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Survey of Developments in North Carolina Law, 1982

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SURVEY OF DEVELOPMENTS IN NORTH CAROLINA LAW, 1982

TABLE OF CONTENTS

I.	ADMINISTRATIVE LAW	961
A.	<i>Procedure</i>	961
B.	<i>State and Local Government</i>	963
1.	Annexations	963
2.	Records	968
3.	Separation of Powers	969
C.	<i>Employment</i>	970
1.	Unemployment Compensation	970
2.	Retirement and Health Benefits	973
3.	Dismissal and Demotion of Public Employees	974
D.	<i>Education</i>	975
E.	<i>Election Law</i>	979
F.	<i>Health and Medical Law</i>	984
G.	<i>Professional Standards and Licensing</i>	985
H.	<i>Utilities Regulation</i>	988
II.	CIVIL PROCEDURE	991
A.	<i>Service of Process</i>	991
B.	<i>Rules 7(a) and 8(d)—Compulsory Forms of Pleadings</i>	992
C.	<i>Compulsory Counterclaims</i>	994
D.	<i>Summary Judgment</i>	996
E.	<i>Rule 60(b)(1): Relief from Judgment</i>	996
F.	<i>Rule 59: New Trials; Amendment of Judgment</i>	999
G.	<i>Rule 68: Offer of Judgment</i>	1002
H.	<i>Interlocutory Appeals</i>	1004
I.	<i>Res Judicata</i>	1008
J.	<i>Personal Jurisdiction</i>	1010
K.	<i>Limitation of Actions</i>	1012
L.	<i>Discovery</i>	1015
M.	<i>Dismissal</i>	1016
III.	COMMERCIAL LAW	1018
A.	<i>Insurance</i>	1018
B.	<i>Antitrust and Unfair Trade Practices</i>	1024
C.	<i>Business Associations</i>	1028
1.	Partnerships	1028
2.	Corporations	1030
D.	<i>Contracts</i>	1034
1.	Employment Contracts	1034

2. Building & Construction Contracts	1036
E. <i>Uniform Commercial Code</i>	1038
1. Sales	1038
2. Secured Transactions	1046
3. Commercial Paper	1049
IV. CONSTITUTIONAL LAW	1052
A. <i>Freedom of Speech</i>	1052
B. <i>Right to Jury Trial</i>	1054
C. <i>Fourteenth Amendment: Due Process</i>	1055
D. <i>Fourteenth Amendment: Equal Protection</i>	1056
E. <i>Freedom of Religion</i>	1057
F. <i>Power to Tax</i>	1058
G. <i>Separation of Powers</i>	1058
V. CRIMINAL LAW	1060
A. <i>Armed Robbery</i>	1060
B. <i>Arson</i>	1062
C. <i>Assault With Intent to Kill</i>	1063
D. <i>Defenses</i>	1065
1. Duress Defense for Prison Escapees	1065
2. Entrapment	1068
3. Self-Defense	1070
E. <i>Drug-Related Offenses</i>	1071
F. <i>Felony Murder</i>	1076
G. <i>Receipt of Stolen Goods</i>	1077
H. <i>Serious Injury</i>	1081
I. <i>Sex Crimes</i>	1082
J. <i>Liability for Failure to Act</i>	1087
VI. CRIMINAL PROCEDURE	1090
A. <i>Searches and Seizures</i>	1090
1. Searches Under Warrant	1090
2. Legitimate Expectation of Privacy	1091
3. Stop and Frisk	1092
B. <i>Miranda Requirements</i>	1096
1. Custody	1097
2. Interrogation	1100
3. Waiver	1101
C. <i>Right to Counsel</i>	1104
1. Standard of Competence	1104
2. Time to Prepare a Defense	1107
3. Conflict of Interest	1110
D. <i>Compelling Psychiatric Examinations</i>	1112
E. <i>Unanimous Verdict</i>	1116

<i>F. Failure to Object to Improper Jury Charge</i>	1119
<i>G. Sentencing</i>	1120
1. Fair Sentencing Act	1120
2. Capital Punishment.....	1122
VII. EVIDENCE	1126
<i>A. Hearsay</i>	1126
<i>B. Impeachment</i>	1130
<i>C. Privileges</i>	1133
<i>D. Destruction of Evidence</i>	1136
<i>E. Rape Victim Shield Statute</i>	1138
<i>F. Deadman's Statute</i>	1141
<i>G. Methods of Proof</i>	1143
1. Polygraphs	1143
2. Handwriting Comparison	1145
3. Fingerprints	1147
4. Scientific Proof	1149
5. Tape Recordings	1150
<i>H. Opinion Testimony</i>	1151
<i>I. Introduction into Evidence</i>	1153
VIII. FAMILY LAW	1155
<i>A. The Parent-Child Relationship</i>	1155
1. Termination of Parental Rights	1155
2. Adoption.....	1158
3. Other Developments.....	1159
<i>B. Separation Agreements</i>	1160
<i>C. Child Support and Custody</i>	1163
<i>D. Alimony</i>	1166
<i>E. Arbitration</i>	1167
<i>F. Husband-Wife Property</i>	1169
IX. PROPERTY.....	1171
<i>A. Leases</i>	1171
<i>B. Title</i>	1174
<i>C. Mortgages</i>	1177
<i>D. Joint Ownership</i>	1180
<i>E. Eminent Domain</i>	1181
<i>F. Easements</i>	1187
<i>G. Zoning</i>	1189
<i>H. Wills, Trusts and Estates</i>	1191
1. Construction	1191
2. Equitable Remedies	1194
(a) Resulting Trusts and Presumptive Gifts	1194
(b) Unjust Enrichment and Equitable Liens	1200

(c) <i>Constructive Trusts</i>	1203
3. <i>Statute of Limitations</i>	1205
4. <i>Illegitimate's Right to Inherit from Putative Father</i>	1210
I. <i>Real Estate Brokers</i>	1212
X. <i>TAXATION</i>	1217
A. <i>Property Tax</i>	1217
B. <i>Local Charges</i>	1218
C. <i>Use Tax</i>	1219
D. <i>Income Tax</i>	1220
E. <i>Unemployment Tax</i>	1221
F. <i>Inheritance Tax</i>	1222
G. <i>Statutory Developments</i>	1223
XI. <i>TORTS</i>	1225
A. <i>Products Liability</i>	1225
B. <i>Wrongful Death</i>	1227
C. <i>Medical Malpractice</i>	1230
D. <i>Contractors</i>	1231
E. <i>Innkeepers and Guests</i>	1233
F. <i>Public Utility's Duty to Maintain Attractive Nuisance</i>	1236
G. <i>Parental Supervision</i>	1238
H. <i>Mental Distress</i>	1239
I. <i>Statute of Limitations</i>	1241
XII. <i>WORKER'S COMPENSATION</i>	1243
A. <i>Compensable Injuries</i>	1243
B. <i>Occupational Diseases</i>	1248
C. <i>Procedure and Terminology</i>	1251
D. <i>Availability of Benefits</i>	1254

I. ADMINISTRATIVE LAW

A. Procedure

The interrelationship between the courts and administrative agencies is one of the most frequently debated issues in North Carolina law today. Specifically, the standard of review to be used by North Carolina courts when examining the decisions and actions of the various state agencies is unclear in many situations. Complexity arises when the express provisions for court review contained in some statutes are juxtaposed to the general standard of review found in the North Carolina Administrative Procedure Act.¹ The appropriate standard of judicial review was the main issue in the highly publicized case of *Warren County v. State*.² The case stemmed from efforts of the citizens of Warren County to stop the state's construction of a PCB dump in their midst.³ After dispensing with several issues of general civil procedure,⁴ the United States District Court for the Eastern District of North Carolina considered the novel question of how North Carolina courts should review an allegedly defective environmental impact statement (EIS) filed under the state Environmental Policy Act (EPA).⁵ The court presumed North Carolina policy to require that state EPA decisions be reviewed using standards similar to those used in review of federal EPA actions.⁶ Federal policy, as articulated by the fifth circuit in *Sierra Club v. Morton*,⁷ was found to be "the rule of reason."⁸ That is, courts should not impose impossible standards upon agency action affecting the environment; rather, "[t]he court's task is to determine whether the EIS was compiled with objective good faith and whether the resulting statement would permit a decisionmaker to fully consider and balance the environmental factors."⁹ After fully considering each of the allegations of defectiveness, the district court found all statutory and regulatory requirements

1. N.C. GEN. STAT. §§ 150A-1 to -64 (1983). Specifically exempted from the North Carolina Administrative Procedure Act are the Employment Security Commission, the Industrial Commission, the Occupational Safety and Health Review Board, the Department of Correction, and the Utilities Commission. N.C. GEN. STAT. § 150A-1(a) (1983). See Powell, *Pressing the NCAPA Paradigm: Too Much Form for Ad Hoc Adjudicatory Rulemaking*, 61 N.C.L. REV. 67 (1982).

2. 528 F. Supp. 276 (E.D.N.C. 1981).

3. "PCB" is an acronym used for polychlorinated biphenyls. Laboratory tests have indicated that PCB's are highly carcinogenic. *Id.* at 281 n.9.

4. *Id.* at 282-84.

5. N.C. GEN. STAT. §§ 113A-1 to -20 (1978). The court first ruled that Warren County had standing to sue under this statute. This was an issue of first impression in North Carolina case law. 528 F. Supp. at 284-85. The court considered the plaintiff county's allegations that the state's proposed PCB landfill created a nuisance. Under the precedent of *Ferris v. Wilbur*, 27 F.2d 262 (4th Cir. 1928), the district court held, "[t]he use by the State of North Carolina of its own property in a manner authorized by valid legislative authority may not be enjoined by the courts as a nuisance." 528 F. Supp. at 285-86.

6. 528 F. Supp. at 291 (citing *Orange County v. Dept. of Transp.*, 46 N.C. App. 350, 265 S.E.2d 890, *disc. rev. denied*, 301 N.C. 94, 273 S.E.2d 299 (1980)).

7. 510 F.2d 813 (5th Cir. 1975).

8. 528 F. Supp. at 291.

9. *Id.* (quoting *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975)).

fulfilled by the state in preparing and filing the final EIS.¹⁰

In a separate cause of action, Warren County alleged that the construction of the PCB dump violated a county ordinance banning PCB dumps within the county.¹¹ The court held that the ordinance "clearly stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the Toxic Substances Control Act. . . ." ¹² The court reasoned that if local governments have the power to legislate bans on PCB dumping, the entire PCB disposal program would be halted; therefore, despite authority allowing local governments to impose more restrictive requirements than those imposed by federal law,¹³ the district court held the Warren County ban void.¹⁴

In *In re Vandiford*¹⁵ the North Carolina Court of Appeals held that the express provisions of G.S. 143-166.4, which state that decisions of the the Industrial Commission are "final and conclusive and not subject to judicial review . . .,"¹⁶ override the general provisions for review found in the North Carolina Workers' Compensation Act.¹⁷ This result is in accord with prior North Carolina case law holding that a specific statutory provision prevails over a more general one.¹⁸ In *North Carolina State Bar v. DuMont*,¹⁹ the North Carolina Supreme Court found that the standard for judicial review contained in the North Carolina Administrative Procedure Act, i.e., the "whole record" test,²⁰ should be used by courts reviewing decisions of the North Carolina State Bar Disciplinary Hearing Commission. Finally, the principle that administrative remedies must be exhausted before obtaining judicial review was reiterated by the fourth circuit in *Sandhill Motors, Inc. v. American Motors Sales Corp.*²¹ and by the North Carolina Supreme Court in

10. *Id.* at 291-95.

11. *Id.* at 288.

12. *Id.* at 290, (discussing 15 U.S.C. §§ 2601-2605(a)(6)(B) (1976)).

13. *See, e.g.,* Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n, 472 F. Supp. 191 (S.D. Cal. 1979).

14. 528 F. Supp. at 290.

15. 56 N.C. App. 224, 287 S.E.2d 912 (1982).

16. N.C. GEN. STAT. § 143-166.4 (1978).

17. N.C. GEN. STAT. § 7A-29 (1981). Decisions of the Industrial Commission are specifically exempted from the North Carolina Administrative Procedure Act, N.C. GEN. STAT. §§ 150A-1 to -64 (1983).

18. *See, e.g.,* Food Stores v. Board of Alcoholic Control, 268 N.C. 624, 151 S.E.2d 582 (1966); *State ex rel. Util. Comm'n v. Union Elec. Membership Corp.*, 3 N.C. App. 309, 164 S.E.2d 889 (1968).

19. 304 N.C. 627, 641-42, 286 S.E.2d 89, 98 (1982).

20. N.C. GEN. STAT. § 150A-43 (1983). The reviewing court must determine whether there was a rational basis for the agency's decision. As the United States Supreme Court stated:

[T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. [citations omitted] Although inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

21. 667 F.2d 1112 (4th Cir. 1981) (lack of determination by motor vehicle commissioner of facts committed solely to his jurisdiction precluded plaintiff's bringing suit in federal district court).

Cianfarra v. Dept. of Transportation.²²

B. State and Local Government

1. Annexations

During 1982 the North Carolina courts decided several cases construing the state's annexation statutes. The most important decision was that of the supreme court in *Greene v. Town of Valdese*.²³ At issue in *Greene* was the proper construction of G.S. 160A-36,²⁴ the provision governing the character of areas that may be annexed by municipalities with populations of five thousand or less. Subsection (a) of the statute states that municipalities "may" extend their corporate limits to areas that meet the requirements of subsections (b) and (c).²⁵ G.S. 160A-36(d) provides that "[i]n fixing new municipal boundaries, a municipal governing board shall, wherever practical, use natural topographic features such as ridge lines and streams and creeks as boundaries. . . ."²⁶ The North Carolina Supreme Court in *Greene* was called upon to decide whether an area had to comply with subsections (b), (c), and (d) to be ripe for annexation, or whether compliance with only subsections (b) and (c) would suffice when compliance with subsection (d) was not "practical." In a question of statutory construction in which case law was not instructive,²⁷ the supreme court adopted the latter interpretation and held that subsection (d) did not contain mandatory requirements for annexation.²⁸

Plaintiffs in *Greene* challenged an annexation by the Town of Valdese on the grounds that the town planner and municipal governing board violated G.S. 160A-36. Conceding that the annexed area met the subdivision and use tests of subsections (a), (b), and (c), plaintiffs argued that the town's failure to draw the boundaries in accordance with "natural topographical features" defeated the annexation.²⁹ Agreeing with plaintiffs that treelines do not constitute such features, the supreme court found that the annexation area failed to comply with subsection (d).³⁰ This failure alone, however, was found not to

22. 306 N.C. 737, 295 S.E.2d 457 (1982) (lack of finding by Employment Security Commission precluded judicial review of the issue of misconduct under N.C. GEN. STAT. § 96-4(m) (1981)).

23. 306 N.C. 79, 291 S.E.2d 630 (1982).

24. N.C. GEN. STAT. § 160A-36 (1982).

25. *Id.* § 160A-36(a). N.C. GEN. STAT. § 160A-36(b) provides that the area to be annexed must be adjacent or contiguous to the annexing municipality, that "[a]t least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary," and that the area must not already be part of another municipality. N.C. GEN. STAT. § 160A-36(c) provides that the area must be developed for "urban purposes," and defines what those purposes are. For a discussion of the "urban purposes" requirement, see *Scovill Mfg. Co. v. Town of Wake Forest*, 58 N.C. App. 15, 293 S.E.2d 240 (1982).

26. N.C. GEN. STAT. § 160A-36(d) (1982).

27. *Greene*, 306 N.C. at 88, 291 S.E.2d at 636 (Carlton, J., dissenting).

28. *Id.* at 85, 291 S.E.2d at 634.

29. *Id.* at 82, 291 S.E.2d at 632.

30. *Id.* at 83-84, 291 S.E.2d at 633-34. Distinguishing tree lines from ridge lines, streams, and creeks because tree lines neither affect natural drainage boundaries nor limit the ability of a municipality to extend its services, the court concluded that 90% of the annexation area's boundary did not follow natural topographic features. *Id.*

invalidate the annexation. The court also required that plaintiffs demonstrate that drawing the boundary along ridge lines, creeks, and streams was practical.³¹ Finding that subsections (b) and (c) were mandatory provisions while subsection (d) was merely prescriptive, the supreme court stated that following natural topographic features was practical only where it would not defeat a "proposed annexation which otherwise met the mandatory provisions of G.S. 160A-36."³² Affirming the court of appeals, the supreme court upheld the annexation by the town because plaintiffs "failed to carry their burden of showing that the boundary of the annexed area could *practically* have been drawn along ridge lines, creeks, and streams."³³

In a strident dissent, Justice Carlton attacked the majority for "in essence" writing G.S. 160A-36(d) out of the annexation statutes.³⁴ Arguing that subsection (d) is "a provision of limitation," the dissent asserted that noncompliance generally should prevent an area from being ripe for annexation.³⁵ Justice Carlton did acknowledge that there could be "compelling reasons" that would make it "simply impracticable to comply with the topographic requirement." No such reasons, however, were present in *Greene*, in which the record showed that the town followed property lines primarily in order to avoid "administrative and tax problems."³⁶

In 1981 the North Carolina Supreme Court held that the scope of review for annexations by municipalities with populations of greater than five thousand was limited to the standards enumerated in G.S. 160A-50(f).³⁷ In *Baldwin v. City of Winston-Salem*³⁸ and *Raintree Homeowners Association v. City of Charlotte*³⁹ property owners contended that this statutory construction violated the due process clause of the fourteenth amendment of the United States Constitution because it precluded an inquiry into the reasonableness of an annexation ordinance.⁴⁰ Rejecting this argument, the United States District Courts for both the Western and Middle Districts held that the North Carolina Supreme Court's construction of scope of review provided for by G.S. 160A-

31. *Id.* at 82, 291 S.E.2d at 633. Adopting the South Carolina Supreme Court's definition of "practical," the court held that the term means "that which is possible of reasonable performance." *Id.* at 84, 291 S.E.2d at 634 (quoting *Woody v. South Carolina Power Co.*, 202 S.C. 73, 81, 24 S.E.2d 121, 124 (1943)).

32. *Greene*, 306 N.C. at 85, 291 S.E.2d at 634.

33. *Id.*

34. *Id.* at 89, 291 S.E.2d at 636 (Carlton, J., dissenting).

35. *Id.*

36. *Id.*

37. *In re Annexation Ordinance*, 303 N.C. 220, 278 S.E.2d 224 (1981) (rejecting challenges to a City of Winston-Salem annexation ordinance). N.C. GEN. STAT. § 160A-50(f) (1982) authorizes the reviewing court to hear evidence designed to show: (1) That the statutory procedure was not followed, or (2) That the provisions of G.S. 160A-47 were not met, or (3) That the provisions of G.S. 160A-48 have not been met. N.C. GEN. STAT. § 160A-49 (1982) sets forth the procedure for annexation. N.C. GEN. STAT. § 160A-47 (1982) establishes the preannexation disclosure requirements for municipalities, and N.C. GEN. STAT. § 160A-48 (1982) defines the character an area must have in order to be eligible for annexation.

38. 544 F. Supp. 123 (M.D.N.C. 1982) (annexation by the City of Winston-Salem).

39. 543 F. Supp. 625 (W.D.N.C. 1982) (annexation by the City of Charlotte).

40. *Baldwin*, 544 F. Supp. at 123-24; *Raintree*, 543 F. Supp. at 627.

50(f) was constitutional.⁴¹

In *Raintree* the Western District found two bases for upholding G.S. 160A-50(f). First, the court sought to determine whether the judicial review statute withstood constitutional scrutiny.⁴² Answering this question affirmatively, the Western District concluded that the Constitution does not require a separate reasonableness inquiry because G.S. 160A-50(f) does give "substantial protection against arbitrary, capricious, and unreasonable acts" by a municipality.⁴³ Second, the court noted that the general rule established by the Supreme Court⁴⁴ and recently emphasized by the Fourth Circuit Court of Appeals⁴⁵ is that challenges in annexation cases are not actionable under the fourteenth amendment.⁴⁶ Because none of the limited exceptions to this rule was applicable, the court in *Raintree* rejected the property owners' due process claim.⁴⁷ Following the Fourth Circuit, the Middle District in *Baldwin* reached the same result without repeating the preliminary reasonableness analysis conducted by the Western District in *Raintree*.⁴⁸

Raintree and *Baldwin* are sound expositions of the principle that annexations are not subject to attack on due process grounds. While the Middle District exhibited proper respect for principles of stare decisis in reaching this result, its decision in *Raintree* can be criticized because the court's preliminary holding on reasonableness was unnecessary in disposing of the case.⁴⁹ Such a reasonableness analysis would be appropriate only if a court disregarded precedent and first found that due process challenges to annexations were actionable.⁵⁰ If presented with a similar challenge to the constitutionality of G.S. 160A-50(f), therefore, North Carolina courts should ignore the *Raintree* reasonableness analysis and should uphold the judicial review statute based upon the general rule that was dispositive in *Raintree* and *Baldwin*. That rule, subject to limited exceptions, is that annexations are not susceptible to challenge under the fourteenth amendment.⁵¹

In *Moore v. Swinson*⁵² the North Carolina Court of Appeals defined when the right to vote in municipal bond referenda vests in the registered voters of a newly annexed area. At issue in *Moore* was an apparent conflict between G.S. 160A-49(f)⁵³ and the Voting Rights Act of 1965.⁵⁴ G.S. 160A-49(f) provides that citizens of the annexed territory become citizens of the annexing muni-

41. *Baldwin*, 544 F. Supp. at 124; *Raintree*, 543 F. Supp. at 629.

42. *Raintree*, 543 F. Supp. at 628.

43. *Id.* at 629. For analysis of N.C. GEN. STAT. § 160A-50(f) (1982), see *supra* note 37.

44. *Hunter v. Pittsburgh*, 207 U.S. 161, 178-79 (1907).

45. *Berry v. Bourne*, 588 F.2d 422 (4th Cir. 1978).

46. *Raintree*, 543 F. Supp. at 629.

47. *Id.* at 629-30. Two exceptional situations in which challenges to annexations lie under the fourteenth amendment are when a city has manipulated its boundaries for a racially discriminatory purpose, and when freeholders but not nonfreeholders are given the right to vote. *Id.*

48. *Baldwin*, 544 F. Supp. at 123-24.

