal process, voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer, N.C.G.S. § 15A-1340.4(a)(2)(l) (1988).

As to the charges of aiding and abetting in the solicitation to commit murder and conspiracy to commit murder, the trial judge consolidated the judgment and sentenced defendant to ten years to run concurrently with the life sentence. The trial judge found as a statutory aggravating factor that defendant had a prior conviction of criminal offenses punishable by more than sixty days, N.C.G.S. § 15A-1340.4(a)(1)(o) (1988), and as a nonstatutory aggravating factor that the solicitation and conspiracy were committed for pecuniary gain. As to mitigating factors, the trial judge found that defendant aided in the apprehension of another felon, N.C.G.S. § 15A-1340.4(a)(2)(h) (1988), and that at an early stage of the criminal process, defendant voluntarily acknowledged wrongdoing in connection with the offenses to a law enforcement officer, N.C.G.S. § 15A-1340.4(a)(2)(l) (1988).

The case is before this Court on the sole issue of whether the Court of Appeals erred in reversing the trial judge's use as a nonstatutory aggravating factor that the crimes were committed for pecuniary gain. It is quite clear that there was sufficient evidence to support the factor. There was substantial evidence that defendant was the primary instigator in pursuing and getting the agreement for someone to kill Bobby White in return for payment by Sandra White. The sum of $35,000 to be paid for the killing was to come from $100,000 in insurance proceeds which Sandra White would receive upon Bobby White's death. While there was no evidence that defendant was hired or paid to commit the offenses, there was plenary evidence that defendant and Sandra White intended to live together after Bobby White's murder and to share in the remainder of the proceeds of the insurance policy, as well as the land and the mobile home belonging to Bobby White.

The issue to be decided is whether pecuniary gain may be used as a nonstatutory aggravating factor in the absence of any evidence that defendant was hired or paid to commit an offense. The Court of Appeals held that it was not available. We disagree.

The Fair Sentencing Act, which became effective 1 July 1981, provided the statutory aggravating factor that "[t]he offense was committed for hire or pecuniary gain." N.C.G.S. § 15A-1340.4(a)(1)(c) (Cum. Supp. 1981). Effective 1 October 1983, the General Assembly amended this statute to read: "The defendant was hired or paid to commit the offense." N.C.G.S. § 15A-1340.4(a)(1)(c) (1988). In discussing this statutory factor in *State v. Lattimore*, 310 N.C. 295, 311

S.E.2d 876 (1984), we said: "It is well-settled law now that, under the Fair Sentencing Act, in order to find this factor in aggravation, there must be evidence that the defendant was paid or hired to commit the offense." *Id.* at 299, 311 S.E.2d at 879; *see also State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985); *State v. Edwards*, 310 N.C. 142, 310 S.E.2d 610 (1984); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983); *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983); *State v. Abdullah*, 309 N.C. 63, 306 S.E.2d 100 (1983).

In the case at bar, the State did not contend, and there was no evidence to show, that defendant was hired or paid to commit the offense. The evidence did, however, tend to show that defendant was motivated to commit the crime by expectations of enjoyment of financial or pecuniary gain upon the death of the victim. The uncontradicted evidence showed that Sandra White, the deceased's wife, had stated in defendant's presence on many occasions that she would like to see her husband dead so that she and defendant, who was her lover, could get the mobile home and the land and could live together and get her husband's assets. These assets would include the remainder of approximately $100,000 in insurance payable upon her husband's death, after paying Mobley to kill the deceased.

Defendant contended before the Court of Appeals that the trial court improperly found as a *nonstatutory* aggravating factor that the murder, solicitation, and conspiracy were committed for pecuniary gain. In the Court of Appeals opinion, that court said: "A trial court should not be allowed to assign in aggravation a factor as *nonstatutory* where the statute clearly prohibits its use as a statutory aggravating factor." *State v. Manning*, 96 N.C. App. at 505, 386 S.E.2d at 97 (emphasis added). The State contends, and we agree, that this conclusion is in error because the statute does not prohibit the use of pecuniary gain as a *nonstatutory* aggravating factor.

Because the evidence would not support the statutory aggravating factor in N.C.G.S. § 15A-1340.4(a)(1)(c), that "[t]he defendant was hired or paid to commit the offense," does not mean that it cannot be used to support a nonstatutory aggravating factor. As pointed out by the opinion below, the sentencing judge " 'may consider any aggravating . . . factors that he finds are proved by the preponderance of the evidence, and that are reasonably

related to the purpose of sentencing . . .' even though not enumerated on the statutory list. N.C.G.S. § 15A-1340.4[(a)]." *State v. Manning*, 96 N.C. App. at 504, 386 S.E.2d at 97 (citation omitted).

This Court has upheld trial courts' findings of nonstatutory aggravating factors where the use of evidence to aggravate sentences is "reasonably related to the purposes of sentencing." *State v. Moore*, 317 N.C. 275, 279, 345 S.E.2d 217, 220 (1986); N.C.G.S. § 15A-1340.4(a) (1988). Since pecuniary gain as an incentive to commit a crime is reasonably related to the purposes of sentencing, it can be a nonstatutory aggravating factor unless there is something to preclude its use.

N.C.G.S. § 15A-1340.4 provides:

> Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the same item of evidence may not be used to prove more than one factor in aggravation.

N.C.G.S. § 15A-1340.4(a)(1) (1988). In the recent case of *State v. Vandiver*, 326 N.C. 348, 389 S.E.2d 30 (1990), this Court upheld that trial court's finding of premeditation and deliberation as a nonstatutory aggravating factor in second-degree murder and reiterated its previous statement that " *'[a]s long as they are not elements essential to the establishment of the offense* to which the defendant pled guilty, all circumstances which are transactionally related to the admitted offense and which are reasonably related to the purposes of sentencing must be considered during sentencing.' " *Id.* at 351, 389 S.E.2d at 32 (quoting *State v. Melton*, 307 N.C. 370, 378, 298 S.E.2d 673, 679 (1983)) (emphasis added).

We find no language in any other provision of the Fair Sentencing Act which would prohibit use of pecuniary gain as a nonstatutory aggravating factor where pecuniary gain is not used to support an element of the crime. Pecuniary gain is not an element essential to the establishment of the crimes of murder, conspiracy to commit murder, and solicitation to commit murder; so use of pecuniary gain as a nonstatutory aggravating factor would not be prohibited by the language forbidding double use of evidence necessary to prove an element of the crime. To find as a nonstatutory aggravating factor that the defendant committed these crimes for pecuniary gain is consistent with the purposes of sentencing as set out in N.C.G.S. § 15A-1340.3:

> The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, *taking into account factors that may diminish or increase the offender's culpability*; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

N.C.G.S. § 15A-1340.3 (1988) (emphasis added).

A person who conspires and solicits the taking of a person's life, so that he may live off the insurance proceeds from that person's death and live in that person's home, is more culpable by reason of those motives, and a sentence greater than the presumptive is warranted for purposes of deterrence as well as protection of the unsuspecting public.

We therefore hold that, in cases where defendant is not hired or paid to commit the offense, there is nothing to prevent use of pecuniary gain as a *nonstatutory* aggravating factor, provided pecuniary gain is not an element essential to the establishment of the crime which is sought to be aggravated.

The decision of the Court of Appeals is reversed, and the case is remanded to that court for further remand to the Superior Court, Pitt County, for reinstatement of the judgment entered by Reid, J., on 23 November 1988.

Defendant also argued before the Court of Appeals that the trial court erred in failing to submit the requested statutory mitigating factor that the defendant played a minor role or was a passive participant in the commission of the crimes. N.C.G.S. § 15A-1340.4(a)(2)(c) (1988). The Court of Appeals affirmed the trial court's refusal to submit that statutory mitigating factor because the evidence tended to show that defendant actively participated in planning the murder, assisted in the search for an assassin, and took part in the attempted cover-up. Defendant did not seek our review of that issue, and the Court of Appeals decision on that issue remains undisturbed.

Reversed and remanded.

DONALD W. CARROLL, EMPLOYEE v. DANIELS AND DANIELS CONSTRUCTION COMPANY, INC., EMPLOYER, AND/OR N.C. FARM BUREAU MUTUAL INSURANCE COMPANY, CARRIER

No. 55PA90

(Filed 5 December 1990)

1. **Master and Servant § 49 (NCI3d)— workers' compensation— employees of insured employer—employees of subcontractor**

The North Carolina Workers' Compensation Act generally provides compensation to an injured plaintiff only if he is an "employee" of an insured employer, in fact and in law, at the time of the injury. However, former N.C.G.S. § 97-19 (1985) created an exception to this general rule by imposing liability on a general contractor for injuries to the employees of a subcontractor but not to the subcontractor itself.

Am Jur 2d, Workmen's Compensation § 171.

2. **Estoppel § 5 (NCI3d); Master and Servant § 81 (NCI3d)— workers' compensation—law of estoppel**

The law of estoppel does apply in workers' compensation proceedings, and liability may be based upon estoppel to contravene an insurance carrier's subsequent attempt to avoid coverage for a work-related injury. The burden is on the plaintiff to show that the carrier misled the plaintiff by words, acts, or silence.

Am Jur 2d, Workmen's Compensation §§ 172, 424, 425.

3. **Master and Servant § 81 (NCI3d)— workers' compensation— subcontractor—estoppel of carrier to deny coverage— insufficient findings**

The Industrial Commission erred in concluding that defendant carrier was estopped to deny workers' compensation coverage to plaintiff subcontractor based upon findings that the general contractor's superintendent agreed to deduct seven percent from plaintiff's pay to provide workers' compensation coverage under the contractor's policy; this deduction was made by the general contractor; the superintendent told plaintiff's wife after plaintiff was injured that the general contractor's policy would pay plaintiff's hospital and medical expenses as well as provide compensation; and there was a past course of dealing between the carrier and general contractor to cover

"people" under workers' compensation insurance. The rights of the parties cannot be determined in the absence of findings with regard to (1) any actions, representations or silence in the face of a duty to speak on behalf of the carrier to mislead plaintiff regarding workers' compensation coverage; (2) the carrier's acceptance of premiums for "subcontractor" coverage deducted from plaintiff's pay or acceptance of deducted premiums from other "subcontractors" in the past; and (3) the existence of authority between the carrier and the general contractor or between the carrier and the general contractor's superintendent to extend coverage to a subcontractor. Therefore, the case is remanded for a determination as to whether the carrier accepted premiums paid on plaintiff's behalf or whether there was a course of past dealing between the general contractor and defendant carrier with regard to providing coverage of other subcontractors.

Am Jur 2d, Workmen's Compensation §§ 172, 424, 425.

ON discretionary review of a decision of the Court of Appeals, 96 N.C. App. 649, 386 S.E.2d 752 (1990), affirming an opinion and award of the North Carolina Industrial Commission filed 16 December 1988, holding defendant-carrier liable for plaintiff's workers' compensation benefits. Heard in the Supreme Court 5 September 1990.

Connor, Bunn, Rogerson & Woodard, P.A., by James F. Rogerson, for plaintiff-appellee.

Maupin Taylor Ellis & Adams, P.A., by Richard M. Lewis and Jack S. Holmes, for defendant-appellant Farm Bureau Mutual Insurance Company.

MEYER, Justice.

The question presented in this workers' compensation case is whether the Court of Appeals erred in holding that defendant-carrier was estopped to deny plaintiff workers' compensation coverage. We hold that the Court of Appeals erred and remand this case to that court for further remand to the Industrial Commission for further proceedings consistent with this opinion.

Plaintiff and Bobby Harrelson owned and operated C & H Builders, a partnership which performed carpentry work for general contractors. Plaintiff and Harrelson, as C & H Builders, were hired

by defendant Daniels and Daniels Construction Company (Daniels) to box in and put siding on a house the Daniels Company was building. The facts as found by the Deputy Commissioner and adopted by the full Commission reveal that plaintiff and Harrelson controlled the hours they worked, that they worked at their own speed, that no one told them how to do the work, and that they were paid as subcontractors on a piecemeal basis with no deductions for social security. Prior to starting the job, plaintiff discussed workers' compensation insurance coverage with Daniels' construction superintendent. The superintendent agreed to deduct seven percent from plaintiff's pay to provide workers' compensation coverage under Daniels' policy. Two days after plaintiff began working for Daniels, the scaffolding upon which plaintiff was working collapsed and he was injured. At the time of the accident, Daniels was insured by North Carolina Farm Bureau Mutual Insurance Company (carrier). Daniels' superintendent told plaintiff's wife while plaintiff was in the hospital that Daniels' workers' compensation policy would pay the hospital and medical expenses as well as provide compensation.

The carrier denied plaintiff's claim for coverage of his injuries, and plaintiff subsequently requested a hearing with the Industrial Commission. A Deputy Commissioner heard this matter and filed an opinion and award concluding that the carrier was estopped from denying plaintiff workers' compensation coverage and directing the carrier and Daniels to pay compensation and medical benefits to plaintiff. The Deputy Commissioner's decision was affirmed by the full Commission. The Court of Appeals affirmed the opinion and award of the full Commission.

[1] The North Carolina Workers' Compensation Act provides compensation to an injured plaintiff only if he is an "employee" of an insured employer, in fact and in law, at the time of the injury. *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 364 S.E.2d 433, *reh'g denied*, 322 N.C. 116, 367 S.E.2d 923 (1988). An exception to the general rule illustrated in *Youngblood* is that the Act creates liability for a general contractor under N.C.G.S. § 97-19. *Withers v. Black*, 230 N.C. 428, 53 S.E.2d 668 (1949). The exception was "enacted to protect the employees of financially irresponsible sub-contractors who do not carry workmen's compensation insurance, and to prevent principal contractors, immediate [sic] contractors, and sub-contractors from relieving themselves of liability under the Act by doing through sub-contractors what they would

otherwise do through the agency of direct employees." *Id.* at 434, 53 S.E.2d at 673. At the time of the plaintiff's injury, N.C.G.S. § 97-19 provided as follows:

> *Any principal contractor, intermediate contractor, or subcontractor* who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such subcontractor has complied with G.S. 97-93 hereof, *shall be liable*, irrespective of whether such subcontractor has regularly in service less than four employees in the same business within this State, to the same extent as such subcontractor would be if he were subject to the provisions of this Article *for the payment of compensation and other benefits under this Article on account of the injury or death of any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract.* If the principal contractor, intermediate contractor or subcontractor shall obtain such certificate at the time of subletting such contract to subcontractor, he shall not thereafter be held liable to any employee of such subcontractor for compensation or other benefits under this Article.

N.C.G.S. § 97-19 (1985) (emphasis added). N.C.G.S. § 97-19 as then written imposed liability on a general contractor for injuries to the employees of its subcontractor but not to the subcontractor itself. *Doud v. K & G Janitorial Service*, 69 N.C. App. 205, 316 S.E.2d 664, *disc. rev. denied*, 312 N.C. 492, 322 S.E.2d 554 (1984).

In the case *sub judice*, the Industrial Commission determined, and plaintiff concedes in his brief, that plaintiff was a "subcontractor" and not an employee of Daniels. The carrier contends that since plaintiff was neither an employee of Daniels nor an employee of a subcontractor, plaintiff cannot recover under the North Carolina Workers' Compensation Act. Plaintiff responds that under the principles of estoppel it would be unconscionable for the carrier to be allowed to deny coverage. The Commission made a finding of fact that, even though plaintiff was in fact a "subcontractor," Daniels, the general contractor, had agreed to provide workers' compensation insurance coverage for plaintiff. The Commission concluded that since Daniels had made an agreement with the plaintiff, the carrier was subsequently estopped from denying said coverage.

The Commission made this conclusion of law without any specific findings of fact as to whether this carrier was providing insurance coverage for this particular plaintiff or any findings involving a course of past dealing between Daniels and the carrier with regard to providing coverage of other subcontractors themselves.

In a workers' compensation appeal such as this, this Court is limited in its review to two questions of law: (1) whether any competent evidence exists before the Industrial Commission to support its findings of fact, and (2) whether the Commission's findings of fact justify its legal conclusions and decision. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981). The findings of fact made by the Commission below are not in dispute. The Commission found as a fact that Daniels' superintendent agreed to deduct seven percent from plaintiff's pay to provide workers' compensation coverage under Daniels' workers' compensation policy and that the deduction had been processed by Daniels. The Commission also found that the superintendent told plaintiff's wife that the policy would cover plaintiff's hospital and medical expenses as well as provide compensation. The Commission concluded that defendant-Daniels agreed to provide workers' compensation coverage and did in fact make such deduction from the plaintiff's pay, and therefore defendant-carrier was estopped from denying said coverage. We hold that the Commission's findings of fact do not support its conclusion of law that the carrier is estopped from denying workers' compensation coverage to plaintiff.

[2] The law of estoppel does apply in workers' compensation proceedings, and liability may be based upon estoppel to contravene an insurance carrier's subsequent attempt to avoid coverage of a work-related injury. *Godley v. County of Pitt*, 306 N.C. 357, 293 S.E.2d 167 (1982); *Aldridge v. Motor Co.*, 262 N.C. 248, 136 S.E.2d 591 (1964). In *Aldridge*, unlike the case at bar, the employer had explained to the carrier's local agent exactly what the plaintiff would be doing and had been assured by the agent that the plaintiff would be covered by the workers' compensation insurance. This Court stated:

> [P]laintiff had been put on [the employer's] payroll for the very purpose of protecting him by workmen's compensation insurance and upon the advice of the defendant carrier's agent after a full disclosure to him of the specific nature and location of the plaintiff's work. Therefore, the carrier knew that it

> was insuring an employee of the [employer] who would work as a painter and carpenter on all properties jointly owned by its officers individually. Plaintiff's wages were used in computing the amount of the premiums which the [employer] paid defendant for its coverage, and defendant had accepted these premiums for over two years.

Aldridge, 262 N.C. at 252, 136 S.E.2d at 594. The facts before us do not begin to rise to the level of those in *Aldridge*. The Commission's findings and conclusions do not address any conduct on the part of the carrier prior to the injury in question. "[E]stoppel requires proof that the party to be estopped must have misled the party asserting the estoppel either by some words or some action or by silence." *Moore v. Upchurch Realty Co., Inc.*, 62 N.C. App. 314, 316-17, 302 S.E.2d 654, 656 (1983). The burden is on the plaintiff to show that the carrier misled the plaintiff by words, acts, or silence.

[3] The carrier first contends that it "made no representation to plaintiff regarding workers' compensation coverage." The Commission found that the only direct contact between plaintiff and the carrier occurred after the accident when an agent for the carrier contacted plaintiff to obtain a written statement. The testimony shows that the carrier never told plaintiff that he was covered by the carrier or took any direct action that would have caused plaintiff to believe that he had workers' compensation coverage insurance with the carrier. However, the Commission found that it was the practice of Daniels to routinely add "people" to its "Workmen's Compensation Insurance" at the time it engaged plaintiff. The Court of Appeals held that the Industrial Commission correctly concluded that the carrier is estopped from denying coverage. *Carroll v. Daniels and Daniels Construction Co.*, 96 N.C. App. 649, 653, 386 S.E.2d 752, 755. The error is that when the Deputy Commissioner found that there was a past course of dealing between the carrier and Daniels to cover "people" under workers' compensation insurance, a reviewing court may not conclude that the carrier acquiesced to coverage of "subcontractors" themselves. The Court of Appeals erred in concluding that a past practice involved the carrier, Daniels, and a "subcontractor." Pursuant to N.C.G.S. § 97-19 as it appeared at the time plaintiff was engaged, only employees of subcontractors were covered under the Act. The Commission made no findings regarding any actions, representations, or silence in the face of a duty to speak, on behalf of

the carrier to mislead plaintiff regarding workers' compensation insurance coverage. There are no specific findings of fact by the Commission that would support a conclusion that this carrier is estopped from denying coverage to this particular plaintiff-subcontractor.

The carrier further alleges that it never accepted the premium deducted by Daniels. This Court has stated in several workers' compensation cases that if an insurance carrier accepts workers' compensation insurance premiums for an individual, it cannot deny liability for coverage. *E.g., Aldridge v. Motor Co.*, 262 N.C. 248, 136 S.E.2d 591; *see also Moore v. Upchurch Realty Co., Inc.*, 62 N.C. App. 314, 302 S.E.2d 654. Although in the instant case there is evidence that Daniels deducted the premium from plaintiff's pay, there is no evidence indicated by the Commission that the carrier accepted payments. Additionally, the Commission made no findings of fact and there is no evidence regarding the carrier's acceptance of premiums for other subcontractors in the past. The Court of Appeals incorrectly stated that "[s]ince carrier routinely accepted premiums from employer for the coverage of subcontractors, it can be *assumed* that carrier would have followed that practice in this case. The carrier cannot now be allowed to object to the practice in which it had acquiesced." *Carroll v. Daniels and Daniels Construction Co.*, 96 N.C. App. at 653, 386 S.E.2d at 754 (emphasis added). The Court of Appeals may not make findings of fact on its own. *Pardue v. Tire Co.*, 260 N.C. 413, 132 S.E.2d 747 (1963). We conclude that the Court of Appeals erred when it made its own findings of fact regarding past dealings between Daniels and the carrier. Since the Commission made no findings of fact regarding the carrier's acceptance of premiums for "subcontractor" coverage deducted from plaintiff's pay or acceptance of deducted premiums from other "subcontractors" in the past, the Court of Appeals erred when it assumed such facts. *See Britt v. Construction Co.*, 35 N.C. App. 23, 33, 240 S.E.2d 479, 485 (1978) (There was no finding that the premiums had been accepted by the insurer and the Court of Appeals remanded to the Commission, stating that "the Commission should have made a finding as to [insurer's] acceptance or non-acceptance of Compensation insurance premiums").

Finally, the carrier contends that Daniels had no authority to bind the carrier. The carrier states that there is no record evidence of any action on behalf of the carrier to extend coverage to plaintiff. Furthermore, there is no record evidence that the car-

rier knew of Daniels' promise to extend coverage to plaintiff or that Daniels had any authority to make such a promise. N.C.G.S. § 97-93 only requires employers to insure their liability under the Act. Since plaintiff is neither an employee nor an individual covered by the then-existing N.C.G.S. § 97-19, he is not covered by the basic workers' compensation policy. In order to extend the workers' compensation insurance contract between Daniels and the carrier to cover plaintiff, action or behavior that demonstrates a desire to extend coverage on behalf of both Daniels and the carrier must be shown. The Commission, however, made no findings or conclusions regarding the existence of authority between the carrier and Daniels or between the carrier and Daniels' superintendent. The record shows that no authority or agency relationship, express or implied, existed between Daniels or Daniels' superintendent and the carrier. As the Court of Appeals has stated, "[i]t would be manifestly unjust to hold one party liable for the actions taken by another person if that person did not have authority to act for him." *Vaughn v. Dept. of Human Resources*, 37 N.C. App. 86, 91, 245 S.E.2d 892, 895 (1978), *aff'd*, 296 N.C. 683, 252 S.E.2d 792 (1979). Therefore, the Court of Appeals erroneously concluded that "an implied authority had existed between carrier and employer because of employer's former practice of insuring subcontractors for employer." *Carroll v. Daniels and Daniels Construction Co.*, 96 N.C. App. at 653, 386 S.E.2d at 755.

The findings of fact of the Industrial Commission are insufficient to enable this Court to determine the rights of the parties. The decision of the Court of Appeals is, therefore, reversed and this case is remanded to that court for further remand to the Industrial Commission for a determination as to whether the carrier accepted premiums paid on plaintiff's behalf or whether there was a course of past dealing between the carrier, Daniels, and other subcontractors for insurance coverage of subcontractors under the Workers' Compensation Act.

Reversed and remanded.

JULIAN CLARK CULTON v. JANE ANDERSON CULTON

No. 23A90

(Filed 5 December 1990)

Appeal and Error § 133 (NCI4th)— appointment of guardian ad litem—appeal by third party—appeal from interlocutory order

Plaintiff's appeal was remanded to the Court of Appeals for dismissal where plaintiff filed actions against defendant for divorce and equitable distribution; divorce was granted; counsel for defendant filed a motion in each action seeking the appointment of defendant's brother as guardian ad litem for her; plaintiff objected on the grounds that there must first be an incompetency proceeding before a guardian ad litem can be appointed; plaintiff's objection was overruled; an evidentiary hearing was held during which defendant herself testified that she desired the appointment of a guardian ad litem and the court heard evidence concerning defendant's history of schizophrenia and involuntary commitment; the court thereafter appointed defendant's brother to be defendant's guardian ad litem for each of the two pending cases; and plaintiff appealed from this ruling. Plaintiff was not an aggrieved party, nor did he argue, much less establish, that he was entitled to an appeal of right from the interlocutory order entered below.

Am Jur 2d, Appeal and Error § 219; Divorce and Separation §§ 266, 476.

Justice WEBB dissents.

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) (1989) from the decision of a divided panel of the Court of Appeals, 96 N.C. App. 620, 386 S.E.2d 592 (1989), which vacated and remanded an order entered by *Bissell, J.*, on 7 February 1989 in District Court, MECKLENBURG County, appointing a guardian ad litem for defendant. Heard in the Supreme Court 9 April 1990.

Tucker, Hicks, Hodge and Cranford, P.A., by John E. Hodge, Jr. and Fred A. Hicks, for plaintiff appellee.

Myers, Hulse & Harris, by R. Lee Myers, for defendant appellant.

MARTIN, Justice.