49. See *supra* text accompanying notes 42-43.

50. See *supra* text accompanying notes 44-46.

51. See *supra* notes 44-47 and accompanying text.

52. 58 N.C. App. 714, 294 S.E.2d 381 (1982).

53. N.C. GEN. STAT. § 160A-49(f) (1982).

pality on the effective date of the annexation ordinance.⁵⁵ The natural reading of the statute is that all such qualified voters are enfranchised by the municipality as of the effective date.⁵⁶ The Voting Rights Act, however, runs counter to this interpretation. Under section 5 of that Act, annexations by municipalities in subject counties that expand the electorate are not effective for the purpose of voting until the expiration of the sixty-day period for preclearance by the Attorney General of the United States.⁵⁷ Because the preclearance period is tolled when the proposed change is submitted to the Attorney General, the right to vote in municipal elections may not vest until as much as sixty days after the effective date of the annexation ordinance.⁵⁸

Plaintiffs in *Moore* were qualified voters who lived in an area of Beaufort County that was annexed by the City of Washington.⁵⁹ As a result of the annexation, plaintiffs became subject to Washington ad valorem taxes. Plaintiffs feared that the levy would be increased if a sewer bond referendum, scheduled for forty-three days after the effective date of the annexation ordinance, was approved.⁶⁰ Relying on G.S. 160A-49(f), plaintiffs sued the Beaufort County elections board for a declaratory judgment of their right to vote in that referendum.⁶¹ While conceding that they could be properly ex-

54. 42 U.S.C. §§ 1973-1973bb-1 (1976), as amended by Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

55. See *Moore*, 58 N.C. App. at 718, 294 S.E.2d at 383. The pertinent statutory language is "[f]rom and after the effective date of the annexation ordinance, the territory and its citizens and property shall be subject to all debts, laws, ordinances and regulations in force in such municipality and shall be entitled to the same privileges and benefits as other parts of such municipality." N.C. GEN. STAT. § 160A-49(f) (1982).

56. The right to vote presumably is one of the "privileges and benefits" that G.S. 160A-49(f) confers upon citizens of an area annexed as of the effective date. The court of appeals in *Moore* agreed with that interpretation, but held that the Voting Rights Act nevertheless controlled. 58 N.C. App. at 718, 294 S.E.2d at 383. See *infra* text accompanying notes 64-66.

57. 42 U.S.C. § 1973c (1976). The annexation is effective for voting purposes after sixty days unless the Attorney General has objected. *Id.* While an objection prevents the annexed territory from holding elections, it does not affect the validity of the annexation itself. See *City of Petersburg v. United States*, 354 F. Supp. 1021, 1023 n.2 (D.D.C. 1972) (per curiam), *aff'd*, 410 U.S. 962 (1973).

The standard of review under section 5 of the Voting Rights Act is whether the proposed change has a discriminatory purpose or effect. 42 U.S.C. § 1973c (1976). For a comprehensive analysis of section 5 annexation cases, see Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C.L. REV. 189, 221-32 (1983).

It should be noted that section 5 provides an alternative to the Attorney General's preclearance procedure. That alternative is to submit the proposed change in the composition of the electorate to a three-judge panel of the United States District Court for the District of Columbia. 42 U.S.C. § 1973c (1976). This course, however, is seldom followed. Because seeking a declaratory judgment from the district court involves substantial expense and delay, "almost all covered jurisdictions first seek preclearance for their changes from the Attorney General." Motomura, *supra*, at 191.

58. Annexations by municipalities in subject jurisdictions that expand the electorate must be submitted for preclearance before the effective date of the annexation ordinance. See *Sperry Rand Corp. v. City of Jackson*, 248 So. 2d 810, 812 (Miss. 1971). Assuming that the Attorney General neither approves nor objects to an annexation during the preclearance period, those annexed will not be enfranchised by the annexing municipality until sixty days after the effective date.

59. *Moore*, 58 N.C. App. at 715, 294 S.E.2d at 381.

60. *Id.* at 715, 294 S.E.2d at 381-82.

61. *Id.* at 718, 294 S.E.2d at 382-83. Plaintiffs also sought to enjoin the elections on the grounds that the equal protection clause of the fourteenth amendment of the United States Consti-

cluded under the Voting Rights Act,⁶² plaintiffs argued that they should be allowed to vote because, under North Carolina law, they had become county citizens on the effective date.⁶³

Moore resolved the apparent conflict between G.S. 160A-49(f) and the Voting Rights Act by holding that section 5 of the Act preempts all other statutory provisions regarding the voting rights of those annexed.⁶⁴ Affirming the superior court, the court of appeals held that plaintiffs, as residents of a newly annexed area, were not enfranchised by the annexing municipality until the requirements of the Voting Rights Act were satisfied.⁶⁵ The provisions of G.S. 160A-49(f) notwithstanding, the court rejected plaintiffs' claims because the sixty-day preclearance period of section 5 had not expired.⁶⁶ On the effective date of the annexation ordinance, therefore, plaintiffs became citizens of the City of Washington for all purposes *except* voting.

Moore is significant to North Carolina practitioners because forty counties in this state are subject to the Voting Rights Act of 1965.⁶⁷ *Moore* is also significant because it is the first case to decide whether qualified voters residing in a newly annexed area are precluded from voting in a bond referendum of the annexing municipality held prior to the expiration of the section 5 preclearance period.⁶⁸ While the court's holding that section 5 preempts G.S. 160A-49(f) was not compelled by the relevant case law,⁶⁹ the result in *Moore* is in accord with the policies underlying the Voting Rights Act.⁷⁰ These policies would be furthered and section 5 jurisprudence faithfully followed if the

tution barred municipalities from holding elections during the first sixty days after an annexation. *Id.* at 718, 294 S.E.2d at 383-84. For the resolution of this claim, see *infra* note 64.

62. *Id.* at 718, 294 S.E.2d at 383. The controlling case on this point of law is *City of Rome, Ga. v. United States*, 472 F. Supp. 221 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980).

63. 58 N.C. App. at 718, 294 S.E.2d at 383.

64. *Id.* The court of appeals found that *Dotson v. City of Indianola*, 514 F. Supp. 397 (N.D. Miss. 1981), was "dispositive of the issue whether plaintiffs were entitled to vote in the . . . sewer bond referendum, held after annexation but before the period for preclearance of the resultant voting change by the Attorney General had expired." 58 N.C. App. at 719, 294 S.E.2d at 383.

The court of appeals also affirmed the superior court's denial of plaintiff's request for an injunction against the municipal bond referendum. The court held that plaintiffs were neither injured nor deprived of a fundamental right as a result of their exclusion from the referendum. *Id.* at 719, 294 S.E.2d at 384.

65. 58 N.C. App. 718, 294 S.E.2d at 383.

66. *Id.*

67. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, 28 C.F.R. app., pt. 51 (1981). Those forty counties are Anson, Beaufort, Bertie, Bladen, Camden, Caswell, Chowan, Cleveland, Craven, Cumberland, Edgecombe, Franklin, Gaston, Gates, Granville, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Jackson, Lee, Lenoir, Martin, Nash, Northampton, Onslow, Perquimans, Pasquotank, Person, Pitt, Robeson, Rockingham, Scotland, Union, Vance, Washington, Wayne, and Wilson.

68. Other cases construing section 5 have decided the question whether those annexed may vote in elections (not bond referenda) held by the annexing municipality during the preclearance period. These cases have held that the annexation is not effective for voting purposes during that period. *See, e.g., City of Richmond v. United States*, 422 U.S. 358 (1975).

69. There is no North Carolina law on point, and decisions by the federal judiciary and the courts of other states are not dispositive. *See supra* note 68 and accompanying text.

70. The Voting Rights Act was enacted to protect minority citizens' right to vote. *See generally* S. REP. NO. 417, 97th Cong., 2d Sess. 4-9, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 180-86.

North Carolina judiciary were to construe *Moore* broadly, and apply it to municipal elections as well as to bond referenda during the annexation preclearance period.

2. Records

*Baugh v. Woodard*⁷¹ presented the North Carolina Court of Appeals with the issue whether a prisoner who has undergone psychiatric or psychological treatment while in prison is entitled to direct access to the records of that treatment. Suing on behalf of himself and all present and past prisoners, plaintiff presented three legal theories to support his claim. First, plaintiff argued that he had a statutory right to his psychiatric records pursuant to G.S. 122-55.2.⁷² Second, he claimed a common-law right to the records in question.⁷³ His third theory was based upon three constitutional arguments: (1) disallowing him direct access to his mental health records denied him equal protection;⁷⁴ (2) denying him direct access to his records violated the fourteenth amendment by depriving him a property interest without due process of law;⁷⁵ and (3) denying him access to his records constituted cruel and unusual punishment in violation of the eighth amendment.⁷⁶ The court dismissed the action in response to a motion made under rule 12(b)(6) of the North Carolina Rules of Civil Procedure.⁷⁷

On appeal, the court of appeals first considered plaintiff's claim that he had a right of access to his records pursuant to G.S. 122-55.2. This claim was based upon his contention that he was a patient in a treatment facility.⁷⁸ Since a finding that a prison constitutes a treatment facility for prisoners who receive mental health care would entitle prisoners to a variety of rights not afforded ordinary prisoners,⁷⁹ the court of appeals reasoned that "the legislature could not have contemplated that prison-operated mental health facilities be included within the meaning of 'treatment facility' as defined in G.S. 122-36(g)."⁸⁰ Therefore, the court ruled that plaintiff's argument was without

71. 56 N.C. App. 180, 287 S.E.2d 412 (1982).

72. *Id.* at 182-83, 287 S.E.2d at 414. N.C. GEN. STAT. § 122-55.2 (1981), which sets forth rights for patients in treatment facilities, provides that "no restriction may be placed upon the right of any patient to communicate with an attorney of the patient's choice, to have that attorney visit with him and, with the consent of the patient, to have the attorney provided with copies of all pertinent records and information relating to the patient."

73. 56 N.C. App. at 184, 287 S.E.2d at 414.

74. *Id.* at 184, 287 S.E.2d at 415.

75. *Id.* at 185, 287 S.E.2d at 415.

76. *Id.* at 186, 287 S.E.2d at 416.

77. *Id.* at 181, 287 S.E.2d at 413. See N.C. GEN. STAT. § 1A-1, Rule 12(b)(6) (1969).

78. N.C. GEN. STAT. § 122-36(g) (1981) defines treatment facility as
any hospital or institution operated by the State of North Carolina and designated for
the admission of any person in need of care and treatment due to mental illness or
mental retardation, any center or facility operated by the State of North Carolina for the
care, treatment, or rehabilitation of inebriates, any community health clinic or center
....

79. For instance, N.C. GEN. STAT. § 122-55.2(b)(5) (1981) would allow a patient to keep and use his own clothing and personal possessions.

80. 56 N.C. App. at 183, 287 S.E.2d at 414.

merit.⁸¹ Relying on *Goble v. Bounds*,⁸² the court of appeals then determined the common-law rule to be that "prison records of inmates are confidential and are not subject to inspection by the inmate concerned."⁸³ Thus, the court concluded that plaintiff's claim of a common-law right to inspect his psychiatric records was without merit.⁸⁴

The court then examined plaintiff's constitutional arguments. Plaintiff's equal protection claim was based upon the premise that prisoners receiving mental health care in a Department of Human Resources facility are entitled to direct access to their psychiatric records, while similarly treated prisoners remaining in prison are not so entitled.⁸⁵ In refuting this argument, the court of appeals construed G.S. 122-36(g) to -55.2 as excluding prisoners who are mental health patients.⁸⁶ The court relied upon the rule of statutory construction that "[w]hen a statute is reasonably susceptible of two constructions, one of which will raise a serious constitutional question and the other will avoid such question, the court must adopt the construction which avoids the constitutional question."⁸⁷

Plaintiff's second constitutional argument was based upon the due process clause of the fourteenth amendment. The court quoted the United States Supreme Court, and stated that, "[t]o have a property interest in a benefit [protectable under due process], a person clearly must have more than an abstract need for or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement of it."⁸⁸ Since the court of appeals had found that there was no statutory or common-law rule that would make plaintiff's wish to gain access to his records more than a unilateral desire,⁸⁹ the court held that there was no property interest in such records and, therefore, there was no merit to plaintiff's due process argument.⁹⁰

Finally, the court of appeals dismissed plaintiff's cruel and unusual punishment argument, since it found that withholding the records in question did not "offend the evolving standards of decency that mark the progress of a maturing society."⁹¹

3. Separation of Powers

In 1981 the North Carolina legislature increased the membership of the

81. *Id.* at 184, 287 S.E.2d at 414.

82. 281 N.C. 307, 188 S.E.2d 347 (1972).

83. 56 N.C. App. at 184, 287 S.E.2d at 414.

84. *Id.* at 184, 287 S.E.2d at 415.

85. *Id.*

86. *Id.* at 185, 287 S.E.2d at 415.

87. *Id.*

88. *Id.* at 185-86, 287 S.E.2d at 415, (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

89. 56 N.C. App. at 186, 287 S.E.2d at 415-16.

90. *Id.* at 186, 287 S.E.2d at 416.

91. *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

Environmental Management Commission⁹² by four persons, all of whom were to be members of the North Carolina General Assembly. Subsequently, the North Carolina Supreme Court in *State ex rel. Wallace v. Bone*⁹³ held that G.S. 143-283(d) violated the separation of powers provision of the North Carolina Constitution by involving legislators in executive and administrative functions of government.⁹⁴ In response to the court's decision in *Bone*, the General Assembly passed the Separation of Powers Act of 1982.⁹⁵ This Act provides that no member of the General Assembly may serve on any of the listed boards or commissions,⁹⁶ one of which is the Environmental Management Commission.⁹⁷ Further legislation was pending in early 1983.⁹⁸ Thus, the issue of separation of powers in North Carolina is still part of an unsettled and developing area of the law.⁹⁹

C. Employment

1. Unemployment Compensation

In *Intercraft Industries Corporation v. Morrison*¹⁰⁰ the North Carolina Supreme Court adopted a standard definition for the term "misconduct" as it appears in G.S. 96-14(2).¹⁰¹ Under this statute, misconduct disqualifies an

92. N.C. GEN. STAT. § 143B-283 (1983) provides for the composition of the Environmental Management Commission. N.C. GEN. STAT. § 143B-282 (1983) empowers the Environmental Management Commission "to promulgate rules and regulations to be followed in the protection, preservation, and enhancement of the water and air resources of the State."

93. 304 N.C. 591, 286 S.E.2d 79 (1982).

94. *Id.* at 608-09, 286 S.E.2d at 88-89. For a discussion of *Bone*, see *Survey of Developments in North Carolina Law, 1981—Constitutional Law*, 60 N.C.L. REV. 1273, 1283-85 (1982).

95. Act of June 17, 1982, ch. 1191, 1982 N.C. Sess. Laws 74 (Reg. Sess.).

96. *Id.* § 2 (codified at N.C. GEN. STAT. § 120-123 (Interim Supp. 1982)). The boards or commissions on which a legislator may not serve include the Board of Agriculture, the Art Museum Building Commission, the Governor's Advocacy Council for Persons with Disabilities, the Board of Public Telecommunications Commissioners, the Board of Transportation, the Board of Trustees Teachers' and State Employees' Retirement System, the Coastal Resources Commission, the Environmental Management Commission, the State Fire Commission, the Public Officers and Employees Liability Insurance Commission, the North Carolina Land Conservancy Corporation, the North Carolina Capital Building Authority, the North Carolina Criminal Justice Education and Training Standards Commission, the North Carolina Housing Finance Agency Board of Directors, the North Carolina Seafood Industrial Park Authority, the Committee for Review of Applications for Incentive Pay for State Employees, the Board of Trustees of the North Carolina School of Science and Mathematics, the North Carolina Board of Sciences and Technology, the State Farm Operations Commission, the Board of Commissioners of the Law Enforcement Officers' Benefit and Retirement Fund, the Board of Trustees of the University of North Carolina Center for Public Television, the Commission for Mental Health, Mental Retardation and Substance Abuse Services, the Governor's Waste Management Board, the North Carolina Alcoholism Research Authority, the North Carolina Ports Railway Commission, the North Carolina State Ports Authority, the Property Tax Commission, the Social Services Commission, the North Carolina State Commission of Indian Affairs, the Wildlife Resources Commission, the Council on the Status of Women, and the Board of Trustees of the North Carolina Museum of Art.

97. N.C. GEN. STAT. §120-123(8) (Interim Supp. 1982).

98. See LEGISLATIVE RESEARCH COMMISSION, SEPARATION OF POWERS: REPORT TO THE 1983 GEN. ASSEMBLY OF NORTH CAROLINA (1983).

99. See Orth, *Forever Separate and Distinct: Separation of Powers in North Carolina*, 62 N.C.L. REV. 1 (1983).

100. 305 N.C. 373, 289 S.E.2d 357 (1982).

101. N.C. GEN. STAT. § 96-14(2) (1981).

employee from eligibility to receive unemployment benefits. The need for a standard definition is apparent because courts frequently are required to make this factual determination.¹⁰² Adopting a definition first articulated by the court of appeals in *In re Collingsworth*,¹⁰³ the court in *Intercraft* declared that "misconduct sufficient to disqualify a discharged employee from receiving unemployment compensation is conduct which shows a wanton or wilful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent."¹⁰⁴

The *Intercraft* court did not find sufficient misconduct to disqualify the employee, Morrison, from receiving unemployment compensation. Morrison had been absent from work because she "couldn't find child care."¹⁰⁵ Writing for the court, Chief Justice Branch stated, "[I]t is generally recognized that chronic or persistent absenteeism, in the face of warnings, and without good cause may constitute wilful misconduct However, a violation of a work rule is not wilful misconduct if the evidence shows that the employee's actions were reasonable and taken with good cause."¹⁰⁶ The supreme court specifically withheld judgment as to whether the inability to procure child care necessarily constitutes "good cause;" good cause remains an issue for factual determination dependent upon the circumstances of each case.¹⁰⁷

Evidentiary burdens of proof under G.S. 96-14(2)¹⁰⁸ were also addressed in *Intercraft*. The court declared that the general policy of the Unemployment Compensation Act¹⁰⁹ was to create a rebuttable presumption that a claimant is entitled to benefits.¹¹⁰ The burden of proof is now clearly placed upon the employer to show circumstances disqualifying the claimant. In the instant case, *Intercraft Industries* failed to offer evidence to rebut Morrison's evidence showing "good cause."¹¹¹ This new presumption alters the former burden of proof which required a claimant to show he was *not disqualified* for benefits

102. For 1982 cases dealing with "misconduct," see *Collins v. B & G Pie Co.*, 59 N.C. App. 341, 296 S.E.2d 809 (1982); *In re Peden Steel Co.*, 57 N.C. App. 363, 291 S.E.2d 308 (1982); *Walter Kidde & Co. v. Bradshaw*, 56 N.C. App. 718, 289 S.E.2d 571 (1982); *In re Chavis*, 55 N.C. App. 635, 286 S.E.2d 623 (1982).

103. 17 N.C. App. 340, 194 S.E.2d 210 (1973).

104. 305 N.C. at 375, 289 S.E.2d at 359.

105. *Id.* at 376, 289 S.E.2d at 359.

106. *Id.* at 375, 289 S.E.2d at 359.

107. *Id.* at 377, 289 S.E.2d at 360. This facet of *Intercraft* was apparently missed by the dissenters, who adopted the dissent filed by Judge Hedrick in the court of appeals. *Id.* at 377, 289 S.E.2d at 360 (Carlton, J., dissenting). Judge Hedrick objected to allowing the inability to procure child care to constitute good cause for an employee to miss work, because it might discourage employers from hiring women with young children. *Intercraft*, 54 N.C. App. 225, 228-29, 282 S.E.2d 555, 558 (Hedrick, J., dissenting). Since the inability to find child care was held to not to constitute good cause in all circumstances, the point became moot. The dissent's argument is especially inapposite in that *Intercraft* lost primarily because it failed to meet its burden of proof and not because Morrison had good cause for her absenteeism. See *infra* notes 108-114 and accompanying text.

108. N.C. GEN. STAT. § 96-14(2) (1981).

109. N.C. GEN. STAT. § 96-1 to -18 (1981).

110. 305 N.C. at 376, 289 S.E.2d at 359.

111. *Id.* at 377, 289 S.E.2d at 360.

under the provisions of G.S. 96-14.¹¹² This shifting of the burden of proof may be insignificant, however, because the express provisions of G.S. 96-14 disqualifying a claimant have always been strictly construed in favor of the claimant,¹¹³ despite the statute's general policy that all an employer need prove to prevail is that a claimant is out of work because of his own misconduct.¹¹⁴

The most notable 1982 case disallowing unemployment benefits was *Collins v. B & G Pie Co.*¹¹⁵ Using the *Intercraft* definition of misconduct, the court of appeals held that "absence from employment in violation of a work rule due to incarceration for a willful or legally unexcused probation violation" disqualified the claimant from receiving unemployment compensation.¹¹⁶ It appears that a parolee who has violated his probation will therefore be conclusively precluded from receiving unemployment benefits, since reincarceration will always be the result of the parolee's "own fault," i.e. breaking the conditions of his parole.¹¹⁷

In *Employment Security Commission of North Carolina v. Lachman*¹¹⁸ the state supreme court took judicial notice, pursuant to G.S. 150A-64,¹¹⁹ that employees of the North Carolina Employment Security Commission are subject to competitive services rules.¹²⁰ This holding enables employees of the Employment Security Commission to use Chapter 126 grievance procedures¹²¹ pursuant to G.S. 126-39.¹²²

Legislative action included the amendment in 1981 of Chapter 96 of the General Statutes¹²³ to bring it into conformity with federal requirements.¹²⁴ In particular, G.S. 96-17¹²⁵ was amended to allow withholding of unemployment benefits for the payment of child support obligations.¹²⁶ This provision will allow child support obligations imposed by Chapter 110¹²⁷ to be discharged in a more efficient and reliable manner when wages cannot be gar-

112. See *Blue Jeans Corp. v. Amalgamated Clothing Workers*, 275 N.C. 503, 169 S.E.2d 867 (1969); *In re Stutts*, 245 N.C. 405, 95 S.E.2d 919 (1957); *State ex rel. Employment Security Comm'n. v. Jarrell*, 231 N.C. 381, 57 S.E.2d 403 (1950); *In re Steelman*, 219 N.C. 306, 13 S.E.2d 544 (1941). See also the general policy statement found in N.C. GEN. STAT. § 96-2 (1981).

113. *In re Watson*, 273 N.C. 629, 161 S.E.2d 1 (1968); *In re Scaringelli*, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

114. N.C. GEN. STAT. § 96-2 (1981).

115. 59 N.C. App. 341, 296 S.E.2d 809 (1982).

116. *Id.* at 341, 296 S.E.2d at 810.

117. *Id.* at 343, 297 S.E.2d at 811.

118. 305 N.C. 492, 290 S.E.2d 616 (1982).

119. N.C. GEN. STAT. § 150A-64 (1978).

120. 1 N.C. ADMIN. CODE 8C.0602(b)(1) as adopted by the State Personnel Commission effective February 1, 1976.

121. N.C. GEN. STAT. § 126-34 to -39 (1981 & Cum. Supp. 1981).

122. N.C. GEN. STAT. § 126-39 (1981).

123. N.C. GEN. STAT. § 96-1 (1981).

124. Act of June 16, 1982, ch. 1178, 1982 N.C. Sess. Laws 55 (Reg. Sess.) (codified primarily at N.C. GEN. STAT. § 96-17 (Interim Supp. 1982)).

125. N.C. GEN. STAT. § 96-17 (1981).

126. Defined at ch. 1178, § 2, 1982 Sess. Laws 55 (Reg. Sess. 1982) (codified at N.C. GEN. STAT. § 96-17(d)I.(B) (Interim Supp. 1982)).

127. N.C. GEN. STAT. § 110-141 (Cum. Supp. 1981).

nished.¹²⁸ The same legislative act also amended the extended benefits for Chapter 96¹²⁹ uniform state and federal indicators will now activate the extended benefits provisions of G.S. 96-12.¹³⁰ In addition, G.S. 96-14 was amended¹³¹ specifically to allow unemployment compensation for persons in training programs approved under the Trade Act of 1974.¹³²

2. Retirement and Health Benefits

Federal decisions interpreting disability standards under Title II of the Social Security Act,¹³³ while "persuasive authority on relevant issues,"¹³⁴ were found not to be binding upon North Carolina courts in *Lackey v. North Carolina Department of Human Resources*.¹³⁵ The supreme court made this ruling despite the mandate of G.S. 108A-56¹³⁶ that "[a]ll of the provisions of the federal Social Security Act¹³⁷ providing grants to the states for medical assistance are accepted and adopted, and the provisions of this Part shall be liberally construed in relation to such act so that the intent to comply with it shall be made effectual."¹³⁸ Following its declaration of judicial independence, the court did cite federal authorities extensively in deciding to allow disability compensation to the claimant.¹³⁹ The court held that the burden is on the claimant:

to prove he is disabled within the meaning of the social security statutes. . . . Once plaintiff has established that he is disabled and can no longer perform his usual work, the burden of going forward shifts to the defendant to show that there are other specific jobs which exist in the national economy that plaintiff can perform.¹⁴⁰

The report of a nonexamining physician was found not to discharge defendant's burden once plaintiff has made his *prima facie* case.¹⁴¹

In *Stanley v. Retirement and Health Division*¹⁴² a widower of a public school teacher was awarded death benefits. The deceased was held to be a "career teacher" at the time of her death, even though she had applied for

128. N.C. GEN. STAT. § 110-136 (Cum. Supp. 1981).

129. N.C. GEN. STAT. § 96-12(3) (Interim Supp. 1982).

130. Act of June 16, 1982, ch. 1178, §3, 1982 N.C. Sess. Laws 57 (Reg. Sess.) (codified at N.C. GEN. STAT. § 96-12(e)A.(1) (Interim Supp. 1982)).

131. *Id.* § 15 (codified at N.C. GEN. STAT. § 96-14(11) (Interim Supp. 1982)).

132. 19 U.S.C. § 2296 (1976 & Supp. V 1981).

133. 42 U.S.C. §§ 401-432 (1976).

134. *Lackey v. North Carolina Dept. of Human Resources*, 306 N.C. 231, 236, 293 S.E.2d 171, 175 (1982).

135. 306 N.C. 231, 293 S.E.2d 171 (1982).

136. N.C. GEN. STAT. § 108A-56 (Cum. Supp. 1981).

137. 42 U.S.C. § 1396 (1976).

138. N.C. GEN. STAT. § 108A-59 (Cum. Supp. 1981).

139. 306 N.C. at 235-40, 293 S.E.2d at 176-82.

140. *Id.* at 242-43, 293 S.E.2d at 179 (citations omitted). All plaintiff need show is "evidence of what he has done, of his inability to do that kind of work any longer, and, of his lack of particular experience for any other type of job." *Id.* at 242, 293 S.E.2d at 179 (quoting *Rice v. Celebreeze*, 315 F.2d 7, 17 (6th Cir. 1963)).

141. 306 N.C. at 249, 293 S.E.2d at 176.

142. 55 N.C. App. 588, 286 S.E.2d 643 (1982).

disability payments, because her application for disability had not yet been approved. Thus, the court considered her still to be "in service."¹⁴³ A teacher is "in service" if her "last actual day of service occurred not more than 366 days before the date of [her] death if [she] during said one-year period had applied for and was entitled to receive a disability retirement allowance under the System."¹⁴⁴ The court of appeals rejected respondent's contention that the "90 day deemed" rule of G.S. 135-4(h)¹⁴⁵ precluded the widower's claim and held that the provisions of the statute were intended "not to exclude, but to include state employees under an umbrella of protections."¹⁴⁶ The court therefore opted to have the 366-day restriction take precedence over the more restrictive 90-day rule of G.S. 135-5.¹⁴⁷ The liberal holding in *Stanley* clearly comports with previous case law that the purpose of Chapter 135 is to ensure that state employees will have benefits in sickness and old age.¹⁴⁸

3. Dismissal and Demotion of Public Employees

In *North Carolina Department of Correction v. Gibson*¹⁴⁹ a black guard at a minimum security prison was held by the court of appeals to be the victim of racial discrimination because of his dismissal. The court overturned the trial court order that had reversed the decision of the State Personnel Commission (SPC) in favor of the dismissed employee.¹⁵⁰ The similar wording of Title VII¹⁵¹ and the North Carolina Equal Employment Practices Act¹⁵² regarding the unlawfulness of racial discrimination in employment practices led the court to hold the SPC's use of federal evidentiary standards "eminently rea-

143. *Id.* at 592, 286 S.E.2d at 645-46.

144. N.C. GEN. STAT. § 135-5(1) (Cum. Supp. 1981).

145. Act of July 2, 1969, ch. 1223, 1969 N.C. Sess. Laws 1415 (Reg. Sess.)(codified at N.C. GEN. STAT. § 135-4(h) (1981)).

146. *Stanley*, 55 N.C. App. at 591, 286 S.E.2d at 645.

147. *Id.* N.C. GEN. STAT. 135-5(1)(2) (1974)(amended 1981 & Cum. Supp. 1981) stated:

For the purposes of this subsection (1), a member shall be deemed to be in service at the date of his death if his last day of actual service occurred not more than 90 days before the date of his death.

....

(2) Last day of actual service shall be:

a. When employment has been terminated, the last day the member actually worked.

b. When employment has not been terminated, the date on which an absent member's sick and annual leave expire, unless he is on approved leave of absence and is in service under the provisions of G.S. 135-4(h).

Stanley was decided under the 1974 version of this statute, the relevant wording of which was not altered by the 1981 amendments. Act of June, 24, 1981, ch. 672, 1981 N.C. Sess. Laws 970 (1st Sess.).

148. *Bridges v. City of Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1941); *Powell v. Board of Trustees of Teachers and State Employees Retirement Sys.*, 3 N.C. App. 39, 164 S.E.2d 80 (1968).

149. 58 N.C. App. 241, 293 S.E.2d 664 (1982).

150. *Id.* at 259, 293 S.E.2d at 675. The court of appeals held the trial court reversal an abuse of discretion under the "whole record" test of N.C. GEN. STAT. § 150A-51 (1981). 58 N.C. App. at 255-59, 293 S.E.2d at 673-75.

151. Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976).

152. N.C. GEN. STAT. §§ 154-422.1 to -422.3 (1978).

sonable.”¹⁵³ The SPC used the standards enunciated by the United States Supreme Court in *McDonnell-Douglas Corporation v. Green*.¹⁵⁴ Under this standard, the court held: (1) that Gibson had carried his initial burden of establishing a prima facie case of racial discrimination (that he was black, qualified for his job, and dismissed although three white guards were not dismissed for the same incident);¹⁵⁵ (2) that the burden then shifted to the Department of Correction (DOC) to articulate some legitimate, nondiscriminatory reason for Gibson’s dismissal (DOC offered evidence to show that Gibson had been more negligent than his white peers);¹⁵⁶ and (3) that Gibson then had the burden of proving that DOC’s stated reasons for his dismissal were merely a pretext for racial discrimination.¹⁵⁷ In this last determination the court of appeals felt compelled to defer to the SPC’s decision because the subjective nature of the standard applied.¹⁵⁸ *Gibson* is significant because it is the first North Carolina decision to articulate clearly the evidentiary standards to be used in cases arising under the North Carolina Equal Employment Practices Act.

In *Canipe v. Abercrombie*¹⁵⁹ no abuse of discretion was found in the Mecklenburg County Civil Service Board’s requirement of written examinations for promotion to police sergeant and captain, but not to assistant chief. The argument was made that Chapter 398 of the 1973 Session Laws¹⁶⁰ required the police department to use the results of the police entrance exams in determining priority for all promotions. The court rejected the argument, holding that since the law refers only to “applicants for positions on the police force . . .,”¹⁶¹ the competitive examination mentioned therein is mandated only for entry level positions. Therefore, the police department was not required to use the results from the entrance exam in determining later promotion. Addressing the issue why an examination was required only for promotion to police sergeant and captain, and not for assistant chief, the court emphasized the discretion afforded the chief of police in choosing persons who are to be in a close professional relationship with him.¹⁶²

D. Education

In *Nova University v. Board of Governors of the University of North Carolina*¹⁶³ the North Carolina Supreme Court addressed the question whether G.S.116-15¹⁶⁴ authorizes the Board of Governors to regulate through a licens-

153. 58 N.C. App. at 247, 293 S.E.2d at 668.

154. 411 U.S. 792 (1973).

155. 58 N.C. App. at 248-49, 293 S.E.2d at 669.

156. *Id.* at 249-50, 293 S.E.2d at 669-70.

157. *Id.* at 250-55, 293 S.E.2d at 670-73.

158. *Id.* at 254, 293 S.E.2d at 672. *See supra* note 150.

159. 58 N.C. App. 395, 293 S.E.2d 647 (1982).

160. Act of May 9, 1973, ch. 398, § 7, 1973 N.C. Sess. Laws 489 (1st Sess.).

161. *Id.* § 5.

162. 58 N.C. App. at 398, 293 S.E.2d at 650.

163. 305 N.C. 156, 287 S.E.2d 872 (1982).

164. N.C. GEN. STAT. § 116-15 (1978 & Cum. Supp. 1981).

ing procedure teaching in North Carolina by a nonresident institution when that teaching institution leads to the conferral of degrees in a state other than North Carolina. Defendant, acting pursuant to G.S. 116-15,¹⁶⁵ denied Nova, a Florida corporation and educational institution, a license to teach curricula designed to culminate in Nova's conferral of academic degrees in Florida.¹⁶⁶ The court of appeals held that G.S. 116-15 did not give the Board of Governors power to regulate Nova's teaching program insofar as it did not confer degrees in North Carolina.¹⁶⁷

The supreme court affirmed the court of appeals' interpretation of G.S. 116-15 for a variety of reasons. First, after surveying several cases concerning attempted regulation of teaching, the court concluded that the Board's interpretation of G.S. 116-15¹⁶⁸ would raise constitutional questions under the first amendment, the due process clause of the fourteenth amendment, and the commerce clause.¹⁶⁹ As a result, the court noted that the Board's position was in conflict with the canon of statutory construction which provides that "where one of two reasonable constructions will raise serious constitutional question, the construction which avoids this question should be adopted."¹⁷⁰ Moreover, since "[i]nherent in the power to license degrees is the power to establish minimum criteria which a North Carolina institution must meet in order to be licensed to grant degrees,"¹⁷¹ the court believed that the power to license teaching was not needed to accomplish the purpose of G.S. 116-15.¹⁷² The court also found that with the exception of G.S. 116-15, provision of Chapter 116 purports to give the Board authority over private institutions.¹⁷³ Justice Carlton dissented from the decision on the grounds that the power to license a degree program not only is inherent in the power to license an institution to confer degrees,¹⁷⁴ but also is essential in allowing the Board of Governors to plan and develop a coordinated system of higher education in North Carolina.¹⁷⁵

165. This statute provides in part:

(a) No nonpublic educational institution created or established in this State after December 31, 1960, by any person, firm, organization, or corporation shall have power or authority to confer degrees upon any person except as provided in this section. For purposes of this section, the term "created or established in this State" or "established in this State" shall mean, in the case of an institution whose principal office is located outside of North Carolina, the act of issuance by the Secretary of State of North Carolina of a certificate of authority to do business in North Carolina

Id.

166. 305 N.C. at 157, 287 S.E.2d at 874.

167. *Id.* at 158, 287 S.E.2d at 874.

168. The Board argued that since G.S. 116-15 authorized the Board to license degree conferrals, the power to license the degree program is necessarily implied. 305 N.C. at 163, 287 S.E.2d at 877.

169. *Id.* at 166, 287 S.E.2d at 879.

170. *Id.* at 163, 287 S.E.2d at 878 (quoting *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977)).

171. 305 N.C. at 168, 287 S.E.2d at 880.

172. *Id.* at 167, 287 S.E.2d at 880.

173. *Id.*

174. *Id.* at 172, 287 S.E.2d at 883 (Carlton, J., dissenting).

175. *Id.* See N.C. GEN. STAT. § 116-11(1) (Cum. Supp. 1981).

Even though the Board of Governors has the power to plan and develop a coordinated system of higher education in North Carolina,¹⁷⁶ it does not follow, as the dissent proposed, that the Board would be able to regulate Nova's teaching program. First, as discussed earlier, such a power would raise constitutional problems. Second, the stated goal in G.S. 116-11(1) of a coordinated system of higher education seems to refer to a coordinated system of North Carolina's public and private institutions. Insofar as an institution such as Nova is a nonresident institution that does not confer degrees in North Carolina, it is difficult to comprehend how regulation of the degree program of such an institution would promote the goal of a coordinated system of higher education in North Carolina.

In *Appeal of Willett*¹⁷⁷ the court of appeals confronted the question whether the University of North Carolina and its constituent institutions were exempt from the hearing procedures of North Carolina's Setoff Debt Collection Act.¹⁷⁸ In 1977 petitioner, a Kentucky resident, was accepted for admission at the University of North Carolina at Greensboro (UNC-G) and was billed at the in-state tuition rate, which he paid.¹⁷⁹ On October 5, 1977, approximately one month past the deadline to drop courses and still receive a tuition refund from UNC-G, petitioner withdrew from the university. He was subsequently notified by UNC-G that his account had been charged an additional \$573, representing the difference between in-state and out-of-state tuition, since he had been erroneously classified as an in-state student.¹⁸⁰ After the Cashiers' Office of the University notified the petitioner that it intended to claim his 1979 income tax refund pursuant to G.S. 105A-1 to -16¹⁸¹ to pay his delinquent account, petitioner requested and was granted a hearing before the Refund Committee.¹⁸²

When petitioner sought judicial review from the adverse Committee deci-

176. N.C. GEN. STAT. § 116-11(1) (Cum. Supp. 1981). *Contra Nova* 305 N.C. at 167, 287 S.E.2d at 880.

177. 56 N.C. App. 584, 289 S.E.2d 576 (1982).

178. *Id.* at 588, 289 S.E.2d at 578. The hearing procedures for North Carolina's Setoff Debt Collection Act are set forth in N.C. GEN. STAT. § 105A-8(a) (1979).

179. 56 N.C. App. at 584-85, 289 S.E.2d at 576.

180. *Id.*

181. N.C. GEN. STAT. §§ 105A-1 to -16 (1979). N.C. GEN. STAT. § 105A-5 (1979) provides that the "Department of Revenue shall upon request render assistance in the collection of any delinquent account or debt owing to any claimant agency. This assistance shall be provided by setting off any refunds due the debtor from the Department by the sum certified by claimant agency as due and owing."

N.C. GEN. STAT. § 105A-7 (1979) provides:

(a) The claimant agency, upon receipt of notification from the Department that a debtor is entitled to a refund, shall within 10 days send a written notification to the debtor and a copy of the same to the Department of its assertion of rights to the refund or any part thereof. Such notification shall inform the debtor of the claimant agency's intention to direct the Department to apply the refund or any portion thereof against the debt certified as due and owing

(b) The contents of the written notification to the debtor of the setoff claim shall clearly set forth . . . the debtor's opportunity to give written notice of intent to contest the validity of the claim before the claimant agency within 30 days of the date of the mailing of the notice

182. 56 N.C. App. at 585, 289 S.E.2d at 576. N.C. GEN. STAT. § 105A-8 provides that a claim-

sion,¹⁸³ the trial court vacated the decision on the ground that an official record of the proceedings had not been made as required by the Administrative Procedure Act.¹⁸⁴ Claiming that the Committee process was exempt from the hearing procedures of G.S. 105A-8(a),¹⁸⁵ respondent appealed from the trial court's decision.¹⁸⁶ Respondent's claim was based upon G.S. 150A-1(a) of the Administrative Procedure Act which provides:

Article 4 of this Chapter, governing judicial review of final agency decision, shall apply to the University of North Carolina and its constituent or affiliated boards, agencies, and institutions, but the University of North Carolina and its constituent or affiliated boards, agencies, and institutions are specifically exempted from the remaining provisions of this Chapter.¹⁸⁷

The court of appeals held that although UNC-G was exempt from the hearing procedures required by G.S. 105A-8(a) under the Administrative Procedure Act, it was not exempt from these procedures under the Setoff Debt Collection Act.¹⁸⁸ The court's decision was grounded in its belief that the legislature had simply adopted the hearing procedures of the Administrative Procedure Act as the appropriate hearing procedures under the the Setoff Debt Collection Act and did not intend to provide an exemption from the Setoff Debt Collection Act under G.S. 150A-1(a).¹⁸⁹ Therefore, the court affirmed the trial court's decision.¹⁹⁰

Although the court of appeals' interpretation is subject to debate,¹⁹¹ the decision is understandable in that it assures a reviewing court an official record from which it can accurately determine whether the agency decision was supported by the evidence presented at the hearing.

ant agency shall grant a hearing to the debtor according to the procedures established under the Administrative Procedure Act, Chapter 150A. *See infra* note 184.

183. 56 N.C. App. at 586, 289 S.E.2d at 577.

184. *Id.* at 587-88, 289 S.E.2d at 577-78. N.C. GEN. STAT. § 150A-36 (1978) provides that "[a] final decision or order of an agency in a contested case shall be made, after review of the official record as defined in G.S. 150A-37(a)" N.C. GEN. STAT. § 150A-37(a) (1978) provides:

An agency shall prepare an official record of a hearing which shall include:

- (1) Notices, pleadings, motions, and intermediate rulings;
- (2) Questions and offers of proof, objections, and rulings thereon;
- (3) Evidence presented;
- (4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose;
- (5) Proposed findings and exceptions; and
- (6) Any decision, opinion, order, or report by the officer presiding at the hearing and by the agency.

185. N.C. GEN. STAT. § 105A-8(a) (1979). *See supra* note 182.

186. 56 N.C. App. at 588, 289 S.E.2d at 578.

187. N.C. GEN. STAT. 150A-1(a) (1979).

188. *Id.* at 589, 289 S.E.2d at 578.

189. *Id.* at 588-89, 289 S.E.2d at 578.

190. *Id.* at 590, 289 S.E.2d at 579.

191. It could be argued that N.C. GEN. STAT. 105A-8(a) (1979) was subject to the entire Administrative Procedure Act and did not merely adopt that Act's hearing procedures.

E. Election Law

One of the most demanding tasks a state legislature faces is the redrawing of voter districts. The apportionment of legislators among voters goes to the core of representative democracy and "touch[es] legislative sensibilities as do few subjects."¹⁹² During the 1981 session of the General Assembly, the job had to be done twice and may not be finished yet.

The North Carolina Constitution requires state legislative redistricting during the first regular session after the return of each decennial census.¹⁹³ Each legislator is to represent, "as nearly as may be, an equal number of inhabitants,"¹⁹⁴ and "no county shall be divided in the formation of a . . . district."¹⁹⁵ Two sets of legislative districts are required because the number of representatives is not an even multiple of the number of senators. The inevitable result of the requirements of an equal population per legislator and the prohibition against dividing counties is the creation of large multiseat districts.¹⁹⁶

In addition to the above considerations, forty of North Carolina's counties¹⁹⁷ are subject to the requirements of section 5 of the Voting Rights Act of 1965, according to which any redistricting plan must obtain federal approval.¹⁹⁸ Without such approval the state is prohibited from enforcing the plan.¹⁹⁹ In addition, the plan may be open to attack by private action even after the required federal approval is obtained.²⁰⁰

192. J. SANDERS, NORTH CAROLINA LEGISLATION 1981, 55 (A. Sawyer ed. 1981)(available in North Carolina Institute of Government Library).

193. N.C. CONST. art. II, §§ 3, 5 (1970).

194. *Id.* §§ 3(1), 5(1). The redrawing of United States congressional districts is required by the United States Constitution and by federal statutes. See U.S. CONST. art. I, § 2; U.S. CONST. amend. XIV § 2; 2 U.S.C. § 2a (1982). The Constitution requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Kirkpatrick v. Preisler*, 394 U.S. 526, 527-28 (1969) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964)).

195. N.C. CONST. art. II, §§ 3(3), 5(3).

196. J. SANDERS, *supra* note 192, at 55.

197. For a listing of the forty counties subject to the Act, see *supra* note 67.

198. See 28 C.F.R. § 51.9 (1982). Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1976), prohibits states subject to its provisions:

from enforcing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," unless it has obtained a declaratory judgment from the District Court for the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or has submitted the proposed change to the Attorney General and the Attorney General has not objected to it.