On 26 February 1987 plaintiff appellee filed separate actions against defendant for divorce and for an equitable distribution of marital property. The defendant filed a counterclaim for alimony in the divorce action on 17 June 1987. The parties were divorced 22 June 1987. On 8 August 1988 counsel for defendant filed a motion in each action for the appointment of a guardian ad litem for defendant pursuant to Rule 17 of the North Carolina Rules of Civil Procedure. The defendant's counsel set forth in these motions assertions to the effect that defendant was not able to assist in the ongoing litigation. The motions sought the appointment of the defendant's brother as guardian ad litem for her.

The plaintiff objected to the appointment of a guardian ad litem by the district court judge on grounds that before a guardian ad litem can be appointed under Rule 17 for an incompetent adult, incompetency must be determined in a proceeding brought under Chapter 35A of the general statutes. The district court overruled plaintiff's objection and held an evidentiary hearing on defendant's motions, during which defendant, herself, testified that she desired the appointment of a guardian ad litem. The court also heard evidence concerning defendant's history of schizophrenia and three occasions during which defendant had been involuntarily committed to mental health care institutions. The district court thereafter appointed defendant's brother to be defendant's guardian ad litem for each of the two pending cases. The plaintiff appealed from this ruling to the Court of Appeals.

The Court of Appeals, with one judge dissenting, held that Article I of Chapter 35A of the General Statutes provided the exclusive procedure for determining incompetency and vacated the order of the district court. The defendant then appealed to this Court.

The initial question we address is whether the plaintiff, who is defendant's former husband, has standing to appeal from the trial court's order appointing a guardian ad litem for the defendant. Only a "party aggrieved" may appeal from an order or judgment of the trial division. N.C.G.S. § 1-271 (1983); N.C.R. App. P. 3(a) (1990). *Cf. Barker v. Agee*, 326 N.C. 470, 389 S.E.2d 803 (1990). An aggrieved party is one whose rights have been directly and injuriously affected by the action of the court. *E.g., Buick Co.*

v. General Motors Corp., 251 N.C. 201, 110 S.E.2d 870 (1959); *Freeman v. Thompson*, 216 N.C. 484, 5 S.E.2d 439 (1939).

Plaintiff has not been directly or injuriously affected by the order appointing a guardian ad litem for defendant. Plaintiff's argument that future settlements or orders might later be disavowed by the defendant on grounds that the procedure followed was allegedly irregular is speculative and alleges at best a possible indirect injury to plaintiff's purported rights. In this connection, we note again that defendant, herself, testified that she desired the appointment of a guardian ad litem. Plaintiff has suffered no injury presenting the appellate division with a question ripe for review. His rights have not been affected by the court's order. Because he was not an aggrieved party, plaintiff had no standing to challenge on appeal the order entered by the trial court. For this reason the Court of Appeals should have dismissed plaintiff's appeal.

Moreover, plaintiff gave notice of appeal from an interlocutory order, namely, one granting defendant's motions for the appointment of a guardian ad litem. As this order was not a final judgment, for plaintiff to have been entitled to appeal of right from the order, plaintiff was required to establish that it either:

(1) Affects a substantial right, or

(2) In effect determines the action and prevents a judgment from which appeal might be taken, or

(3) Discontinues the action, or

(4) Grants or refuses a new trial

N.C.G.S. § 7A-27(d) (1989). *See also* N.C.G.S. § 1-277(a) (1983). *See, e.g., Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978) (decision by trial court must deprive the *appellant* of a substantial right which he would lose if the ruling or order is not reviewed before final judgment). Plaintiff was not an aggrieved party, nor did he argue, much less establish, that he was entitled to an appeal of right from the interlocutory order entered below. The Court of Appeals should have dismissed this attempted appeal. *E.g., State v. School*, 299 N.C. 351, 261 S.E.2d 908 (1980); *Metcalf v. Palmer*, 46 N.C. App. 622, 265 S.E.2d 484 (1980).

The decision of the Court of Appeals is reversed and the cause is remanded to that court for entry of an order dismissing the appeal.

Reversed and remanded.

Justice WEBB dissents.

STATE OF NORTH CAROLINA v. GEORGE ALAN GARVICK

291A90

(Filed 5 December 1990)

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 98 N.C. App. 556, 392 S.E.2d 115 (1990), finding no error in the judgment entered by *Strickland, J.*, on 19 October 1988, in Superior Court, CRAVEN County. Defendant's petition for discretionary review as to additional issues was denied by the Supreme Court on 26 July 1990. Heard in the Supreme Court 15 November 1990.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State.

Kennedy W. Ward, P.A., by Kennedy W. Ward; and Ward, Ward, Willey & Ward, by Elizabeth Williams, for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. JOHNNY LEE ROBBINS

329A90

(Filed 5 December 1990)

APPEAL by the defendant pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 99 N.C. App. 75, 392 S.E.2d 449 (1990), finding no error in the judgment entered 22 January 1987, by *Griffin (William C.), J.*, in Superior Court, NEW HANOVER County. Heard in the Supreme Court 14 November 1990.

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

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

PER CURIAM.

Affirmed.

MINNA SUSAN GOLDBERG TALIAN, ADMINISTRATRIX OF THE ESTATE OF SHERRI LYNN GOLDBERG, AND DANA KING v. THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION

No. 233A90

(Filed 5 December 1990)

APPEAL of right by the plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 98 N.C. App. 281, 390 S.E.2d 737 (1990), finding no error in the judgment entered by *Lamm, J.*, in Civil Superior Court, MECKLENBURG County, on 29 September 1988. Petition for discretionary review of additional issues was allowed 26 July 1990. Heard in the Supreme Court on 13 November 1990.

Ronald Williams, PA, by Ronald Williams, for plaintiff-appellant Dana King.

Levine and Levine, by Miles S. Levine, for plaintiff-appellant Minna G. Talian.

Golding, Meekins, Holden, Cosper and Stiles, by Fred C. Meekins and Emily S. Reeve, for defendant-appellee.

PER CURIAM.

Affirmed.

STATE OF NORTH CAROLINA)
)
v.) ORDER
)
JAMES EDWARD THOMAS)

No. 455A87

(Filed 3 October 1990)

THIS case was heard 11 May 1989 on defendant's appeal from judgments imposing a sentence of death for first degree murder and a mandatory sentence of life imprisonment for first degree sexual offense, entered at the 6 July 1987 criminal session of Superior Court, WAKE County, *Farmer, J.*, presiding.

One issue raised on appeal is whether certain concessions by defendant's attorney of defendant's guilt before the trial jury denied defendant the effective assistance of counsel.

Defendant was indicted on charges of first degree murder, first degree sexual offense, and robbery of Teresa Ann West, who was found dead in her room at the Sir Walter Tourist Home on 14 June 1986. Physical evidence introduced by the State at defendant's trial linked defendant to the murder. The jury found defendant guilty of first degree murder both by premeditation and deliberation and under the felony murder rule, and guilty of first degree sexual offense. The jury found defendant not guilty of common law robbery and not guilty of larceny. After a sentencing hearing, the jury recommended the death penalty for the first degree murder.

During arguments to the jury, defendant's counsel, apparently as a matter of trial strategy, conceded that defendant was guilty of second degree murder and that defendant participated in the sexual offense. Trial counsel stated to the trial court that defendant had consented to this strategy, at least as to the murder charge. Defendant on appeal denies he consented.

In *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), we held that ineffective assistance of counsel, in violation of a defendant's sixth amendment right to counsel, is established in every criminal case in which the defendant's counsel admits defendant's guilt of a lesser included crime to the jury without defendant's consent. The Court's opinion explained the basis for this rule:

> When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Id. at 180, 337 S.E.2d at 507.

The defendant in *Harbison*, appealing the trial court's denial of a motion for appropriate relief, contended that his right to effective assistance of counsel was violated when defense counsel, without his consent, admitted defendant's guilt and recommended that jurors convict him of manslaughter, rather than convict him of first degree murder or find him not guilty. The State did not contest the defendant's assertion that he had not consented to his attorney's admission.

Unlike in *Harbison*, the State here contests defendant's assertion of fact that he did not consent to his attorney's admissions. The trial record does not resolve this issue. Before determination, therefore, of this and other issues in the case it is ORDERED, in the exercise of the Court's supervisory powers over the trial divisions, that the case be remanded to the Superior Court, Wake County, for an evidentiary hearing for the sole purpose of determining whether defendant knowingly consented to trial counsel's concessions of defendant's guilt to the jury. The trial court then shall forthwith make findings of fact and conclusions of law, upon which it shall enter its order. It shall then certify the order together with supporting findings and conclusions and the transcript of the hearing to this Court. *See State v. Sanders*, 319 N.C. 399, 354 S.E.2d 724 (1987); *State v. Richardson*, 313 N.C. 505, 329 S.E.2d 404 (1985).

By order of the Court in conference, this 3rd day of October 1990.

WHICHARD, J.
For the Court

WITNESS my hand and seal of the Supreme Court of North Carolina, this the 10th day of October, 1990.

J. GREGORY WALLACE
Clerk of the Supreme Court

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

BADILLA v. BADILLA

No. 500P90

Case below: 99 N.C.App. 582

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 8 November 1990.

BALLOU ENTERPRISES, INC. v. SOUTHERN RAILWAY CO.

No. 470P90

Case below: 100 N.C.App. 190

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

BURGESS v. VESTAL

No. 409P90

Case below: 99 N.C.App. 545

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990. Motion by N. C. Academy of Trial Lawyers for leave to file amicus curiae brief in support of petition for discretionary review dismissed as moot 5 December 1990.

CHAMPS CONVENIENCE STORES v. UNITED CHEMICAL CO.

No. 350A90

Case below: 99 N.C.App. 275

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals allowed 8 November 1990.

CHICOPEE, INC. v. SIMS METAL WORKS

No. 260PA90

Case below: 98 N.C.App. 423; 327 N.C. 426

Motion by defendant (Insurance) for reconsideration of petition for discretionary review denied 25 September 1990.

CONTINENTAL TELEPHONE CO. v. GUNTER

No. 455P90

Case below: 99 N.C.App. 741

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

CORDER v. ALLENTON, INC.

No. 334P90

Case below: 99 N.C.App. 221

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

CURRIN-DILLEHAY BLDG. SUPPLY v. FRAZIER

No. 485P90

Case below: 100 N.C.App. 188

Notice of appeal by defendants pursuant to G.S. 7A-30 dismissed 5 December 1990. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

FARLOW v. FARLOW

No. 230P90

Case below: 98 N.C.App. 340

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

FLOYD v. N.C. DEPT. OF COMMERCE

No. 337P90

Case below: 99 N.C.App. 125; 327 N.C. 482

Motion by plaintiff for reconsideration of petition for discretionary review dismissed 8 November 1990.

FORREST v. PITT COUNTY BD. OF EDUCATION

No. 472A90

Case below: 100 N.C.App. 119

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

HACKMAN v. HACKMAN

No. 501P90

Case below: 100 N.C.App. 329

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

HARE v. BUTLER

No. 457P90

Case below: 99 N.C.App. 693

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

HAUGHN v. FIRST-CITIZENS BANK & TRUST CO.

No. 414P90

Case below: 99 N.C.App. 582

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

HEATHER HILLS HOME OWNERS ASSN. v. CAROLINA CUSTOM DEV. CO.

No. 519P90

Case below: 100 N.C.App. 263

Petition by defendant (Richard E. Ford) for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990. Petition by defendants (Properties and Anderson) for writ of certiorari to the North Carolina Court of Appeals denied 5 December 1990.

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

HOOVER v. WILSON

No. 256P90

Case below: 98 N.C.App. 514

Motion by defendants to dismiss appeal by plaintiff for lack of substantial constitutional question allowed 8 November 1990. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

IN RE REQUEST FOR DECLARATORY RULING BY TOTAL CARE, INC.

No. 423P90

Case below: 99 N.C.App. 517

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

KEMPSON v. N.C. DEPT. OF HUMAN RESOURCES

No. 570P90

Case below: 100 N.C.App. 482

Petition by defendant for temporary stay allowed pending consideration and determination of defendant's petition for discretionary review 11 December 1990.

LaBARRE v. DUKE UNIVERSITY

No. 408P90

Case below: 99 N.C.App. 563

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

LEWIS v. LEWIS

No. 199P90

Case below: 98 N.C.App. 138

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

LOWDER v. ALL STAR MILLS, INC.

No. 536P90

Case below: 100 N.C.App. 318

Petition by defendant (W. Horace Lowder) for discretionary review pursuant to G.S. 7A-31 denied 26 November 1990.

LOWDER v. ALL STAR MILLS, INC.

No. 537P90

Case below: 100 N.C.App. 322

Petition by intervening defendant (Lois L. Hudson) for discretionary review pursuant to G.S. 7A-31 denied 26 November 1990. Petition by defendant (W. Horace Lowder) for discretionary review pursuant to G.S. 7A-31 denied 26 November 1990.

MAHAFFEY v. FORSYTH COUNTY

No. 443A90

Case below: 99 N.C.App. 676

Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 5 December 1990. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

MARINA FOOD ASSOC., INC. v. MARINE RESTAURANT, INC.

No. 495P90

Case below: 100 N.C.App. 82

Petition by several defendants for discretionary review pursuant to G.S 7A-31 denied 5 December 1990.

McKINNEY v. AVERY JOURNAL, INC.

No. 411P90

Case below: 99 N.C.App. 529

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

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

MIDDLETON v. MIDDLETON

No. 237P90

Case below: 98 N.C.App. 217

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

MILLER v. MILLER

No. 212P90

Case below: 98 N.C.App. 221

Notice of appeal by defendant pursuant to G.S. 7A-30 dismissed 8 November 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

MUT. BENEFIT LIFE INS. CO. v. CITY OF WINSTON-SALEM

No. 502P90

Case below: 100 N.C.App. 300

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

NEWTON v. UNITED STATES FIRE INS. CO.

No. 301P90

Case below: 98 N.C.App. 619

Petition by defendant (Guaranty Association) for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

OMNI INVESTMENTS, INC. v. MILLER

No. 403P90

Case below: 99 N.C.App. 583

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

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

PLESS v. ARTIS

No. 458P90

Case below: 99 N.C.App. 773

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

SETZER v. BABOFF

No. 432P90

Case below: 99 N.C.App. 774

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

STALLINGS v. GUNTER

No. 450P90

Case below: 99 N.C.App. 710

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

STATE v. DAVIS

No. 367P90

Case below: 97 N.C.App. 507

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 December 1990.

STATE v. DAVY

No. 567P90

Case below: 100 N.C.App. 551

Petition by defendant for writ of supersedeas and temporary stay denied 5 December 1990. Notice of appeal by defendant pursuant to G.S. 7A-30 dismissed 5 December 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

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

STATE v. HARRELL

No. 546P90

Case below: 100 N.C.App. 450

Petition by defendant for temporary stay allowed 14 November 1990 pending receipt, consideration and determination of a timely filed petition for discretionary review.

STATE v. HUANG

No. 396P90

Case below: 99 N.C.App. 658

Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 denied and stay dissolved 8 November 1990.

STATE v. JENKINS

No. 375P90

Case below: 99 N.C.App. 362

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 November 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990. Motion by defendant to stay consideration of petition for discretionary review denied 8 November 1990.

STATE v. LINEBERGER

No. 533P90

Case below: 100 N.C.App. 307

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 December 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

STATE v. LOCKLEAR

No. 422P90

Case below: 99 N.C.App. 585

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 November 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

STATE v. McKIVER

No. 481P90

Case below: 100 N.C.App. 330

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

STATE v. MORENO

No. 308P90

Case below: 98 N.C.App. 642

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

STATE v. ODOM

No. 377P90

Case below: 99 N.C.App. 265

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

STATE v. POWELL

No. 451P90

Case below: 99 N.C.App. 775

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 November 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

STATE v. RICHARDSON

No. 514P90

Case below: 100 N.C.App. 240

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 December 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

STATE v. ROSEMON

No. 459P90

Case below: 99 N.C.App. 775

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990. Notice of appeal by defendant pursuant to G.S. 7A-30 dismissed 8 November 1990.

STATE v. SANDERS

No. 368P90

Case below: 94 N.C.App. 781

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 December 1990.

STATE v. SELLERS

No. 449P90

Case below: 99 N.C.App. 775

Petition by defendant (Mark Timothy Delk) for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

STATE v. SHERRILL

No. 416P90

Case below: 99 N.C.App. 540

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

STATE v. SMITH

No. 516P90

Case below: 100 N.C.App. 331

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

STATE v. THEIS

No. 294P90

Case below: 98 N.C.App. 700

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 November 1990. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

STATE v. TORRES

No. 316A90

Case below: 99 N.C.App. 364

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 5 December 1990 limited to review of questions of whether the trial court erred in finding the aggravating factor that the victim was mentally infirm and in failing to find the mitigating factors of "mental condition" and "extenuating relationships." Petition by defendant for writ of supersedeas allowed 5 December 1990.

STATE v. WHITTED

No. 358P90

Case below: 99 N.C.App. 502

Temporary stay dissolved 10 October 1990.

STREETER v. SHEPARD

No. 494P90

Case below: 99 N.C.App. 776

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

SWILLING v. SWILLING

No. 379PA90

Case below: 99 N.C.App. 551

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 8 November 1990.

TAY v. FLAHERTY

No. 453P90

Case below: 100 N.C.App. 51

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

TEAGUE v. PUTNAM

No. 372P90

Case below: 99 N.C.App. 363

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

UMSTEAD v. RODENHIZER

No. 507P90

Case below: 100 N.C.App. 331

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1990.

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

WILLIAMS BRANCH CEMETERY ASSN. v.
ABSALOM DILLINGHAM CEMETERY

No. 454P90

Case below: 99 N.C.App. 776

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 November 1990.

PETITIONS TO REHEAR

JOHNSON v. RUARK OBSTETRICS

No. 177PA88

Case below: 327 N.C. 283

Petition by defendants to rehear denied 12 November 1990.

WILSON v. STATE FARM MUT. AUTO. INS. CO.

No. 45PA89

Case below: 327 N.C. 419

Petition by defendant (N. C. Farm Bureau) to rehear allowed 8 November 1990 with new brief on rehearing limited to whether this Court cited the wrong statutory provision, thereby making any resident of a covered person's household also a covered person, regardless of lawful possession or permission.

APPENDIXES

PRESENTATION OF MOORE PORTRAIT

ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY

AMENDMENT TO SUPERIOR-DISTRICT COURT RULES

AMENDMENTS TO RULES OF APPELLATE PROCEDURE

RULES FOR COURT-ORDERED ARBITRATION IN NORTH CAROLINA

AMENDMENTS TO PRINTING DEPARTMENT INTERNAL OPERATING PROCEDURES

AMENDMENT TO CONTINUING LEGAL EDUCATION RULES

AMENDMENT TO BAR RULES RELATING TO STANDING COMMITTEES OF THE COUNCIL

AMENDMENTS TO RULES OF PROFESSIONAL CONDUCT

CEREMONY FOR THE PRESENTATION OF THE PORTRAIT OF FORMER ASSOCIATE JUSTICE DANIEL KILLIAN MOORE

On December 15, 1988, at 2:00 p.m., the Supreme Court of North Carolina convened for the purpose of receiving the portrait of the Honorable Daniel Killian Moore, former Associate Justice of the Supreme Court of North Carolina.

Upon the opening of Court on the afternoon of December 15, 1988, the Clerk of the Supreme Court sounded the gavel and announced:

> "The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of North Carolina."

All persons in the Courtroom rose, and upon the members of the Court reaching their respective places on the bench, the Clerk announced:

> "Oyez, Oyez, Oyez—The Supreme Court of North Carolina is now sitting in ceremonial occasion for the presentation of the portrait of former Associate Justice Daniel Killian Moore. God save the State and this Honorable Court."

The Clerk was then seated.

Chief Justice James G. Exum, Jr., welcomed official and personal guests of the Court, and recognized the special guests who would address the Court:

> "The Honorable Franklin Freeman, Jr., is Director of the Administrative Office of the Courts. Mr. Freeman served as Justice Moore's Law Clerk; he is a former Assistant Director of the Administrative Office, a former District Attorney for the Seventeenth Judicial District, and he presently serves on the Executive Committee of the National Conference of State Court Administrators. Mr. Freeman, incidentally, was Justice Moore's first law clerk, or at least the first law clerk that Justice Moore chose; and Mr. Freeman's brother, Sam, was the last. Sam, after leaving Justice Moore's employ obtained his doctorate in philosophy from Harvard and is now a professor of philosophy at the University of Pennsylvania. Dan Moore was fond of asking Franklin about news from Franklin's 'educated brother,' as he liked to put it."

> "The next person to offer remarks will be Mr. George Ragsdale. When Justice Moore was Governor, Mr. Ragsdale served as

his Legal Counsel. Mr. Ragsdale later served with distinction on the Superior Court Bench. He resigned from the bench and formed a Raleigh law firm, which ultimately became Moore, Ragsdale, Liggett, and Foley, after Justice Moore retired from the bench and joined the firm as a partner. Mr. Ragsdale is now a senior partner with LeBoeuf, Lamb, Leiby & MacRae. Mr. MacRae, incidentally, is the grandson of Justice MacRae, a former member of this Court. I understand, too, that the Chairman of the firm, Mr. Taylor Briggs, is with us today, and we are glad to welcome him."

REMARKS OF
MR. FRANKLIN FREEMAN, DIRECTOR OF
THE ADMINISTRATIVE OFFICE OF THE COURTS,
IN THE SUPREME COURT OF NORTH CAROLINA
DECEMBER 15, 1988

May it Please the Court:

Dan Moore loved the law. Next to his family and his church, I know of nothing he loved more. Therefore, it is fitting and proper that we gather in this courtroom today to honor the memory of former Associate Justice and Governor Dan K. Moore. It is fitting because it is in this courtroom and in the halls surrounding this courtroom that Dan Moore spent the last nine years of his public career.

Nowhere was Dan Moore's love of the law better manifested than in his appointments to the bench. During his four years as Governor, he appointed, up to that time, more justices and judges than any Governor before him. The list of his appointees reads like a who's who of the judiciary these last 20 years.

In an address to the North Carolina State Bar in October of 1967, Governor Moore described our Supreme Court as, "being recognized as one of the finest courts in the land."

His appointments to this court reflected that tradition. They were:

J. Will Pless, Jr.	Frank Huskins
I. Beverly Lake	Joseph Branch

One of the appointees, Joseph Branch, who is also my mentor and friend, reached the pinnacle of North Carolina's judiciary serving as Chief Justice from August 1979 until September 1, 1986. He is universally admired for his leadership of North Carolina's Judicial Branch of Government during those years.

The North Carolina Court of Appeals was established in 1967, during Governor Moore's administration. It thus fell his lot to appoint the first six members of this new court. In that same speech to the State Bar, Governor Moore said of the newly appointed Court of Appeals:

> "In making my appointments to the newly created Court of Appeals, I sought the advice and counsel of every member of the North Carolina Supreme Court. It was my purpose to appoint persons to this court of the same high calibre, learning, temperament, and personal integrity, so that the Court of Appeals might be an effective partner in the system of appellate review which has been established by the legislature. I am pleased that my search for distinguished jurists have led so happily to the appointment of those six who compose our new Appellate Court. They serve under the strong leadership of Chief Judge Mallard, and I know that he will continue to be an inspiration to the Bench and Bar of North Carolina."

In addition to Chief Judge Raymond Mallard, Judge Moore's initial six appointees to the Court of Appeals included:

James C. Farthing
Hugh B. Campbell
David M. Britt
Walter E. Brock
Naomi Morris

Shortly after this speech was made, Judge Farthing died and Governor Moore appointed a fellow mountaineer, Francis M. Parker. All of these appointees exemplified the characteristics Governor Moore used to describe the persons he had appointed. Two of his appointees, David M. Britt and Walter E. Brock, ascended to this court. A third, Naomi Morris, was appointed by Chief Justice Susie Sharp as the Chief Judge of the Court of Appeals, the only woman to bear that distinction.

Associate Justice Moore served for ten years as a judge of the Superior Court. One lawyer who appeared before him, Sam J. Ervin, III, described him as "the ultimate in trial judges." He considered his years on the Superior Court Bench as one of the highlights of his career. Therefore, it was fortuitous that during his four years as governor, Dan Moore appointed over one-half of the Superior Court Bench. It was also his service on the Superior Court Bench that caused him to take particular care in selecting appointees to that bench. In his talk to the Bar in 1967, he enumerated the characteristics he had looked for in his Superior Court appointments up to that point and that he continued to look for as he made appointments through the end of his term. He said:

> "I have appointed those men who I believe will make a career of the office, who will be hard-working and energetic judges, and who will be a credit to the North Carolina Judiciary."

Surely his appointments to the Superior Court exemplified his intent to leave an enduring mark on this State's Judicial Branch of Government for we find that his appointees to the Superior Court did and have made a career of the office, they have been hard-working energetic judges, and they have been a credit to the North Carolina Judiciary. Many have ascended the judicial ladder and all have acquitted themselves in the greatest tradition of trial judges. They were in the order of their appointment:

REGULAR SUPERIOR COURT JUDGES

Guy L. Houk
William E. Anglin
B. T. Falls, Jr.
Harvey A. Lupton
James H. Pou Bailey
Walter W. Cohoon
Jonathan Williams Jackson
Thaddeus D. Bryson
Fredrick H. Hasty
Edward D. Clarke
Sam J. Ervin, III
Harry C. Martin
Frank W. Snepp, Jr.
James G. Exum, Jr.
Thomas W. Seay, Jr.
Coy E. Brewer
Robert A. Collier, Jr.
William T. Grist

SPECIAL JUDGES

Lacy H. Thornburg
Fate J. Beal
Robert M. Martin
James William Copeland
Hubert E. May
James C. Bowman
A. Pilston Godwin, Jr.
George Robinson Ragsdale

Of these appointees, three, J. William Copeland, Harry Martin, and James G. Exum, Jr., ascended to this court. As Governor Moore intended, James G. Exum, Jr., has for 21 years made a

career of the judiciary as a trial judge and justice. He now serves with credit as the hard-working and energetic Chief Justice of this court. Likewise, Associate Justice Harry Martin is serving on this court in that tradition.

Three of the Superior Court appointees ascended to the Court of Appeals: Harry Martin, Robert Martin, and Ed Clark. One, Sam J. Ervin, III, serves as a judge of the Fourth Circuit United States Court of Appeals. Lacy Thornburg serves as the Attorney General of North Carolina. After 21 years, two of Governor Moore's appointees to the Superior Court Bench still sit on that bench, Frank Snepp and Thomas Seay; and four of his appointees still serve as Emergency Superior Court Judges, Harvey Lupton, James H. Pou Bailey, Robert Collier, Jr., and Pilston Godwin, Jr.

Finally, Judge Moore was privileged to appoint four solicitors of the Superior Court, including Herbert Small, Allen Cobb, Thomas Moore and Hampton Childs. Herbert Small went on to become a judge of the Superior Court and is now the Senior Resident Judge of the First Judicial District.

Micah, Chapter 6, verse 8 says, "What doth the Lord require of thee but to do justly, and to love mercy, and to walk humbly with thy God." Dan K. Moore exemplified these characteristics in his life and in its conduct and in his appointments to the bench.

REMARKS OF
GEORGE R. RAGSDALE, ESQUIRE,
IN THE SUPREME COURT OF NORTH CAROLINA
DECEMBER 15, 1988

May it please the Court:

How often have I stood here and said those very words: "May it please the Court." Every lawyer's misbegotten dream. But today, for this one brief shining moment, everything said, done, dreamt and remembered will please this Court, because it pleases this Court even to hear the name of Dan K. Moore.

I am profoundly honored to be amongst those chosen by Mrs. Moore to say a few comfortable words about one of the greatest men ever to sit as a member of this, the highest Court of what Sir Walter Raleigh called "the Goodliest Land Under the Cope of Heaven." Of all the things he was or ever wanted to be, I think Dan Moore wanted to be a Justice of this Court more than anything. And when Governor Scott appointed him in 1969, his dream came true.

It was a joy to be his friend. It was the single greatest professional privilege of my life to work with him as I did for almost four years as his counsel in the Governor's Office and then twice that long as his law partner after he left this Bench. I do not know that I can reveal anything new about him to you today, but I would like to focus upon a few of the great achievements of his life.

Scripture tells us to "store up your treasure in the Heaven of your hearts, where moth and rust do not corrode and thieves cannot break through and steal." Two decades ago, as Governor, Dan Moore stored up something and preserved such a treasure for the people of North Carolina that the passage of time can only enable us to better marvel at the value of his courage.

In the summer of 1963, eighteen long months before Dan Moore ever became Governor of this State, the General Assembly passed what came to be known as the Speaker Ban Law. It is hard to remember today what damage and heartache that law caused, but the pages of history of this State contain ample evidence that North Carolina was deeply and bitterly divided and in a condition which Coleridge would have called a "ceaseless turmoil seething."

Dan Moore took the oath of office as Governor in the bitter cold of January 1965. He was promptly struck down by two successive illnesses which confined him to the Executive Mansion. While there, representatives of the Southern Association of Colleges and Schools visited him and threatened to revoke the accreditation of the University of North Carolina if the Speaker Ban Law was not promptly repealed. That would have been a blow from which the University might not have recovered in this century. It would have been equivalent to turning the lights out in Chapel Hill. It was unthinkable. It was intolerable. But the clear and present danger was at hand.

The threat seemed to revive him. He recovered quickly and set about leading the process of repeal. Deep divisions of opinion within the State made his task Herculean. For reasons impossible today to fathom, he was suspected by zealots on all sides. In order to lead and succeed, he was required to occupy that awful no man's DMZ where gunfire from irresponsible extremists rain alike on the just and the unjust. The left wingers thought he had thrown in with the radical right. The arch conservatives believed he was a closet left winger. The students at Chapel Hill booed him and named the northern boundary of the campus "the Dan Moore Wall." He bore his suffering quietly, as was his way. As Churchill said

of the Czar's military forces, "You can measure the strength of the Russian Army by the battering it endured." Dan Moore proved what his mother already knew—he was not born with a glass jaw.

In the end, after a long and painful time, he worked it out. Although he had nothing to do with the enactment of the Speaker Ban Law, he got it repealed. Many of us who worked closely with him throughout the dark midnight of that time, among them Joe Branch, Lacy Thornburg, Bill Friday, Charles Dunn, David Britt, Ed Rankin, Tim Valentine and others, said privately that Dan Moore had saved the University. It is long past high time for that to be said publicly and on the record. We have recently been taught to read lips. Read mine: As Daniel Webster saved the Union, Dan Moore saved the University. Cornelia Spencer should ring the bell again for him. To me, it was his greatest single achievement as Governor.

Today, the State's brightest gem, shining more brilliantly than ever, is ready to celebrate her 200th birthday. We can thank the courage, heroism and sacrifice of Dan Moore that she was given the chance to soar so high, to sail so far, and to serve the people of this State and Nation so long, so honorably and so well.

After that, David Wolper, the documentarist, produced a film about Dan Moore and called him "a single man of courage." I said, "Mr. Wolper, I don't think you ought to say that. The First Lady claims they're married."

When on that sunny September Sunday afternoon in 1986 and the bird of time fluttered no more for him, Mrs. Moore asked Bob Leak and me to telephone the press to request that, in lieu of flowers, donations be made in the Governor's memory to the Law School at Chapel Hill. Out of that simple request was such a princely sum procured that his family and friends decided to raise a larger fund which would enable the Law School to establish the Dan K. Moore Program in Jurisprudence and Ethics. I don't believe those students who booed him had much influence on how the University feels about one of its most distinguished alumni. Let me read to you something I didn't write, but which was written by the Law School at Chapel Hill in the Statement of Purpose of this Fund:

> "Dan Moore was an exceptional man who gave extraordinary exemplification of the word 'justice.' His word was his bond and his reputation as one of the greatest public servants of the history of North Carolina remains unparalleled. Under what were sometimes the most stressful conditions, he

manifested integrity, intelligence and courage, as well as a keen sense of human relations. It is this record of distinguished public service by which his integrity and overwhelming sense of justice has reflected great credit on his alma mater, that the University of North Carolina School of Law now establishes the Dan K. Moore Program in Jurisprudence and Ethics, by which funds are being raised to recruit a scholar of national renown for the School of Law and to serve as a resource for the entire State. An additional fund will establish scholarships carrying Governor Moore's name, thus emphasizing to future lawyers the importance of reflecting the high ideals and lofty standards so consistently associated with Dan K. Moore."

Two months and three days ago today, on a glorious October morning in Chapel Hill, Chief Justice Exum administered the oath of office to the new Chancellor of the University, Paul Hardin. In his Inaugural address, Chancellor Hardin stated that one of his goals was to entice 25 new academic superstars to Chapel Hill. Thanks in great measure to the nerve and courage of Dan Moore, the University is capable of providing the necessary temptation to those superstars, and I believe the funds will soon be here to enable the Chancellor to purloin at least one of them for the Law School.

If the Research Triangle Park was the brainchild of Luther Hodges, and it was, it became the manchild of Dan Moore. His personal role in convincing IBM to build a major facility in the Research Triangle Park was the spark which ignited the explosion of the uninterrupted development of the Park and the cities which surround it. It took a lot of nerve, courage, brass or whatever you want to call it that night at the Mansion for Governor Moore to promise Thomas J. Watson that he would build a then non-existent road from Raleigh to the Park if Mr. Watson would put IBM at the western end of it. Both men kept their promise. I suppose they both had to; Mrs. Moore heard every word of it. The coming of IBM to the Park is, to this day, the measuring moment by which everything else is compared. In the late summer before he died, Governor Martin and the North Carolina Department of Transportation recognized Dan Moore's contribution to the Park by naming that super-highway which now connects Raleigh to the heart of the Park the "Dan K. Moore Freeway."

When Dan K. Moore left this Bench, many law firms, including mine, offered him a position. When he said "yes" to Frank Liggett and to me, we did not ask for a re-count. We have since gone

through substantial growth, merger and change, and had he lived, Dan Moore would today be the senior Raleigh member of the largest law firm practicing in North Carolina, almost 400 lawyers strong in twelve major American cities and three foreign nations. The firm of LeBoeuf, Lamb, Leiby & MacRae and its predecessors have been practicing law in North Carolina since the end of World War I, bearing with pride the great name of Cameron F. MacRae, born in Wilmington, a distinguished alumnus of the University, himself the son of Superior Court Judge Cameron MacRae and, as you have already heard from the Chief Justice this morning, the grandson of James Cameron MacRae, a Justice of this Court and member of the faculty of the Law School at Chapel Hill. As has been said, our most senior partner and Chairman, Taylor R. Briggs of New York, and many others from our Raleigh office and elsewhere are here today to join in expressing our respect and affection for Dan Moore, one of the very ablest and most beloved lawyers ever to practice in our firm.

There was a time when they called him the "Mountain Man"—a mountain of a man, more likely. He lived and practiced law all of his maturing years in a small mountain town, and when the time came for him to seek the executive leadership of the government of this State, he reached his hand down from those great mountains, across the Piedmont and the Coastal Plain into another small town where he found another mountain of a man, another lawyer, Joe Branch, and together they forged a brotherly respect and affection which inspired all who knew them and loved them, as I did and do. With Joe Branch managing Dan Moore's campaign for the Democratic nomination for Governor in 1964, they accomplished a political miracle which will never be repeated in the lifetimes of any of us here today. Dan Moore carried 93 of North Carolina's 100 counties in the June 1964 primary. It ranks with what Roosevelt did to Alf Landon, with Babe Ruth's prowess at the bat, with the Tar Heels' 32 straight wins and the National Championship in '57, with $E = MC^2$, and with what those two brothers who owned the Ohio bicycle shop did at Kitty Hawk in 1903. As Joe Branch participates in this occasion drawing aside the curtains which obscure the image of Dan Moore, so did he do in 1964, and the people not only *liked* what they saw of this mountain of a man, they *loved* him. He was the most popular Chief of State in the South in his time. At the suggestion of Secretary of State Thad Eure (who by persisting in referring to himself as "the oldest rat in the Democratic barn" demonstrates conclusively that he knows nothing about rodents), the Democratic Party of

this State accorded him its highest honor by nominating Dan Moore as its Favorite Son at the Democratic National Convention in Chicago in 1968.

Dan Moore brought Joe Branch out of Enfield and into a fulfilled life of public service. These two small-town boys grew to greatness as public men. When I would see them together, I would think of Abraham Lincoln and John Marshall, but I never knew which was which.

Nothing made Dan Moore prouder than to appoint Joe Branch to this bench, nothing pleased him more later than to serve here with him, nothing gratified him more than to see him become Chief Justice, and nothing surprised him less than to see Joe Branch become one of the greatest leaders of the Judiciary in the history of this State.

Leo Durocher and Marc Antony had one thing in common: They were both wrong. Dan Moore was one nice man who finished first and who did so much good in his lifetime that it was not buried with his bones, but lives long after him. By his fruits he is still known, respected, honored and remembered.

It will be wonderful to see his portrait hanging here, for then his visage and his great heart will be together, at last, in the same place, in this Court he loved."

The Chief Justice then introduced The Honorable Joseph Branch to present the portrait of Dan K. Moore:

"I will now call on one who, by any measure, ranks in the upper echelons of North Carolina's ablest sons. He was a champion high school basketball player, and he has a grandson today who is following at least in those footsteps. He has been a country lawyer; a four-term member of the North Carolina House of Representatives; Legislative Counsel to two Governors, Governor Hodges and Governor Moore. He holds honorary degrees and distinguished awards too numerous to mention here. He has served as Chairman of the Board of Trustees of his beloved Wake Forest University, where he wisely guided the University during times when difficult and far-reaching decisions had to be made. He served as a member and, finally, as Chief Justice of this Court.

Those of us on the present Court who served with him and under his leadership, Justices Meyer, Mitchell, Martin, Frye, and I, count ourselves fortunate, indeed, to have been the beneficiaries of his warm friendship, his wise counsel, his legal knowledge and ability. We miss his stories, and he has good ones, appropriate for almost any situation or occasion. We have already heard elo-

quently from Mr. Ragsdale about the relationship between this man and Dan Moore. Joe Branch honors the Court with his presence today. We are pleased, now, to recognize Joe Branch, former Chief Justice of the Supreme Court of North Carolina, for the presentation of the portrait."

REMARKS BY THE HONORABLE JOSEPH BRANCH,
RETIRED CHIEF JUSTICE OF THE SUPREME COURT
OF NORTH CAROLINA,
UPON THE PRESENTATION TO THE COURT
OF THE PORTRAIT OF DAN K. MOORE

If it please the Court:

I am highly honored that the family of the late Governor and Associate Justice of this Court, Dan K. Moore, has given me the privilege of having a part in the presentation of his portrait to the Court. My only professed qualifications for performing the duty assigned me are my respect, admiration and affection for this great man.

Dan Killian Moore was born on April 2, 1906 in Asheville, North Carolina. His parents were Fred and Lela Enloe Moore. His father, a lawyer and Superior Court Judge, was the youngest person ever to be elected to that position. Judge Fred Moore died when young Dan was only two years old, leaving his widow Lela and children, Fred, Enloe, Edith, Margaret, and Dan. The Moore family experienced some hard, but happy days. Dan K. Moore came to know the necessity of hard work as a young high school student when it was necessary for him to work in order to stay in school and as a self-help student at the University of North Carolina. Although working at odd jobs at the University, he was possessed of a bright mind and an innate desire to excel, which resulted in his being inducted into the Order of Phi Beta Kappa. After his undergraduate years, he received his legal education at the University of North Carolina Law School. Upon completing his legal education, he returned to Sylva, North Carolina, where he was a sole practitioner. His ability and integrity were quickly recognized and he became attorney for Jackson County, attorney for Jackson County Board of Education, attorney for Town of Sylva, and attorney for Nantahala Power Company. He also found time to serve the Democratic Party, beginning as a precinct committeeman and progressing to chairman of the precinct committee, member of the county executive committee and serving as a member of the State Executive Committee for twenty-five years.

The people of his county elected him to the House of Representatives, where he served with distinction in the 1941 session. In 1943, he took a step which, in itself, established him as a great patriot. At the age of thirty-seven, with a wife and two children, he chose to ignore his draft-proof status and enlisted in the Army of the United States. He served as an enlisted man in Europe with a paratroop division. Upon his discharge, he returned to his native county, resumed the practice of law and was elected solicitor of the Twentieth Judicial District, serving in that capacity from 1946 to 1948. Governor Greg Cherry appointed Dan K. Moore Resident Superior Court Judge of the Twentieth Judicial District in 1948 and he was elected to that position by the people of North Carolina in 1950. It was in his capacity as a Superior Court Judge that his legal ability, compassion and integrity began to spread throughout North Carolina in all the counties in which he held court.

After presiding over the courts in Mecklenburg County for twelve months, the Charlotte Observer reported: "Lawyers—without audible exception—have given him unqualified praise in the twelve months he has been here. They are joined by the court reporters, newspapermen, jurors, witnesses and other judges."

After a six-month assignment in Guilford County, the bar expressed their appreciation by giving the judge a briefcase accompanied by a statement from the President of the Greensboro Bar who said: "justice has been administered impartially, squarely, and fairly." It is reported that he received the same recognition and expressions of appreciation wherever he held court during his tenure as a Superior Court Judge.

Judge Moore resigned from the bench in 1958 and joined Champion Paper, Inc., in Canton as Legal Counsel and Assistant Secretary. However, his love for good government and politics still burned and in 1964 he left the safety and comparatively peaceful life as a business executive to run for Governor of North Carolina. I had known Governor Moore casually and favorably during my legislative days, and when he and my brother-in-law, A. Paul Kitchin, approached me about managing his campaign in Halifax County I readily agreed. Somehow, I really do not know how, after a few visits this appointment grew to become Dan K. Moore's manager in his state-wide campaign. From November 1963 until November 1964, a great percentage of my time was occupied by this endeavor. During that time I saw him in many extremely trying situations, many happy situations, and observed his transition from that of a candidate to the role of Governor of North Carolina.

I recall an incident in the early days of his campaign when we had driven to the home of a man who had indicated that he would assume leadership in a financial area of the campaign. He apparently had been convinced that Dan K. Moore could not be elected and very courteously but firmly sent us on our way with the distinct understanding that he could be of no help. As we made our way back to Raleigh in the rain and sleet, Governor Moore inquired "is there any honorable way I can get out of this race?" I replied with something like things will be better and, to my own surprise, they very quickly were better. I recount this episode because this man of integrity emphasized that his course of conduct must follow the path of honor.

As a candidate and as Governor, Dan K. Moore offered the people of North Carolina an ambitious program which included: (1) a highway safety program including the once legislatively killed automobile inspection law; (2) although his candidacy was generally opposed by the leadership of the NCAE, he proposed a forty-one million dollar educational outlay which provided a five percent teacher pay raise for each year of the biennium, a reduction in classroom size for the first three grades, elimination of elementary school textbook fees, funds to hire eighty-five more remedial teachers for the handicapped, and free lunches for needy children; (3) a ten percent across the board raise for state employees; (4) establishment of regional industry hunting offices; (5) two additional rehabilitation centers for alcoholics; (6) a three hundred million dollar road bond issue to be submitted to the voters; (7) reorganization of the State Highway Commission, the Wildlife Resources Commission, the State Board of Higher Education and the State Board of Conservation and Development; (8) a resolution of the long-time feud between the rural electric cooperatives and the private electric utilities; (9) creation of the North Carolina Traffic Authority; (10) a study commission to report to the legislature on the highly controversial speaker ban law; (11) a five hundred thousand dollar emergency appropriation for land purchases in the capital area; (12) a seven hundred and fifty thousand dollar appropriation to purchase a site in the Research Triangle for a multimillion dollar Federal environmental center; (13) appropriations for one hundred additional highway patrolmen; (14) expansion of Charlotte College into the university system.

It is hard to believe, but under Governor Moore's guidance every one of these proposals was enacted into law during the 1965 General Assembly.

The years of the Moore administration were years when the nation faced a period of civil unrest, racial tension, lunch counter sit-ins, and campus unrest. How fortunate North Carolina was to have as Governor this quiet man of strong convictions who did not fan the flames of prejudice but firmly demanded and supervised the enforcement of law and order. A notable example of his effective leadership was the manner in which he defused the emotionally charged speaker ban law. He did not disappoint those who elected him and even those who opposed him applauded his strong and even-handed leadership.

After the completion of his term as Governor of North Carolina, Judge Moore joined the firm of Joyner, Moore and Howison as a partner, and practiced law with that firm until he was appointed Associate Justice of the North Carolina Supreme Court on November 20, 1969 by Governor Robert W. Scott. He was elected without opposition to a full eight-year term on November 3, 1970 and served with great distinction and credit to that Court until his retirement on December 31, 1978 because of the age limitation in the statute. His opinions grace the North Carolina Reports beginning in Volume 276 and continuing through Volume 296. In his short tenure on the North Carolina Supreme Court, he wrote 188 opinions. These scholarly opinions were models of clarity and reflected an understanding of the law and of people.

After his retirement from the Court, Justice Moore was still not ready for a complete retirement. He again entered the practice of law in the firm of Moore, Ragsdale & Liggett and remained with that firm until his last illness.

Dan K. Moore was proud of and had a great love for his family. His own ancestors were prominent and active people. As we have previously noted, his father was the youngest Superior Court Judge ever elected in North Carolina. His great-grandfather Moore was the first white man to settle west of the Blue Ridge Mountains. In this regard, I often recall the truisms spoken by Nanny Darden who served the Moores as a domestic in the mansion and later in their home who said: "The Governor didn't have to be elected Governor to be somebody. He was already somebody."

Dan K. Moore's life was not entirely devoted to his profession and to the government and politics of North Carolina. He was an active member of the Methodist Church in Sylva, North Carolina and was a member of the Edenton Street Methodist Church in Raleigh, North Carolina. He served as Director of the University of North Carolina Law School Foundation, Director of the Universi-

ty of North Carolina General Alumni Association, served on the Morehead Scholarship Committee, Trustee of High Point College, Director of Wachovia Bank and Trust Company, Director of Durham Life Insurance Company.

His recognitions are too numerous to enumerate. However, I will note a few. He was given an honorary doctor of law degree by Wake Forest University, honorary doctor of law degree from the University of North Carolina and an honorary degree from Elon College. The North Carolina Citizens for Better Business gave him a citation for outstanding public service.

One of the happiest moments in his life occurred when he met Jeanelle Coulter, who was attending summer school at Western Carolina College in 1931. Perhaps this meeting may have had something to do with Jeanelle's decision to take a teaching position in nearby Canton. In any event, this happy meeting was the beginning of a love affair which has lasted to this very day. They were married in Pikeville, Tennessee, on 4 May 1933 and there were born to that marriage two children: Edith and Dan, Jr. Edith is married to Edgar B. Hamilton, President and Chief Executive Officer of the First National Bank of Shelby, North Carolina, and they have two children, Jeanelle and Blanton. Dan K. Moore, Jr., married the former Frances Brock and they have one child, Brock Moore. Dan K. Moore, Jr., is President of Pat Brown Lumber Corporation in Lexington, North Carolina. Jeanelle Hamilton Lovett is married to Rick Lovett and they reside in Winston-Salem, North Carolina, where her husband is completing his second year of law school at Wake Forest University.

I believe that the greatest joy of Dan K. Moore's life has been his family. It was my privilege to attend several gatherings of the Moore family. I was always impressed by the fact that in addition to the ordinary love found among the family members that the children of this family found in their father and grandfather a very special quality that neared reverence. Their great respect and love for him was evidenced at a time when he entered the race for Governor. His entire family joined in the fray and became an integral part of the long and hard campaign.

During his lifetime, Dan K. Moore directly and indirectly touched the lives of many people and each of them was the better for it. I know this for I was one of those whose life he touched.

On September 7, 1986, North Carolina lost a man whose convictions and beliefs were as strong and immovable as the mountains from which he sprung. Yet he was a gentle, sincere, unassuming

man who loved people from all walks of life. He related comfortably with the working man as well as the leaders of industry and government.

Today could mark the last public gathering honoring Dan Killian Moore, but as long as a person lives who knew him, his memory will be honored, as long as the North Carolina Reports are read, the legal profession will pay him homage, and as long as the history of good government in North Carolina is remembered, the name Dan Killian Moore will be honored.

So it was with Dan K. Moore, loving husband, father, and grandfather, patriot, soldier, talented lawyer, compassionate judge, scholarly justice, friend, and a man who embodied the phrase "The great Governor of North Carolina."

The Chief Justice announced the unveiling of the portrait by Mrs. Edith Hamilton and Mr. Dan K. Moore, Jr., children of Justice Moore.

[Unveiling of Portrait]

The Chief Justice then made his remarks accepting the portrait:

I think it would be appropriate to ask the artist, Mr. Dean Paulis, to stand and be recognized.

On behalf of the entire Court, I want to thank Mr. Freeman, Mr. Ragsdale, and Chief Justice Branch for their eloquent remarks, all of which exuded a genuine warmth that, I am confident, reflects the special relationship each of them had with Dan Moore, and the kind of warmth that he radiated as a person. I want to thank the artist, Dean Paulis, for his creativity, and Jeanelle Moore, Dan Moore, and Edith Hamilton for their wonderful gift of the portrait, which the Court now gratefully accepts.

The remarks we have heard and the portrait go a long way toward capturing for us the essence of the great man whom they memorialize. The remarks will be spread upon the minutes of the Court and will be printed in a volume of the North Carolina Reports. The portrait will be hung in an appropriately prominent place in the hall of the Court. The Court will always treasure it. It will remind us of the countless contributions Dan K. Moore made to his beloved State; and it will remind us of all of the splendid human qualities he exhibited and about which we have heard today.

In the hectic pace of life today, it seems that we are always moving from one kind of stampede to another kind of stampede.

One of the things that exemplified the personality and style of Dan Moore, as much as anything, was revealed in a remark that Chief Justice Sharp once made to me about him. She said that Dan Moore could not be stampeded into anything.

All of us who knew Dan Moore learned from him. Because of him, because of his qualities, because of the many lives that he touched, having his portrait here will be a source of strength and encouragement to those of us who use this building and to our successors for many years to come.

The Clerk then escorted the Moore family to their places in the receiving line. Members of the Supreme Court, official guests of the Court, and special friends proceeded through the receiving line until all had so proceeded. The ceremony was thereupon concluded.

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

Beginning 18 October 1982, Canon 3A(7) of the Code of Judicial Conduct and Rule 15 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure, published in 276 N.C. at 740, were suspended, and electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state have been allowed on an experimental basis, in accordance with the terms of rules then adopted and published in 306 N.C. 797, and amended on 10 November 1982, published in 307 N.C. 741, on 24 June 1987, published in 319 N.C. 681, and on 30 June 1988, published in 322 N.C. 868.

Canon 3A(7) of the Code of Judicial Conduct is amended to read as follows:

> (7) A judge should exercise discretion with regard to permitting broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during civil or criminal sessions of court or recesses between sessions, pursuant to the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts.

Rule 15 of the General Rules of Practice for the Superior and District Courts is amended to read as in the following pages.

Adopted by the Court in Conference this 13th day of June, 1990. These amendments shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals.