Beer v. United States, 425 U.S. 130, 132-33 (1976) (quoting 42 U.S.C. § 1973c (1976)).

The Act further provides that "[n]either an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure." 42 U.S.C. § 1973c (1976)

199. 42 U.S.C. § 1973c (1976). See *Beer v. United States*, 425 U.S. 130 (1976).

200. 42 U.S.C. § 1973c (1976). See also *supra* note 196. For a discussion of the Voting Rights Act, see Bickerstaff, *Reapportionment By State Legislatures: A Guide for the 1980's*, 34 Sw. L.J. 607 (1980); Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C.L. REV. 189 (1983).

With all these factors in mind, the 1981 session of the General Assembly passed reapportionment plans for United States congressional districts,²⁰¹ and state senate²⁰² and representative²⁰³ districts. These plans were challenged shortly thereafter in *Gingles v. Edmisten*,²⁰⁴ a class action brought on behalf of all black residents of North Carolina. Plaintiffs alleged that the plans violated their rights under the equal protection clause of the fourteenth amendment, under the fifteenth amendment, and under the Voting Rights Act by diluting the vote of black citizens. They also alleged that the plans did not comply with the one person-one vote requirement enunciated by the United States Supreme Court.²⁰⁵ Plaintiffs sought declaratory relief and injunctive relief to prevent any election from being conducted pursuant to the apportionment plans.

The *Gingles* case also raised an issue concerning the validity of the 1968 amendment to the North Carolina Constitution that prohibits the splitting of counties among voting districts.²⁰⁶ The amendment, which only applies to state senate and representative redistricting had never received federal approval as required by the Voting Rights Act.²⁰⁷ When plaintiffs sought to prevent enforcement of the amendment, the State Board of Elections submitted the amendment to the Attorney General for approval on October 1, 1981.²⁰⁸ The Attorney General objected to the amendment because he was "unable to conclude that the 1968 Amendment . . . does not have a racially discriminatory purpose or effect."²⁰⁹ The Attorney General's analysis showed that the prohibition against dividing counties "predictably" required the use of large multimember districts that "necessarily submerges cognizable minority population concentrations into larger white electorates."²¹⁰ The Attorney General further observed that "[i]n the context of the racial bloc voting that seems to exist, such a phenomenon operates and would continue to operate 'to minimize or cancel out the voting strength of racial . . . elements of the voting population'".²¹¹

201. Act of July 9, 1981, ch. 894, 1981 N.C. Sess. Laws 1330, amended by Act of Feb. 11, 1982, ch. 7, 1981 N.C. Sess. Laws 13 (1st Ex. Sess. 1982) (codified at N.C. GEN. STAT. § 163-201 (Interim Supp. 1982)).

202. Act of July 3, 1981, ch. 821, 1981 N.C. Sess. Laws 1191, amended by Act of Feb. 11, 1982, ch. 5, 1981 N.C. Sess. Laws 10 (1st Ex. Sess. 1982); Act of April 27, 1982, ch. 2, 1981 N.C. Sess. Laws 15 (2d Ex. Sess. 1982) (codified at N.C. GEN. STAT. § 120-1 (Interim Supp. 1982)).

203. Act of Oct. 30, 1981, ch. 1130, 1981 N.C. Sess. Laws 1657, amended by Act of Feb. 11, 1982, ch. 4, 1981 N.C. Sess. Laws 6 (1st Ex. Sess. 1982); Act of April 27, 1982, ch. 1, 1981 N.C. Sess. Laws 15 (2d Ex. Sess. 1982) (codified at N.C. GEN. STAT. § 120-2 (Interim Supp. 1982)). For an analysis of the plans, see J. SANDERS, *supra* note 192, at 57-62.

204. *Gingles v. Edmisten*, No. 81-803 (E.D.N.C. filed September 17, 1981). A similar suit, *Pugh v. Hunt*, No. 81-1066 (E.D.N.C. filed Nov. 25, 1981), was filed in Iredell County State Court and subsequently removed to the United States District Court for the Eastern District of North Carolina, where it was consolidated with *Gingles*.

205. See *supra* note 194.

206. N.C. CONST. art. II §§ 3(3), 5(3).

207. See Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970). See *supra* note 6.

208. Objection letter to the State of North Carolina (Nov. 30, 1981).

209. *Id.*

210. *Id.*

211. *Id.* (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)).

When the State Board of Elections submitted the reapportionment plans for the United States congressional districts and for the reapportionment of the North Carolina senate on October 6, 1981, the Attorney General objected to both plans.²¹² The Attorney General's analysis of the senate plan showed that the use of multimember districts diluted the political strength of minorities; he noted that this effect "well may have been the result of the State's adherence to the 1968 Amendment" to which he objected earlier.²¹³

In objecting to the congressional redistricting, the Attorney General was chiefly concerned with the decision to exclude Durham County from District No. 2. He was unable to conclude that the decision was wholly free from discriminatory purpose and effect: "In this connection we find particularly troublesome the 'strangely irregular' shape of Congressional District No. 2 . . . , which appears designed to exclude Durham County from that district contrary to the House Congressional Redistricting Committee's recommendation."²¹⁴ The Attorney General noted that prior to 1971, District No. 2 had been approximately 43 percent black, that the 1971 redistricting plan decreased that percentage to 40.2 percent and that the proposed plan further reduced the black population in the district to 36.7 percent. The State Board of Elections' submission of the proposed reapportionment plan for the state house of representatives met with similar results.²¹⁵ The effect of the Attorney General's objections was to make the plans legally unenforceable.²¹⁶ Thus, the General assembly was faced with the choice of either seeking declaratory judgment from the United States District Court for the District of Columbia that the plans were not discriminatory or drafting new reapportionment plans. The General Assembly chose to rewrite the plans.

On February 2, 1982, the Governor of North Carolina proclaimed that the General Assembly would meet in a second extra session on February 9 for the purpose of enacting legislation concerning the redistricting.²¹⁷ New plans were enacted,²¹⁸ and the reapportionment plan for the United States congressional districts was submitted to the Attorney General and approved on March 11, 1982.²¹⁹ The redistricting plans for the state house and senate were submitted to the Attorney General on February 23, 1982. Although the Attorney General noted that the new plans divided numerous counties and represented

212. Objection letter to the State of North Carolina (Dec. 7, 1981).

213. *Id.*

214. *Id.* (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)).

215. Objection letter to the State of North Carolina (Jan. 20, 1982). The Attorney General found deficiencies in the house of representatives plans similar to those objected to earlier in the senate plan.

216. See *supra* note 198.

217. Governor Hunt acted pursuant to N.C. CONST. art. III, § 5(7).

218. Act of February 11, 1982, ch. 7, 1981 N.C. Sess. Laws 13 (1st Ex. Sess. 1982) (reapportioned United States congressional districts); Act of Feb. 11, 1982, ch. 5, 1981 N.C. Sess. Laws 10 (1st Ex. Sess. 1982), amended by Act of April 27, 1982, ch. 2, 1981 N.C. Sess. Laws 15 (2d Ex. Sess. 1982) (reapportioned the state senate districts); Act of Feb. 11, 1982, ch. 4, 1981 N.C. Sess. 6 (1st Ex. Sess. 1982), amended by Act of April 27, 1982, ch. 1, 1981 N.C. Sess. Laws 15 (2d Ex. Sess. 1982) (reapportioned the state house of representative districts).

219. Letter to the State of North Carolina (March 20, 1982).

a "substantial improvement" over the previously rejected plan he nevertheless objected to the plans.²²⁰ The senate plan was deficient in that District No. 2, although redrawn with a 51.7 percent black population, could easily have been drawn with a 55 percent black population, which was "widely recognized" as necessary before black voters could have a reasonable chance of electing a candidate. As to the house plan, the Attorney General disapproved of the districts drawn in Cumberland County. Although a single-member district with an overwhelmingly black composition had been created, nearly three-fourths of Fayetteville's black community was submerged within a white-majority, four-member district.²²¹

The General Assembly thereupon remedied these problems²²² and the final plans were submitted to the Attorney General and approved on April 30, 1982.²²³ This result does not mean, however, that the redistricting plans are now free from attack since the Voting Rights Act provides that "an affirmative indication by the Attorney General that no objection will be made . . . shall [not] bar a subsequent action to enjoin enforcement of [the change]."²²⁴

In addition to the *Gingles* and *Pugh* cases²²⁵, an additional suit has been filed challenging the reapportionment plans. Plaintiffs in *Cavanaugh v. Brock*²²⁶ are Forsyth County citizens, including State Representative Frank Rhodes and State Senator John Cavanagh. Plaintiffs seek a declaratory judgment and an injunction restraining the State Board of Elections from implementing any redistricting plan pertaining to Forsyth County that would violate the prohibition of the North Carolina Constitution against the splitting of counties.²²⁷ *Cavanaugh* has been consolidated with *Gingles* and slated to be heard before a three judge panel in April, 1983.

Even if the reapportionment statutes withstand the current attack, the General Assembly may not have completed its work with election law. In *North Carolina Socialist Workers Party v. North Carolina State Board of Elections*,²²⁸ the federal district court for the Eastern District issued a preliminary injunction to restrain enforcement of that part of the statutory procedure for the creation of new political parties which requires that voters signing petitions in support of the new party "request and direct the county board of elections to change [their] political party affiliation to the [new party]".²²⁹

Prior to 1981, the statute required the petitions to "declare that the signers intend to organize a new political party on a statewide basis, that they intend

220. Objection letter to the State of North Carolina (April 19 1982).

221. *Id.*

222. Act of April 27, 1982, ch. 1-2, 1982 N.C. Sess. Laws 15 (2d Ex. Sess. 1982) (codified at N.C. GEN. STAT. §§ 120-1 to -2 (1982)).

223. Letter to the State of North Carolina (April 30, 1982).

224. *Beer v. United States*, 425 U.S. 130, 131-33 n.1 (1976) (quoting section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1976)).

225. See *supra* note 203 and accompanying text.

226. No. 82-545 (E.D.N.C. filed May 4, 1982).

227. N.C. CONST. art. II, §§ 3(3), 5(3).

228. 538 F. Supp 864 (E.D.N.C. 1982).

229. N.C. GEN. STAT. § 163-96(b) (1982).

to participate as a political party in the next succeeding general election, and that they intend to affiliate with the new party by voting for its nominees.”²³⁰ Under this version of the statute, plaintiffs qualified for a position on the 1980 ballot.²³¹ After the General Assembly repealed the statute in 1981, apparently as a result of an opinion from the Attorney General that the “intent to vote for its nominees” section was unconstitutional,²³² it ratified the present section pertaining to party affiliation.

In petitioning the court to restrain enforcement of the disaffiliation requirement, plaintiffs argued that the section substantially interfered with their effort to obtain a position on the ballot, impinged their freedom to associate in the formation of a political party, and impaired the right of qualified voters to cast their votes effectively. In addition, plaintiffs asserted a fourteenth amendment equal protection claim on the grounds that independent candidates were not required to submit petitions containing the disaffiliation directive.²³³ In support of their motion, plaintiffs submitted “numerous affidavits of registered voters who would have signed a petition supporting placement of the Socialist Workers Party on the ballot but declined to sign the petition when informed that their signatures would direct the local board of elections to change their party affiliation.”²³⁴

The court found that plaintiffs had made a *prima facie* showing that the disaffiliation requirement had a substantially restrictive effect on their access to the ballot.²³⁵ As a result, the burden was placed on the state to show that the restriction was necessary to serve a substantial state interest and that it was the least restrictive means available to achieve that state interest.²³⁶ Plaintiffs did not dispute that the state has a compelling interest to ensure the integrity, efficiency, and manageability of the elections process. Plaintiffs did argue, however, and the court agreed, that there were less restrictive means to achieve these goals, such as requiring the new party to submit the ordinary petitions used for independent candidates.²³⁷ Consequently, the court, balancing the likelihood of irreparable harm to plaintiffs against the likelihood of harm to the interests of the State Board of Elections concluded that the balance of hardships favored plaintiff and that its claim for relief should be granted.²³⁸

As the court observed, plaintiffs would likely prevail in a trial on the merits. In *Illinois State Board of Electors v. Socialist Workers Party*,²³⁹ the

230. Act of June 14, 1967, ch. 775, § 1, 1967 N.C. Sess. Laws 848, 886 (Reg. Sess.).

231. 538 F. Supp. at 865.

232. *Id.* at 865 n.1.

233. See N.C. GEN. STAT. § 163-122(a)(1) (1982).

234. 538 F. Supp. at 865-66.

235. *Id.* at 866.

236. See *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184-86 (1979).

237. 538 F. Supp. at 867.

238. *Id.* at 867-68. The court observed that the harm to plaintiffs was not technically irreparable since the court could at some later date order that the party be put on the ballot. To do so, however, might require such “drastic measures” as delaying or even overturning the elections, actions that the court sought to avoid. *Id.*

239. 440 U.S. 173 (1979).

Supreme Court held that "[r]estrictions on access to the ballot burden two distinct and fundamental rights, the 'right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.'"²⁴⁰ When such fundamental rights are affected, the state must choose the least drastic means to achieve its ends.²⁴¹ In light of the General Assembly's requirement of an ordinary petition (without a disaffiliation requirement) in the case of independent candidates who seek a place on the ballot,²⁴² it seems unlikely that the state can successfully maintain that the disaffiliation requirement for new political parties represents the least restrictive means available.

The difference between the petition requirements for independent candidates versus new political parties also provides the basis for a fourteenth amendment equal protection attack on the statute. The state argued that the purpose of the disaffiliation requirements was to ensure that new political parties demonstrate an appreciable modicum of public support.²⁴³ There is, however, no substantial difference between new political parties and independent candidates that should require the disaffiliation requirement in the case of the former but not the latter.

The state submitted as an independent ground for the requirement substantial evidence that petition signers had been the victims of misrepresentation by solicitors. As the Court pointed out, however:

The problem of misrepresentation would be more directly attacked with sanctions directed at any party actually found to be misrepresenting the import of a petition and with criminal sanctions directed at persons misrepresenting the purpose of the petitions, neither of which would have any restrictive impact on bona fide solicitation.²⁴⁴

Thus, it appears that the General Assembly will once again be forced to rewrite G.S. 163-96 in a manner that avoids abridging the first and fourteenth amendment rights of North Carolinians.

F. Health and Medical Law

In *Harrell v. Wilson County Schools*²⁴⁵ the North Carolina Court of Appeals construed the requirement of a "free appropriate public education" under G.S. 115-363.²⁴⁶ The statute is North Carolina's version of the Educa-

240. *Id.* at 184 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).

241. *Id.* at 185.

242. See N.C. GEN. STAT. § 163-122(a)(1) (1982).

243. 538 F. Supp. at 867.

244. *Id.*

245. 58 N.C. App. 260, 293 S.E.2d 687 (1982).

246. N.C. GEN. STAT. § 115-363 (1978) provides:

Policy.—The policy of the State is to provide a free appropriate publicly supported education to every child with special needs. The purpose of this Article is to (i) provide for a system of special educational opportunities for all children requiring special education (hereinafter called "children with special needs"); (ii) provide a system for identifying and evaluating the educational needs of all children with special needs; (iii) require evaluation of the needs of such children and the adequacy of special education programs

tion for All Handicapped Children Act,²⁴⁷ which was recently interpreted by the United States Supreme Court in *Rowley v. Board of Education*.²⁴⁸ Stating that the *Rowley* standard did not control,²⁴⁹ the court of appeals ruled that the North Carolina General Assembly intended a higher standard: "eliminat[ing] the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible."²⁵⁰ Nevertheless, the court denied the hearing-impaired child's request that the Wilson County Schools subsidize her education in a school for the deaf in St. Louis, stating that the schools had satisfied their obligations under G.S. 115-363. The case is significant, however, for asserting the right of handicapped children in North Carolina to receive a free appropriate public education that is judged by a higher standard than that required under federal precedent.

G. Professional Standards and Licensing

In *North Carolina National Bank v. Virginia Carolina Builders, Inc.*²⁵¹ the court of appeals ordered the reinstatement of a default judgment upon a finding that defendant was inexcusably negligent in hiring a Virginia attorney to represent it in a North Carolina court. The majority found the trial court committed reversible error in taking judicial notice of the long-standing practice whereby Virginia attorneys practicing near the North Carolina border appear in North Carolina courts without complying with the state's requirements for the limited practice of out-of-state attorneys.²⁵²

After plaintiff filed suit seeking recovery on a promissory note executed

before placing children in the programs; (iv) require periodic evaluation of the benefits of the programs to the children and of the nature of the children's needs after placement; (v) prevent denials of equal educational opportunity on the basis of physical, emotional, or mental handicap; (vi) to assure that the rights of children with special needs and their parents or guardians are protected; (vii) insure that there be no inadequacies, inequities, and discrimination with respect to children with special needs; and (viii) bring State law, regulations, and practice into conformity with relevant federal law.

247. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified at 20 U.S.C. §§ 1401-1461 (1976 & Supp. V 1981)). The North Carolina statute was designed in part to bring North Carolina into conformity with the federal statute.

248. 102 S. Ct. 3034 (1982).

249. In *Rowley* the Supreme Court rejected a deaf child's request for a full-time interpreter, and stated that the child was receiving a free appropriate public education if she received "specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.* at 3048.

250. 58 N.C. App. at 264-65, 293 S.E.2d at 690 (quoting *Rowley*, 102 S. Ct. at 3055 (White, J., dissenting)). This standard is supported by the express statutory policy of ensuring "every child a fair and full opportunity to reach his full potential." N.C. GEN. STAT. § 115C-106 (Cum. Supp. 1981). The standard was espoused by the district and appellate courts in *Rowley*, but rejected by the Supreme Court. 102 S. Ct. at 3042. See generally Note, *Board of Education v. Rowley: The Supreme Court Takes a Conservative Approach to Handicapped Children*, 61 N.C.L. REV. 881 (1982).

251. 57 N.C. App. 628, 292 S.E.2d 135 (1982).

252. N.C. GEN. STAT. § 84-4.1 (1981). The statute provides for admission to practice in North Carolina for attorneys who are licensed in other states but who have not been admitted to the North Carolina bar. The privilege is limited in that attorneys admitted under this statute may appear only in the legal proceeding specified in their application for admission. Information that must be supplied by an attorney seeking admission under G.S. 84-4.1 includes an acknowledgment that the state in which the applicant is admitted grants similar privileges to North Carolina

by defendant, Virginia attorney Epperly filed an answer on defendant's behalf, alleging a much smaller amount due on the note. Subsequently, plaintiff filed a motion for entry of a default judgment on the ground that no proper answer had been filed because Epperly had not satisfied the statutory requirements for limited admission.²⁵³ When the clerk of court filed an entry of default, Epperly and North Carolina attorney Bryant then each filed a motion to set aside the default judgment and Epperly moved pursuant to G.S. 84-4.1 to be admitted in the case. The court granted both motions and ordered that defendant's answer be declared a proper motion of the record. Taking judicial notice of the custom among Virginia attorneys practicing near the state line to appear in North Carolina without complying fully with G.S. 84-4.1, the court concluded that Epperly had been negligent in failing to comply with the statute, but that such neglect should not be imputed to defendant. The court also found that defendant had asserted a meritorious defense.²⁵⁴

The decision by the court of appeals reversing this trial court order is open to question. The North Carolina Rules of Court provide that a court may relieve "a party or his legal representative" from a default judgment for excusable neglect.²⁵⁵ The court was correct in finding Epperly guilty of inexcusable neglect in failing to comply with the statute for over seventeen months. The existence of a particular custom in an area certainly does not justify ignoring the law.²⁵⁶ Nevertheless, custom is certainly relevant to the issue of *defendant's* negligence in hiring an out-of-state attorney. As Chief Judge Morris observed in dissent, despite a finding of inexcusable neglect of Epperly's part, defendant was still entitled to have the default judgment vacated providing he himself exercised proper care.²⁵⁷ When, by virtue of a long-standing practice, defendant's chosen attorney was apparently qualified to practice in the court of jurisdiction, defendant's neglect in relying upon those apparent credentials should be excused.²⁵⁸ At the very least, evidence of such apparent qualifica-

attorneys, a statement that the applicant has associated a North Carolina attorney to appear with him in the proceeding, and a statement by the client that he has retained the applicant.

In *Holley v. Burroughs Wellcome Co.*, 56 N.C. App. 337, 289 S.E.2d 393 (1982), the court reiterated the rule that before the trial court may exercise its discretion in admitting an out-of-state attorney for limited practice under G.S. 84-4.1 the statutory requirements must be met. *See In re Smith*, 301 N.C. 621, 272 S.E.2d 834 (1980). Upon a finding that plaintiff's Georgia attorney's motion for admission under G.S. 84-4.1 did not conform to the requirements of the statute, the trial court in *Holley* denied the motion in the exercise of its discretionary power. The court of appeals held this denial was error and that the trial court's ruling was properly one of law. According to the court of appeals, the discretionary ruling denied plaintiff the opportunity to request leave to amend in order to correct any deficiencies in his attorney's motion.

253. N.C. GEN. STAT. § 84-4.1 (1981).

254. North Carolina case law holds that in order for a default judgment to be set aside, defendant must have a meritorious defense and must not have committed inexcusable negligence. *See, e.g., Davis v. Mitchell*, 46 N.C. App. 272, 265 S.E.2d 248 (1980).

255. N.C. GEN. STAT. § 1A-1, Rules 60(b), 55(d) (1981) (emphasis added).

256. As the court noted, "Such a custom in no way abrogates or excuses out-of-state counsel from complying with the statute." 57 N.C. App. at 631, 292 S.E.2d at 137.

257. *Id.* at 634, 292 S.E.2d at 139 (Morris, C.J., dissenting). *See Moore v. Deal*, 239 N.C. 224, 79 S.E.2d 507 (1954).

258. 57 N.C. App. at 632, 292 S.E.2d at 138 (Morris, C.J., dissenting). In reaching a contrary conclusion, the majority relied upon *Harrell v. Welstead*, 206 N.C. 817, 175 S.E. 283 (1934). In *Harrell*, however, defendant was found to have committed inexcusable neglect in that "he en-

tion should be relevant to the determination of defendant's negligence.