WHICHARD, J.
For the Court

WITNESS my hand and the Seal of the Supreme Court of North Carolina, this the 25th day of June, 1990.

J. GREGORY WALLACE
Clerk of the Supreme Court

RULE 15

ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

(a) Definition.

The terms "electronic media coverage" and "electronic coverage" are used in the generic sense to include coverage by television, motion picture and still photography cameras, broadcast microphones and recorders.

(b) Coverage allowed.

Electronic media and still photography coverage of public judicial proceedings shall be allowed in the appellate and trial courts of this state, subject to the conditions below.

(1) The presiding justice or judge shall at all times have authority to prohibit or terminate electronic media and still photography coverage of public judicial proceedings, in the courtroom or the corridors immediately adjacent thereto.

(2) Coverage of the following types of judicial proceedings is expressly prohibited: adoption proceedings, juvenile proceedings, proceedings held before clerks of court, proceedings held before magistrates, probable cause proceedings, child custody proceedings, divorce proceedings, temporary and permanent alimony proceedings, proceedings for the hearing of motions to suppress evidence, proceedings involving trade secrets, and in camera proceedings.

(3) Coverage of the following categories of witnesses is expressly prohibited: police informants, minors, undercover agents, relocated witnesses, and victims and families of victims of sex crimes.

(4) Coverage of jurors is prohibited expressly at any stage of a judicial proceeding, including that portion of a proceeding during which a jury is selected. The trial judge shall inform all potential jurors at the beginning of the jury selection process of the restrictions of this particular provision which is designated (b)(4).

(c) Location of equipment and personnel.

(1) The location of equipment and personnel necessary for electronic media and still photographic coverage of trial proceedings shall be at a place either inside or outside the courtroom in such a manner that equipment and personnel are completely obscured from view from within the courtroom and not heard by anyone inside the courtroom.

(i) If located within the courtroom, this area must be set apart by a booth or other partitioning device constructed therein at the expense of the media. Such construction must be in harmony with the general architectural style and decor of the courtroom and must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(ii) If located outside the courtroom, any booth or other partitioning device must be built so that passage to and from the courtroom will not be obstructed. This arrangement must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(2) Appropriate openings to allow photographic coverage of the proceedings under these rules may be made in the booth or partitioning device, provided that no one in the courtroom will see or hear any photographic or audio equipment or the personnel operating such equipment. Those in the courtroom are not to know when or if any such equipment is in operation.

(3) The presiding judge may, however, exercise his or her discretion to permit the use of electronic media and still photography coverage without booths or other restrictions set out in Rule 15(c)(1) and (c)(2) if the use can be made without disruption of the proceedings and without distraction to the jurors and other participants. Such permission may be withdrawn at any time.

(4) Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the courtroom.

(5) Media personnel shall not exit or enter the booth area or courtroom once the proceedings are in session except during a court recess or adjournment.

(6) Electronic media equipment and still photography equipment shall not be taken into the courtroom or removed from the designated media area except at the following times:

(i) prior to the convening of proceedings;

(ii) during the luncheon recess;

(iii) during any court recess with the permission of the presiding justice or judge; and

(iv) after adjournment for the day of the proceedings.

(7) The Chief Justice of the Supreme Court, and the Chief Judge of the Court of Appeals may waive the requirements of Rule 15(c)(1) and (2) with respect to judicial proceedings in the Supreme Court and in the Court of Appeals, respectively.

(d) Official representatives of the media.

(1) This Court hereby designates the North Carolina Association of Broadcasters, the Radio and Television News Directors Association of the Carolinas, and the North Carolina Press Association, as the official representatives of the news media. The governing boards of these associations shall designate one person to represent the television media, one person to represent the radio broadcasters, and one person to represent still photographers in each county in which electronic media and still photographic coverage is desired. The names of the persons so designated shall be forwarded to the Senior Resident Superior Court Judge, the Director of the Administrative Office of the Courts, and the county manager or other official responsible for administrative matters in the county or municipality in which coverage is desired. Thereafter, these persons shall conduct all negotiations with the appropriate officials concerning the construction of the booths or partitioning devices referred to above. Such persons shall also be the only persons authorized to speak for the media to the presiding judge concerning the coverage of any judicial proceedings.

(2) It is the express intent and purpose of this rule to preclude judges and other officials from having to "negotiate" with various representatives of the news media. Since these rules require pooling of equipment and personnel, cooperation by the media is of the essence and the designation of three media representatives is expressly intended to prevent presiding judges from having to engage in discussion with others from the media.

(e) Equipment and personnel.

(1) Not more than two television cameras shall be permitted in any trial or appellate court proceedings.

(2) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes, shall be permitted in any proceeding in a trial or appellate court.

(3) Not more than one wired audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate

court. Audio pickup for all media purposes shall be accomplished with existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes may be installed and maintained at media expense. The microphones and wiring must be unobtrusive and shall be located in places designated in advance of any proceeding by the Senior Resident Superior Court Judge of the judicial district in which the court facility is located. Such modifications or additions must be approved by the governing body of the county or municipality which owns the facility. Provided, however, hand-held audio tape recorders may be used upon prior notification to, and with the approval of, the presiding judge; such approval may be withdrawn at any time.

(4) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

(5) In no event shall the number of personnel in the designated area exceed the number necessary to operate the designated equipment or which can comfortably be secluded in the restricted area.

(f) Sound and light criteria.

(1) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with the television camera.

(2) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with a still camera.

(g) Courtroom light sources.

With the concurrence of the Senior Resident Superior Court Judge of the judicial district in which a court facility is situated, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense and provided such modifications or additions are approved by the governing body of the county or municipality which owns the facility.

(h) Conferences of counsel.

To protect the attorney-client privilege and the right to counsel, there shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, between adverse counsel, or between counsel and the presiding judge held at the bench.

(i) Impermissible use of media material.

None of the film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent and collateral thereto, or upon any retrial or appeal of such proceedings.

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER ADOPTING AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to authority of N.C.G.S. § 7A-34, the General Rules of Practice for the Superior and District Courts are amended by the adoption of a new Rule 7.1, to read as follows:

> When any person is charged with a crime wherein the victim is a minor, or a minor is a potential witness to such crime, the court may appoint an attorney, from a list of *pro bono* attorneys approved by the Chief District Court Judge, as guardian ad litem for such minor victim or witness.

Adopted by the Court in Conference this 26th day of July, 1990. This amendment shall be effective 1 October 1990, and shall be promulgated by publication in the Advance sheets of the Supreme Court and the Court of Appeals.

WHICHARD, J.
For the Court

WITNESS my hand and the Seal of the Supreme Court of North Carolina, this the 30th day of July, 1990.

J. GREGORY WALLACE
Clerk of the Supreme Court

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER ADOPTING AMENDMENTS TO RULES OF APPELLATE PROCEDURE

Rules 6, 7, 9, 11, 16, 17, 18, 26, 27, 28, and 29, and Appendixes A, C, and F of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, are hereby amended to read as in the following pages. All amendments shall be effective 1 October 1990.

Adopted by the Court in Conference this 26th day of July, 1990. These amendments shall be promulgated by publication in the Advance sheets of the Supreme Court and the Court of Appeals.

WHICHARD, J.
For the Court

WITNESS my hand and the Seal of the Supreme Court of North Carolina, this the 30th day of July, 1990.

J. GREGORY WALLACE
Clerk of the Supreme Court

Rule 6

SECURITY FOR COSTS ON APPEAL

(a) **In Regular Course.** Except in pauper appeals an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of G.S. 1-285 and 1-286.

(b) **In Forma Pauperis Appeals.** An appellant in a civil action may be allowed to prosecute an appeal in forma pauperis without providing security for costs in accordance with the provisions of G.S. 1-288.

(c) **Filed with Record on Appeal.** When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a cash deposit made in lieu of bond.

(d) **Dismissal for Failure to File or Defect in Security.** For failure of the appellant to provide security as required by subdivision (a) or to file evidence thereof as required by subdivision (c), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37 of these rules. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within 10 days after service of the motion upon him or before the case is called for argument, whichever first occurs.

(e) **No Security for Costs in Criminal Appeals.** Pursuant to G.S. 15A-1449, no security for costs is required upon appeal of criminal cases to the appellate division.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—6(e)—effective 1 February 1985;
26 July 1990—6(c)—effective 1 October 1990.

Rule 7

PREPARATION OF THE TRANSCRIPT; COURT REPORTER'S DUTIES

(a) **Ordering the Transcript.**

(1) **Civil Cases.** Within 10 days after filing the notice of appeal the appellant shall contract, in writing, with the court reporter for production of a transcript of such parts of the proceedings not already on file as he deems necessary. The appellant shall file a copy of the contract with the clerk of the trial tribunal. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall file with the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be filed, an appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to file with the record and a statement of the issues he intends to present on the appeal. If an appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant, file and serve on the appellant a copy of the contract ordering any additional parts of the transcript. As a part of the contract ordering the transcript, the ordering party shall provide such deposit toward payment of the cost of the transcript as the court reporter may require.

(2) **Criminal Cases.** In criminal cases where there is an order establishing the indigency of the defendant for the appeal, unless the trial judge's appeal entries specify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order from the court reporter a transcript of the proceedings by forwarding a copy of the appeal entries signed by the judge and a statement of the portions of transcript requested; the number of copies required; the name, address and telephone number of appellant's counsel; and the trial court's order establishing indigency for the appeal, if any. In criminal cases where there is no order establishing indigency, the defendant shall

contract with the court reporter for production of the transcript, as in civil cases.

(b) **Production and Delivery of Transcript.**

(1) From the date of the reporter's receipt of a contract for production of a transcript, the reporter shall have 60 days to produce and deliver the transcript in civil cases and non-capital criminal cases and shall have 120 days to produce and deliver the transcript in capitally tried cases. The trial tribunal, in its discretion, and for good cause shown by the reporter or by a party on behalf of the reporter may extend the time to produce the transcript for an additional 30 days. Any subsequent motions for additional time required to produce the transcript may only be made to the appellate court to which appeal has been taken. Where the clerk's order of transcript is accompanied by the trial court's order establishing the indigency of the appellant and directing the transcript to be prepared at State expense, the time for production of the transcript commences seven days after the filing of the clerk's order of transcript.

(2) The court reporter shall deliver the completed transcript to the parties, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The reporter shall certify to the clerk of the trial tribunal that the parties' copies have been so delivered, and shall send a copy of such certification to the appellate court to which the appeal is taken. The appealing party shall retain custody of the original of the transcript and shall transmit the original transcript to the appellate court upon settlement of the record on appeal.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

REPEALED: July 1, 1978.
(See note following Rule 17.)

Re-adopted: 8 December 1988—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

Amended: 8 June 1989—effective for all judgments of the trial tribunal entered on or after 1 July 1989;

26 July 1990—7(a)(1), (a)(2), and (b)(1)—effective 1 October 1990.

Rule 9

THE RECORD ON APPEAL

(a) **Function; Composition of Record.** In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9.

(1) **Composition of the Record in Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same;

d. copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and

k. assignments of error set out in the manner provided in Rule 10.

(2) **Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies.** The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all errors assigned;

f. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

g. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3); and

h. assignments of error to the actions of the superior court, set out in the manner provided in Rule 10.

(3) **Composition of the Record in Criminal Actions.** The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken;

and in capitally tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally; of all orders establishing time limits relative to the perfecting of the appeal; of any order finding defendant indigent for the purposes of the appeal and assigning counsel; and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all errors assigned, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and

j. assignments of error set out in the manner provided in Rule 10.

(b) **Form of Record; Amendments.** The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) **Order of Arrangement.** The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) **Inclusion of Unnecessary Matter; Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other deter-

mination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) **Pagination; Counsel Identified.** The pages of the record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R p)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and cited as "(T p ____)." At the end of the record on appeal shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

(5) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the docketing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal.

(c) **Presentation of Testimonial Evidence and Other Proceedings.** Testimonial evidence, voir dire, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). Where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal.

(1) **When Testimonial Evidence Narrated—How Set Out in Record.** Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(a) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Counsel are expected to

seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) **Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used.** Appellant may designate in the record that the testimonial evidence will be presented in the verbatim transcript of the evidence in the trial tribunal in lieu of narrating the evidence as permitted by Rule 9(c)(1). Appellant may also designate that the verbatim transcript will be used to present voir dire or other trial proceedings where those proceedings are the basis for one or more assignments of error and where a verbatim transcript of those proceedings has been made. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript which has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned. When appellant has narrated the evidence and trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

(3) **Verbatim Transcript of Proceedings—Settlement, Filing, Copies, Briefs.** Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the settled, verbatim transcript to be filed, contemporaneously with the record on

appeal, with the clerk of the appellate court in which the appeal is docketed;

c. in criminal appeals, the district attorney, upon settlement of the record, shall forward one copy of the settled transcript to the Attorney General of North Carolina; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) **Presentation of Discovery Materials.** Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances where discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to questions raised on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(d) **Models, Diagrams, and Exhibits of Material.**

(1) **Exhibits.** Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(2) **Transmitting Exhibits.** Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed in the appellate court; the original documentary exhibit need not be filed with the appellate court. When an original, non-documentary exhibit has been settled as

a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the appellate court. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the records in the appellate court. Portions of the record on appeal in either appellate court which are not suitable for reproduction may be designated by the Clerk of the Supreme Court to be exhibits. Counsel may then be required to submit three additional copies of those designated materials.

(3) **Removal of Exhibits from Appellate Court.** All models, diagrams, and exhibits of material placed in the custody of the Clerk of the appellate court must be taken away by the parties within 90 days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the Clerk. When this is not done, the Clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to him may seem best.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 10 June 1981—9(c)(1)—applicable to all appeals docketed on or after 1 October 1981;
12 January 1982—9(c)(1)—applicable to all appeals docketed after 15 March 1982;
27 November 1984—applicable to all appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—9(a), (c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—9(a)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;

26 July 1990 – 9(a)(3)h and 9(d)(2) – effective 1 October 1990.

Rule 11

SETTLING THE RECORD ON APPEAL

(a) **By Agreement.** Within 35 days after the reporter's certification of delivery of the transcript, if such was ordered (70 days in capitally tried cases), or 35 days after filing of the notice of appeal if no transcript was ordered, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within 21 days (35 days in capitally tried cases) after service of the proposed record on appeal upon him an appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) **By Judicial Order or Appellant's Failure to Request Judicial Settlement.** Within 21 days (35 days in capitally tried cases) after service upon him of appellant's proposed record on appeal, an appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the

request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case. If only one appellee or only one set of appellees proceeding jointly have so filed, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20 days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial settlement process with the order settling the record on appeal.

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) **Multiple Appellants; Single Record on Appeal.** When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The assignments of error of the several appellants shall be set out separately in the single record on appeal and related to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) **RESERVED.**

(f) **Extensions of Time.** The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—11(a), (c), (e), and (f)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—11(a), (b), (c), (e), and (f)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
26 July 1990—11(b), (c), and (d)—effective 1 October 1990.

Note: Paragraph (e) formerly contained the requirement that the settled record on appeal be certified by the clerk of the trial tribunal. The 27 November 1984 amendments deleted that step in the process. Under the present version of the rules, once the record is settled by the parties, by agreement or by judicial settlement, the appellant has 15 days to file the settled record with the appropriate appellate court.

Rule 16

SCOPE OF REVIEW OF DECISIONS OF COURT OF APPEALS

(a) **How Determined.** Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Except where the appeal is based solely upon the existence of a dissent in the Court of Appeals, review in the Supreme Court is limited to consideration of the questions stated in the notice of appeal filed pursuant to Rule 14(b)(2) or the petition for discretionary review and the response thereto filed pursuant to Rule 15(c) and (d), unless further limited by the Supreme Court, and properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

(b) **Scope of Review in Appeal Based Solely Upon Dissent.** Where the sole ground of the appeal of right is the existence

of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those questions which are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review, pursuant to Rule 15, or by petition for writ of certiorari, pursuant to Rule 21.

(c) **Appellant, Appellee Defined.** As used in this Rule 16, the terms "appellant" and "appellee" have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, "appellant" means the petitioner, "appellee" means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, "appellant" means the party aggrieved by the decision of the Court of Appeals; "appellee" means the opposing party. Provided that in its order of certification the Supreme Court may designate either party "appellant" or "appellee" for purposes of proceeding under this Rule 16.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 3 November 1983—16(a) and (b)—applicable to all notices of appeal filed in the Supreme Court on and after 1 January 1984;
30 June 1988—16(a) and (b)—effective 1 September 1988;
26 July 1990—16(a)—effective 1 October 1990.

Rule 17

APPEAL BOND IN APPEALS UNDER G.S. 7A-30, 7A-31

(a) **Appeal of Right.** In all appeals of right from the Court of Appeals to the Supreme Court in civil cases, the party who takes appeal shall, upon filing the notice of appeal in the Supreme Court, file with the Clerk of that Court a written undertaking,

with good and sufficient surety in the sum of $250, or deposit cash in lieu thereof, to the effect that he will pay all costs awarded against him on the appeal to the Supreme Court.

(b) **Discretionary Review of Court of Appeals Determination.** When the Supreme Court on petition of a party certifies a civil case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subdivision (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) **Discretionary Review by Supreme Court Before Court of Appeals Determination.** When a civil case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) **Appeals in Forma Pauperis.** No undertakings for costs are required of a party appealing in forma pauperis.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 19 June 1978, effective 1 July 1978;
26 July 1990—17(a)—effective 1 October 1990.

Note to 1 July 1978 Amendment.

Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, "In criminal cases no security for costs is required upon appeal to the appellate division." Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

Rule 18

TAKING APPEAL; RECORD ON APPEAL— COMPOSITION AND SETTLEMENT

(a) **General.** Appeals of right from administrative agencies, boards, or commissions (hereinafter "agency") directly to the appellate division under G.S. 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as hereinafter provided in this Article.

(b) **Time and Method for Taking Appeals.**

(1) The times and methods for taking appeals from an agency shall be as provided in this Rule 18 unless the statutes governing the agency provide otherwise, in which case those statutes shall control.

(2) Any party to the proceeding may appeal from a final agency determination to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within 30 days after receipt of a copy of the final order of the agency. The final order of the agency is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final agency determination from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(3) If a transcript of fact-finding proceedings is not made by the agency as part of the process leading up to the final agency determination, the appealing party may contract with the reporter for production of such parts of the proceedings not already on file as he deems necessary, pursuant to the procedures prescribed in Rule 7.

(c) **Composition of Record on Appeal.** The record on appeal in appeals from any agency shall contain:

(1) an index of the contents of the record, which shall appear as the first page thereof;

(2) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a statement showing same;

(3) copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency to be filed with the agency to present and define the matter for determination;

(4) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the agency from which appeal was taken;

(5) so much of the evidence taken before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3);

(6) where the agency has reviewed a record of proceedings before a division, or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for an understanding of all errors assigned;

(7) copies of all other papers filed and statements of all other proceedings had before the agency or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed pursuant to Rule 9(c)(2) and (3);

(8) a copy of the notice of appeal from the agency, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3); and

(9) assignments of error to the actions of the agency, set out as provided in Rule 10.

(d) **Settling the Record on Appeal.** The record on appeal may be settled by any of the following methods:

(1) **By Agreement.** Within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), file in the office of the agency head and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within 30 days after service of the proposed record on appeal upon him, an appellee may file in the office of the agency head and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Conference or Agency Order; Failure to Request Settlement.** If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the agency head to convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the agency head, shall be served upon all other parties. Each party shall promptly provide to the agency head a reference copy of the record items, amendments, or objections served by that party in the case. If only one appellee or only one set of appellees proceeding jointly have so filed and no other party makes timely request for agency conference or

settlement by order, the record on appeal is thereupon settled in accordance with the one appellee's, or one set of appellees', objections, amendments, or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for agency conference or for settlement by order results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

Upon receipt of a request for settlement of the record on appeal, the agency head shall send written notice to counsel for all parties setting a place and a time for a conference to settle the record on appeal. The conference shall be held not later than 15 days after service of the request upon the agency head. The agency head or a delegate appointed in writing by the agency head shall settle the record on appeal by order entered not more than 20 days after service of the request for settlement upon the agency. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the agency head is a party to the appeal, the agency head shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these Rules and the appointing order.

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by agency order.

(e) **Further Procedures.** Further procedures for perfecting and prosecuting the appeal shall be as provided by these Rules for appeals from the courts of the trial divisions.

(f) **Extensions of Time.** The times provided in this Rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 21 June 1977;
7 October 1980—18(d)(3)—effective 1 January 1981;
27 February 1985—applicable to all appeals in which the notice of appeal is filed on or after 15 March 1985;
26 July 1990—18(b)(3), (d)(1) and (d)(2)—effective 1 October 1990.

Rule 26

FILING AND SERVICE

(a) **Filing.** Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court.

(1) Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing, except that motions, responses to petitions, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service, if first class mail is utilized.

(2) Filing in the appellate courts may be accomplished by electronic means only as hereinafter provided.

In any case, responses and motions may be filed by electronic means, but only if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court upon a showing of good cause.

In all cases where a document has been filed by electronic means pursuant to this rule, counsel must forward the following items by first class mail, contemporaneously with the transmission: the original signed document, the electronic transmission fee, and the applicable filing fee for the document, if any. The party filing a document by electronic means shall be responsible for all costs of the transmission and neither they nor the electronic transmission fee may be recovered as costs of the appeal.

"Electronic means" means any method of transmission of information between two machines designed for the purpose of sending and receiving such transmissions, and which results in the fixation of the information transmitted in a tangible medium of expression.

(b) **Service of All Papers Required.** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) **Manner of Service.** Service may be made in the manner provided for service and return of process in Rule 4 of the N. C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail.

(d) **Proof of Service.** Papers presented for filing shall contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) **Joint Appellants and Appellees.** Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately.** When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties

designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) **Form of Papers; Copies.** Papers presented to either appellate court for filing shall be letter size (8½ x 11") with the exception of wills and exhibits. Documents filed in the trial division prior to July 1, 1982, may be included in records on appeal whether they are letter size or legal size (8½ x 14"). All printed matter must appear in at least 11 point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. The format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules.

All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 5 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 5 May 1981—26(g)—effective for all appeals arising from cases filed in the court of original jurisdiction after 1 July 1982;
11 February 1982—26(c);
7 December 1982—26(g)—effective for documents filed on and after 1 March 1983;
27 November 1984—26(a)—effective for documents filed on and after 1 February 1985;
30 June 1988—26(a) and (g)—effective 1 September 1988;
26 July 1990—26(a)—effective 1 October 1990.

Rule 27

COMPUTATION AND EXTENSION OF TIME

(a) **Computation of Time.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(b) **Additional Time After Service by Mail.** Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(c) **Extensions of Time; By Which Court Granted.** Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing prescribed by these rules or by law.

(1) **Motions for Extension of Time in the Trial Division.** The trial tribunal for good cause shown by the appellant may extend once for no more than 30 days the time permitted by Rule 11 or Rule 18 for the service of the proposed record on appeal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state.

Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner.

(2) **Motions for Extension of Time in the Appellate Division.** All motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) may only be made to the appellate court to which appeal has been taken.

(d) **Motions for Extension of Time; How Determined.** Motions for extension of time made in any court may be determined ex parte, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time. Provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 7 March 1978—27(c);
4 October 1978—27(c)—effective 1 January 1979;
27 November 1984—27(a) and (c)—effective 1 February 1985;
8 December 1988—27(c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
26 July 1990—27(c) and (d)—effective 1 October 1990.

Rule 28

BRIEFS: FUNCTION AND CONTENT

(a) **Function.** The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then stated in the notice of appeal or the petition, accepted by the Supreme Court for review, and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

(b) **Content of Appellant's Brief.** An appellant's brief in any appeal shall contain, under appropriate headings, and in the form

prescribed by Rule 26(g) and the Appendixes to these rules, in the following order:

(1) A cover page, followed by a table of contents and table of authorities required by Rule 26(g).

(2) A statement of the questions presented for review.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(5) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

The body of the argument shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.

(6) A short conclusion stating the precise relief sought.

(7) Identification of counsel by signature, typed name, office address and telephone number.

(8) The proof of service required by Rule 26(d).

(9) The appendix required by Rule 28(d).

(c) **Content of Appellee's Brief; Presentation of Additional Questions.** An appellee's brief in any appeal shall contain a table of contents and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix as may be required by Rule 28(d). It need contain no statement of the questions presented, statement of the procedural history of the case, or statement of the facts, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present questions in addition to those stated by the appellant.

Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant.

If the appellee is entitled to present questions in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new questions supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate.

(d) **Appendixes to Briefs.** Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).

(1) **When Appendixes to Appellant's Brief Are Required.** Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

a. those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any question presented in the brief;

b. those portions of the transcript showing the pertinent questions and answers when a question presented in the brief involves the admission or exclusion of evidence;

c. relevant portions of statutes, rules, or regulations, the study of which is required to determine questions presented in the brief.

(2) **When Appendixes to Appellant's Brief Are Not Required.** Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an assignment of error:

a. whenever the portion of the transcript necessary to understand a question presented in the brief is reproduced verbatim in the body of the brief;

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

c. to show the general nature of the evidence necessary to understand a question presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) **When Appendixes to Appellee's Brief Are Required.** Appellee must reproduce appendixes to his brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript he believes to be necessary to understand the question.

b. Whenever the appellee presents a new or additional question in his brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript as if he were the appellant with respect to each such new or additional question.

(4) **Format of Appendixes.** The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages which have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered and an index to the appendix shall be placed at its beginning.

(e) **References in Briefs to the Record.** References in the briefs to assignments of error shall be by their numbers and to the pages of the printed record on appeal or of the transcript of proceedings, or both, as the case may be, at which they appear. Reference to parts of the printed record on appeal and to the verbatim transcript or documentary exhibits shall be to the pages where the parts appear.

(f) **Joinder of Multiple Parties in Briefs.** Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief although they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities.** Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and 14 copies of the memorandum.

(h) **Reply Briefs.** Unless the court, upon its own initiative, orders a reply brief to be filed and served, none will be received or considered by the court, except as herein provided:

(1) If the appellee has presented in its brief new or additional questions as permitted by Rule 28(c), an appellant may, within 14 days after service of such brief, file and serve a reply brief limited to those new or additional questions.

(2) If the parties are notified under Rule 30(f) that the case will be submitted without oral argument on the record and briefs, an appellant may, within 14 days after service of such notification, file and serve a reply brief limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief or in a reply brief filed pursuant to Rule 28(h)(1).

(i) **Amicus Curiae Briefs.** A brief of an *amicus curiae* may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that Court on its own initiative.

A person desiring to file an *amicus curiae* brief shall present to the Court a motion for leave to file, served upon all parties, within ten days after the printed record is mailed by the Clerk and ten days after the record is docketed in pauper cases. The motion shall state concisely the nature of the applicant's interest, the reasons why an *amicus curiae* brief is believed desirable, the questions of law to be addressed in the *amicus curiae* brief and the applicant's position on those questions. The proposed *amicus curiae* brief may be conditionally filed with the motion for leave. Unless otherwise ordered by the Court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the Court permitting the brief, the *amicus curiae* shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. Reply briefs of the parties to an *amicus curiae* brief will be limited to points or authorities presented in the *amicus curiae* brief which are not presented in the main briefs of the parties. No reply brief of an *amicus curiae* will be received.

A motion of an *amicus curiae* to participate in oral argument will be allowed only for extraordinary reasons.

(j) **Page Limitations Applicable to Briefs Filed in the Court of Appeals.** Principal briefs filed in the North Carolina Court of Appeals, whether filed by appellant, appellee, or *amicus curiae*, formatted according to Rule 26 and the Appendixes to these Rules, shall be limited to 35 pages of text, exclusive of tables of contents, tables of authorities, and appendixes. Reply briefs, if permitted by this Rule shall be limited to 15 pages of text.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 January 1981—repeal 28(d)—effective 1 July 1981;
10 June 1981—28(b) and (c)—effective 1 October 1981;

12 January 1982—28(b)(4)—effective 15 March 1982;
7 December 1982—28(i)—effective 1 January 1983;
27 November 1984—28(b), (c), (d), (e), (g), and (h)—effective 1 February 1985;
30 June 1988—28(a), (b), (c), (d), (e), (h), and (i)—effective 1 September 1988;
8 June 1989—28(h) and (j)—effective 1 September 1989;
26 July 1990—28(h)(2)—effective 1 October 1990.

Rule 29

SESSIONS OF COURTS; CALENDAR OF HEARINGS

(a) **Sessions of Court.**

(1) **Supreme Court.** The Supreme Court shall be in continuous session for the transaction of business. Unless otherwise scheduled by the Court, hearings in appeals will be held during the week beginning the second Monday in the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.

(2) **Court of Appeals.** Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) **Calendaring of Cases for Hearing.** Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order in which they are docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or the court's own initiative, no appeal will be calendared for hearing at a time less than 30 days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel of record of the setting of an appeal for hearing by mailing a copy of the calendar.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 3 March 1982—29(a)(1);
3 September 1987—29(a)(1);
26 July 1990—29(b)—effective 1 October 1990.

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking Appeal (civil)	30	entry of judgment (unless tolled)	3(c)
Taking Appeal (agency)	30	final agency determination (unless statutes provide otherwise)	18(b)(2)
Taking Appeal (crim.)	10	entry of judgment (unless tolled)	4(a)
Ordering Transcript (civil) (agency)	10	filing notice of appeal	7(a)(1) 18(b)(3)
Ordering Transcript (criminal indigent)	—	order filed by clerk of superior court	7(a)(2)
Ordering Transcript (criminal)	10	filing notice of appeal	7(a)(2)
Preparing & delivering transcript (civil, non-capital criminal)	60	receipt of order for transcript	7(b)(1)
(capital criminal)	120		
Serving proposed record on appeal (civil, non-capital criminal)	35	notice of appeal (no transcript) or reporter's certificate	11(b)
(agency)	35	of delivery of transcript	18(d)
Serving proposed record on appeal (capital)	70	reporter's certificate of delivery	11(b)
Serving objections or proposed alternative record on appeal (civil, non-capital criminal)	21	service of proposed record	11(c)
(capital criminal)	35		

Action	*Time (Days)*	*From date of*	*Rule Ref.*
(agency)	30	service of proposed record	18(d)(2)
Requesting judicial settlement of record	10	last day within which an appellee served could file objections, etc.	11(c) 18(d)(3)
Judicial settlement of record	20	service on judge of request for settlement	11(c) 18(d)(3)
Filing Record on Appeal in appellate court	15	settlement of record on appeal	12(a)
Filing appellant's brief (or mailing brief under Rule 26(a))	30	Clerk's mailing of printed record—or from docketing record in civil appeals in forma pauperis (60 days in Death Cases)	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief (60 days in Death Cases)	13(a)
Oral Argument	30	filing appellant's brief (usual minimum time)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

TIMETABLE OF APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEALS UNDER ARTICLE III OF THE APPELLATE RULES

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Petition for Discretionary Review prior to determination	15	docketing appeal in Court of Appeals	15(b)
Notice of Appeal and/or Petition for Discretionary Review	15	Mandate of Court of Appeals (or from order of Court of Appeals denying petition for rehearing)	14(a) 15(b)

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Cross-Notice of Appeal	10	filing of first notice of appeal	14(a)
Response to Petition for Discretionary Review	10	service of petition	15(d)
Filing appellant's brief (or mailing brief under Rule 26(a))	30	Clerk's mailing of printed record or from docketing record in civil appeals in forma pauperis	14(d) 15(g)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief	14(d) 15(g)
Oral Argument	30	filing appellant's brief (usual minimum time)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

NOTES

All of the critical time intervals here outlined except those for taking an appeal and petitioning for discretionary review or for rehearing may be extended by order of the Court wherein the appeal is docketed at the time. Note that Rule 27 has been amended and now grants the trial tribunal the authority to grant only one extension of time for service of the proposed record. All other motions for extension of the times provided in the rules must be filed with the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." (Rule 21(c))

ARRANGEMENT OF RECORD ON APPEAL

Only those items listed in the following tables which are required by Rule 9(a) in the particular case should be included in the record. See Rule 9(b)(2) for sanctions against including unnecessary items in the record. The items marked by an asterisk (*) could be omitted from the record proper if the transcript option of Rule 9(c) is used, and there exists a transcript of the items.

Table 1

SUGGESTED ORDER IN APPEAL FROM CIVIL JURY CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(1)a.
3. Statement of organization of trial tribunal, per Rule 9(a)(1)b.
4. Statement of record items showing jurisdiction, per Rule 9(a)(1)c.
5. Complaint
6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon (* if oral)
9. Pre-trial order

*10. Plaintiff's evidence, with any evidentiary rulings assigned as error

*11. Motion for directed verdict, with ruling thereon

*12. Defendant's evidence, with any evidentiary rulings assigned as error

*13. Plaintiff's rebuttal evidence, with any evidentiary rulings assigned as error

14. Issues tendered by parties
15. Issues submitted by court
16. Court's instructions to jury, per Rule 9(a)(1)f.
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment
20. Items required by Rule 9(a)(1)i.
21. Entries showing settlement of record on appeal, extension of time, etc.
22. Assignments of error, per Rule 10
23. Names, office addresses, and telephone numbers of counsel for all parties to appeal

Table 2

SUGGESTED ORDER IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(2)a.
3. Statement of organization of superior court, per Rule 9(a)(2)b.
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(a)(2)c.

5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all pertinent items from administrative proceeding filed for review in superior court, including evidence
*8. Evidence taken in superior court, in order received
9. Copies of findings of fact, conclusions of law, and judgment of superior court
10. Items required by Rule 9(a)(2)g.
11. Entries showing settlement of record on appeal, extension of time, etc.
12. Assignments of error, per Rule 9(a)(2)h.
13. Names, office addresses, and telephone numbers of counsel for all parties to appeal

Table 3

SUGGESTED ORDER IN APPEAL OF CRIMINAL CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(3)a.
3. Statement of organization of trial tribunal, per Rule 9(a)(3)b.
4. Warrant
5. Judgment in district court (where applicable)
6. Entries showing appeal to superior court (where applicable)
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. Voir dire of Jurors
*10. State's evidence, with any evidentiary rulings assigned as error
11. Motions at close of state's evidence, with rulings thereon (* if oral)
*12. Defendant's evidence, with any evidentiary rulings assigned as error
13. Motions at close of defendant's evidence, with rulings thereon (* if oral)
*14. State's rebuttal evidence, with any evidentiary rulings assigned as error
15. Motions at close of all evidence, with rulings thereon (* if oral)
16. Court's instructions to jury, per Rules 9(a)(3)f., 10(b)(2)
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment and order of commitment
20. Appeal entries

21. Entries showing settlement of record on appeal, extension of time, etc.
22. Assignments of error, per Rule 9(a)(3)j.
23. Names, office addresses and telephone numbers of counsel for all parties to appeal

Table 4

ASSIGNMENTS OF ERROR

A. Examples related to pre-trial rulings in civil action

Defendant assigns as error:

1. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(2) to dismiss for lack of jurisdiction over the person of the defendant on the grounds (that the uncontested affidavits in support of the motion show that no grounds for jurisdiction existed) (or other appropriately stated grounds).

   Record, p. 4.

2. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(6) to dismiss for failure of the complaint to state a claim upon which relief can be granted, on the ground that the complaint affirmatively shows that the plaintiff's own negligence contributed to any injuries sustained.

   Record, p. 7.

3. The court's denial of defendant's motion requiring the plaintiff to submit to physical examination under N.C.R.Civ.P. 35, on the ground that on the record before the court, good cause for the examination was shown.

   Transcript, vol. 1, p. 137, lines 17-20.

4. The court's denial of defendant's motion for summary judgment, on the ground that there was not genuine issue of fact that the statute of limitations had run and defendant was therefore entitled to judgment as a matter of law.

   Record, p. 15.

B. Examples related to civil jury trial rulings

Defendant assigns as error the following:

1. The court's admission of the testimony of the witness E.F., on the ground that the testimony was hearsay.

Transcript, vol. 1, p. 295, line 5, through p. 297, line 12. Transcript, vol. 1, p. 299, lines 1-8.

2. The court's denial of the defendant's motion for directed verdict at the conclusion of all the evidence, on the ground that plaintiff's evidence as a matter of law established his contributory negligence.

Record, p. 45.

3. The court's instructions to the jury, Record pp. 50-51, as bracketed, explaining the doctrine of last clear chance, on the ground that the doctrine was not correctly explained.

4. The court's instructions to the jury, Record pp. 53-54, as bracketed, applying the doctrine of sudden emergency to the evidence, on the ground that the evidence referred to by the court did not support application of the doctrine.

5. The court's denial of defendant's motion for a new trial for newly discovered evidence, on the ground that on the uncontested affidavits in support of the motion the court abused its discretion in denying the motion.

Record, p. 80; Transcript, vol. 3, p. 764, lines 8-23.

C. Examples related to civil non-jury trial

Defendant assigns as error:

1. The court's refusal to enter judgment of dismissal on the merits against plaintiff upon defendant's motion for dismissal made at the conclusion of plaintiff's evidence, on the ground that plaintiff's evidence established as a matter of law that plaintiff's own negligence contributed to the injury.

Record, p. 20.

2. The court's Finding of Fact No. 10, on the ground that there was insufficient evidence to support it.

Record, p. 25.

3. The court's Conclusion of Law No. 3, on the ground that there are findings of fact which support the conclusion that defendant had the last clear chance to avoid the collision alleged.

Record, p. 27.

FEES AND COSTS

Fees and costs are provided by order of the Supreme Court and apply to proceedings in either appellate court. There is no fee for filing a motion in a cause; other fees are as follows, and should be submitted with the document to which they pertain, made payable to the Clerk of the appropriate appellate court:

Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Certiorari or other extraordinary writ, Petition for Writ of Supersedeas—docketing fee of $10.00 for each document, i.e.: docketing fees for a notice of appeal and petition for discretionary review filed jointly would be $20.00.

Petitions to rehear require a docketing fee of $20.00. (Petitions to rehear are only entertained in civil cases.)

Certification fee of $10.00 (payable to Clerk, Court of Appeals) where review of a judgment of Court of Appeals is sought in Supreme Court by notice of appeal or by petition.

An appeal bond of $250.00 is required in civil cases per Appellate Rules 6 and 17. The bond should be filed contemporaneously with the record in the Court of Appeals and with the notice of appeal in the Supreme Court. The Bond will not be required in cases brought by petition for discretionary review or certiorari unless and until the Court allows the petition.

Costs for printing documents are $2.00 per printed page where the Clerk determines that the document is in proper format and can be printed from the original, and $5.00 per printed page where the document must be retyped and printed. The Appendix to a brief under the Transcript option of Appellate Rules 9(c) and 28(b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief.

The Clerk of the Court of Appeals requires that a deposit for estimated printing costs accompany the document at filing. The Clerk of the Supreme Court prefers to bill the party for the costs of printing after the fact.

Court costs on appeal total $9.00, plus the cost of copies of the opinion to each party filing a brief, and are imposed when a notice of appeal is withdrawn or dismissed and when the mandate is issued following the opinion in a case.

Photocopying charges are $.20 per page. The electronic transmission fee for documents sent from the clerk's office, which is in addition to standard photocopying charges, is $5.00 for the first 25 pages and $.20 for each page thereafter. The electronic transmission fee for documents received by the clerk's office for filing pursuant to Rule 26(a)(2) is $10.00 per document filed.

ORDER ADOPTING AMENDMENTS TO RULES FOR COURT-ORDERED ARBITRATION

Rules 1, 2, 3, 5, 6, 7, 8, and 9 of the Rules for Court-Ordered Arbitration in North Carolina, 325 N.C. 735, are hereby amended to read as in the following pages. All amendments shall be effective 8 March 1990.

Adopted by the Court in Conference this 8th day of March, 1990. The Appellate Court Reporter shall publish the Rules for Court-Ordered Arbitration in North Carolina, in their entirety as amended through this action, at the earliest practicable time.

WHICHARD, J.
For the Court

WITNESS my hand and the Seal of the Supreme Court of North Carolina, this the 8th day of March, 1990.

J. GREGORY WALLACE
Clerk of the Supreme Court

Arb. Rule 1

ACTIONS SUBJECT TO ARBITRATION

(a) Types of Actions; Exceptions.

All civil actions filed in the trial divisions of the General Court of Justice which are not assigned to a magistrate and all appeals from judgments of magistrates in which there is a claim or there are claims for monetary relief not exceeding $15,000 total, exclusive of interest, costs and attorneys' fees, are subject to court-ordered arbitration under these rules, except actions:

(1) Which are class actions;

(2) In which there is a substantial claim for injunctive or declaratory relief;

(3) Involving:

(i) family law issues,

(ii) title to real estate,

(iii) wills and decedents' estates, or

(iv) summary ejectment;

(4) Which are special proceedings;

(5) In which a claim is asserted for an unspecified amount exceeding $10,000 in compliance with N.C.R. Civ. P. 8(a)(2), unless the court finds that the amount of the claim actually does not exceed $15,000 total, after consideration of the case, upon its motion or the motion of a party;

(6) Involving a claim for monetary recovery in an unspecified amount later to be determined by an accounting or otherwise, if the claimant certifies in the pleading asserting the claim that the amount of the claim will actually exceed $15,000; or

(7) Which are certified by a party to be companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue.

(b) Arbitration by Agreement.

The court may submit any other civil action to arbitration under these rules or any modification thereof, pursuant to agreement by the parties approved by the court.

(c) Court-Ordered Arbitration in Cases Having Excessive Claims.

The court may order any case submitted to arbitration under these rules at any time before trial if it finds that the amount actually in issue is $15,000 or less, even though a greater amount is claimed.

(d) Exemption and Withdrawal From Arbitration.

The court may exempt or withdraw any action from arbitration on its own motion, or on motion of a party, made not less than 10 days before the arbitration hearing and a showing that: (i) the amount of the claim(s) exceed(s) $15,000; (ii) the action is excepted from arbitration under Arb. Rule 1(a); or (iii) there is a strong and compelling reason to do so.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted:	28 August 1986.
Pilot Rule Amended:	4 March 1987.
Permanent Rule Adopted:	14 September 1989
Amended:	8 March 1990—(a) and (d)

COMMENT

The purpose of these rules is to create an efficient, economical alternative to traditional litigation for prompt resolution of disputes involving money damage claims up to $15,000. The $15,000 jurisdictional limit by statute and Arb. Rule 1(a) applies only to the claim(s) actually asserted, even though the claim(s) is or are based on a statute providing for multiple damages, e.g. N.C. Gen. Stat. §§ 1-538, 75-16. An arbitrator may award damages in any amount which a party is entitled to recover. These rules do not affect the jurisdiction or functions of the magistrates where they have been assigned such jurisdiction. Counsel are expected to value their cases reasonably without court involvement. The court has inherent authority to order overvalued cases to arbitration. The court's authority and responsibility for conducting all proceedings and for the final judgment in a case are not affected by these rules, which merely give the court a new civil procedure. A false certification

under Arb. Rule 1(a)(6) might trigger N.C.R. Civ. P. 11(a) and N.C. Gen. Stat. § 6-21.5 sanctions or State Bar disciplinary action.

"Family law issues" in Arb. Rule 1(a)(3)(i) includes all family law cases such as divorce, guardianship, adoptions, juvenile matters, child support, custody and visitation. Actions which are "special proceedings" or involve summary ejectment, referred to in Arb. Rule 1(a), are actions so designated by the General Statutes.

Arb. Rules 1(a)(5) and 1(c) are the court's authority for submitting any case to arbitration in accordance with these rules. Moreover, a court may establish a local administrative procedure (e.g. review of case files by a clerk) to ensure that cases subject to Arb. Rule 1(a)(5) are brought to a judge's attention.

Arb. Rule 1(b) allows binding or non-binding arbitration of any case by agreement and permits the parties to modify these rules for a particular case. Court approval of any modification will give a variant proceeding the court's imprimatur and ensure adherence to their primary purpose. For example, arbitrators under these rules are not expected to decide protracted cases without fair compensation. These rules do not provide adequate compensation for arbitrators in protracted cases. Court review and approval of extraordinary stipulations are required to ensure fair compensation by the parties.

Arb. Rule 1(c) is a safeguard against overvaluation of a claim to evade arbitration. It would become operative on motion of a party. This rule *does not* require (nor forbid) the court to examine any case on its own motion to determine its true value. The court may establish an administrative procedure for reviewing pleadings in cases appropriate for consideration by a judge for referral under Arb. Rule 1(c). *See also* the *Comment* to Arb. Rule 1(a).

Exemption or withdrawal may be appropriate under Arb. Rule 1(d)(iii) in a challenge to established precedent in an action in which a trial de novo and subsequent appeal are probable or a case in which there has been prior mediation through the North Carolina Attorney General's office.

Cases involving pre-litigation contractual agreements for private arbitration under federal law, such as the Federal Arbitration Act or under state law, such as this State's Uniform Arbitration Act, should be exempted from court-ordered arbitration under these rules, unless all the parties waive their rights under their arbitration agreement. If parties agree to arbitrate the issue(s) in a case after an action has been filed, their stipulation of agreement should

state clearly whether the arbitration is to be in accordance with these rules or subject to state or federal law. In the latter instance the case should be exempted from arbitration.

Arb. Rule 2

ARBITRATORS

(a) Selection.

(1) The court shall select and maintain a list of qualified arbitrators, which shall be a public record. Unless the parties file a stipulation identifying their choice of an arbitrator on the court's list within the first 20 days after the 60-day period fixed in Arb. Rule 8(b) begins to run, the court will appoint an arbitrator, chosen at random from the list, and will notify the parties of the arbitrator selected in the notice of hearing.

(2) Parties may choose an arbitrator who is not on the court's list provided the arbitrator consents, the court approves the choice, and the arbitrator otherwise meets all the requirements of Arb. Rule 2 with the exception of the requirement to complete the arbitrator training as prescribed by the Administrative Office of the Courts. The stipulation of agreement on an arbitrator, the arbitrator's consent, and the court order approving such stipulation shall be filed within the same 20-day period for choosing an arbitrator on the court's list.

(b) Eligibility.

An arbitrator shall have been a member of the North Carolina State Bar for at least five years, shall have completed the arbitrator training as prescribed by the Administrative Office of the Courts, and must be approved by the Senior Resident Superior Court Judge and the Chief District Court Judge for such service. Arbitrators so approved shall serve at the pleasure of the appointing court(s).

(c) Fees and Expenses.

Arbitrators shall be paid a $75 fee by the court for each arbitration hearing when they file their awards with the court. An arbitrator may be reimbursed for expenses actually and necessarily incurred in connection with an arbitration hearing and paid a reasonable fee not exceeding $75 for work on a case not resulting in a hearing upon the arbitrator's written application to, and approval by, the Senior Resident Superior Court Judge, or the Chief

Judge of the District Court, of the court in which the case was pending.

(d) Oath of Office.

Arbitrators shall take an oath or affirmation similar to that prescribed in N.C. Gen. Stat. §11-11, in a form approved by the Administrative Office of the Courts, before conducting any hearings.

(e) Disqualification.

Arbitrators shall be disqualified and must recuse themselves if as a judge in the same action they would be disqualified or obliged to recuse themselves. Disqualification and recusal may be waived by the parties upon full disclosure of any basis for disqualification or recusal.

(f) Replacement of Arbitrator.

If an arbitrator is disqualified, recused, unable, or unwilling to serve, a replacement shall be appointed in a random manner by the court.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989
Amended: 8 March 1990—(a) and (b)

COMMENT

Under Arb. Rule 2(a) the parties have a right to choose one arbitrator from the list if they wish to do so, but they have *the burden of taking the initiative if they want to make the selection,* and they must do it promptly.

The parties in a particular case may choose a person to be an arbitrator who is not on the list required by Arb. Rule 2(a)(1), provided that person consents, the choice is approved by the Senior Resident Superior Court Judge if the case is filed in Superior Court or the Chief District Court Judge if the case is filed in District Court, and the person otherwise meets the requirements of Arb. Rule 2. The stipulation of agreement on an arbitrator, the arbitrator's consent, and the order approving such stipulation and consent must be filed within the 20-day period mentioned in Arb. Rule 2(a)(1).

Under Arb. Rule 2(c) filing of the award is the final act at which payment should be made, closing the matter for the arbitrator. The arbitrator should make the award when the hearing is concluded. Hearings must be brief and expedited so that an arbitrator can hear at least three per day. See Arb. Rule 3(n).

Payments and expense reimbursements authorized by Arb. Rule 2(c) are made subject to court approval to insure conservation and judicial monitoring of the use of funds available for the program.

Since the arbitrator has the authority of a judge except for the contempt power, *see* Arb. Rule 3(g), the arbitrator's behavior should comport with the ethics rules for lawyers, *e.g.* N.C.R. Prof'l Conduct 9.2, and judges, *e.g.* the N.C. Code of Judicial Conduct. In some instances, *e.g. id.*, Canon 5.E., there may be conflicts, in which case the arbitrator should consult with the Senior Resident Superior Court Judge or the Chief Judge of the District Court, depending on the court in which the case is filed. The court should review the list of arbitrators periodically; in the court's discretion, names may be removed from the Arb. Rule 2(a)(1) list. If an arbitrator's performance or conduct does not comport with the spirit of these rules, the arbitrator's name may be removed from the Arb. Rule 2(a)(1) list by the appointing judge(s).

Arb. Rule 3

ARBITRATION HEARINGS

(a) Hearing Scheduled by the Court.

Arbitration hearings shall be scheduled by the court and held in a courtroom, if available, or in any other public room suitable for conducting judicial proceedings and shall be open to the public.

(b) Prehearing Exchange of Information.

At least 10 days before the date set for the hearing, the parties shall exchange:

(1) Lists of witnesses they expect to testify;

(2) Copies of documents or exhibits they expect to offer in evidence; and

(3) A brief statement of the issues and their contentions.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Failure

to comply with Arb. Rule 3(b) may be cause for sanctions under Arb. Rule 3(l).

(c) Exchanged Documents Considered Authenticated.

Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(d) Copies of Exhibits Admissible.

Copies of exchanged documents or exhibits are admissible in arbitration hearings.

(e) Witnesses.

Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(f) Subpoenas.

N.C.R. Civ. P. 45 shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(g) Authority of Arbitrator to Govern Hearings.

Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all contempt matters to the court.

(h) Law of Evidence Used as Guide.

The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(i) No Ex Parte Communications With Arbitrator.

No ex parte communications between parties or their counsel and arbitrators are permitted.

(j) Failure to Appear; Defaults; Rehearing.

If a party who has been notified of the date, time and place of the hearing fails to appear without good cause therefor, the hearing may proceed and an award may be made by the arbitrator against the absent party upon the evidence offered by the parties present, but not by default for failure to appear. If a party is in default for any other reason but no judgment has been entered upon the default pursuant to N.C.R. Civ. P. 55(b) before the hearing, the arbitrator may hear evidence and may issue an award against the party in default. The court may order a rehearing of any case in which an award was made against a party who failed to obtain a continuance of a hearing and failed to appear for reasons beyond the party's control. Such motion for rehearing shall be filed with the court within the time allowed for demanding trial de novo stated in Arb. Rule 5(a).