In essence, the court declared defendant's answer through his Virginia attorney to be void *ab initio*. By contrast, in *Pope v. Jacobs*²⁵⁹ the court ruled that in the absence of a showing of prejudice, it was not a reversible error for the trial court to fail to require plaintiff's attorney to comply with G.S. 84-4.1.

The purpose of the statute is to afford the courts a means of controlling out-of-state counsel and assuring compliance with the duties and responsibilities of attorneys practicing in North Carolina.²⁶⁰ This legitimate aim must be balanced, however, against the policy that disputes should be settled on their merits and not on technicalities. Thus, the flexible *Pope* approach seems more equitable than that of *North Carolina National Bank*.

G.S. 87-15.1 to -15.2, which provide for licensing of general contractors,²⁶¹ were recently interpreted in two court of appeals cases. These statutes are intended to protect the public from work being done by incompetent builders.²⁶² Under North Carolina law, a general contractor that is unlicensed by the state is barred from recovering compensation for its work both under its contract and in quantum meruit.²⁶³

In *Barrett, Robert and Woods, Inc. v. ARMI*²⁶⁴ the court of appeals held that the protective purpose of the licensing statute had been satisfied and that plaintiff contractor should not be barred from recovering under its contract, even though it was not licensed for ninety percent of the construction period. Plaintiff in *Barrett* brought suit alleging breach of contract and seeking \$35,163 plus interest which was the balance due on a contract with defendant for the construction of a customized residential dwelling. After discovery, defendant filed a motion for summary judgment on the ground that plaintiff was not licensed during most of the construction period. The motion was denied, and following judgment in plaintiff's favor for \$36,055, defendant appealed.

The evidence showed that plaintiff was duly licensed at the time the contract was executed, but that the license expired after approximately ten percent of the work was completed. Plaintiff, according to the court, "inadvertently failed to file a renewal application until October 1978;"²⁶⁵ by then, plaintiff had left the job.²⁶⁶ In finding that the protective policy of the statute had been satisfied, the court found the following determinative:

trusted his case to one who is neither a licensed nor a practicing attorney in this state, and employed no one who regularly practices in the courts of Currituck County." *Id.* at 820-21, 175 S.E. at 286. Although it is unclear from the *North Carolina Nat'l Bank* opinion whether Epperly practiced regularly in North Carolina, the retention in this case of North Carolina attorney Bryant suggests that the court's practice reliance upon *Harrell* is misplaced.

259. 51 N.C. App. 374, 276 S.E.2d 487 (1981).

260. *North Carolina Nat'l Bank*, 57 N.C. App. at 631, 292 S.E.2d at 137.

261. N.C. GEN. STAT. §§ 87-1 to -15.2 (Cum. Supp. 1981).

262. *Bryan Builders Supply v. Midyette*, 217 N.C. 264, 162 S.E.2d 507 (1968).

263. *Vogel v. Reed Supply Co.*, 277 N.C. 119, 177 S.E.2d 273 (1970).

264. 59 N.C. App. 134, 296 S.E.2d 10 (1982).

265. *Id.* at 138, 296 S.E.2d at 13.

266. *Id.*

[P]laintiff was licensed at the significant moment of contracting; plaintiff's license lapsed through inadvertence, not as a result of incompetence or disciplinary action by the licensing board; plaintiff's license was renewed immediately upon its filing of a renewal application and fees; plaintiff's financial condition and composition, particularly the involvement of Runyon C. Woods, plaintiff's chief designer, carpenter, and construction supervisor who qualified plaintiff for its general contractor's license by passing the required written examination, remained unchanged during the period plaintiff was not licensed.²⁶⁷

In *Phillips v. Parton*²⁶⁸ defendant general contractor did not fare so well. In contrast to plaintiff in *Barrett*, defendant in *Phillips* was not licensed either before or after the contract was executed. Defendant argued, however, that in view of the extensive control exercised over the project by plaintiff, defendant should be considered a subcontractor or employee rather than a general contractor. The court rejected defendant's claim; nevertheless, this defense should not be overlooked. Although in determining whether the builder is a general contractor within the meaning of the statute the cost of the project is often a determinative factor,²⁶⁹ the statute by its terms applies to "any person . . . who . . . undertakes . . . to construct or who undertakes to superintend or manage, on his own behalf or for any other person . . . that is not licensed as a general contractor pursuant to this Article" ²⁷⁰ Thus, if the "builder" can show that he did not undertake to superintend or manage the construction of the building, he should not be subject to the terms of the statute.

H. Utilities Regulation

During 1982 the General Assembly made two significant changes in the public utilities statutes. First, the legislature amended G.S. 62-133(b)(1)²⁷¹ to make it discretionary rather than mandatory for the Utilities Commission to include in its general ratemaking determinations the cost of public construction work in progress (CWIP). The General Assembly deleted the requirement that CWIP "shall be included" and substituted in its place the words CWIP "may be included, to the extent the commission considers such inclusion in the public interest and necessary to the financial stability of the utility in question."²⁷² Prior to the amendment, the Utilities Commission seemed

267. *Id.* at 140, 296 S.E.2d at 14. The court seemed particularly impressed by Woods' score of 96 out of 100 on the written licensing examination. *Id.* at 138, 296 S.E.2d at 13.

268. 59 N.C. App. 179, 296 S.E.2d 317 (1982).

269. *Hickory Furniture Mart v. Burns*, 31 N.C. App. 626, 631-32, 230 S.E.2d 609, 612 (1976). Under N.C. GEN. STAT. § 87-1 (Cum. Supp. 1981), a "general contractor" is one who undertakes projects costing \$30,000 or more.

270. N.C. GEN. STAT. § 87-1 (Cum. Supp. 1981).

271. N.C. GEN. STAT. § 62-133 (1982). This section applies to public utilities "other than motor carriers and certain water and sewer utilities." *Id.* § 62-133(a). The rate base for water and sewer utilities is determined pursuant to N.C. GEN. STAT. § 62-133.1 (1982). N.C. GEN. STAT. § 62-133.2 (1982), which governs fuel adjustment proceedings, applies only to electric utilities. See *infra* notes 277-82 and accompanying text.

272. Act of June 17, 1982, ch. 1197, § 6, 1982 N.C. Sess. Laws 99, 100 (Reg. Sess.).

inclined to grant public utilities their full requests for increases in the rate base to cover the cost of CWIP.²⁷³ Under the new law, however, the Commission appears more willing to closely examine such requests to determine whether they are "reasonable and prudent" and "in the public interest and necessary to the financial stability of the utility."²⁷⁴ A recent rate case suggests that the Commission will no longer grant entire CWIP requests as a matter of course. Applying the new G.S. 62-133(b)(1) tests in that case, the Commission factored only 38.3% of the required CWIP into the public utility's rate base.²⁷⁵

The second major statutory development during 1982 involved the provision governing fuel adjustment clause proceedings for electric utilities. By replacing G.S. 62-134 with G.S. 62-133.2,²⁷⁶ the General Assembly detailed guidelines for the simple standards previously used by the Utilities Commission in considering a utility's request for a temporary rate change pending the next general rate case. Under the repealed G.S. 62-134, the Commission's scope of review was limited to whether an increase should be granted "based solely upon the increased cost of fuel used in the generation or production of electricity."²⁷⁷ Under the newly enacted G.S. 62-133.2, the Commission "shall" consider changes both in "the cost of fuel" and in the cost of "the fuel component of purchased power used in providing the North Carolina customers with electricity."²⁷⁸ Hearings on fuel charge adjustments are to be held "within 12 months of the last general rate case order" and "on an annual basis" thereafter.²⁷⁹ Based on an analysis of nine categories of information provided by the utility,²⁸⁰ the Commission is to determine "whether an increment or decrement rider is required to reflect actual changes."²⁸¹

By complicating the procedure for fuel adjustment proceedings, G.S. 62-133.2 may have diminished their usefulness. Gathering the information necessary to satisfy the requirements of G.S. 62-133.2 will require a major invest-

273. See, e.g., *Re Carolina Power and Light Co.*, 40 Pub. Util. Rep. 366, 512 (PUR) (N.C. Util. Comm'n, Feb. 12, 1982) (The Commission found "that the expenditures on construction projects . . . were reasonably incurred and . . . will be needed to provide adequate service to CP&L's customers in the future.").

274. *Re Virginia Elec. & Power Co.*, 48 Pub. Util. Rep. 327, 341 (PUR) (N.C. Util. Comm'n, August 26, 1982).

275. *Id.*

276. Law of June 17, 1982, *supra* note 271, §§ 1-2.

277. N.C. GEN. STAT. § 62-134(e) (Cum. Supp. 1981) (repealed 1982). The definition of the "cost of fuel" under the repealed fuel adjustment statute was a controversial issue during 1982. In separate cases, two panels of the North Carolina Court of Appeals reached opposite results when called upon to decide whether the "cost of fuel" included the cost of purchased or interchange power. Cf. *State ex rel. Util. Comm'n v. Public Staff—N.C. Util. Comm'n*, 58 N.C. App. 480, 293 S.E.2d 880 (1982) ("[t]he increase experienced by the selling utility is incurred by the power-purchasing utility when it pays for the purchased power, and this increase may properly be the basis of an adjustment, based solely on the cost of fuel, in the power-purchasing company's rates pursuant to G.S. 62-134(e).") *Id.* at 491, 293 S.E.2d at 886.

278. N.C. GEN. STAT. § 62-133.2 (1982).

279. *Id.* § 62-133.2(b). While additional hearings are to be held annually after the initial post-general rate case fuel charge adjustment, "only one hearing for each such electric utility may be held within 12 months of the last general rate case." *Id.*

280. These information requirements are outlined in *id.* § 62-133.2(c).

281. *Id.* § 62-133.2(b).

ment in time and money by the utility seeking review. Without much additional effort, an electric utility could present a general rate case to the Utilities Commission, allowing it to obtain a more comprehensive consideration of its rate needs,²⁸² and rendering a fuel clause proceeding unnecessary.²⁸³

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282. The scope of a general rate case is broader than that of a fuel clause proceeding. While N.C. GEN. STAT. § 62-133.2 (1982) limits the Utilities Commission's inquiry to nine categories of information, N.C. GEN. STAT. § 62-133 (1982), which governs general rate-making, states that "[t]he Commission shall consider all . . . material facts of record that will enable it to determine what are reasonable and just rates." *Id.* § 62-133(d). By virtue of this catch-all provision, a public utility can introduce in the general rate hearing any information that supports its rate request. Those facts would become part of the administrative record and, if material, an element in the Commission's rate base determination.

283. Because the review of utility rate requirements under N.C. GEN. STAT. § 62-13 (1982) is broader than under N.C. GEN. STAT. § 62-133.2 (1982) and presumably does not take substantially more time, the Utilities Commission would be acting inefficiently if it were to begin a fuel cost adjustment proceeding after an electric utility had filed a general rate case. Whether an ongoing fuel adjustment hearing would be incorporated into a subsequently filed rate case is open to question. To insure that the Commission does not contravene a rate adjustment proceeding before a general rate case is filed, an electric utility should inform the Commission that it will request an annual review of its entire rate structure.

It seems likely that given a choice between a fuel adjustment proceeding and a general rate case, an electric utility would opt for the latter. While the utility could obtain judicial review pursuant to N.C. GEN. STAT. § 62-94 (1982) of a rate adjustment by the Commission, that appeal, barring an error of law or abuse of discretion, is unlikely to be successful. The courts may not substitute their judgment for that of the Utilities Commission in factual disputes or policy disagreements. *State ex rel. Util. Comm'n v. N.C. Textile Mfg. Ass'n*, 59 N.C. App. 240, 296 S.E.2d 487 (1982).

II. CIVIL PROCEDURE

A. Service of Process

*Roshelli v. Sperry*¹ is a recent reaffirmation of North Carolina's strict adherence to the prescriptions for summons issuance contained in North Carolina Rule of Civil Procedure 4(a).² Rule 4(a) provides that following the filing of the complaint "summons shall be issued forthwith, and in any event within five days."³ In *Roshelli* the complaint was filed and the initial summons was issued⁴ on the same day, but the initial summons incorrectly named the party defendant. A second summons naming the proper party defendant and containing an endorsement by the clerk was not issued until eleven days after the complaint was filed.⁵

Rejecting plaintiff's arguments to the contrary,⁶ the court of appeals stated that the policy behind the five day period was to set an outer limit for issuance of the summons after the filing of the complaint.⁷ Pursuant to rule 4(b),⁸ the court found the initial issuance and service invalid, and plaintiff's

1. 57 N.C. App. 305, 291 S.E.2d 355 (1982).

2. N.C.R. Civ. P. 4(a).

3. *Id.* (emphasis added). Compare North Carolina's strict rule and interpretation with rule 4(a) of the Federal Rules of Civil Procedure, which simply requires that the summons be issued "forthwith." 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1084, at 337 (1969).

4. A civil action may be commenced in North Carolina by filing a complaint with the court or by issuance of a summons coupled with an appropriate application to the court and a court order. N.C.R. Civ. P. 3. Under Federal Rule 3 only the former avenue is open. FED. R. Civ. P. 3.

5. N.C.R. Civ. P. 4(d) provides two alternative methods for a party to continue an action when service is not made within the period prescribed by rule 4(c): the party may secure an endorsement upon the original summons or he may sue out an alias or pluries summons. N.C.R. Civ. P. 4(d)(1), (2).

6. Plaintiff first argued that the misnaming of defendant in the first summons merely represented a "misnomer." He then argued that by securing the clerk's endorsement on the second summons, rule 4(d) extended the time for service on defendant and that when effected, the service of the second summons related back, under rule 4(f), to the date of issuance of the original summons. The court rejected plaintiff's misnomer argument because the original summons did not comply with the strict requirement of rule 4(b) that process be directed to the defendant and issued and served as required by the rule. The court rejected plaintiff's 4(d) argument by noting that the extension provisions of rule 4(d) can be used only when a properly named party is not served. The extension provisions are not applicable when, as here, a proper summons is not issued within the prescribed period because the party defendant has never been named. The court simply rejected the relation back prong of plaintiff's argument. The court also noted that plaintiff should have attempted to amend the original summons under rule 4(i) which allows "any process . . . to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued." Since both the original and second summons were served by leaving a copy with the wife of defendant, rule 4(i) may well have provided plaintiff with a simple remedy to his problem.

7. 57 N.C. App. at 306, 291 S.E.2d at 356.

8. N.C.R. Civ. P. 4(b) requires that the summons "shall be directed to the defendant." The court in *Roshelli* noted that "process must be issued and served in the manner prescribed by statute, and failure to do so makes the service invalid even though a defendant had actual notice of the lawsuit." 57 N.C. at 307, 291 S.E.2d at 356. The court's statement in *Roshelli* contradicts its statement several months later in *Jones v. Whitaker*, 59 N.C. App. 223, 296 S.E.2d 27 (1982). In *Jones*, the original summons, the alias and pluries summons, and plaintiff's original complaint all incorrectly named defendant's daughter as defendant. When defendant mentioned this fact to the process server, the process server corrected the alias and pluries summons and served process on defendant. The *Jones* court did not even discuss whether the alias and pluries summons could be

action based upon his initial summons abated. The second summons, proper in form, was ostensibly untimely because it was not issued within the prescribed five days. Nevertheless, the court held that because defendant failed to move to dismiss the action prior to the issuance of the second summons, the issuance and service of that summons effected a revival and commencement of a new action on the date the second summons was issued. The case should alert practitioners that prompt and proper issuance of a summons is necessary to meet the strict notice requirements of rule 4,⁹ and that prompt objection by the defense attorney may be advisable to preserve plaintiff's error. Such an objection must be counterbalanced against the dangers of putting the plaintiff on notice of a possible violation of the rule 4 issuance prescription or the statute of limitations.¹⁰

B. Rules 7(a) & 8(d)—Compulsory Forms of Pleadings

Under the North Carolina Rules of Civil Procedure, the forms of pleadings are strictly prescribed.¹¹ In *Connor v. Royal Globe Insurance Co.*¹² the court of appeals carved out a limited exception to the general rule that failure to file a reply to a counterclaim requires that the allegations in the counterclaim be admitted.¹³ The court held that failure to reply to a counterclaim would not be deemed an admission when allegations in the counterclaim were

issued when the original summons had been issued for service on a person not a party to the action. Nor did the court discuss whether plaintiff could have used rule 4(i) to amend process. Rather, the court in *Jones* held that the process server's change of name was of no legal significance since the proper party was actually served. *Id.* at 226, 296 S.E.2d at 29. *Jones* may be a harbinger of a significant shift in the law. It suggests that the strict prescriptions of rule 4 that have been a touchstone of proper and sufficient service in North Carolina may be giving way to an "actual notice" requirement characteristic of federal decisions in this area of the law.

9. See *Kleinfeldt v. Shoney's, Inc.*, 257 N.C. 791, 794, 127 S.E.2d 573, 575 (1962); *Swenson v. All Am. Assurance Co.*, 33 N.C. App. 458, 465, 235 S.E.2d 793, 797 (1977). But see *McCoy v. McCoy*, 29 N.C. App. 109, 223 S.E.2d 513 (1976) (holding that issuance of summons is not essential to validity of service of process by publication made pursuant to N.C.R. Civ. P. 4(j)(9)(c)); see also *Jones*, 59 N.C. App. at 226, 296 S.E.2d at 29 (process server's changing name from that of defendant's daughter to that of defendant and serving process on defendant is of no legal significance when proper party is actually served and consequently suffers no prejudice).

10. See generally W. SHUFORD, NORTH CAROLINA CIVIL PRACTICE AND PROCEDURE § 3-7, at 9 (2d ed. 1981).

11. N.C.R. Civ. P. 7(a) provides in pertinent part:

There shall be a complaint and an answer a reply to a counterclaim denominated as such; an answer to a crossclaim, if the answer contains a crossclaim; a third party complaint if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. . . . (emphasis added).

12. 56 N.C. App. 1, 286 S.E.2d 810, *disc. rev. denied*, 306 N.C. 382, 294 S.E.2d 206 (1982).

13. There is no substantive difference between the North Carolina and the federal rule. The former makes one additional provision for a permissive reply of last clear chance when the answer alleges contributory negligence. The provisions of rule 8(d) contain the enforcement mechanism for rule 7(a):

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

N.C.R. Civ. P. 8(d) (emphasis added).

neither relevant nor material to a party's recovery.¹⁴ In *Connor* plaintiff-mortgagors sued to recover on a fire policy. The defendant-insurer's answer asserted that plaintiffs had violated several of the policy's conditions of recovery and included an allegation that plaintiffs were guilty of arson.¹⁵ Nevertheless, defendant's counterclaim sought a set-off only for the outstanding balance it had paid the plaintiffs' mortgagee.¹⁶ During trial, both parties stipulated that defendant was entitled to the outstanding balance it sought in its counterclaim.¹⁷ After a judgment for plaintiffs, defendant revived its earlier 8(d) argument that plaintiffs' failure to respond to defendant's counterclaim constituted an admission by plaintiffs of the allegation of arson in the counterclaim. Such an admission would, of course, completely bar plaintiffs' recovery.

After considering the "general policy of proceeding to the merits of an action,"¹⁸ the opinion of commentators,¹⁹ and earlier case law,²⁰ the court refused to adhere strictly to the language of rules 7(a) and 8(d).²¹ Relying upon the identical language of federal rule 8(d) as interpreted by federal courts, the court in *Connor* found an implied exception to the provision of the rule that failure to deny averments in a preceding pleading constitutes an admission of the facts alleged in those pleadings. Instead, the court followed federal precedent and held that "when a defendant makes a counterclaim denominated as such and the plaintiff fails to make a reply, [only] the *material* or *relevant* averments of the counterclaim are deemed admitted."²² Because plaintiffs stipulated at trial that they owed the amount prayed for in defendant's counterclaim,²³ plaintiffs' failure to reply was neither material nor rele-

14. 56 N.C. App. at 6, 10, 286 S.E.2d at 813, 815. Despite its flexible approach in the *Connor* case, the court issued a sharp warning that "[l]itigants should comply strictly with our rules." *Id.* at 5, 286 S.E.2d at 813.

15. Defendant's answer asserted that plaintiffs had violated their policy by setting fire to their own building, increasing the fire risk, and misrepresenting other material facts. *Id.* at 2-3, 286 S.E.2d at 811.

16. The counterclaim restated the essentials of defendant's answer and claimed that defendant's subrogation rights entitled it to recover the outstanding balance it had paid to the mortgagee. *Id.* at 3, 286 S.E.2d at 811-12.

17. *Id.* at 8, 286 S.E.2d at 814.

18. *Id.* at 8, 286 S.E.2d at 813 (quoting *Johnson v. Johnson*, 14 N.C. App. 40, 43, 187 S.E.2d 420, 422 (1972). Defendant's failure to object before proceeding to the merits was a major factor in the court's decision. *Id.* at 7-8, 286 S.E.2d at 814.

19. 56 N.C. App. at 6, 286 S.E.2d at 813 (citing 5 C. WRIGHT & A. MILLER, *supra* note 3, § 1279, at 354-55).

20. *Eubanks v. First Protection Life Ins. Co.*, 44 N.C. App. 224, 261 S.E.2d 28 (1979), *disc. rev. den.*, 299 N.C. 735, 267 S.E.2d 661 (1980); *Johnson v. Johnson*, 14 N.C. App. 40, 187 S.E.2d 420 (1972). See also *Dyotherm Corp. v. Turbo Machine Co.* 233 F. Supp. 119 (E.D. Pa. 1964).

21. See *supra* notes 11 & 13.

22. *Connor*, 56 N.C. App. at 6, 286 S.E.2d at 813. The court also noted that defendant's counterclaims were neither material nor necessary to the defendant's recovery. The court did not clarify the distinction between its stated test of materiality or relevancy on the one hand, and materiality or necessity on the other.

23. Had defendant in *Connor* prayed for an amount greater than the amount of the stipulated set-off, it is arguable that plaintiffs' failure to reply would be deemed an admission under the court's "material or relevant" test. In short, defendant's counterclaim was not material or relevant because it was limited to the amount of damage set-off to which it had stipulated. *Id.* at 5, 286 S.E.2d at 813. The opinion is unclear why defendant so limited its counterclaim.

vant to defendant's recovery.