(k) No Record of Hearing Made.

No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(l) Sanctions.

Any party failing or refusing to participate in an arbitration proceeding in a good faith and meaningful manner shall be subject to sanctions by the court on motion of a party, or report of the arbitrator, as provided in N.C.R. Civ. P. 11, 37(b)(2)(A)—37(b)(2)(C) and N.C. Gen. Stat. § 6-21.5.

(m) Proceedings in Forma Pauperis.

The right to proceed *in forma pauperis* is not affected by these rules.

(n) Limits of Hearings.

Arbitration hearings shall be limited to one hour unless the arbitrator determines at the hearing that more time is necessary to ensure fairness and justice to the parties.

(1) A written application for a substantial enlargement of time for a hearing must be filed with the court and the arbitrator, if appointed, and must be served on opposing parties at the earliest practicable time, and no later than the date for prehearing exchange of information under Arb. Rule 3(b). The court will rule on these applications after consulting the arbitrator if appointed.

(2) An arbitrator is not required to receive repetitive or cumulative evidence.

(o) Hearing Concluded.

The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within 3 days after the hearing has been concluded.

(p) Parties Must be Present at Hearings; Representation.

All parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Only individuals may appear *pro se*.

(q) Motions.

Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(1) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions deferred to the arbitrator in the exchange of information required by Arb. Rule 3(b).

(2) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989
Amended: 8 March 1990—(b), (j), (o), and (q)

COMMENT

Good faith compliance with Arb. Rule 3(b) is required by professional courtesy and fairness as well as the spirit of these rules. Failure to comply with Arb. Rule 3(b) may justify a sanction of limiting of evidence otherwise admissible under Arb. Rules 3(c)—3(f) and 3(h).

Arb. Rule 3(d) contemplates that the arbitrator shall return all evidence submitted when the hearing is concluded and the award has been made. Original documents and exhibits should not be marked in any way to identify them with the arbitration, to avoid possible prejudice in any future trial.

The purpose of Arb. Rule 3(n) is to ensure that hearings are limited and expedited. Failure to limit and expedite the hearings defeats the purpose of these rules. In this connection, note the option in Arb. Rule 3(b) for use of prehearing stipulations and/or sworn or unsworn statements to meet time limits.

Under Arb. Rule 3(o) the declaration that the hearing is concluded by the arbitrator formally marks the end of the hearing. Note Arb. Rule 4(a), which requires the arbitrator to file the award within three days after the hearing is concluded or post-hearing briefs are received. The usual practice should be a statement of the award at the close of the hearing, without submission of briefs. In the unusual case where an arbitrator is willing to receive post-hearing briefs, the arbitrator should specify the points to be addressed promptly and succinctly. Time limits in these rules are governed by N.C.R. Civ. P. 6 and N.C. Gen. Stat. §§ 103-4, 103-5.

An arbitrator may at any time encourage settlement negotiations and may participate in such negotiations if all parties are present in person or by counsel. See Arb. Rule 3(p).

Under Arb. Rule 3(q)(1), the court will rule on prehearing motions which dispose of all or part of the case on the pleadings, or which relate to procedural management of the case. The court will normally defer to the arbitrator's consideration motions addressed to the merits of a claim requiring a hearing, the taking of evidence, or examination of records and documents other than the pleadings and motion papers, except in cases in which a N.C.R. Civ. P. 12(b) motion is filed in lieu of a responsive pleading.

Arb. Rule 4

THE AWARD

(a) Filing the Award.

The award shall be in writing, signed by the arbitrator and filed with the court within 3 days after the hearing is concluded or the receipt of post-hearing briefs, whichever is later.

(b) Findings; Conclusions; Opinions.

No findings of fact and conclusions of law or opinions supporting an award are required.

(c) Scope of Award.

The award must resolve all issues raised by the pleadings and may exceed $15,000.

(d) Copies of Award to Parties.

The court shall forward copies of the award to the parties or their counsel.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

COMMENT

The arbitrator should issue the award when the hearing is over and should not take the case under advisement. *See* Arb. Rule 4(a). If the arbitrator wants post-hearing briefs, the arbitrator must receive them within three days, consider them, and file the award within three days thereafter. See Arb. Rule 3(o) and its *Comment*.

See Arb. Rule 1(a) and its *Comment* in connection with Arb. Rule 4(c).

Arb. Rule 5

TRIAL DE NOVO

(a) Trial De Novo As Of Right.

Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo as of right upon filing a written demand for trial de novo with the court, and service of the demand on all parties, on an approved form within 30 days after the arbitrator's award has been filed, or within 10 days after an adverse determination of an Arb. Rule 3(j) motion to rehear.

(b) Filing Fee.

A party filing a demand for trial de novo shall pay a filing fee equivalent to the arbitrator's compensation, which shall be held

by the court until the case is terminated and returned to the demanding party only if there has been a trial in which, in the trial judge's opinion, the position of the demanding party has been improved over the arbitrator's award. Otherwise, the filing fee shall be deposited into the State's General Fund.

(c) No Reference to Arbitration in Presence of Jury.

A trial de novo shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

(d) No Evidence of Arbitration Admissible.

No evidence that there have been arbitration proceedings or any fact concerning them may be admitted in a trial de novo, or in any subsequent proceeding involving any of the issues in or parties to the arbitration, without the consent of all parties to the arbitration and the court's approval.

(e) Arbitrator Not to be Called as Witness.

An arbitrator may not be deposed or called as a witness to testify concerning anything said or done in an arbitration proceeding in a trial de novo or any subsequent civil or administrative proceeding involving any of the issues in or parties to the arbitration. The arbitrator's notes are privileged and not subject to discovery.

(f) Judicial Immunity.

The arbitrator shall have judicial immunity to the same extent as a trial judge with respect to the arbitrator's actions in the arbitration proceeding.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989
Amended: 8 March 1990—(a), (b), (e), and (f)

COMMENT

Arb. Rule 5(c) does not preclude cross-examination of a witness in a later proceeding concerning prior inconsistent statements during arbitration proceedings, if done in such a manner as not to violate the intent of Arb. Rules 5(c) and 5(d).

See also the *Comment* to Arb. Rule 6 regarding demand for trial de novo.

Arb. Rule 6

THE COURT'S JUDGMENT

(a) Termination of Action by Agreement Before Judgment.

The parties may file a stipulation of dismissal or consent judgment at any time before entry of judgment on an award.

(b) Judgment Entered on Award.

If the case is not terminated by agreement of the parties, and no party files a demand for trial de novo within 30 days after the award is filed, the clerk or the court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be mailed to all parties or their counsel.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989
Amended: 8 March 1990—(b)

COMMENT

A judgment entered on the arbitrator's award is not appealable because there is no record for review by an appellate court. A trial de novo is not an "appeal," in the sense of an appeal to the North Carolina Court of Appeals from Superior Court or District Court, from the arbitrator's award. By failing to demand a trial de novo the right to appeal is waived. Demand for jury trial pursuant to N.C. R. Civ. P. 38(b) does not preserve the right to a trial de novo. There must be a separate, specific, timely demand for trial de novo after the award has been filed.

Arb. Rule 7

COSTS

(a) Arbitration Costs.

The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(b) Costs Following Trial De Novo.

If there is trial de novo, court costs may, in the discretion of the trial judge, include costs taxable under Arb. Rule 7(a) incurred in the arbitration proceedings.

(c) Costs Denied if Party Does Not Improve Position in Trial De Novo.

A party demanding trial de novo whose position is not improved at the trial may be denied costs in connection with the arbitration proceeding by the trial judge, even though that party prevails at trial.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989
Amended: 8 March 1990—(c)

Arb. Rule 8

ADMINISTRATION

(a) Actions Designated for Arbitration.

The court shall designate actions eligible for arbitration upon the filing of the complaint or docketing of an appeal from a magistrate's judgment and give notice of such designation to the parties.

(b) Hearings Rescheduled; 60 Day Limit; Continuance.

(1) The court shall schedule hearings with notice to the parties to begin within 60 days after: (i) the docketing of an appeal from a magistrate's judgment, (ii) the filing of the last responsive pleading, or (iii) the expiration of the time allowed for the filing of such pleading.

(2) A hearing may be scheduled, rescheduled or continued to a date after the time allowed by this rule only by the court before whom the case is pending upon a written motion and a showing of a strong and compelling reason to do so.

(c) Date of Hearing Advanced by Agreement.

A hearing may be held earlier than the date set by the court, by agreement of the parties with court approval.

(d) Forms.

Forms for use in these arbitration proceedings must be approved by the Administrative Office of the Courts.

(e) Delegation of Nonjudicial Functions.

To conserve judicial resources and facilitate the effectiveness of these rules, the court may delegate nonjudicial, administrative duties and functions to supporting court personnel and authorize them to require compliance with approved procedures.

(f) Definitions.

"Court" as used in these rules means, depending upon the context in which it is used:

(1) The Senior Resident Superior Court Judge, if the action is pending in the Superior Court Division, or the delegate of such judge;

(2) The Chief District Court Judge, if the action is pending in the District Court Division, or the delegate of such judge; or

(3) Any assigned judge exercising the court's jurisdiction and authority in an action.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted:	28 August 1986.
Pilot Rule Amended:	4 March 1987.
Permanent Rule Adopted:	14 September 1989
Amended:	8 March 1990—(a), (b), (d), and (f)

COMMENT

One goal of these rules is to expedite disposition of claims involving $15,000 or less. See Arb. Rule 8(a). The 60 days in Arb. Rule 8(b)(1) will allow for discovery, trial preparation, pretrial motions disposition and calendaring. A motion to continue a hearing will be heard by a judge mindful of this goal. Continuances may be granted when a party or counsel is entitled to such under law, *e.g.* N.C. R. Civ. P. 40(b); rule of court, *e.g.* N.C. Prac. R. 3; or customary practice.

Arb. Rule 9

APPLICATION OF RULES

These rules shall apply to cases filed on or after their effective date and to pending cases submitted by agreement of the parties under Arb. Rule 1(b) or referred to arbitration by order of the court in those districts designated for court-ordered arbitration in accordance with G.S. §§ 7A-37 and 7A-37.1.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted:	28 August 1986.
Pilot Rule Amended:	4 March 1987.
Permanent Rule Adopted:	14 September 1989
Amended:	8 March 1990

COMMENT

A common set of rules has been adopted. These rules may be amended only by the Supreme Court of North Carolina. The enabling legislation, G.S. §§ 7A-37 and 7A-37.1, vests rule-making authority in the Supreme Court, and this includes amendments.

ORDER ADOPTING
AMENDMENTS TO INTERNAL OPERATING PROCEDURES
PRINTING DEPARTMENT

The Internal Operating Procedures of the Supreme Court Printing Department, published as the Internal Operating Procedures Mimeographing Department at 295 N.C. 743, are hereby amended to read as in the following pages. All amendments shall be effective 15 October 1990.

Adopted by the Court in Conference this 11th day of October, 1990. The operating procedures, as amended, shall be published in their entirety in the Advance Sheets of the Supreme Court and the Court of Appeals.

WHICHARD, J.
For the Court

INTERNAL OPERATING PROCEDURES
PRINTING DEPARTMENT

The following rules are hereby adopted to govern the internal operation of the Supreme Court Printing Department:

Pursuant to G.S. § 7A-11 and the North Carolina Rules of Appellate Procedure, the Clerk of the Supreme Court is authorized and directed to administer the Printing Department as follows:

1. Receipts by the Printing Department shall be deposited daily or as often as practicable in a checking account entitled "Supreme Court of North Carolina Mimeographing Department," which shall be maintained in a bank insured by the Federal Deposit Insurance Corporation and approved by the Supreme Court. All checks drawn against the Printing Department account must be co-signed by the Clerk and another person designated by the Supreme Court. A savings account shall be maintained in the State Employees Credit Union under the same title, to which the Clerk shall transfer excess funds when, in his discretion, such transfer is practicable. Excess funds accumulated by the Printing Department shall be held in the savings account named above, subject to the order of this Court.

2. The Clerk shall employ the necessary personnel to operate the Printing Department. These persons may be employed on a full or part-time basis, or on the basis of piecework services, in the discretion of the Clerk. Employees of the State or of the Printing Department may perform piecework services for additional compensation so long as the work is performed on their own time and not on State-owned premises. State employees whose regular duties require services related to printing operations shall not receive dual compensation for those services. Printing Department employees shall be subject to the provisions of the North Carolina Judicial Branch of Government Personnel Management Manual, except that they shall be paid every two weeks out of the Printing Department receipts, at rates approved by the Supreme Court and filed with the Minutes of the Clerk. Printing Department employees shall be provided fringe benefits equivalent to the benefits provided by the State to other Judicial Department employees.

3. The Clerk shall make the necessary withholding deductions from compensation paid to Printing Department personnel and shall remit the same monthly to the appropriate agencies.

4. The Clerk shall purchase the necessary supplies and materials for the operation of the Printing Department. He shall also purchase and maintain necessary equipment and shall make any other

expenditures reasonably necessary for the operation of the department.

a. Competitive bidding is the foundation of the Printing Department's purchasing program. Open, competitive bidding should provide the lowest available price. In a market where many forces act upon price, the competitive bidding procedure provides an open method of acquiring goods and services. In choosing a bid, price is not the only element considered. Other factors, such as volume, product quality, delivery schedules, lead times, types of services required, value of trade-ins, servicing capabilities, and warranties/guarantees offered, affect the purchase decision. There must be a valid, documented reason when items are purchased by means other than competitive bidding.

b. A term contract is a binding agreement between the Printing Department and the vendor to buy and sell certain items at agreed contract prices, terms and conditions. The award of a term contract shall be based upon sealed competitive bids for which the Printing Department publicly advertises. Once a term contract is awarded, suppliers and prices of commodities shall be established for a certain period of time, usually twelve calendar months. Some term contracts, due to fluctuating markets, may be effective for different periods.

c. Equipment items are tangible goods with a value over $100.00 and a life of one year or longer, and they may have an identifying serial number. Equipment items are distinguished from supplies, which are consumed or expended in the course of use. Computer software and numbering machines are considered to be supplies rather than equipment, notwithstanding the existence of a serial number.

d. Purchasing Authorization. The Printing Department may purchase supplies and equipment items from vendors who are under State contract without engaging in a separate process for competitive quotes. All other purchases must be conducted under the following procedures:

(a) A petty purchase is generally justified when an immediate need arises for a specific item or items not on hand at the office and either not readily available through standard purchasing procedures or where time does not permit the office to follow normal procedures. Before

Printing Department employees make petty purchases, they must first obtain the approval of the Clerk. The established limit for such a purchase is $25.00.

(b) Purchases of equipment or supplies valued from $25.00 to $1,000.00 may be made upon oral quotations from at least three vendors. Forms recording such quotations shall be approved by the Clerk and shall be retained with the financial records of the Printing Department.

(c) Purchases of equipment or supplies valued over $1,000.00 or purchases under a term contract may be made only upon written, sealed quotations from at least three vendors, approved by the Clerk and the Court, and retained with the financial records of the Printing Department.

e. Surplus property is equipment which has been replaced by other equipment, is outdated or is of no further use to the Printing Department or the Court. Property may be declared surplus by the Clerk with the approval of the Court. Surplus property shall be disposed of by public sale or transfer to other state agencies, in accordance with State Surplus Property Agency procedures.

5. Equipment items valued over $500.00 shall be included in a fixed asset inventory system, using serialized identification tags distinct from those used by the Judicial Department. The existence and location of all Printing Department assets shall be verified at least annually. In accordance with the policy of the State Controller, assets valued over $5,000.00 shall be depreciated on a five-year basis; assets valued under $5,000.00 shall be recorded as an expense for the year in which the asset is purchased.

6. The Clerk shall make quarterly financial reports on the operation of the Printing Department to the Chief Justice and Associate Justices of the Supreme Court. In May of each year, the Clerk shall present to the Supreme Court a proposed operating budget for the fiscal year beginning July 1. The budget proposal shall be in line-item format and shall include a detailed description of equipment items proposed for purchase or lease.

7. All books and records of the Printing Department shall be open for inspection and audit by the State Auditor.

8. Until such time as the Court may order further, records, briefs, petitions, and any other documents which may be required by the Rules of Appellate Procedure or by order of the appropriate appellate court to be reproduced, shall be printed at a cost of $5.00 per printed page where the document is retyped and printed and at a cost of $2.00 per printed page where the Clerk determines that the document is in proper format and can be reproduced directly from the original.

ADMINISTRATIVE HISTORY

Adopted: 12 September 1978.

Amended: 7 December 1982—(8)—to become effective 1 January 1983;
11 October 1990—effective 15 October 1990.

The North Carolina State Bar

AMENDMENT TO CONTINUING LEGAL EDUCATION RULES

The following amendments to the Continuing Legal Education Rules were duly adopted by the Council of the North Carolina State Bar at its meeting on July 13, 1990.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Continuing Legal Education as appear in 318 NC at 711 et seq. be and the same are hereby amended as follows:

Amend Rule 9 by striking the period at the end of said sentence and inserting in lieu thereof a comma so that the sentence will read as follows:

Commencing in 1989, each active member of the North Carolina State Bar shall make an annual written report to the North Carolina State Bar in such form as the Board shall prescribe by regulation concerning compliance with the Continuing Legal Education Program for the preceding year or declaring an exemption under Rule 4, unless the Board's records indicate that such member has been previously exempted and the circumstances resulting in the exemption are unchanged. It shall be the responsibility of any previously exempted member whose circumstances have changed and who is therefore not presently qualified for an exemption to notify the Board of such changed circumstances within 30 days after such become apparent and to satisfy fully the requirements of these Rules for the year following such change in circumstances.

BE IT FURTHER RESOLVED that Rule 11 (A) is amended by inserting the following phrase, including the payment of duly assessed penalties and attendee fees, so that Rule 11 (A) will read as follows:

An attorney who is required to file a report of CLE credits and does not do so or who fails to meet the minimum requirements of these rules, including the payment of duly assessed penalties and attendee fees, may be suspended from the practice of law in the State of North Carolina.

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 were duly adopted

by the Council of the North Carolina State Bar at its meeting on July 13, 1990, and the amendments as certified were duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 30th day of July, 1990.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of September, 1990.

JAMES G. EXUM, JR.
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 25th day of September, 1990.

WHICHARD, J.
For the Court

AMENDMENT TO BAR RULES RELATING TO STANDING COMMITTEES OF THE COUNCIL

The following amendment to the Rules, Regulations, and Certification of Organization was duly adopted by the Council of the North Carolina State Bar at its July 13, 1990, quarterly meeting.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, Standing Committees of the Council, be amended by adding a new paragraph n. and thereby create a standing committee known as "Of Counsel" as follows:

n. Of Counsel. A committee of at least nine members shall design and implement programs to enhance the competence and professionalism of lawyers through voluntary efforts of members of the bar. These programs shall be designed to orient, counsel, educate, and advise fellow lawyers, educators, students, and persons in ancillary occupations regarding the practice of the profession and work related thereto.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its meeting on July 13, 1990, and the amendment as certified was duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 30th day of July, 1990.

B. E. JAMES
Secretary

After examining the foregoing amendment 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 is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of September, 1990.

JAMES G. EXUM, JR.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 25th day of September, 1990.

WHICHARD, J.
For the Court

AMENDMENTS TO STATE BAR RULES CONCERNING RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules and Regulations of the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 19, 1990.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar as appear on 312 NC 845 are amended by adding the following sentences to Rule 10.1(A):

Canon X. A LAWYER SHOULD STRICTLY PRESERVE THE IDENTITY OF FUNDS AND PROPERTY HELD IN TRUST.

Rule 10.1 Preserving Identity of Funds and Property of a Client, by adding the following sentences after the current Rule 10.1(A):

". . . These rules shall not be generally applicable to a lawyer serving as a trustee, personal representative or attorney in fact. However, a lawyer serving in such a fiduciary role must segregate property held in trust from property belonging to the lawyer, maintain the minimum financial records required by Rules 10.2(B) and (C) and instruct any financial institution in which property of a trust is held in accordance with Rule 10.2(F). The financial records referred to above shall be subject to audit for cause and random audit in accordance with the Rules and Regulations of the North Carolina State Bar.

BE IT FURTHER RESOLVED that Rule 10.1(B)(2) be amended.

"by deleting the comma in the first sentence at the end of the word, client, and inserting in lieu thereof a period (.) and striking the remainder of the sentence which now reads: 'other than those funds held as a court appointed fiduciary.' "

BE IT FURTHER RESOLVED that the Comment to Rule 10.3 is amended by adding the following sentence immediately before the final sentence in the first paragraph as follows:

"It would not be applicable in cases where a lawyer handles money for a business, religious, civic or charitable organization as an officer, employee, or other official of that organization."

BE IT FURTHER RESOLVED that the Comment to Rule 10.3 be amended by deleting the word, "therefore" from the final sentence in the first paragraph.

BE IT FURTHER RESOLVED that the Comment to Rule 10.3 be amended by relocating the first five paragraphs so that they immediately follow Rule 10.1 under Comment.

BE IT FURTHER RESOLVED that the Comment to 10.3 be further amended by relocating the last four paragraphs so that they immediately follow Rule 10.2 under Comment. This eliminates any Comment under 10.3. The Comment for 10.1 and 10.2 as amended will read as follows:

Comment to Rule 10.1

The purpose of an attorney's trust account is to segregate the funds belonging to clients from those belonging to the attorney. The attorney is in a fiduciary relationship with the client and should never use money belonging to the client for personal purposes. Failure to place client funds in a trust account can subject the funds to claims of the attorney's creditors or place the funds in the attorney's estate in the event of death or disability. The general rule is that every receipt of money from a client or for a client which will be used or delivered on the client's behalf is held in trust and should be placed in the trust account. It would not be applicable in cases where a lawyer handles money for a business, religious, civic, or charitable organization as an officer, employee or other official of that organization. Every attorney who receives funds belonging to clients must maintain a trust account.

The definitions in Rule 10.1(B) are basic and allow the rule to encompass accounts maintained at institutions other than commercial banks. Additionally, the definition of check is intended to encompass any device by which funds may be withdrawn, including nonnegotiable instruments, transfers, and direct computer transfers.

Rule 10.1 is patterned after former Disciplinary Rule 9-102. However, the language used clarifies the deposit requirements. Under the prior rule, there was some confusion as to whether payments of clients to attorneys for payment of expenses should be deposited in the trust account. The new language eliminates the ambiguity. Under the new rule, all money received by the attorney except that to which the attorney is presently entitled must be deposited in the trust account, including funds for payment of expenses. Funds delivered to the attorney by the client for payment of potential expenses are intended to be used for only that purpose and the funds should never

be used by the attorney for personal purposes or subjected to the potential claims of the attorney's creditors.

There is a question as to whether a payment of a retainer by the client should be placed in the trust account. The determination depends upon the fee arrangement with the client. A retainer in its truest sense is a payment by the client for the reservation of the exclusive services of the attorney which by agreement of the parties is nonrefundable upon discharge of the attorney. It is a payment to which the attorney is immediately entitled and should not be placed in the trust account. A "retainer" which is actually a deposit by the client of an advance payment of a fee to be billed on an hourly basis is not a payment to which the attorney is immediately entitled. This is really a security deposit and should be placed in the trust account. As the attorney earns the fee or bills against the retainer, the funds should be withdrawn from the account.

The attorney may come into possession of property belonging to the client other than money. Similar considerations apply concerning the segregation of such property from that of the attorney.

Comment to Rule 10.2

The lawyer must notify the client of the receipt of the client's property. It is the lawyer's responsibility to assure that complete and accurate records of the receipt and disbursement of client property are maintained. Therefore, there are minimum record-keeping requirements.

The lawyer is also responsible for keeping his client advised of the status of any property held by the lawyer. Therefore, it is essential that the attorney reconcile the trust account regularly. The attorney also has an affirmative duty to produce an accounting for the client in writing and to deliver it to the client, either at the conclusion of the transaction or periodically if funds are held for an appreciable period. Such accountings must be made at least annually, and can be made at more frequent intervals in the discretion of the attorney.

The lawyer is also responsible for making payments from his trust account only as directed by the client or only on the client's behalf.

A properly maintained trust account should not have any checks returned by the bank for insufficient funds. Although even

the best maintained accounts are subject to bank errors, such legitimate problems are easily explained. Therefore, the reporting requirement should not be burdensome.

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 were duly adopted by the Council of the North Carolina State Bar at its meeting on October 19, 1990, and the amendments as certified were duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of November, 1990.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 19th day of December, 1990.

JAMES G. EXUM, JR.
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 19th day of December, 1990.

WHICHARD, J.
For the Court

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ANALYTICAL INDEX

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ADOPTION

§ 13 (NCI4th). Parent as necessary party

The trial court did not abuse its discretion in an adoption proceeding by not allowing an affidavit required by G.S. 48-13, filed two years after the adoption petition, to relate back to the original adoption petition, and the father's consent was necessary for the adoption to proceed in the case. *In re Adoption of Clark*, 61.

APPEAL AND ERROR

§ 133 (NCI4th). Appointment of guardian ad litem

Plaintiff's appeal was remanded to the Court of Appeals for dismissal where defendant in a divorce action sought appointment of a guardian ad litem; a guardian ad litem was appointed over the objection of the plaintiff in the divorce action; and the plaintiff in the divorce action appealed. Plaintiff was not an aggrieved party and did not argue or establish that he was entitled to an appeal of right from the interlocutory order. *Culton v. Culton*, 624.