Thus, the rule of admission in 8(d) does not apply to averments of (1) amount of damages,²⁴ (2) pleadings to which responsive pleadings are not specifically required,²⁵ or (3) facts which are neither "material" nor "relevant."²⁶ Because the terms "material" and "relevant" are necessarily defined case by case, a cautious pleader will respond to all allegations in a preceding pleading that require a response.

C. Compulsory Counterclaims

The North Carolina Court of Appeals decided two cases interpreting the requirements for compulsory counterclaims under rule 13.²⁷ In the first of these cases, *Curlings v. Macemore*,²⁸ the trial court dismissed plaintiff's negligence suit against defendant-landlord on the grounds that the claim should have been asserted as a compulsory counterclaim in defendant's prior summary ejectment action. The court of appeals reversed the trial court's decision and held that a tenant's subsequent claim based upon a landlord's negligence was not a compulsory counterclaim to an ejectment action. Citing *Twin City Apartments, Inc. v. Landrum*,²⁹ related federal precedent,³⁰ and the opinions of commentators,³¹ the court enunciated a three-part balancing test for determining whether a claim is a compulsory counterclaim: "(1) whether the issues of fact and law raised by the claim and counterclaim are largely the same; (2) whether substantially the same evidence bears on both claims; and (3) whether any logical relationship exists between the two claims."³²

24. This exemption is specifically enumerated in N.C.R. Civ. P. 8(d).

25. *Id.*

26. *Conner*, 56 N.C. App. at 6, 286 S.E.2d at 813.

27. N.C.R. Civ. P. 13(a). The rule states in pertinent part:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

The North Carolina rule is identical to its federal counterpart. FED. R. Civ. P. 13(a). See N.C. GEN. STAT. § 50-19 (Cum. Supp. 1981) which essentially removes alimony, divorce, custody, and support actions from the compulsory counterclaim rule.

28. 57 N.C. App. 200, 290 S.E.2d 725 (1982).

29. 45 N.C. App. 490, 263 S.E.2d 323 (1980) (holding plaintiff's subsequent claim for summary ejectment not a compulsory counterclaim to defendant's prior action for breaches of lease agreement, of covenants of fitness and habitability, and of duty to repair, because of the divergent nature of actions and remedies sought).

30. *Valencia v. Anderson Bros. Ford*, 617 F.2d 1278, 1291 (7th Cir. 1980) ("whether a particular counterclaim should be considered compulsory depends not so much on the immediacy of its connection with the plaintiff's claim as upon its logical relationship to that claim"); *Whigham v. Beneficial Fin. Co.*, 599 F.2d 1322 (4th Cir. 1979) (in applying rule 13(a) to particular cases courts have considered three factors: (1) whether the counterclaim raises significantly different issues of fact or law; (2) whether the evidence to support the claim and the counterclaim differs; (3) whether the claim and the counterclaim are logically related). Both *Valencia* and *Whigham* arose in a Truth-in-Lending context.

31. 6 C. WRIGHT & A. MILLER, *supra* note 3, § 1410, at 40 (1977).

32. *Curlings*, 57 N.C. App. at 202, 290 S.E.2d at 726. *Landrum* required a logical relationship between the factual and legal backgrounds of the claims and a logical relationship between the nature of the actions. *Curlings* added a "similar evidence" requirement to the *Landrum* test. This

In applying the test to the facts in *Curlings*, the court noted that the two claims failed to provide an affirmative answer to any of the questions raised. The court noted that the two claims contained many dissimilar issues of fact and law, and that a compulsory counterclaim "should not be used to combine actions that, despite their origin in a common factual background, have no logical relationship to each other."³³ The court's decision in *Curlings* suggests a willingness to define narrowly the scope of rule 13(a) to avoid the harsh consequences of a determination that a party's counterclaim is compulsory rather than permissive. While this result is ostensibly accomplished through application of a balancing test, the requirement of evidentiary congruence specifically serves to narrow the scope of compulsory counterclaims.

The second court of appeals decision involved an application of the rule 13 condition that the pleader know the facts giving rise to the compulsory counterclaim at the time of the pleading. In *Stines v. Satterwhite*³⁴ the court, consistent with both the plain meaning of the rule and prior case law, upheld the refusal of the trial court to dismiss plaintiff's cause for failure to assert it as a compulsory counterclaim. In *Stines* the court found that, since the aggrieved party neither knew nor could reasonably have ascertained alleged construction defects until after the prior institution of related cases, no claim existed at the time of the pleading. Thus, plaintiff's counterclaim could not be defined as compulsory under rule 13(a). The holding in *Stines* corresponds with federal standards for compulsory counterclaims.³⁵

additional requirement underscores the court's implicit emphasis upon the requirement that the legal (as opposed to factual) backgrounds of the claims be congruent. Neither *Whigham* nor *Curlings* made clear the exact nature of the test. Wright and Miller enumerate four tests: (1) Are the issues of fact and law raised by the claim and counterclaim largely the same? (2) Would res judicata bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule? (3) Will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaim? (4) Is there any logical relation between the claim and the counterclaim? Under any one of these tests an affirmative answer to the question means that the counterclaim is compulsory. 6 C. WRIGHT & A. MILLER, *supra* note 3, at 42. The *Curlings* court adopted the three-part test suggested in *Whigham*. See *supra* note 5.

Wright and Miller's analysis suggests the three tests enunciated in *Whigham* and *Curlings* are generally perceived as alternatives, rather than factors to be balanced. Because both *Curlings* and *Whigham* failed to provide an affirmative answer to any of the questions posed, it is impossible to state with certainty what the North Carolina rule 13 test is for determining whether a counterclaim is compulsory. But the analysis and language in both cases suggests that the court has adopted a balancing test in which an affirmative answer to any one of the questions posed will not necessarily render the counterclaim compulsory as a matter of law. See also Note, *Creditor's Counterclaim for Underlying Debt in Default is a Compulsory Counterclaim in Truth in Lending Action*, 31 MERCER L. REV. 1071 (1980).

33. *Curlings*, 57 N.C. App. at 201, 290 S.E.2d at 726.

34. 58 N.C. App. 608, 294 S.E.2d 324 (1982).

35. Both cases confirm that a party asserting this defense must meet a heavy burden of proof in order to warrant a dismissal of the nonmovant's claim. See 6 C. WRIGHT & A. MILLER, *supra* note 3, § 141L, at 54.

D. Summary Judgment³⁶

In *Lowe v. Bradford*³⁷ the North Carolina Supreme Court lent added vigor to the requirement of rule 56(e)³⁸ that if the moving party satisfies its burden of proof, the nonmoving party "may not rest upon the mere allegations of his pleadings"³⁹ but must "set forth *specific facts* showing that there is a genuine issue for trial."⁴⁰ Thus, while the party opposing summary judgment is only required to convince the court that an issue of material fact exists,⁴¹ and not that he will win at trial, he cannot successfully counter a summary judgment motion under rule 56(e) by relying upon conclusory allegations unsupported by facts.⁴²

E. Rule 60(b)(1): Relief From Judgment

North Carolina Rule of Civil Procedure 60(b)(1) provides that "on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertance, surprise or excusable neglect."⁴³ The Supreme Court of North Carolina has consistently interpreted rule 60(b)(1) as requiring the movant to show both excusable neglect and a meritorious defense before a trial judge may grant the motion.⁴⁴ In *Emdur Metal Products, Inc. v. Super Dollar Stores, Inc.*⁴⁵ the North Carolina Court of Appeals affirmed a trial judge's modification of a default judgment pursuant to a rule 60(b)(1) motion. This is the first case since the adoption of the North Carolina Rules of Civil Procedure to modify judgment pursuant to a 60(b)(1) motion, rather than to grant complete and total relief from a judgment.

In *Emdur*, upon defendant's failure to answer, the trial judge granted

36. In *American Travel Corp v. Central Carolina Bank & Trust Co.*, 57 N.C. App. 437, 291 S.E.2d 892 (1982), the court of appeals held that a motion for summary judgment denied by one superior court judge may not be allowed by another superior court judge on identical legal issues. An order denying summary judgment is determinative as to issues presented.

Summary judgment for the party with the burden of proof was held to be properly granted in *Stanley v. Walker*, 55 N.C. App. 377, 285 S.E.2d 297 (1982) (plaintiffs established prima facie case alleging possession of validly executed note, nonpayment, and exercise of right to accelerate; defendants failed to support allegation of payment in unverified answer and affidavit).

37. 305 N.C. 366, 289 S.E.2d 363 (1982).

38. N.C.R. Civ. P. 56(e) and FED R. Civ. P. 56(e) are identical.

39. 305 N.C. at 370, 289 S.E.2d at 366.

40. *Id.* at 369-70, 289 S.E.2d at 366 (emphasis in original). Twice the court underscored the necessity for the nonmovant to meet the movant's motion with specific facts in order to satisfy the response requirement of rule 56(e).

41. In *Rathburn v. Hawkins*, 56 N.C. App. 82, 84, 286 S.E.2d 827, 829 (1982), the court noted that an issue is material if the facts as alleged "would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Id.* (quoting with approval *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972)).

42. 305 N.C. at 370, 289 S.E.2d at 366.

43. N.C.R. Civ. P. Rule 60(b)(1).

44. *Stephens v. Childers*, 236 N.C. 348, 72 S.E.2d 849 (1952); *Perkins v. Sykes*, 233 N.C. 147, 63 S.E.2d 133 (1951); *Dishman v. Dishman*, 37 N.C. App. 543, 246 S.E.2d 819 (1978); *Whaley v. Rhodes*, 10 N.C. App. 109, 111, 177 S.E.2d 735, 737 (1970).

45. 55 N.C.App. 668, 286 S.E.2d 642 (1982).

plaintiff a default judgment for the recovery of \$12,960 in a breach of contract action. After receiving notice of the default judgment, defendant moved pursuant to rule 60(b)(1) to set aside the verdict. Defendant first demonstrated excusable neglect,⁴⁶ and further claimed to have a meritorious defense that some of the goods delivered by plaintiff were defective. The trial judge ruled that a meritorious defense existed only as to \$5,507.30 of the judgment, and modified the default judgment by reducing the award to \$7,452.70.⁴⁷ Defendant appealed, claiming that the meritorious defense and the showing of excusable neglect entitled him to a vacation of the entire default judgment and a new trial.

The court of appeals affirmed the trial judge's ruling.⁴⁸ Citing *Geer v. Reams*,⁴⁹ the court observed, "[O]ur Supreme Court, long ago stated that '[t]he court [is] vested with a full legal discretion over the matter . . . and [has] the right to annul or modify the judgment.'"⁵⁰ Thus, in interpreting the current Rules of Civil Procedure the court of appeals reaffirmed the previous rule under G.S. 1-220⁵¹ that there is "no abuse of discretion in setting aside only that portion of the judgment for which there was both excusable neglect and a meritorious defense."⁵²

If a court does not find excusable neglect on the part of a party making a rule 60(b)(1) motion, the motion shall be denied whether or not a meritorious defense is shown.⁵³ Thus, establishing excusable neglect is an indispensable requisite to a successful 60(b)(1) motion. In the recent case of *Lee v. Jenkins*,⁵⁴ the court of appeals held it was error for a trial judge to deny a party the opportunity to show excusable neglect after making a 60(b)(1) motion. In *Lee* plaintiff alleged that defendant was negligent in an automobile accident; defendant counterclaimed for damages and asserted the last clear chance defense. At trial, neither plaintiff nor his counsel were present. When the judge was informed that plaintiff's counsel was in superior court eighty-five miles away, the judge promptly called the superior court and was advised that counsel was leaving to attend the *Lee* case. Although plaintiff's counsel had not yet

46. N.C. GEN. STAT. § 1A-1 was adopted in 1967, repealing, among other statutes, N.C. GEN. STAT. §§ 1-108, 1-220. Nevertheless, the cases interpreting former N.C. GEN. STAT. § 1-220 are still applicable. See, e.g., *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971).

47. 55 N.C. App. 668, 286 S.E.2d 642. An employee of defendant corporation received the complaint but failed to deliver it to defendant's counsel.

48. *Id.* at 669, 286 S.E.2d at 642-43.

49. 88 N.C. 197 (1883). In *Geer* the supreme court affirmed the trial judge's decision to modify a default judgment against defendant by reducing the amount of the judgment from full value to one-fourth that originally awarded.

50. 55 N.C. App. at 670, 286 S.E.2d at 643 (quoting *Geer*, 88 N.C. at 199).

51. Although not cited in *Emdur*, further authority supports the court's conclusion. In *Aligood v. Shelton*, 224 N.C. 754, 32 S.E.2d 350 (1944), the court stated that "it was in the power of the trial judge in the exercise of his sound discretion to set aside the verdict of the jury, in whole or in part." *Id.* at 756, 32 S.E.2d at 351.

52. 55 N.C. App. at 670, 286 S.E.2d at 643.

53. *City of Durham v. Keen*, 40 N.C. App. 652, 253 S.E.2d 585, cert. denied, 297 N.C. 608, 257 S.E.2d 217 (1979); *Holcombe v. Bowman*, 8 N.C. App. 673, 174 S.E.2d 362 (1970); *Ellison v. White*, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

54. 57 N.C. App. 522, 291 S.E.2d 797 (1982).

arrived when the trial began, the judge dismissed plaintiff's claim and allowed defendant to proceed with his counterclaim. The jury found for defendant and awarded him \$3,000. Subsequently, the son of plaintiff's counsel moved to set aside the verdict, and the motion was denied.⁵⁵

The court of appeals held that the motion made by the son of plaintiff's counsel should have been treated as a rule 60(b)(1) motion, even though it was not made in that form. The court also stated that the trial judge was obligated to allow plaintiff to show excusable neglect and a meritorious defense.⁵⁶ Though no express holding was made on the matter, the court seemed to indicate that the docket conflict for plaintiff's counsel was ground for excusable neglect. The court relied upon rule 3 of the General Rules of Practice for the Superior and District Courts, which states, "When an attorney has conflicting engagements in different courts, priority shall be as follows: Appellate Courts, Superior Court, District Court, Magistrate's Court."⁵⁷

Judge Hedrick dissented, arguing that no rule 60(b)(1) motion was ever properly made. He noted that the motion by the son of plaintiff's counsel was one to set aside the verdict, not the judgment; furthermore, there was no showing that the son had standing to make such a motion. Judge Hedrick also noted that even though plaintiff's counsel had ample time to file a rule 60(b)(1) motion, he instead chose to appeal immediately to the court of appeals.⁵⁸ In so doing, the appellant was required to show prejudicial error⁵⁹—a burden Judge Hedrick felt appellant had failed to discharge.

Although the dissent correctly noted that the son of plaintiff's attorney made the motion, and that plaintiff himself never actually filed a rule 60(b)(1) motion, the majority was obviously and reasonably disturbed with the trial judge's decision to proceed with the trial when he knew that plaintiff's counsel had a conflict that took precedence. To correct this result, the majority found the motion to be a rule 60(b)(1) motion, which required a hearing on excusable neglect.⁶⁰

55. *Id.* at 523, 291 S.E.2d at 797-98.

56. *Id.* at 525, 291 S.E.2d at 798. See also *U.S.I.F. Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 219 S.E.2d 787 (1975); *Johnson v. Sidbury*, 225 N.C. 208, 34 S.E.2d 67 (1945); *Carolina Electric Serv. Inc. v. Granger*, 16 N.C. App. 427, 192 S.E.2d 19 (1972).

57. 57 N.C. App. at 524, 291 S.E.2d at 799. Rule 3 of the General Rules of Practice for the Superior and District Courts was adopted pursuant to N.C. GEN. STAT. § 7A-34 (1981). The *Lee* case was first brought in the district court.

58. 57 N.C. App. at 526-27, 291 S.E.2d at 799-800 (Hedrick, J., dissenting).

59. *Id.* at 526, 291 S.E.2d at 799. See also *London v. London*, 271 N.C. 568, 570, 157 S.E.2d 90, 92 (1967).

60. North Carolina courts have recognized that a rule 60(b)(1) motion need not be specified as such. In *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E.2d 806 (1975), *cert. denied*, 289 N.C. 619, 223 S.E.2d 396 (1976), the court of appeals stated, "[A]lthough Rule 60 says the court is to act 'on motion' it does not deprive the court of the power to act in the interest of justice in an unusual case where its attention has been directed to the necessity for relief by means other than a motion." *Id.* at 717, 220 S.E.2d at 811. The trial judge was made aware of the conflict of plaintiff's attorney in *Lee*, and therefore had the discretionary power to vacate the judgment. Because the trial judge did not do so, the court of appeals characterized the motion

F. Rule 59: New Trials; Amendment of Judgments

In 1982 the North Carolina Supreme Court decided two cases dealing with motions for a new trial made pursuant to rule 59 of the North Carolina Rules of Civil Procedure.⁶¹ In *Housing, Inc. v. Weaver*⁶² the court articulated a new rule establishing the proper time for a trial judge to grant a rule 59 motion. In *Worthington v. Bynum*⁶³ the court refused to adopt the federal standard for determining whether a trial judge abused his discretion in granting or denying a rule 59 motion.

The plaintiff in *Housing* brought suit seeking to have a note declared void because of economic duress; defendant counterclaimed for the value of the note and other damages. At the conclusion of the trial, the judge submitted five issues to the jury. The fifth issue concerned the amount of damages to which defendant would be entitled if the jury found in his favor. On that issue the trial judge instructed the jury that the evidence tended to show that defendant was entitled to damages in the amount of \$149,167, but that the jury could use any other figure they deemed appropriate based upon their assessment of the evidence. The jury found for the defendant but awarded no damages, and the trial court entered judgment on December 13, 1979 in accordance with the jury's findings.⁶⁴

Seven days after judgment was entered, defendant filed alternative motions for judgment notwithstanding the verdict,⁶⁵ amendment of the judgment, or a new trial.⁶⁶ Plaintiff filed similar motions on the same day, December 20, 1979. Under current statutory provisions, such motions must be made not

made by the son of plaintiff's counsel as a rule 60(b)(1) motion, thus requiring the trial judge to hold a hearing on the issues of excusable neglect and meritorious defense.

Although the dissent questioned whether the son's motion was proper, the trial judge treated the son's statements as a motion, as shown by the following transcript from the trial:

MR. JONES [son of plaintiff's counsel]: Your Honor, may I be heard?

THE COURT: Yes, Mr. Jones.

MR. JONES: I give notice of appeal, your Honor, I'd also like to make a motion at this time.

THE COURT: All right, sir. I'll be delighted to hear from you.

MR. JONES: I'd like to make a motion to set aside the verdict based on excuse (unintelligible) from the fact that my father was tied up in criminal Superior Court this morning and that he tried to get over here and that he got hung up over there.

THE COURT: Motion is denied. Anything else, Sir?

57 N.C. App. at 523, 291 S.E.2d at 798. Since the trial judge treated Mr. Jones' statements as a motion, the majority seems to be well justified in characterizing the statements as a rule 60(b)(1) motion: motions need not be made in writing if made orally during the session in which the trial is calandered. *Sims v. Oakwood Trailer Sales Corp.*, 18 N.C. App. 726, 198 S.E.2d 73, cert. denied, 283 N.C. 754, 198 S.E.2d 723 (1973); N.C.R. Civ. P. Rule 7. Arguably, the recognized oral motion could be construed as a rule 60(b)(1) motion, although it was not specified as such. See *Taylor v. Triangle Porsche-Audi Inc.*, 289 N.C. 619, 223 S.E.2d 396 (1976).

61. N.C.R. Civ. P. Rule 59.

62. 305 N.C. 428, 290 S.E.2d 642 (1982).

63. 305 N.C. 428, 290 S.E.2d 599 (1982).

64. 305 N.C. at 429-38, 290 S.E.2d at 643-48.

65. *Id.* at 438, 290 S.E.2d at 648. The motion was made pursuant to N.C.R. Civ. P. Rule 50.

66. 305 N.C. at 438, 290 S.E.2d at 648. The motion was made pursuant to N.C.R. Civ. P. 59(b), (e).

later than ten days after entry of judgment.⁶⁷ Thus, all motions in this action were timely. On June 19, 1980 the trial judge entered final judgment, denying plaintiff's motions, vacating the award made by the jury and amending the judgment for defendant in the amount of \$215,866.⁶⁸ Although the record did not state when the trial judge adjourned the session in which the case was heard, the supreme court determined that the trial judge adjourned the term before December 17, 1979.⁶⁹ Thus, the supreme court faced the issue of the propriety of a trial judge's modification of judgment subsequent to the expiration of the term.

A unanimous court held that it was proper for the trial judge to grant the rule 59 motion and amend the judgment subsequent to adjourning the term in which the judgment was initially entered.⁷⁰ Prior to the adoption of the North Carolina Rules of Civil Procedure,⁷¹ the accepted rule was that "once a trial judge has adjourned court and left the bench for the term, he cannot modify a judgment entered during that term."⁷² With the adoption of rules 50(b) and 59(e) of the North Carolina Rules of Civil Procedure, the legislature specified a ten day limit upon motions made pursuant to those rules. The court in *Housing*, noted that "[n]o time is specified for judicial action upon such a motion."⁷³ The court reasoned that if the old rule prohibiting the amendment of judgments after adjournment of the term were followed, the time limits set in rules 50(b) and 59(e) would be senseless for the following reason: a timely motion could be made after adjournment of the term, but the judge would not be able to act upon that motion. The court refused to adopt a rule that would render the trial judge powerless to act upon such a motion.⁷⁴ Instead, the court held that a timely rule 50(b) or 59(e) motion allows the trial judge to act upon that motion even if the term has been adjourned.⁷⁵

Once a timely motion for a new trial is made, the trial court may grant or

67. See N.C.R. Crv. P. Rules 50(b)(1), 59(b) & (e).

68. 305 N.C. at 438, 290 S.E.2d at 648.

69. *Id.*

70. *Id.* at 441, 290 S.E.2d at 650.

71. The North Carolina Rules of Civil Procedure, N.C. GEN. STAT. § 1A-1, were adopted in 1967.

72. 305 N.C. at 439, 290 S.E.2d at 649. See, e.g., *Shaver v. Shaver*, 248 N.C. 113, 102 S.E.2d 791 (1958).

73. 305 N.C. at 440, 290 S.E.2d at 649.

74. The court cited *W. SHUFORD*, *supra* note 10 § 59-18 (2d ed. 1981) as support for this proposition.

75. Although not specifically stated, it appears that this rule applies in either of these fact situations: (1) the timely motion was made prior to the court adjourning for the term; or (2) the timely motion was made after the court adjourned for the term. The *Housing* fact situation fits only category (2) above. Nevertheless, given the court's reasoning that a 10 day limitation upon judicial action is not applicable, motions made in a category (1) situation would also allow a trial judge to act after adjournment of the term.

In *Hennessee v. Cogburn*, 39 N.C. App. 627, 251 S.E.2d 623, *cert. denied*, 297 N.C. 300, 254 S.E.2d 919 (1979), a case not cited by the court in *Housing*, a timely rule 59(a)(7) motion for a new trial was made and granted by the trial judge in a subsequent term. The court of appeals held that the trial judge "did not lose his power [to set aside the verdict] when the term of court ended." *Id.* at 629, 251 S.E.2d at 624. The *Hennessee* case does not indicate whether the timely motion was made during the initial term of the court (category (1) above), or after the initial term had adjourned (category (2) above). The relation between the timing of the motion and the adjournment

deny the motion within its sound discretion.⁷⁶ Upon appeal of the discretionary ruling, the court is strictly limited to a determination from the record whether the judge abused his discretion.⁷⁷ The question of what constitutes an abuse of discretion by a trial judge in granting a rule 59 motion for a new trial was faced by the North Carolina Supreme Court in *Worthington v. Bynum*.⁷⁸ Defendant admitted negligence in an auto accident in which plaintiffs were injured. The sole issue for the jury in a consolidated trial was damages. Plaintiffs sought damages in the amount of \$250,000 and \$200,000, respectively, but the jury returned verdicts of \$175,000 and \$150,000. Defendant made a timely rule 59 motion for a new trial; the trial judge held a hearing and granted defendant's motion. The order for a new trial made it clear that the trial judge had granted the motion in his discretion.⁷⁹

Applying the federal rule for determining whether an abuse of discretion had occurred, the court of appeals reversed.⁸⁰ That federal test permits a finding of abuse of discretion when the trial judge grants a motion for a new trial but the jury verdict for damages is within the maximum limits of a reasonable range.⁸¹

In reversing the court of appeals, the North Carolina Supreme Court rejected the "maximum limits of a reasonable range" test:

[T]he overwhelming precedent of this Court discloses no compelling reason for the implementation of such a rule in North Carolina.

of the term apparently was immaterial so long as the motion was made within the prescribed limitations of rule 59.

76. See *Coletrane v. Lamb*, 42 N.C. App. 654, 257 S.E.2d 445 (1979); *Currence v. Hardin*, 36 N.C. App. 130, 243 S.E.2d 172, *aff'd*, 296 N.C. 95, 249 S.E.2d 387 (1978); *City of Winston-Salem v. Rice*, 16 N.C. App. 294, 192 S.E.2d 9, *cert. denied*, 282 N.C. 425, 192 S.E.2d 835 (1972); *Mangum v. Surlis*, 12 N.C. App. 547, 183 S.E.2d 839 (1971), *rev'd on other grounds*, 281 N.C. 91, 187 S.E.2d 697 (1972); *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

77. *Goldston v. Chambers*, 272 N.C. 53, 59, 157 S.E.2d 676, 680 (1967).

78. 305 N.C. 478, 290 S.E.2d 599 (1982).

79. *Id.* at 480-81, 290 S.E.2d at 601.

80. *Worthington v. Bynum*, 53 N.C. App. 409, 281 S.E.2d 166 (1981), *rev'd*, 305 N.C. 478, 290 S.E.2d 599 (1982).

81. *Id.* at 414, 281 S.E.2d at 171. The court of appeals relied upon *Howard v. Mercer*, 36 N.C. App. 67, 243 S.E.2d 168, *cert. granted*, 295 N.C. 466, 246 S.E.2d 9 (1978) (petition later withdrawn on defendant's motion). In *Howard* the court adopted the same "maximum limits of a reasonable range" test in overturning a trial judge's grant of a motion to set aside the verdict. The court of appeals in *Howard*, as in *Worthington*, adopted this rule as one recognized by the federal courts in dealing with similar appellate review of rule 59 motions, as announced in *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969). The use of federal precedent as a guide for North Carolina courts in determining the scope of the North Carolina Rules of Civil Procedure has been accepted, since the North Carolina Rules are based on the Federal Rules of Civil Procedure. *Brewer v. Harris*, 279 N.C. 288, 182 S.E.2d 345 (1971); *Johnson v. Johnson*, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

After reviewing the evidence presented at trial, the court of appeals in *Worthington* stated:

[T]he amount of medical expenses, the severity and diversity of the injuries, the permanent disabilities, and the extensive evidence of pain and suffering of each plaintiff impel us to conclude that the verdicts were clearly within the maximum limit of a reasonable range. The fact that the jury considered its verdict for approximately thirty minutes simply shows the degree of unanimity as to the verdicts and adds emphasis to the fact that the jury unanimously believed that both *Worthington* and *Cogdell* [plaintiffs] had sustained substantial damages.

Worthington, 53 N.C. App. at 418, 281 S.E.2d at 173.

Moreover, we are not persuaded that the appellate use of a vague test to measure the "reasonable range" of a given verdict's amount would provide a more effective, consistent or precise method of determining whether a trial judge has exceeded the bounds of discretion in the grant or denial of a new trial.⁸²

In rejecting the federal test the court explicitly overruled *Howard v. Mercer*⁸³ on the same point.⁸⁴

The court then reaffirmed its adherence to the abuse of discretion standard of review of a trial court's rulings on rule 59 motions. Proceeding with that analysis, the court noted that "a trial judge's *discretionary* order pursuant to G.S. 1A-1, rule 59 for or against a new trial upon *any* ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown."⁸⁵ The court found that the trial judge did not overstep his bounds in determining that there was insufficient evidence to support the jury's award and in finding that the jury disregarded many of the judge's instructions.⁸⁶ The court held that there was not a clear showing of abuse of discretion, and therefore reinstated the order for a new trial. Finally, the court reminded appellate courts not to "disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice."⁸⁷

G. Rule 68: Offer of Judgment

North Carolina Rule of Civil Procedure 68 provides for a procedural device by which defendants may compel plaintiffs to give serious consideration to defendants' settlement offers.⁸⁸ If the offeree does not accept the offer within ten days, he must bear his costs accrued from the time the offer was made if the judgment ultimately obtained is less than the offer.⁸⁹

In *Purdy v. Brown*⁹⁰ defendant tendered to plaintiff in a personal injury action an offer of judgment of \$5,001, "together with the costs, *except any attorneys' fees*, accrued at the time the offer [was] filed."⁹¹ Plaintiff did not respond to the offer; the action proceeded to trial, and a judgment was returned for plaintiff in the amount of \$3,500. Plaintiff moved for attorney's fees pursu-

82. 305 N.C. at 485, 290 S.E.2d at 604 (citations omitted).

83. 36 N.C. App. 67, 243 S.E.2d 168 (1978).

84. 305 N.C. at 485, 290 S.E.2d at 604.

85. *Id.* at 484, 290 S.E.2d at 603. See *Scott v. Trogden*, 268 N.C. 574, 151 S.E.2d 18 (1966); *Sherrill v. Boyce*, 265 N.C. 560, 144 S.E.2d 596 (1965); *Walston v. Greene*, 246 N.C. 617, 99 S.E.2d 805 (1957); *Frye & Sons, Inc. v. Francis*, 242 N.C. 107, 86 S.E.2d 790 (1955).

86. 305 N.C. at 485-87, 290 S.E.2d at 604-05.

87. *Id.* at 487, 290 S.E.2d at 605.

88. N.C.R. Civ. P. 68(a) provides in part, "At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or the effect specified in his offer, with costs then accrued."

89. *Id.*

90. 56 N.C. App. 793, 290 S.E.2d 397 (1982).

91. *Id.* at 793, 290 S.E.2d at 397-98.

ant to G.S. 6-21.1⁹² and was awarded \$1,200. In appealing the award, defendant contended that once a rule 68 offer of judgment is made and subsequently rejected, the offeree must bear the costs accrued—including attorney's fees—from the time the offer of judgment was made.

The court of appeals held that an offer of judgment is defective and invalid under rule 68 if the offer excludes attorney's fees from the tender of costs then accrued.⁹³ Thus, when a judgment obtained is less than \$5,000 the court in its discretion, pursuant to G.S. 6-21.1, may award attorney's fees. If defendant's offer of judgment had been valid, plaintiff would not have been entitled to any costs incurred after the offer was made, despite G.S. 6-21.1.⁹⁴ Noting that there was no authority in North Carolina dispositive of the issue whether attorney's fees could be excluded from an offer of judgment,⁹⁵ the court looked to federal precedent.⁹⁶ The court cited *Scheriff v. Beck*⁹⁷ as holding that a rule 68 offer of judgment is fatally defective when it excludes attorney's fees then accrued.⁹⁸ Thus, it is clear from the court of appeals' holding in *Purdy* that a plaintiff need not fear bearing costs accrued after refusing an offer of judgment if the offer excludes attorney's fees as part of the costs accrued.

92. N.C. GEN. STAT. § 6-21.1 (1981) provides:

In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, when the judgment for recovery is five thousand dollars (\$5,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

93. 56 N.C. App. at 795, 290 S.E.2d at 398.

94. *Id.* at 796, 290 S.E.2d at 398.

95. The court did not discuss *Yates Motor Co. v. Simmons*, 51 N.C. App. 339, 276 S.E.2d 496 (1981), which seems to support the finding in *Purdy*. In *Yates*, another personal injury action, plaintiff accepted defendant's rule 68 offer of judgment and asked the court "for the allowance of a reasonable attorney's fee to be taxed as part of the cost of the action." Defendant opposed plaintiff's motion; the court, however, awarded plaintiff the sum of \$624 for attorneys' fees. Defendant appealed, claiming that rule 68(a) does not authorize the inclusion of attorneys' fees as part of the "costs then accrued." The court of appeals disagreed, holding that a "trial court clearly has the authority to award plaintiff's attorney's fees accrued at the time the offer of judgment was made as part of the costs accrued."

96. See *supra* note 81.

97. 452 F. Supp. 1254 (D. Colo. 1978).

98. The court in *Scheriff* stated, "Rule 68 does not permit an offeror to choose which accrued costs he is willing to pay." 452 F. Supp. at 1260. The court of appeals in *Purdy* cited only *Scheriff* as precedent. In *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), Justice Powell noted:

A Rule 68 offer of judgment is a proposal of settlement that, by definition, stipulates that the plaintiff shall be treated as the prevailing party. It follows, therefore, that the "costs" component of a Rule 68 offer of judgment . . . must include reasonable attorney's fees accrued to the date of the offer.

Id. at 363 (Powell, J., concurring in result). See also *Mason v. Belieu*, 543 F.2d 215 (D.C. Cir.), cert. denied, 429 U.S. 852 (1976) (rule 68(a) requires attorney to file a bill of cost to determine portion of attorneys' fees accrued at time of offer to be allowed as costs). But see *Cruz v. Pacific Am. Ins. Corp.*, 337 F.2d 746 (9th Cir. 1964) (attorneys' fees discretionary with trial court; therefore, could not be considered accrued at the time offer of judgment is made).

H. Interlocutory Appeals

In *Love v. Moore*⁹⁹ the North Carolina Supreme Court clarified when a party has the right of an immediate appeal from adverse rulings concerning personal jurisdiction.¹⁰⁰ The facts of *Love* are complex, arising from an auto accident that occurred in 1970.¹⁰¹ In 1975, plaintiff obtained a judgment against defendant (who did not attend the trial after being served process through publication) and attempted to enforce the judgment against defendant's insurance company, Nationwide Mutual. The court of appeals later held the judgment unenforceable against Nationwide because the judgment was, in effect, a default judgment.¹⁰²

In 1980 plaintiff successfully moved to vacate the 1975 judgment and gave notice to Nationwide to enable the insurance company to file a defense on behalf of its insured.¹⁰³ Nationwide filed and was granted a motion to intervene. Nationwide then filed motions "to strike the order vacating the default judgment and to dismiss the action for lack of jurisdiction because of improper service on its insured."¹⁰⁴ After the trial judge denied these motions, and the court of appeals affirmed,¹⁰⁵ Nationwide appealed to the North Carolina Supreme Court.

Finding that neither of Nationwide's motions were appealable prior to final judgment, the supreme court vacated the court of appeals decision and remanded the case. The court reaffirmed its previous holdings that interlocutory rulings are "immediately appealable only when they affect a substantial right of the appellant and will work an injury to him if not corrected before an appeal from a final judgment."¹⁰⁶ The court reasoned that because an order vacating a default judgment is interlocutory and not immediately appealable,¹⁰⁷ an appeal from an order denying the motion to strike the order setting aside a default judgment is equally premature.¹⁰⁸

Nationwide's motion to dismiss for lack of personal jurisdiction because of improper service was also held to be not immediately appealable. The court recognized that rulings on motions to dismiss for lack of personal jurisdiction would appear to be immediately appealable under G.S. 1-277(b).¹⁰⁹

99. 305 N.C. 575, 291 S.E.2d 141 (1982).

100. See N.C. GEN. STAT. § 1-277(b) (1969 & Cum. Supp. 1981).

101. For a full discription of the facts in *Love*, see *Survey of Developments in North Carolina Law, 1981—Civil Procedure*, 60 N.C.L. REV. 1214, 1230-32 (1982).

102. *Love v. Nationwide Mut. Ins. Co.*, 45 N.C. App. 444, 263 S.E.2d 337, cert. denied, 300 N.C. 198, 269 S.E.2d 617 (1980).

103. 305 N.C. at 577, 291 S.E.2d at 144.

104. *Id.*

105. *Love v. Moore*, 54 N.C. App. 406, 283 S.E.2d 801 (1981).

106. 305 N.C. at 578, 291 S.E.2d at 144. See *Veazy v. Durham*, 231 N.C. 354, 57 S.E.2d 375 (1950); N.C. GEN. STAT. § 1-277(a) (1969 & Cum. Supp. 1981).

107. See *Bailey v. Gooding*, 301 N.C. 205, 270 S.E.2d 431 (1980) (order vacating default judgment does not work substantial injury to applicant and therefore is not appealable).

108. 305 N.C. at 578, 291 S.E.2d at 145.

109. N.C. GEN. STAT. § 1-277(b) (1969 & Cum. Supp. 1981) provides, in part, "Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant"

The court noted, however, that the real nature of Nationwide's motion was for dismissal based upon the insufficiency of service of process (rule 12(b)(5)),¹¹⁰ and insufficiency of process (rule 12(b)(4)),¹¹¹ rather than dismissal for lack of personal jurisdiction as contemplated by rule 12(b)(2) of the North Carolina Rules of Civil Procedure.¹¹²

In determining when a party may resort to G.S. 1-277(b) for an immediate appeal of an interlocutory order, the court distinguished between motions for dismissal based upon a rule 12(b)(2) motion and the same motion based upon rules 12(b)(4) and (5).¹¹³ The court declared that under G.S. 1-277(b), immediate appeals from interlocutory decisions are limited to those concerning rule 12(b)(2). Other orders by the trial court based upon other rule 12(b) motions are issues concerning technical defects that can be fully considered on appeal from a final judgment, and such orders are therefore not immediately appealable. This rule, the court reasoned, provides judicial economy "while ensuring that parties who have less than 'minimum contacts' with this state will never be forced to trial against their wishes."¹¹⁴

110. N.C.R. Crv. P. 12(b) states, in part:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto, if one is required, except that the following defenses may at the option of the pleader be made by motion:

- (1) Lack of jurisdiction over the subject matter,
- (2) Lack of jurisdiction over the person,
- (3) Improper venue or division,
- (4) Insufficiency of process,
- (5) Insufficiency of service of process,
- (6) Failure to state a claim upon which relief can be granted
- (7) Failure to join a necessary party.

111. *Id.* When plaintiff attempted to personally serve Moore and was unable to do so, plaintiff resorted to service through notice by publication. Plaintiff used the name Frank William Moore in the publication, since that was the name on the accident report; defendant's name, however, was actually Frank Willard Moore. Nationwide contended that this service on defendant was improper and justified dismissal. 305 N.C. at 576-79, 291 S.E.2d at 143-45.

112. *See supra* note 110.

113. The court stated:

G.S. 1-277(b) applies to the state's authority to bring a defendant before its courts, not to technical questions concerned only with whether that authority was properly invoked from a procedural standpoint. This is not a mere technical distinction; it has far-reaching substantive effect. If the court has no personal jurisdiction over the defendant, it has no right to require the defendant to come into court. A trial court determination concerning such an important fundamental question is made immediately appealable by G.S. 1-277(b). However, if the court has the jurisdictional power to require that the party defend and the challenge is merely to the process or service used to bring the party before the court, G.S. 1-277(b) does not apply.

305 N.C. at 580, 291 S.E.2d at 145.

114. 305 N.C. at 581, 291 S.E.2d at 146. The court in its holding in *Love* reversed any prior decisions construing G.S. 1-277(b) as applying to adverse rulings on service and process. The court specifically cited the following cases as overruled on this point: *Kahan v. Longiotti*, 45 N.C. App. 367, 263 S.E.2d 345, *cert. denied*, 300 N.C. 374, 267 S.E.2d 675 (1980); *Smith v. American Radiator & Standard Sanitary Corp.*, 38 N.C. App. 457, 248 S.E.2d 462, *cert. denied*, 296 N.C. 586, 254 S.E.2d 33 (1978); *Van Buren v. Glasco*, 27 N.C. App. 1, 217 S.E.2d 579 (1975).

The court specifically stated that adverse rulings on rule 12(b)(2) motions are immediately appealable under G.S. § 1-277(b), while adverse rulings on rule 12(b)(4) and (5) motions are not. The court did not make specific declarations about the other rule 12(b) motions. *See supra* note

When an order determines less than all the claims for relief in an action, a party has two avenues of appeal. First, he may appeal if, pursuant to rule 54(b),¹¹⁵ the trial judge certifies the appeal by entering a final judgment on fewer than all the claims. Second, he may appeal if the interlocutory order¹¹⁶ "affects a substantial right" claimed in any action or proceeding.¹¹⁷ In *Green v. Duke Power Co.*¹¹⁸ the supreme court reviewed the lower courts' application of the substantial rights test in a liability-contribution context. The trial court had granted third-party defendants' motion for summary judgment on the issue of liability, while reserving the issue of contribution for a second trial. Defendant¹¹⁹ appealed and the court of appeals affirmed.¹²⁰ The supreme court affirmed orders of both lower courts and held that since the order did not impinge upon a "substantial right,"¹²¹ the trial court's reservation of the contribution issue until a second trial was not, by itself, immediately appealable under the interlocutory appeal provisions of G.S. 1-277(a)¹²² and G.S. 7A-27(d).¹²³

110. Nevertheless, the court's distinction that technicalities are not to be immediately appealable seems to imply that adverse rulings on rule 12(b)(3) through (7) motions would not be immediately appealable.

115. N.C.R. Civ. P. 54(b) states that the trial judge; "[M]ay enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes."

116. "An order is interlocutory if it does not determine the issues but directs some further proceeding preliminary to final decree." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). The precise line between an interlocutory and final order is not clear. See, e.g., *Poore v. Swan Quarter Farms, Inc.* 57 N.C. App. 97, 100-01, 290 S.E.2d 799, 801-02 (1982) (judgment that specifically retained cause for "such further orders as may be necessary to the proper determination of the rights of the parties" is final judgment and not merely interlocutory); see generally *Survey of Developments in North Carolina Law, 1981—Civil Procedure*, 60 N.C.L. REV. 1214, 1222 (1982) (discussing substantial rights doctrine in North Carolina).

117. See N.C. GEN. STAT. §§ 1-277(a) (Cum. Supp. 1981), 7A-27(d) (1981). The term "substantial right" has never been precisely defined. See *infra* note 121. For a general discussion of the substantial right doctrine in North Carolina, see Comment, *Interlocutory Appeals in North Carolina: The Substantial Right Doctrine*, 18 WAKE FOREST L. REV. 857 (1982).

118. 305 N.C. 603, 290 S.E.2d 593 (1982).

119. Duke Power is here referred to as defendant, but may more properly be thought of as defendant and third party plaintiff appellant.

120. *Green v. Duke Power Co.*, 50 N.C. App. 646, 274 S.E.2d 889 (1981).

121. 305 N.C. at 606, 290 S.E.2d at 595. The court in *Green*, after noting that the term "substantial right" must be evaluated on a case by case basis, adopted a general principle suggested by one writer. See *id.* (quoting with approval *Survey of Developments in North Carolina Law, 1978—Civil Procedure*, 57 N.C.L. REV. 891, 907-08 (1979)).

122. N.C. GEN. STAT. § 1-277(a)(Cum. Supp. 1981) provides in pertinent part, "An appeal may be taken from every judicial order or determination of a judge of a superior court or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding. . . ."

123. N.C. GEN. STAT. § 7A-27(d) provides that an appeal may be taken:

From any interlocutory order or judgment or a superior court or district court in a civil action or proceeding which

(1) Affects a substantial right, or

(2) In effect determines the action and prevents a judgment from which an appeal might be taken, or

(3) Discontinues the action, or

(4) Grants or refuses a new trial, appeal lies of right directly to the Court of Appeals.