§ 147 (NCI4th). Preserving questions for appeal generally; necessity of request, objection, or motion

Plaintiffs' failure to verify the complaint in a shareholders' derivative action was raised for the first time on appeal and did not divest the trial court of subject matter jurisdiction. *Alford v. Shaw*, 526.

§ 155 (NCI4th). Effect of failure to make motion, objection, or request in criminal actions

Defendant waived his right to raise on appeal the issue of alleged racial discrimination in the selection of the foreman of the grand jury that indicted him where he failed to challenge at trial any aspect of his indictment. *S. v. Robinson*, 346.

§ 331 (NCI4th). Preparation and delivery of transcript

Defendant's due process rights were not violated by the court reporter's allegedly poor transcription of his trial for three first degree murders. *S. v. Robinson*, 346.

§ 425 (NCI4th). Citation of cases; additional authorities

An assignment of error was deemed waived where defendant presented neither argument nor citation of authority. *S. v. Warren*, 364.

ARREST AND BAIL

§ 140 (NCI4th). Right to pretrial release generally

A judge of the superior court did not have statutory or inherent authority to compel the Division of Adult Probation and Parole to supervise a murder defendant who was incompetent to stand trial but ineligible for involuntary commitment where the DAPP did not consent to such supervision. *S. v. Gravette*, 114.

ATTORNEYS AT LAW

§ 9 (NCI4th). Requirements and procedure for admission; hearing before Board of Law Examiners

The Board of Law Examiners did not err in refusing to permit appellant to withdraw his application for admission to the North Carolina bar by comity after the close of all the evidence at the hearing. *In re Golia-Paladin*, 132.

ATTORNEYS AT LAW — Continued

§ 10 (NCI4th). Hearing before Board of Law Examiners; action by Board

The Board of Law Examiners properly denied appellant's application for admission to the North Carolina bar by comity on the ground that he failed to show that he was actively and substantially engaged in the practice of law in New York for four out of the six years immediately preceding the filing of his application. *In re Golia-Paladin*, 132.

§ 64 (NCI4th). Power of court; fee in absence of agreement

An award of attorneys' fees under 42 U.S.C. 1983 was reversed where the underlying decision was reversed and plaintiffs did not prevail in their cause. *McNeill v. Harnett County*, 552.

BILLS AND NOTES

§ 1 (NCI3d). Requisites of negotiable instruments

An agreement between parties met the legal and accounting definitions of the term note and complied with the definition of note in G.S. 25-3-104. *Regional Acceptance Corp. v. Powers*, 274.

BILLS OF DISCOVERY

§ 1 (NCI3d). Examination of adverse party in general

Discovery was correctly permitted upon remand of a shareholders' derivative action where the court permitted discovery on the step one issues under the *Alford* analysis even though plaintiffs had failed to contest those issues on the prior appeal. *Alford v. Shaw*, 526.

CONSTITUTIONAL LAW

§ 13 (NCI3d). Safety, sanitation, and health

The establishment and operation of a sewer system and an ordinance mandating connection to the system are valid exercises of the police power and do not violate the Federal or North Carolina Constitutions even though they were passed without notice or opportunity to be heard. *McNeill v. Harnett County*, 552.

§ 28 (NCI3d). Due process and equal protection generally in criminal proceedings

Defendant's due process rights were not violated by the court reporter's allegedly poor transcription of his trial for three first degree murders. *S. v. Robinson*, 346.

Defendant was not deprived of his right to a fair trial by false and misleading testimony from a deputy where defendant failed to establish either that the testimony was material or that the prosecution knew it was false. *S. v. Sanders*, 319.

§ 31 (NCI3d). Affording the accused the basic essentials for defense

The trial court did not err in denying defendant's motion for funds to employ an expert witness on North Carolina appellate practice to testify in support of his claim that he received ineffective assistance of counsel on his direct appeal of criminal cases. *S. v. Taylor*, 147.

The trial court in a capital trial for three murders did not err in the denial of the indigent defendant's pretrial motion for the appointment of a private psychiatrist at State expense to assist defendant at trial and at the sentencing hearing where

CONSTITUTIONAL LAW — Continued

defendant had previously been examined by a psychiatrist at Dorothea Dix Hospital. *S. v. Robinson*, 346.

§ 34 (NCI3d). Double jeopardy

Jeopardy did not attach in a trial in district court for driving while impaired and leaving the scene of an accident where the State took a voluntary dismissal before evidence was introduced or witnesses began to testify. *S. v. Brunson*, 244.

§ 80 (NCI3d). Death and life imprisonment sentences

The prosecutor did not seek to impose the death penalty arbitrarily or capriciously in a murder prosecution where he argued in a subsequent case that life imprisonment was appropriate despite evidence of aggravating circumstances. *S. v. Jones*, 439.

CORPORATIONS

§ 6 (NCI3d). Right of stockholders to maintain action

Plaintiffs in a shareholders' derivative action did not lose their standing after a corporate merger in which all of their shares were converted into shares of a different corporation. *Alford v. Shaw*, 526.

The trial court is required by statute to approve or disapprove any proposed discontinuance, settlement, dismissal or compromise of the suit in a shareholders' derivative action based upon an analysis of whether the proposal for disposition of the case was reached by qualified, independent, disinterested decision-makers who in good faith thoroughly investigated and evaluated the claims in the complaint, and based upon the trial court's own independent business judgment. *Ibid.*

The trial court's requirement that plaintiffs file a written statement of the issues they plan to contest at a hearing on the disposition of a shareholders' derivative action was not error. *Ibid.*

§ 15 (NCI3d). Liability of officers and directors for torts

The president of a corporation could be sued in his individual capacity for the torts of nuisance and trespass arising from the contamination of plaintiffs' well water by gasoline leaking from underground storage tanks installed and maintained by the corporation at a convenience store where the president personally participated in the activities surrounding the delivery and sale of gasoline at the store property. *Wilson v. McLeod Oil Co.*, 491.

Defendant corporate president may be liable to plaintiffs for gasoline contamination of their well water under the statute providing strict liability for any "person having control over oil or other hazardous substances" where the contamination was caused by gasoline leaking from underground storage tanks installed by the corporation and defendant had "control" over gasoline placed in the tanks. *Ibid.*

CRIMINAL LAW

§ 15 (NCI3d). Relevancy and competency of evidence in general

A witness was properly allowed to testify in a first degree murder case that four or five months before the murder he saw a sawed-off shotgun in defendant's car with a single barrel the size of a finger joint. *S. v. Simpson*, 178.

CRIMINAL LAW — Continued

§ 34.2 (NCI3d). Inadmissible evidence of defendant's guilt of other offenses; harmless error

Evidence of arson at the victim's home two days after she was murdered should have been excluded where it was unconnected to defendant in any way, but admission of photographs of the fire damage was harmless error. *S. v. Simpson*, 178.

§ 34.7 (NCI3d). Admissibility of evidence of other offenses to show knowledge or intent; animus, motive, malice, premeditation or deliberation

Evidence of defendant's prior assault on the victim was relevant to establish malice in this first degree murder prosecution. *S. v. Simpson*, 178.

§ 35 (NCI3d). Evidence that offense was committed by another, or that defendant had been "framed"

The trial court in a first degree murder case did not err in refusing to allow defendant to cross-examine a detective as to whether another person was a suspect at a particular time. *S. v. Simpson*, 178.

The trial court erred in a prosecution for murder and attempted armed robbery by excluding testimony that another committed the crime. *S. v. Sneed*, 266.

§ 50 (NCI3d). Expert and opinion testimony in general; what constitutes opinion testimony

A new scientific method of proof is admissible at trial if the method is sufficiently reliable. *S. v. Pennington*, 89.

§ 50.2 (NCI3d). Expert and opinion testimony in general; opinion of nonexpert

In a prosecution of a nurse for first degree murder of a hospital patient by withholding the patient's medication, testimony by the victim's husband that "it seemed like [defendant's] attitude toward me was like he was wanting me to give up on her" was admissible under Rule 701 since the testimony related the witness's perception as to defendant's state of mind and was helpful to the jury in explaining the witness's testimony as to why he subsequently asked the hospital not to assign defendant to care for his wife. *S. v. Shook*, 74.

§ 55 (NCI3d). Blood tests generally; tests for presence of alcohol or drugs

The trial court in a first degree murder case did not err in allowing the State's expert witness in serology to testify regarding the type of blood found on defendant's shoes without showing that defendant wore the shoes at the time of the crime. *S. v. Simpson*, 178.

§ 55.1 (NCI3d). Other tests

Expert testimony established the reliability of DNA profiling tests conducted by a commercial clinical laboratory so that the results of the profiling tests were admissible in this prosecution for rape, sexual offense, and other crimes. *S. v. Pennington*, 89.

§ 62 (NCI3d). Lie detector tests

The trial court did not err in denying defendant's request for "what the polygraph showed such as heart rate and so forth" since defendant's written motion that the State provide him with the "results" of the polygraph did not inform either the trial court or the prosecutor that defendant sought the actual polygraphic readout of defendant's physiological responses. *S. v. Payne*, 194.

CRIMINAL LAW — Continued

§ 66.1 (NCI3d). Evidence of identity by sight; competency of witness; opportunity for observation

Eyewitness identification testimony in a prosecution for murder and attempted armed robbery was not inherently incredible and was properly admitted. *S. v. Sneed*, 266.

§ 66.9 (NCI3d). Suggestiveness of photographic identification procedure

A pretrial photographic identification procedure was not impermissibly suggestive although only one picture depicted a balding, light-skinned black male. *S. v. Simpson*, 178.

§ 73.1 (NCI3d). Admission of hearsay statement as prejudicial or harmless error

There was no prejudicial error in a murder prosecution from the admission of hearsay testimony tending to show defendant's involvement in the drug business. *S. v. Warren*, 364.

§ 73.3 (NCI3d). Hearsay statements showing state of mind

Statements by a murder victim that she felt her marriage was in trouble and had related her feeling to defendant were admissible under the state of mind exception to the hearsay rule and were relevant to corroborate one of defendant's admitted motives for deciding to kill his wife. *S. v. Payne*, 194.

Testimony that a murder victim had stated that defendant, her husband, had threatened her and that the victim was nervous and upset, unusually quiet and had fear in her voice when speaking about defendant shortly before the murder was admissible to show the state of mind of the victim and the relationship between her and defendant shortly before her murder. *S. v. Lynch*, 210.

Testimony in a prosecution for murder and attempted armed robbery that a person other than defendant stated that he intended to rob a service station on the night the victim was killed was admissible. *S. v. Sneed*, 266.

§ 73.4 (NCI3d). Hearsay testimony; statement as part of res gestae

Testimony in a prosecution for murder and attempted armed robbery that a person other than defendant had returned to the witness's presence and said that he had done something he didn't want to do was admissible. *S. v. Sneed*, 266.

§ 75 (NCI3d). Confession; admissibility in general

The trial court did not err in a prosecution for first degree murder and first degree rape by admitting defendant's confession. *S. v. Sanders*, 319.

§ 75.7 (NCI3d). Requirement that defendant be warned of constitutional rights; when warning is required; what constitutes "custodial interrogation"

Incriminating statements made by defendant after a polygraph examination were made while defendant was not in custody and were voluntary. *S. v. Payne*, 194.

§ 82.1 (NCI3d). Attorney-client privilege

There was no error in a murder prosecution from admitting an SBI agent's statement concerning defendant's telephone call from jail. *S. v. Brown*, 1.

By alleging in a motion for appropriate relief that the Public Defender rendered ineffective assistance of counsel during the trial and appeal of his cases, defendant waived the benefits of both the attorney-client privilege and the work product

privilege with respect to matters relevant to his allegations of ineffective assistance of counsel. *S. v. Taylor*, 147.

§ 84 (NCI3d). Evidence obtained by unlawful means

The trial court did not err by admitting a confession into evidence where early statements had been coerced but the intervening factors were sufficient to purge any taint. *S. v. Jones*, 439.

§ 89.6 (NCI3d). Impeachment of witnesses

Defendant was not prejudiced by error in the trial court's refusal to allow defendant to present evidence that two law officers failed to disclose to the prosecutor or defendant the existence of a tape recording of defendant's phone call to the county emergency medical services made shortly after the victim was shot. *S. v. Payne*, 194.

§ 98 (NCI4th). Overview of discovery proceedings

It was within the inherent authority of the superior court to order disclosure of the Public Defender's files prior to a hearing on defendant's motion for appropriate relief based on alleged ineffective assistance of counsel. *S. v. Taylor*, 147.

§ 106.4 (NCI3d). Confession of defendant; proof of corpus delicti

Where the State relies upon a confession in a noncapital case, it is not necessary that there be independent proof to establish the corpus delicti if the confession is supported by substantial independent evidence tending to establish its trustworthiness. *S. v. Shook*, 74.

Defendant's confession in which he stated that he improperly mixed the victim's medication with the intent to cause her death was supported by sufficient independent evidence of its trustworthiness to be admissible in this murder trial. *Ibid.*

§ 162 (NCI3d). Objections, exceptions, and assignments of error to evidence

There was no error in a murder prosecution in allowing the prosecutor to cross-examine a defense witness with regard to rumors concerning defendant's guilt where defendant objected only once based on relevancy, did not object on hearsay grounds, and similar evidence was later admitted without objection. *S. v. Brown*, 1.

§ 169.3 (NCI3d). Error cured by introduction of other evidence

The trial court did not err in a murder prosecution by allowing the jury to view two of defendant's handwritten notes which had been introduced into evidence and read to the jury without objection. *S. v. Warren*, 364.

§ 169.6 (NCI3d). Harmless and prejudicial error in exclusion of evidence

Defendant failed to preserve for review a question as to the exclusion of evidence which allegedly would have shown an inconsistency in one witness's testimony. *S. v. Simpson*, 178.

§ 443 (NCI4th). Argument of counsel; explanation of roles of prosecutor, defense counsel

A prosecutor's argument in a rape and murder prosecution that he had taken an oath to fairly enforce the criminal laws and would dismiss a prosecution if he suspected anything wrong in the investigation was made in response to defendant's allegations and was not so grossly improper as to require intervention ex mero motu. *S. v. Sanders*, 319.

CRIMINAL LAW — Continued

§ 460 (NCI4th). Latitude and scope of argument; permissible inferences

The trial court did not err in a murder prosecution by allowing the prosecutor to argue inferences arising from testimony about rumors in the community. *S. v. Brown*, 1.

The prosecutor did not misstate the evidence during his closing argument in a murder prosecution when he stated that an expert in psychology had testified that a telephone call by defendant after the killing would tend to show that his claim of amnesia might not be valid where the psychologist testified that the telephone call conflicted with the idea of amnesia but continued to draw the conclusion that defendant suffered from amnesia. *S. v. Shank*, 405.

§ 463 (NCI4th). Closing arguments; supported by evidence

The prosecutor in a murder prosecution did not improperly argue matters outside the record when he referred to newspapers and television and contended that defendant's motive for killing his wife was an affair he was having with another woman. *S. v. Shank*, 405.

§ 468 (NCI4th). Latitude and scope of argument; miscellaneous

There was no gross error in a murder prosecution from the prosecutor's closing arguments. *S. v. Brown*, 1.

§ 472 (NCI4th). Conduct of counsel during trial; brandishing of physical evidence

The clerk's placement of an iron pipe used in two murders on the railing of the clerk's table during the court's jury charge, allegedly at the direction of the district attorney, did not constitute gross prosecutorial misconduct requiring the court ex mero motu to declare a mistrial or give supplemental jury instructions. *S. v. Robinson*, 346.

§ 491 (NCI4th). Permitting jury to view scene or evidence out of court generally

The trial court did not err in denying defendant's request for a jury view of the crime scene where the court found that photographs and diagrams used at trial were sufficient to assist the jury in visualizing the crime scene. *S. v. Simpson*, 178.

§ 544 (NCI4th). Examination or cross-examination of witnesses; reference to prior crime

The trial court did not err in a murder prosecution by denying defendant's motion for a mistrial after the State made three references to defendant's time in prison. *S. v. Warren*, 364.

§ 753 (NCI4th). Court's discretion to give substance of, rather than precise language of, requested instruction

The trial court did not err in a murder prosecution by denying defendant's requested instruction on presumption of innocence where the instruction given adequately linked the burden of proof with the presumption of innocence. *S. v. Warren*, 364.

§ 793 (NCI4th). Instructions as to acting in concert generally

There was no error in a murder prosecution from the trial court's failure to instruct on acting in concert even though the prosecutor argued acting in concert to the jury. *S. v. Brown*, 1.

CRIMINAL LAW — Continued

§ 951 (NCI4th). Post trial relief; hearing; generally

There was no prejudice in a motion for appropriate relief following a murder conviction in allowing cross-examination of a State's witness regarding a letter allegedly written by the witness admitting guilt. *S. v. Brown*, 1.

§ 959 (NCI4th). Grounds for motion for appropriate relief; newly discovered evidence

The trial court did not err in a murder prosecution by denying defendant's motion for appropriate relief on the basis of recanted testimony or on the ground that the State withheld statements from defense counsel. *S. v. Brown*, 1.

§ 1110 (NCI4th). Nonstatutory aggravating factors; pattern of criminal activity

The trial court did not err when sentencing defendant for robbery and assault by finding as nonstatutory aggravating factors that defendant had previously committed other criminal offenses where there was evidence that defendant had committed the offenses but had never been tried or convicted. *S. v. Jones*, 439.

§ 1140 (NCI4th). Aggravating factors; defendant hired or paid to commit offense generally

Pecuniary gain could be used as a nonstatutory aggravating factor for the crimes of second degree murder, conspiracy to commit murder, and solicitation to commit murder although there was no evidence that defendant was hired or paid to commit the crimes. *S. v. Manning*, 608.

§ 1149 (NCI4th). Use of weapon normally hazardous to lives of more than one person; generally

The trial court did not err when resentencing defendant for second degree murder by finding as an aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a weapon normally hazardous to the lives of more than one person where the victim was shot with a single-shot shotgun while sitting on a couch with two other people. *S. v. Rose*, 599.

§ 1186 (NCI4th). Date or nature of prior conviction or underlying crime

The trial court did not err when resentencing defendant for second degree murder by finding in aggravation that defendant had been convicted in 1984 of a level four driving while impaired offense, which carried a possible sentence of up to 120 days in prison. *S. v. Rose*, 599.

§ 1222 (NCI4th). Statutory mitigating factors; mental or physical condition generally

The trial court did not err when sentencing defendant for robbery and assault by failing to find that his immaturity, mental condition, and mental capacity were mitigating circumstances. *S. v. Jones*, 439.

§ 1230 (NCI4th). Statutory mitigating factors; immaturity or limited mental capacity generally

The trial court did not err when sentencing defendant for robbery and assault by failing to find that his immaturity, mental condition, and mental capacity were mitigating circumstances. *S. v. Jones*, 439.

CRIMINAL LAW — Continued

§ 1318 (NCI4th). Procedure for determining sentence in capital cases; instructions, generally

There was no abuse of discretion during jury selection in a murder prosecution from the trial court's refusal to give a requested preliminary instruction on bifurcated procedures where the pattern jury instruction was given instead. *S. v. Brown*, 1.

§ 1325 (NCI4th). Unanimous decision as to mitigating circumstances

The U. S. Supreme Court decision in *McKoy v. North Carolina* did not invalidate the North Carolina capital sentencing statute but invalidated only our jury instructions requiring unanimity on mitigating circumstances in a capital sentencing proceeding. *S. v. McKoy*, 31.

A *McKoy* error in a capital sentencing proceeding is subject to harmless error analysis. *Ibid.*

The State failed to demonstrate that a *McKoy* error in a capital sentencing proceeding was harmless beyond a reasonable doubt, and defendant is entitled to a new sentencing hearing at which the question of his punishment will be determined anew. *Ibid.*

§ 1339 (NCI4th). Aggravating circumstances; capital felony committed during commission of another crime

The trial court did not err in a sentencing proceeding for first degree murder by submitting to the jury as aggravating circumstances both that the murder was committed during a course of conduct involving commission of other crimes of violence and that it was committed for pecuniary gain. *S. v. Jones*, 439.

§ 1341 (NCI4th). Aggravating circumstances; pecuniary gain

The trial court did not err in a sentencing proceeding for first degree murder by submitting to the jury as aggravating circumstances both that the murder was committed during a course of conduct involving commission of other crimes of violence and that it was committed for pecuniary gain. *S. v. Jones*, 439.

§ 1352 (NCI4th). Consideration of mitigating circumstances; unanimous decision

The U. S. Supreme Court decision in *McKoy v. North Carolina* did not invalidate the North Carolina capital sentencing statute but invalidated only our jury instructions requiring unanimity on mitigating circumstances in a capital sentencing proceeding. *S. v. McKoy*, 31.

A *McKoy* error in a capital sentencing proceeding is subject to harmless error analysis. *Ibid.*

The State failed to demonstrate that a *McKoy* error in a capital sentencing proceeding was harmless beyond a reasonable doubt, and defendant is entitled to a new sentencing hearing at which the question of his punishment will be determined anew. *Ibid.*

A death sentence was set aside and remanded for a new hearing under the *McKoy* harmless error analysis. *S. v. Brown*, 1.

There was prejudicial *McKoy* error in a sentencing proceeding for a murder prosecution. *S. v. Jones*, 439.

The State failed to demonstrate that the trial court's erroneous instruction requiring unanimity on mitigating circumstances in a capital sentencing proceeding was harmless beyond a reasonable doubt, and three sentences of death imposed on defendant are set aside and the cases are remanded for a new sentencing proceeding. *S. v. Robinson*, 346.

CRIMINAL LAW — Continued

A defendant found guilty of murder and sentenced under instructions containing unanimity instructions ruled unconstitutional in *McKoy v. North Carolina* was entitled to a new sentencing hearing where there was prejudice in that there was evidence to support the submitted but unfound mitigating circumstances. *S. v. Sanders*, 319.

Instructions in a capital sentencing proceeding contained *McKoy* error in that they required the jury to find each mitigating circumstance unanimously and there was evidence from which some jurors might have found the existence of mitigating factors submitted but not found. *S. v. Sanderson*, 397.

The Supreme Court declines to require that a *McKoy* error be reviewed under the plain error standard when defendant failed to object at trial for all trials after *State v. Kirkley* and before *Mills v. Maryland*. *Ibid.*

Death sentences for two first degree murders were remanded for a new sentencing proceeding under *McKoy v. North Carolina* even though the trial of this case was held before our courts began to uniformly instruct juries as to unanimity. *S. v. McNeil*, 388.

A *McKoy* unanimity error in a death sentence was not shown by the State to be harmless. *Ibid.*

§ 1369 (NCI4th). Overturning death sentence

A defendant whose death sentence was vacated by the U. S. Supreme Court because of unconstitutional instructions requiring unanimity on mitigating circumstances was not entitled to be resentenced to life imprisonment as a matter of law under prior North Carolina cases or under G.S. 15A-2000(d)(2) on the ground that the death penalty was imposed under the influence of an "arbitrary factor." *S. v. McKoy*, 31.

§ 1371 (NCI4th). Proportionality review of death sentences generally

The trial court did not err in failing to perform a pretrial proportionality review since that duty is reserved exclusively for the Supreme Court. *S. v. Payne*, 194.

DAMAGES

§ 3.4 (NCI3d). Compensatory damages for pain, suffering, and mental anguish

Neither a physical impact, a physical injury, nor a subsequent physical manifestation of emotional distress is an element of the tort of negligent infliction of emotional distress, and a plaintiff may recover for his or her severe emotional distress arising due to concern for another person if plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and foreseeable result of defendant's negligence. *Johnson v. Ruark Obstetrics*, 283.

Factors to be considered on the question of foreseeability of emotional distress arising from concern for another include the plaintiff's proximity to the negligent act, the relationship between plaintiff and the other person, and whether the plaintiff personally observed the negligent act. *Ibid.*

The father and mother of a stillborn fetus stated individual claims for negligent infliction of emotional distress against defendant physicians whose negligence allegedly caused the stillbirth. *Ibid.*

ESTOPPEL

§ 5 (NCI3d). Parties estopped

The law of estoppel can be applied against the carrier in a workers' compensation case. *Carroll v. Daniels and Daniels Construction Co.*, 616.

FIXTURES

§ 1 (NCI3d). Generally

The installation of underground gasoline storage tanks did not constitute improvements to real property within the meaning of the six-year statute of repose of G.S. 1-50(5), and the shortened liability period of the statute of repose thus did not apply in an action against an oil company president for gasoline contamination of well water. *Wilson v. McLeod Oil Co.*, 491.

Assuming that the installation of underground gasoline storage tanks constituted improvements to real property, the six-year statute of repose of G.S. 1-50(5) for a defect or unsafe condition of an improvement to real property did not apply to an action against former owners of the property for contamination of well water because of the exclusion set forth in subsection (d) where the former owners knew that the tanks were on the property and should have known that the tanks were leaking if they had inspected them. *Ibid.*

HOMICIDE

§ 15 (NCI3d). Relevancy and competency of evidence in general

There was no prejudicial error in a murder prosecution where the State was allowed to misstate a previous witness's testimony in cross-examining defendant. *S. v. Warren*, 364.

There was no prejudicial error in a murder prosecution from the State's cross-examination of defendant about whether he worked every day, the number of suits he owned, and whether he knew a certain person. *Ibid.*

§ 17 (NCI3d). Evidence of intent and motive

Evidence of defendant's surreptitious entry into the victim's home one month before the victim was murdered was admissible to show defendant's malice, intent, and ill will toward the victim. *S. v. Lynch*, 210.