In *Green* plaintiff brought suit against defendant to recover for injuries received when she came in contact with an electrical transformer owned and operated by defendant.¹²⁴ Duke Power impleaded the landowner and lessee as third-party defendants, and sought contribution from each as joint tortfeasors.¹²⁵ Both third party defendants moved for, and were granted, summary judgment.¹²⁶ Duke Power then appealed, contending that the granting of the motions for summary judgment affected its substantial right to have its claim for contribution from both third-party defendants determined in the same proceeding in which Duke Power's liability to plaintiff was to be determined.¹²⁷

The supreme court affirmed the court of appeals decision¹²⁸ upholding the trial court, and dismissed the appeal. The court held that no substantial right would be lost by Duke Power's inability to take an immediate appeal from summary judgment against it.¹²⁹ The court explained that Duke Power would have no right to appeal if it later won,¹³⁰ and its exception to the entry of summary judgment would fully and adequately preserve its right to seek contribution thereafter if it lost.¹³¹ While eschewing a statement of a general rule, the court quoted with approval a principle suggested by one writer that "the right to avoid one trial on the disputed issues is not normally a substantial right that would allow an interlocutory appeal while the right to avoid the possibility of two trials on the same issues can be such a substantial right."¹³² The court found that the contribution issue of the *potential* second trial did not involve the same questions as did the issues of liability at the first trial.¹³³ Thus, there was no possibility that a party would be prejudiced in successive trials by different juries' rendering inconsistent verdicts on the same factual issue.¹³⁴

124. The court held that when the character of an easement is such that failure to keep it in repair will result in injury either to the servient estate or to third persons, the owner of the easement will be liable in damages for the injury so caused. Thus, it is the control and not the ownership that determines the liability. 305 N.C. at 611-12, 290 S.E.2d at 598 (quoting with approval *Levy v. Kimball*, 50 Hawaii 497, 499, 443 P.2d 142, 144 (1968)).

125. 305 N.C. at 604-05, 290 S.E.2d at 594. Duke Power based its third-party complaint upon the alleged failure of either defendant to secure or lock the transformer before the accident. *Id.* at 605, 290 S.E.2d at 594.

126. *Id.* at 605, 290 S.E.2d at 594.

127. *Id.* at 606, 290 S.E.2d at 595; see *Survey of Developments in North Carolina Law—Civil Procedure*, 60 N.C. L. REV. 1214, 1224-25 (1982) (comparing *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976) and *Green v. Duke Power Co.*, 50 N.C. App. 646, 274 S.E.2d 889 (1981) when that case was before the court of appeals).

128. 50 N.C. App. 646, 274 S.E.2d 889. For a critique of this decision, see *Survey of Developments in North Carolina Law—Civil Procedure*, 60 N.C. L. REV. 1214, 1224-25 (1982).

129. 305 N.C. at 607, 290 S.E.2d at 596.

130. *Id.*; see N.C. GEN. STAT. § 1-271 (1969) (only an aggrieved party may appeal); see also *Carawan v. Tate*, 304 N.C. 696, 286 S.E.2d 99 (1982).

131. 305 N.C. at 607, 290 S.E.2d at 596.

132. *Id.* (quoting with approval *Survey of Developments in North Carolina Law, 1978—Civil Procedure*, 57 N.C.L. REV. 891, 907-08).

133. 305 N.C. at 608, 290 S.E.2d at 596. The trial on the contribution issue would never take place if Duke Power were not found liable in the initial trial.

134. *Id.* The court noted that its holding would be different if the third party defendants had never been brought into the action or if, upon being impleaded, they had asserted as a defense to

The significance of *Green* seems to lie in the court's apparent willingness to allow the severance of different legal claims arising out of the same factual background. The flurry of cases in this area in the past two years suggests a movement by the court to subordinate judicial efficiency and the right to avoid multiple litigation to a practical consideration of keeping parties and issues simple for the jury, unless the factual and legal considerations are inseparably intertwined.¹³⁵

I. *Res Judicata*

In *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Association*¹³⁶ the United States Supreme Court held that North Carolina courts violated the full faith and credit clause by refusing to accept as binding an Indiana court's adjudication of rights to a deposit posted by Underwriters in North Carolina. Because of its uncertain financial condition, the petitioner Underwriters, an Indiana corporation, had been required by the North Carolina Department of Insurance to deposit \$100,000 for the benefit of potential North Carolina claimants. After further financial difficulties, the Indiana Department of Insurance began rehabilitation proceedings.¹³⁷ Because a judgment in the rehabilitation proceedings would extinguish all prerehabilitation claims not included in the rehabilitation plan, the respondent, the North Carolina association, was required to intervene in the proceedings to preserve its interest. Upon Underwriters' attempt to continue to do business in North Carolina, the association sought a declaratory judgment in the Wake County Superior Court that the previously required deposit could be used to satisfy prerehabilitation claims. Underwriters contended that the Indiana judgment incorporating the rehabilitation plan was res judicata as to any such claims.

The North Carolina trial court ruled that only a state court of North Carolina had "the 'requisite subject matter jurisdiction to determine the rights of North Carolina policyholders in the special deposits made by [Underwriters] for their protection.'"¹³⁸ The North Carolina Court of Appeals affirmed,¹³⁹

Duke Power's third-party complaint that Duke Power was not liable in negligence to plaintiff Green. Under either of these circumstances, third-party defendants might be free at a subsequent trial to deny Duke Power's liability to plaintiff, leaving the jury free in the contribution trial to find that the company was not liable to plaintiff despite a contrary finding by a different jury in the principle case. Since neither party asserted that Duke Power was not liable to plaintiff for negligence, such a result could not occur in the instant case.

135. For a contrary view, see Comment, *supra* note 117.

136. 455 U.S. 691 (1982).

137. An Indiana rehabilitation proceeding is an insolvency action brought in the Indiana Rehabilitation Court, which is a court of general jurisdiction. The purpose of the proceeding is to marshal the assets of a company that is insolvent or in imminent danger of becoming insolvent and develop a plan of rehabilitation to restore the company's financial health. In *Underwriters* the plan of rehabilitation was characterized as a compromise and settlement of all claims against Underwriters. Upon final approval of the plan by the Rehabilitation Court, all claims against Underwriters were compromised, settled, and dismissed. See *id.* at 695 n.1, 699, 702; IND. CODE §§ 27-1, -2 (1975) (rehabilitation of domestic insurance companies) (repealed 1979).

138. *Underwriters*, 455 U.S. at 703.

139. *North Carolina Life & Accident & Health Ins. Guaranty Ass'n v. Underwriters Nat'l Assur-*

and the North Carolina Supreme Court denied discretionary review.¹⁴⁰

The United States Supreme Court ruled that the North Carolina courts were bound by the Indiana judgment extinguishing all prerehabilitation claims. The Court rejected the association's argument that the Indiana court lacked subject matter jurisdiction because the North Carolina courts had exclusive subject matter jurisdiction. The Court stated that although the North Carolina trial court may have been correct in ruling that it had exclusive jurisdiction as a matter of North Carolina law, the issue of jurisdiction may be res judicata when it is fully and fairly litigated in a prior action in another state.¹⁴¹ In such a case, the full faith and credit clause requires North Carolina to abide by the foreign judgment.¹⁴²

The Court further stated that the Indiana court's lack of in personam jurisdiction over North Carolina officials and policyholders was irrelevant because the issue of personal jurisdiction had not been presented for direct review on an appeal of the Indiana judgment.¹⁴³

Although the Court's opinion gave short shrift to the niceties of insurance law,¹⁴⁴ its reasoning is sound.¹⁴⁵ If the Indiana court made errors of law, the association as a party, and any prerehabilitation claimant by a class representative, had opportunities to appeal the decision. As the Court stated, to collaterally attack the judgment in another forum put the North Carolina court in the position of rendering a contrary decision, which was "precisely the situation the Full Faith and Credit Clause was designed to prevent."¹⁴⁶

ance Co., 48 N.C. App. 508, 269 S.E.2d 688 (1980). The North Carolina Court of Appeals explained that because the deposit was located in North Carolina and held in trust by the Commissioner of Insurance and the Treasurer, over whom the Indiana court lacked personal jurisdiction, the only court that could hear the action was a North Carolina court.

140. 301 N.C. 527, 273 S.E.2d 453 (1980).

141. 455 U.S. at 705 & n.11, 706 (citing *Durfee v. Duke*, 375 U.S. 106, 111 (1963)). The Court held that the jurisdiction issue had been fully and fairly litigated in the Indiana proceedings. *Id.* at 707.

142. "This Court has consistently recognized that, in order to fulfill this constitutional mandate, the judgment of a state court should have the same credit, validity, and effect in every other court of the United States, which it had in the state where it was pronounced." 455 U.S. at 704 (citations omitted).

143. The Indiana court had concluded that it had jurisdiction over the North Carolina deposit as an asset of the company. The Court noted: "This conclusion may very well have been erroneous as a matter of North Carolina law. Erroneous or not, however, this jurisdictional issue was fully and fairly litigated and finally determined by the Rehabilitation Court." 455 U.S. at 714 (citations omitted).

144. The Court conceded that the determination by the Indiana court that the funds were an asset of the company includable in the rehabilitation plan may have been erroneous as a matter of North Carolina insurance law. *See* 455 U.S. at 714 (citing *North Carolina ex rel. Ingram v. Reserve Ins. Co.*, 303 N.C. 623, 629, 281 S.E.2d 16, 20 (1981)). Nevertheless, the Court declined to review the determination, stating "[T]he Rehabilitation Court's conclusion that it had jurisdiction to compromise the claims of the parties before it to the North Carolina deposit is not presented to this Court on direct review, and we express no opinion on the propriety of this conclusion." 455 U.S. at 714.

145. The Court repeatedly alluded to the fact that the Indiana court had made a jurisdictional inquiry and thus concluded that "the only forums in which [the association] may challenge the Rehabilitation Court's assertion of jurisdiction . . . are in Indiana." 455 U.S. at 715. That decision may be based in part on the Court's belief that the association still has an avenue of review open in the Indiana forum. *Id.* at 715 n.24.

146. 455 U.S. at 715.

J. Personal Jurisdiction

In *Kaplan School Supply v. Henry Wurst Inc.*¹⁴⁷ the North Carolina Court of Appeals again considered the minimum contacts requirement of "long arm" jurisdiction. Plaintiff, a North Carolina corporation, contracted with Henry Wurst, Inc., a Missouri corporation with its principal place of business in Missouri, and with Henry Wurst, Inc.—Raleigh, a North Carolina corporation with its principal place of business in North Carolina, to print, bind, and mail catalogs of plaintiff's wares. Plaintiff filed an action in North Carolina against the Wurst corporations, seeking damages in tort and for breach of contract arising out of the defective manufacture of the catalogs. Defendants in turn filed a third party complaint against Precision Services & Supply, Inc., an Iowa corporation with its principal place of business in Iowa, which had subcontracted with the Missouri arm of Henry Wurst, Inc. to do the actual printing, binding, and mailing. Precision Services moved to dismiss the third party complaint for lack of personal jurisdiction. The trial court denied the motion, finding that there were sufficient minimum contacts to warrant the exercise of jurisdiction over Precision Services.¹⁴⁸

The North Carolina Court of Appeals found the trial court's refusal to dismiss the third party defendant erroneous.¹⁴⁹ The court reiterated that the standard for exercising jurisdiction under G.S. 1-75.4, the North Carolina "long arm" statute, is one of due process. "Due process requires that a nonresident defendant have certain minimum contacts with the forum state such that the maintenance of the suit [in the forum state] does not offend 'traditional notions of fair play and substantial justice.'"¹⁵⁰

The court noted that the Iowa corporation had no contact with North Carolina other than shipping catalogs into the state. Also, it had not done business in the state nor did it have an agent in the state. Its sole knowledge of the plaintiff corporation, whose catalogs it printed, came through the Missouri corporation with which it had dealt. Thus it had done no act by which it "purposely avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws."¹⁵¹ Clearly

147. 56 N.C. App. 567, 289 S.E.2d 607, *disc. rev. denied*, 306 N.C. 384, 294 S.E.2d 209 (1982).

148. By contracting to print and bind the catalogs of a North Carolina business, to send samples of the catalog to the North Carolina business in Winston-Salem, North Carolina, to mail thousands of copies of the catalog to North Carolina addresses and to ship to the Plaintiff in North Carolina a substantial quantity of the catalogs, the Third Party Defendants have the necessary "minimum contacts" with North Carolina to support the exercise of personal jurisdiction over them by this Court in an action based upon a claim arising from those contacts.

Id. at 569, 289 S.E.2d at 609 (quoting from the trial court's findings of fact and conclusions of law).

149. *Id.* at 572, 289 S.E.2d at 610.

150. *Id.* at 571, 289 S.E.2d at 609-10 (quoting *Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 530, 265 S.E.2d 476, 479 (1980)). In *Brissey*, the court found the contact insufficient because defendants did business solely in South Carolina, plaintiff solicited the order in South Carolina, shipped the goods into South Carolina, and received payment there.

151. 56 N.C. App. at 571, 289 S.E.2d at 609. See *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 515, 251 S.E.2d 610, 614 (1979) (exercise of in personam jurisdiction is proper only if both the following requirements are met: (1) the state "long arm" statute confers jurisdiction over

then, when a foreign party solicits another foreign party to manufacture goods outside the state, mere delivery into the forum state will not suffice to legitimate the exercise of in personam jurisdiction over the delivering party.¹⁵²

A related issue arose in *Whitener v. Whitener*.¹⁵³ The parties, divorced in 1973, had sold a parcel of real property located in North Carolina in 1968 while married and living in Florida. At the time of the sale they received a purchase money note secured by a deed of trust. Plaintiff husband, while domiciled in North Carolina, brought an action in North Carolina for an accounting of proceeds received on the note by defendant, who remained domiciled in Florida. The trial court refused to exercise jurisdiction despite plaintiff's assertion that it was proper under G.S. 1-75.4(6)(b),¹⁵⁴ which authorizes jurisdiction over actions for recovery of any benefits accruing to the defendant by virtue of the use or control of property in North Carolina.

The court of appeals held that this action for an accounting was not one in rem, as it did not affect the debt owed by the purchaser of the property¹⁵⁵ nor was it a quasi in rem action because the debt was not garnished in an ancillary proceeding.¹⁵⁶ Therefore, the minimum contacts test of *International Shoe Co. v. Washington*¹⁵⁷ had to be met for the exercise of in personam jurisdiction. Viewed in light of the decision in *Shaffer v. Heitner*,¹⁵⁸ such contacts were not present.¹⁵⁹ Although defendant previously owned property in North

the nonresident defendant and (2) "defendant purposely avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws"). See also *Mabry v. Fuller-Shuway Co.*, 50 N.C. App. 245, 249, 273 S.E.2d 509, 511 (because the North Carolina "long arm" statute was intended to assert personal jurisdiction to the fullest extent allowed by due process, the only meaningful inquiry is whether defendant has the requisite minimum contacts with the forum state), *disc. rev. denied*, 302 N.C. 398, 279 S.E.2d 352 (1981).

152. Arguably, this case is contra to *Brissey* because the defendant shipped the goods into the state, thereby initiating contact. Defendant manufactured the goods outside the state, however, and never dealt directly with the North Carolina firm. Cf. *Hanson v. Denckla*, 357 U.S. 235 (1958) (nonresident trustee's "regular communications" with resident settlor did not satisfy minimum contacts requirement); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (single life insurance policy shipped into the forum state satisfied minimum contacts).

153. 56 N.C. App. 599, 289 S.E.2d 887, *disc. rev. denied*, 306 N.C. 393, 294 S.E.2d 221 (1982).

154. N.C. GEN. STAT. § 1-75.4 (Cum Supp. 1981) provides in pertinent part:

A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:

....

6) Local Property—In any action which arises out of:

....

(b) A claim to recover for any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this State either at the time of the first use, ownership, control, or possession or at the time the action is commenced;

155. 56 N.C. App. at 600, 289 S.E.2d at 888.

156. *Id.* Based on *Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979), the garnishment of the debt would be insufficient to warrant jurisdiction in the action for an accounting as that would allow jurisdiction only over the obligor of the note. See *Shaffer v. Heitner*, 433 U.S. 186 (1977), which requires that the property garnished be the subject of the action. Here the very point of the action was to determine if a debt was owed by the defendant.

157. 326 U.S. 310 (1945).

158. 433 U.S. 186 (1977). See *supra* note 156.

159. The court distinguished *Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1977), in which

Carolina, not every action concerning the note received upon the sale of that property comes within the purview of G.S. 1-75.4(6)(b). While it is true that defendant had an interest in the property by virtue of the note and deed of trust, the thrust of plaintiff's action was that defendant breached a duty to him concerning money she had received. Rights in the real property were not the subject of the suit; thus it provided no basis for jurisdiction over a Florida resident.¹⁶⁰

Two cases involved the North Carolina courts' power to inquire into the exercise of jurisdiction by sister states. In *Ft. Recovery Industries Inc. v. Perry*¹⁶¹ the court of appeals held that under some circumstances the North Carolina courts could review the sufficiency of jurisdiction exercised by a sister state in an action to enforce the judgment rendered by the sister state. Because the issue of jurisdiction was litigated in the prior foreign action, however, the court held the foreign court's judgment bound the North Carolina court.¹⁶² In *Old Dominion Distributors, Inc. v. Bissette*,¹⁶³ a summary judgment against defendant on the issue of jurisdiction was reversed upon a finding that defendant had not appeared in the Virginia action. Thus, the issue of jurisdiction had not been litigated in that forum. The North Carolina court could then properly inquire into the sufficiency of jurisdiction before granting full faith and credit to the foreign judgment.¹⁶⁴

K. Limitation of Actions

The constitutionality of G.S. 1-50(5),¹⁶⁵ a so-called "statute of repose,"¹⁶⁶

jurisdiction was exercised. There the plaintiff sought satisfaction of a Missouri judgment arising out of her divorce. The real property was the actual *res* in controversy; the husband owned North Carolina property subject to the property settlement. Thus, the action was primarily a determination of rights in the property. See also *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978) (North Carolina lacked jurisdiction over defendant, a Maryland resident who owned property in North Carolina that plaintiff, a Maryland corporation, tried to reach in collateral action).

160. See *supra* notes 154-156.

161. 57 N.C. App. 354, 291 S.E.2d 329 (1982).

162. The decision in *Ft. Recovery* accords with the full faith and credit mandate of *Durfee v. Duke*, 375 U.S. 106 (1963). The judgment, reflecting the decided issue of jurisdiction, is entitled to the full faith and credit of the North Carolina court. 57 N.C. App. at 357, 291 S.E.2d at 331.

163. 56 N.C. App. 200, 287 S.E.2d 409 (1982).

164. *Id.* at 202, 287 S.E.2d at 410.

165. In 1977, when the cause of action in *Lamb v. Wedgewood South Corp.*, 55 N.C. App. 686, 286 S.E.2d 876 (1982) arose, the statute provided:

No action to recover damages for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than six years (6) after the performance or furnishing of such services and construction. This limitation shall not apply to any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action.

N.C. GEN. STAT. § 1-50(5) (1969). This section was amended in 1981 to enumerate specific acts.

166. See McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of*

was upheld by the court of appeals in *Lamb v. Wedgewood South Corp.*¹⁶⁷ That statute bars actions for wrongful death against persons designing or constructing defective or unsafe improvements to real property that are not commenced within six years after the completion of such improvements; persons making the improvements who also retain actual control or possession of the property at the time of the injury are not protected by the statute.

In *Lamb* plaintiff's decedent was pushed or fell to his death from a sixth floor window of defendant's hotel in 1977. The trial court dismissed the claim against the architect who designed the building, which was completed in 1965. Plaintiff contended that the statute violated the equal protection clause embodied in the fourteenth amendment of the United States Constitution and section 18 of article I of the North Carolina Constitution.¹⁶⁸

The court's decision appears to be based on decisions in other jurisdictions evaluating the constitutionality of similar statutes.¹⁶⁹ Without presenting any detailed analysis, the court concluded that "the differences between architects and manufacturers, materialmen, and suppliers so far as [their] functions in the construction industry" provided a rational basis for granting architects earlier repose.¹⁷⁰

The opinion is interesting because of its treatment of the statute in light of article I, section 18 of the North Carolina Constitution, which provides in part that "right and justice shall be administered without favor, denial, or delay."¹⁷¹ Recently, in *Bolick v. American Barmag Corp.*,¹⁷² the court of appeals invoked that clause to invalidate a similar statute of repose, G.S. 1-50 (6),¹⁷³ as a denial of access to the courts. The majority in *Lamb*¹⁷⁴ disagreed with the *Bolick* decision, holding that a guarantee of impartial access to the courts does not bar the General Assembly from "defining or abolishing claims which arise

Repose, 30 AM. U. L. REV. 579, 584 (1981) (statute of repose differs from a statute of limitation because it begins to run at a time unrelated to the traditional accrual of the cause of action).

167. 55 N.C. App. 686, 286 S.E.2d 876 (1982).

168. The fourteenth amendment of the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1. Section 18 of article I of the North Carolina Constitution states: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have a remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. CONST. art. I, § 18.

169. See, e.g., *Fujioka v. Kam*, 55 Hawaii 7, 514 P.2d 563 (1971) (statute held unconstitutional); *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967) (statute held unconstitutional); *Kallas Mill Work Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975) (statute held unconstitutional); *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wash. 2d 528, 503 P.2d 108 (1973) (statute upheld against constitutional attack).

170. 55 N.C. App. at 694, 286 S.E.2d at 882.

171. See *supra* note 168.

172. 54 N.C. App. 589, 284 S.E.2d 188 (1981), *modified*, 306 N.C.364, 293 S.E.2d 415 (1982).

173. "No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect . . . in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption." N.C. GEN. STAT. § 1-50(6)(Cum. Supp. 1981).

174. Judge Wells dissented, agreeing with the *Bolick* reasoning. 55 N.C.App. at 696, 286 S.E.2d at 883 (Wells, J., dissenting).

under the common law."¹⁷⁵

The supreme court subsequently overruled *Bolick*, but did not reach the constitutionality issue. The supreme court opinion seems to buttress the *Lamb* decision, as the court held that the legislature may create a time limitation in which the action must be brought as a condition precedent to the action.¹⁷⁶ Thus, rather than abolishing the common law claim against the architect, G.S. 1-50(5) redefines the claim by placing the time limitation within its substantive framework.

In *F & D Co. v. Aetna Insurance Co.*¹⁷⁷ the supreme court clarified its stance on contract provisions that limit the time in which a claimant may bring an action. Plaintiff contended that the policy provision limiting the time in which to bring its action to no more than one year after it suffered the physical injury or damage conflicted with G.S. 58-31.¹⁷⁸ That statute prohibits insurers from limiting actions to any period less than one year from the date the cause of action accrues. Since *Heilig v. Aetna Life Insurance Co.*,¹⁷⁹ the North Carolina courts have construed such policy provisions liberally to mean that actions must be commenced within one year of accrual of the cause of action