Testimony by the human resources manager at the company where defendant had worked for five years concerning defendant's failure to return to work after a medical leave of absence was admissible as evidence of defendant's motive for killing his wife in order to collect the insurance money and not work as much. *S. v. Payne*, 194.

§ 17.2 (NCI3d). Evidence of threats

The trial court in a first degree murder case committed prejudicial error in permitting a witness for the State to testify about threats made by defendant against an unidentified woman three weeks before the victim's disappearance. *S. v. Franklin*, 162.

Testimony that defendant had threatened the murder victim, his wife, and that the victim was nervous and upset, unusually quiet, and had a fear in her voice when speaking about defendant shortly before the murder was admissible to show the state of mind of the victim and the relationship between her and her husband shortly before her murder. *S. v. Lynch*, 210.

HOMICIDE — Continued

§ 18.1 (NCI3d). Particular circumstances showing premeditation and deliberation

The trial court erred on the retrial of a first degree murder prosecution by allowing the State's expert to testify that defendant was capable of premeditating the killing. *S. v. Rose*, 599.

§ 20.1 (NCI3d). Photographs

The trial court did not err in allowing the state to introduce 23 crime scene photographs and slides in defendant's trial for three first degree murders. *S. v. Robinson*, 346.

§ 21.4 (NCI3d). Sufficiency of evidence of identity of defendant

The evidence was sufficient to permit the jury to find that defendant was the perpetrator of a first degree murder of a girl who had allegedly stolen cocaine from him. *S. v. Franklin*, 162.

§ 21.5 (NCI3d). Sufficiency of evidence of guilt of first degree murder

Evidence that a body was found with marks of violence upon it establishes the corpus delicti, and such evidence coupled with the testimony of a cell mate relating inculpatory statements made by defendant is sufficient to support a conviction. *S. v. Franklin*, 162.

The evidence was sufficient to permit the jury to find defendant guilty of first degree murder on a theory of premeditation and deliberation for the stabbing death of his estranged wife. *S. v. Lynch*, 210.

The evidence was sufficient for the jury in a prosecution of defendant for the first degree murder of his former girlfriend with a shotgun. *S. v. Simpson*, 178.

§ 21.6 (NCI3d). Homicide by poisoning or lying in wait or in perpetration of felony

The evidence was insufficient to support defendant's guilt of first degree murder on a theory of lying in wait where there was no evidence that defendant ambushed or surprised the victim when he fatally stabbed her. *S. v. Lynch*, 210.

§ 23.1 (NCI3d). Instruction; elements of offense generally

There was no plain error in a murder prosecution in the court's instruction on proximate cause and premeditation and deliberation as distinguished between the acts of defendant and those of an accomplice. *S. v. Brown*, 1.

§ 25 (NCI3d). Instructions; first degree murder generally

There was no plain error in a first degree murder prosecution from the omission of a portion of the pattern jury instruction which states that defendant formed the intent to kill over some period of time, however short. *S. v. Brown*, 1.

The trial court did not commit plain error by failing to instruct on the element of a specific intent to kill in its final mandate. *S. v. Stevenson*, 259.

§ 25.2 (NCI3d). Instructions on premeditation and deliberation

The trial court's instruction that premeditation and deliberation could be proved by circumstances from which they could be inferred, such as the lack of provocation by the victim, was not an expression of opinion that lack of provocation had been proved and was justified by the evidence at trial. *S. v. Stevenson*, 259.

The evidence in a murder prosecution supported an instruction that premeditation and deliberation could be proved by circumstances including the brutal or vicious circumstances of the killing. *S. v. Warren*, 364.

HOMICIDE — Continued

§ 30 (NCI3d). Submission of question of guilt of lesser degrees of the crime generally; guilt of second degree murder on charge of premeditated and deliberate murder

The trial court in a first degree murder case did not err in failing to submit second degree murder as a possible verdict where there was no evidence to support a reasonable finding by the jury that defendant killed his victim without premeditation and deliberation. *S. v. Stevenson*, 259.

The trial court did not err in a first degree murder prosecution by denying defendant's request for submission of a possible verdict of guilty of second degree murder. *S. v. Warren*, 364.

§ 30.3 (NCI3d). Submission of guilt of lesser degrees of crime; guilt of manslaughter; involuntary manslaughter

In a prosecution of a nurse for first degree murder of a hospital patient who died as a result of having her life-sustaining medication withheld, there was insufficient evidence that defendant negligently and unintentionally withheld medication from the victim so as to require the trial court to instruct the jury on the lesser included offense of involuntary manslaughter. *S. v. Shook*, 74.

HOSPITALS

§ 2.1 (NCI3d). Control and regulation; selection of hospital site

Under the doctrine of the last antecedent, the limiting phrase "within the review period" in G.S. 131E-185(b) modifies only the phrase "reject the application." *HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Res.*, 573.

When the Department of Human Resources failed to make a decision on applications for certificates of need for construction of chemical dependency treatment facilities within the maximum statutory review period of 150 days, the Department must be deemed as a matter of law to have decided in favor of issuing the certificates of need and lost subject matter jurisdiction to do anything thereafter but issue the certificates. *Ibid.*

INSURANCE

§ 87 (NCI3d). "Omnibus" clause; drivers insured

The evidence was sufficient to support a jury finding that the driver of an automobile involved in a collision was a resident of the same household as his wife, and the husband was thus covered by the wife's automobile liability policy without regard to whether he had the wife's permission to drive her automobile or whether he reasonably believed that he was entitled to drive the automobile. *Wilson v. State Farm Mut. Auto. Ins. Co.*, 419.

§ 100 (NCI3d). Duty of automobile liability insurer to defend

Defendant automobile liability insurer's refusal to defend plaintiffs' claim against its insured did not entitle plaintiffs to recover from the insurer damages which exceeded the policy limits. *Wilson v. State Farm Mut. Auto. Ins. Co.*, 419.

JUDGMENTS

§ 6 (NCI3d). Modification and correction of judgments in trial court

The trial court had jurisdiction to issue nunc pro tunc orders where the court originally stated that he would grant one party's motion to dismiss but made

JUDGMENTS — Continued

no formal findings of fact or conclusions of law and the clerk did not record any judgment or order of any kind in the court minutes, oral notice of appeal was given but no further action was taken, the court subsequently calendared the matter for further testimony, and the court then subsequently issued further nunc pro tunc orders disposing of the various claims. *Kirby Building Systems v. McNiel*, 234.

JURY

§ 6 (NCI3d). Voir dire examination generally; practice and procedure

There was no error in a murder prosecution in denying defendant's motion for individual voir dire and sequestration of jurors. *S. v. Brown*, 1.

§ 6.2 (NCI3d). Voir dire examination; former questions

There was no prejudice or abuse of discretion during jury selection in a murder prosecution where the trial court sustained an objection to one of defendant's questions, but defendant soon asked the same question in slightly different form. *S. v. Brown*, 1.

§ 7.11 (NCI3d). Challenges for cause; scruples against, or belief in, capital punishment

There was no error during jury selection for a murder prosecution in the excusal of six prospective jurors for cause due to their feelings about the death penalty. *S. v. Brown*, 1.

Defendant's assignment of error to the excusal for cause of several jurors because of their death penalty views will not be addressed by the Supreme Court where the defendant is being given a new sentencing proceeding. *S. v. Robinson*, 346.

§ 7.14 (NCI3d). Manner, order, and time of exercising peremptory challenges

The trial court did not err in denying defendant's motion for the clerk to record the race of "prospective jurors" after they had been peremptorily excused and the jury had been selected. *S. v. Payne*, 194.

LIMITATION OF ACTIONS

§ 4.2 (NCI3d). Accrual of negligence actions

Plaintiff's negligence claim for gasoline contamination of her well water from leaking underground storage tanks was barred by the three-year statute of limitations of G.S. 1-52(5) where she waited longer than three years after discovering the contamination to file her action. *Wilson v. McLeod Oil Co.*, 491.

§ 5 (NCI3d). Accrual of cause of action for trespass or for nuisance; recurring damages

The claims of two families for gasoline contamination of their well water from leaking underground storage tanks on defendants' lands were not barred by the statute of limitations where they filed this action less than three years after they were notified by government agents that test results proved that their water was contaminated by gasoline. *Wilson v. McLeod Oil Co.*, 491.

The claims of the intervenor plaintiffs for gasoline contamination of their well water were not barred by the statute of limitations where they filed a motion to intervene in the action against defendants within three years after they had notice of the contamination. *Ibid.*

LIMITATION OF ACTIONS — Continued

Claims against one defendant individually and as personal representative of the estate of her husband for gasoline contamination of well water from leaking underground storage tanks were barred by the ten-year statute of repose of G.S. 1-52(16) where defendant and her husband sold their property containing the storage tanks more than ten years before plaintiffs filed this action. *Ibid.*

MASTER AND SERVANT

§ 11.1 (NCI3d). Competition with former employer; covenants not to compete

A noncompetition clause in an employment contract with a car rental business in which defendant agreed that he would not "solicit or attempt to procure the customers, accounts, or business" of the employer within the State of North Carolina for a period of two years following termination of his employment merely prohibits defendant from directly or indirectly soliciting the business of the employer's known customers in areas in which the employer operates and is reasonable as to both territory and time. *Triangle Leasing Co. v. McMahon*, 224.

§ 33 (NCI3d). Liability of employer for injuries to third persons generally; respondeat superior

Plaintiffs' forecast of evidence was insufficient to establish a claim against defendant school superintendent and defendant school board for negligent hiring or retention of a school principal who allegedly sexually assaulted the minor plaintiff. *Medlin v. Bass*, 587.

§ 34.1 (NCI3d). Liability of employer for injuries to third persons; deviation from master's business for employee's own purpose

A school principal's alleged sexual assaults on a student after he had summoned her to his office to discuss her truancy did not occur within the course and scope of his employment so as to subject defendant school board to liability under a respondeat superior theory. *Medlin v. Bass*, 587.

§ 49 (NCI3d). "Employees" within the meaning of the Act

The Workers' Compensation Act generally provides compensation to an injured plaintiff only if he is an "employee" of an insured employer, but former G.S. 97-19 created an exception to this general rule by imposing liability on a general contractor for injuries to the employees of a subcontractor but not to the subcontractor itself. *Carroll v. Daniels and Daniels Construction Co.*, 616.

§ 81 (NCI3d). Construction of policy as to coverage; insurer's liability generally

The Industrial Commission erred in concluding that defendant carrier was estopped to deny workers' compensation coverage to plaintiff subcontractor based upon findings that the general contractor's superintendent agreed to deduct seven percent from plaintiff's pay to provide workers' compensation coverage under the contractor's policy, and that the superintendent told plaintiff's wife after plaintiff was injured that the general contractor's policy would pay plaintiff's hospital and medical expenses as well as provide compensation. *Carroll v. Daniels and Daniels Construction Co.*, 616.

MUNICIPAL CORPORATIONS

§ 2.2 (NCI3d). Annexation; requirements of use and size of tracts

A city erroneously included an 18.25-acre tract in the calculation of developed property for annexation purposes under G.S. 160A-48 where a subdivision plat

MUNICIPAL CORPORATIONS — Continued

for the property had been recorded but the property had never been subdivided. *Thrash v. City of Asheville*, 251.

§ 30.7 (NCI3d). Zoning ordinances; delegation of power to board or official

The thirty-day period after "adoption" of a zoning ordinance for filing a referendum petition began on the date of the initial adoption of the ordinance rather than on the date the city council reconsidered the ordinance and took another vote thereon. *Sofran Corp. v. City of Greensboro*, 125.

A vote to repeal a rezoning ordinance must be preceded by notice and hearing in addition to that preceding the initial adoption of the rezoning ordinance. *Ibid.*

§ 30.21 (NCI3d). Procedure for enactment or amendment or zoning ordinances; hearing

Additional notice and hearing were not necessary to the validity of a city council's vote to reconsider and to "confirm" a rezoning ordinance initially adopted the previous month. *Sofran Corp. v. City of Greensboro*, 125.

NARCOTICS

§ 1.3 (NCI3d). Elements and essentials of statutory offenses relating to narcotics

A defendant may not be convicted under G.S. 90-95(a)(1) of both the sale and delivery of a controlled substance arising from one transaction. *S. v. Moore*, 378.

§ 5 (NCI3d). Verdict and punishment

Cases remanded for resentencing where the jury was improperly allowed to convict defendant of both sale and delivery of a controlled substance arising from a single transfer, and the appellate court is unable to determine what weight the trial court gave each of the separate convictions for sale and delivery in calculating the consolidated sentence imposed upon defendant. *S. v. Moore*, 378.

NEGLIGENCE

§ 1.1 (NCI3d). Elements of actionable negligence

Neither a physical impact, a physical injury, nor a subsequent physical manifestation of emotional distress is an element of the tort of negligent infliction of emotional distress, and a plaintiff may recover for his or her severe emotional distress arising due to concern for another person if such distress was a proximate and foreseeable result of defendant's negligence. *Johnson v. Ruark Obstetrics*, 283.

Factors to be considered on the question of foreseeability of emotional distress arising from concern for another include the plaintiff's proximity to the negligent act, the relationship between plaintiff and the other person, and whether the plaintiff personally observed the negligent act. *Ibid.*

The father and mother of a stillborn fetus stated individual claims for negligent infliction of emotional distress against defendant physicians whose negligence allegedly caused the stillbirth. *Ibid.*

§ 5 (NCI3d). Dangerous agencies and instrumentalities generally

Strict liability claims for gasoline contamination of well water under G.S. 143-215.93 against an oil company which serviced or owned tanks on two pieces of property were barred by the ten-year statute of repose of G.S. 1-52(16) where the oil company's last acts with respect to both properties occurred more than ten years prior to the filing of the action and the oil company thus had no "control"

NEGLIGENCE — Continued

over the gasoline less than ten years before the action was filed. *Wilson v. McLeod Oil Co.*, 491.

§ 47 (NCI3d). Negligence in condition or use of lands and buildings generally

The owners and manager of an office building cannot be held negligent per se based on a violation of the State Building Code where there was no evidence that they knew or should have known of the Code violation. *Lamm v. Bissette Realty*, 412.

§ 47.1 (NCI3d). Negligence in construction and condition of stairways and steps

Plaintiff invitee's forecast of evidence was sufficient to make out a prima facie case of common law negligence by the owners and manager of an office building in failing to warn plaintiff of a variation in the heights of the risers of steps leading from the building and in failing to provide a handrail for the steps. *Lamm v. Bissette Realty*, 412.

NUISANCE

§ 4 (NCI3d). Pollution of streams

Plaintiff's nuisance claim for contamination of well water from leaking underground storage tanks was governed by the same statute of limitations as her action for trespass. *Wilson v. McLeod Oil Co.*, 491.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 6 (NCI3d). Revocation of licenses generally; grounds

The statute permitting the Board of Medical Examiners to suspend or revoke a physician's license to practice medicine for unprofessional conduct based on a deviation from "the standards of acceptable and prevailing medical practice" is a valid exercise of the police power, is not unconstitutionally vague, does not require a finding that the deviation must pose an actual threat of harm to the public, and is sufficiently specific to provide the Board with the adequate guiding standards necessary to support the legislature's delegation of authority to the Board. *In re Guess*, 46.

A decision by the Board of Medical Examiners to revoke a physician's license because of his practice of homeopathy did not unconstitutionally invade his privacy rights or the privacy rights of his patients. *Ibid.*

§ 6.2 (NCI3d). Revocation of licenses generally; evidence

The evidence supported a decision by the Board of Medical Examiners to revoke the license of a physician who practiced homeopathy on the ground that such practice does not conform to the standards of acceptable and prevailing medical practice in North Carolina and thus constitutes unprofessional conduct. *In re Guess*, 46.

Evidence concerning the efficacy of homeopathy and its use outside North Carolina was not relevant in a proceeding to revoke respondent's medical license on the ground that he practiced homeopathy. *Ibid.*

PLEADINGS

§ 8 (NCI3d). Verification

Plaintiffs' failure to verify the complaint did not divest the trial court of subject matter jurisdiction in a shareholders' derivative action where the issue was raised for the first time on appeal. *Alford v. Shaw*, 526.

PRINCIPAL AND AGENT

§ 1 (NCI3d). Generally; creation and existence of the relationship

The evidence supported the trial judge's findings in an action arising from the construction of a bowling alley that defendant McNiel was the buyer of building materials and that McNiel was in fact acting as an agent for the Mortons. *Kirby Building Systems v. McNiel*, 234.

RULES OF CIVIL PROCEDURE

§ 15.1 (NCI3d). Discretion of court to grant amendment of pleading

Where the trial court denied plaintiffs' motion to amend the complaint to include as defendants certain persons who were already third-party defendants under the mistaken belief that none of plaintiffs' claims were valid, the order will be vacated and the cause remanded for reconsideration of the motion to amend. *Wilson v. McLeod Oil Co.*, 491.

§ 56.5 (NCI3d). Summary judgment; findings of fact and conclusions of law

The trial court appropriately resolved contested issues of fact during a hearing on the disposition of a shareholders' derivative action. *Alford v. Shaw*, 526.

SANITARY DISTRICTS

§ 2 (NCI3d). Powers and functions

Pursuant to an interlocal cooperative agreement and statutory authority, a county may operate a water and sewer system for and on behalf of another unit of local government, and has the power to mandate connections and fix charges. *McNeill v. Harnett County*, 552.

Water service was properly terminated without notice or opportunity for hearing for failure to pay sewer fees even though the plaintiffs were not yet on the sewer system because the water service furnished by the county here did not rise to the level of property protected by due process requirements. *Ibid.*

§ 3 (NCI3d). Taxes and assessments

The General Assembly intended that a local government may choose between financing a project using a procedure which would result in an assessment and doing so by other methods not involving a lien-producing assessment. The provisions of G.S. 162A-88 authorizing user fees for service to be furnished is not limited to existing customers and language in a bond order to the effect that taxes would be levied does not limit the county's ability to finance the project to the imposition of taxes. *McNeill v. Harnett County*, 552.

SCHOOLS

§ 11 (NCI3d). Liability for torts

Plaintiffs' forecast of evidence was insufficient to establish a claim against defendant school superintendent and defendant school board for negligent hiring

SCHOOLS — Continued

or retention of a school principal who allegedly sexually assaulted the minor plaintiff. *Medlin v. Bass*, 587.

A school principal's alleged sexual assaults on a student after he had summoned her to his office to discuss her truancy did not occur within the course and scope of his employment so as to subject defendant school board to liability under a respondeat superior theory. *Ibid.*

SEARCHES AND SEIZURES

§ 2 (NCI3d). Searches by particular persons

The trial court did not err in a murder and rape prosecution by denying defendant's motion to suppress a ring and watch taken from the victim's residence and seized from defendant's bedroom by a civilian. *S. v. Sanders*, 319.

§ 19 (NCI3d). Validity of warrant in general

The titles to G.S. 7A-180 and -181 referring to the functions of clerks of superior court and assistants and deputies "in district court matters" were not intended to limit the authority of superior court clerks to issue search warrants within their operative counties exclusively to criminal matters to be tried in the district court, and a deputy clerk had jurisdiction to issue a search warrant to obtain samples of defendant's blood after defendant had been indicted for felonies which would be tried in the superior court. *S. v. Pennington*, 89.

There was no prejudicial error in a prosecution for rape and murder in the admission of evidence seized pursuant to a flawed search warrant. *S. v. Sanders*, 319.

STATUTES

§ 5.10 (NCI3d). Construction of language of statute generally; particular statutory terms

Under the doctrine of the last antecedent, relative and qualifying words, phrases and clauses ordinarily are to be applied only to the word or phrase immediately preceding. *HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Res.*, 573.

TAXATION

§ 32 (NCI3d). Taxes on solvent credits and intangibles

An agreement between parties met the definitions of the term note so that amounts owed by plaintiff thereunder could be deducted against notes receivable for intangibles tax purposes. *Regional Acceptance Corp. v. Powers*, 274.

The obligations of commercial factors to plaintiff were other evidence of debt under G.S. 105-202 rather than accounts receivable for intangibles tax purposes. *Guilford Mills, Inc. v. Powers*, 279.

TRESPASS

§ 3 (NCI3d). Continuing and recurring trespass and limitation of actions

Where plaintiff forecast sufficient evidence that there was ongoing seepage of gasoline onto her property at the time she filed the action, the ongoing seepage created a renewing rather than a continuing trespass, and her claim was not barred by the three-year statute of limitations for a continuing trespass set forth in G.S.

TRESPASS — Continued

1-52(3), but she could collect damages only for the three years immediately preceding the date she filed the action. *Wilson v. McLeod Oil Co.*, 491.

WATERS AND WATERCOURSES

§ 3.2 (NCI3d). Pollution

The ongoing seepage of gasoline into plaintiff's well water created a renewing rather than a continuing trespass, and her claim was not barred by the three-year statute of limitations for a continuing trespass set forth in G.S. 1-52(3). *Wilson v. McLeod Oil Co.*, 491.

Plaintiff's nuisance claim for gasoline contamination of her well water was governed by the same statute of limitations as her action for trespass. *Ibid.*

Plaintiff's claims for gasoline contamination of her well water from leaking underground storage tanks based on statutory strict liability and negligence were barred by the three-year statute of limitations of G.S. 1-52(2) and 1-52(5) where she waited longer than three years after discovering the contamination to file her action. *Ibid.*

The claims of two families for gasoline contamination of their well water from leaking underground storage tanks on defendants' lands were not barred by the statute of limitations where they filed this action less than three years after they were notified by government agents that test results proved that their water was contaminated by gasoline. *Ibid.*

The claims of the intervenor plaintiffs for gasoline contamination of their well water were not barred by the statute of limitations where they filed a motion to intervene in the action against defendants within three years after they had notice of the contamination. *Ibid.*

Claims against one defendant individually and as personal representative of the estate of her husband for gasoline contamination of well water from leaking underground storage tanks were barred by the ten-year statute of repose of G.S. 1-52(16) where defendant and her husband sold their property containing the storage tanks more than ten years before plaintiffs filed this action. *Ibid.*

Strict liability claims for gasoline contamination of well water under G.S. 143-215.93 against an oil company which serviced or owned tanks on two pieces of property were barred by the ten-year statute of repose of G.S. 1-52(16) where the oil company's last acts with respect to both properties occurred more than ten years prior to the filing of the action and the oil company thus had no "control" over the gasoline less than ten years before the action was filed. *Ibid.*

The installation of underground gasoline storage tanks did not constitute improvements to real property within the meaning of the six-year statute of repose of G.S. 1-50(5), and the shortened liability period of the statute of repose thus did not apply in an action against an oil company president for gasoline contamination of well water. *Ibid.*

Assuming that the installation of underground gasoline storage tanks constituted improvements to real property, the six-year statute of repose of G.S. 1-50(5) for a defect or unsafe condition of an improvement to real property did not apply to an action against former owners of the property for contamination of well water because of the exclusion set forth in subsection (d) where the former owners knew that the tanks were on the property and should have known that the tanks were leaking if they had inspected them. *Ibid.*

WATERS AND WATERCOURSES — Continued

The president of a corporation could be sued in his individual capacity for the torts of nuisance and trespass arising from the contamination of plaintiffs' well water by gasoline leaking from underground storage tanks installed and maintained by the corporation at a convenience store where the president personally participated in the activities surrounding the delivery and sale of gasoline at the store property. *Ibid.*

Defendant corporate president may be liable to plaintiffs for gasoline contamination of their well water under the statute providing strict liability for any "person having control over oil or other hazardous substances." *Ibid.*

Where plaintiffs' forecast of evidence in an action to recover for gasoline contamination of their well water shows that there are three sources of contamination, the forecast is sufficient to survive summary judgment as to each source. *Ibid.*

The forecast of evidence of two families was sufficient to show that underground storage tanks on one piece of property could be a source of gasoline contamination of their well water where a groundwater contour map indicates that the flow direction of the upper aquifer goes from this property directly toward plaintiffs' properties, but their forecast was insufficient to support a finding that underground storage tanks on a second piece of property could be a source of the contamination where their wells are located uphill from the tanks on this property. *Ibid.*

WILLS

§ 28.4 (NCI3d). Determining intent from language of will and circumstances surrounding execution

A devise of "my residence at 2615 Cooleemee Street" created a latent ambiguity so that extrinsic evidence was admissible to ascertain testator's intent. *Britt v. Upchurch*, 454.

An affidavit of the attorney who drafted testator's will containing the attorney's impressions as to testator's intent concerning who was to receive a lot adjoining the lot on which testator's house was located was not admissible on the issue of what was meant by a devise of "my residence at 2615 Cooleemee Street." *Ibid.*

§ 56 (NCI3d). Sufficiency of description of land

A devise of "my residence at 2615 Cooleemee Street" created a latent ambiguity so that extrinsic evidence was admissible to ascertain testator's intent. *Britt v. Upchurch*, 454.

Plaintiff's forecast of evidence showed that testator's family used both lot 36, on which their house was located, and adjoining lot 37 as their "residence" and that testator's devise of "my residence at 2615 Cooleemee Street" thus referred to both lots 36 and 37. *Ibid.*

§ 61 (NCI3d). Dissent of spouse and effect thereof

A surviving spouse received the same property that he would have received had his wife died without making a will, was not disinherited by the will, and could not dissent from the will. *In re Estate of Francis*, 101.

WITNESSES

§ 1.4 (NCI3d). Absence of witness from list

The trial court did not abuse its discretion in a rape and murder prosecution by refusing to allow the testimony of a witness who was not on a master list of all potential witnesses. *S. v. Sanders*, 319.

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Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina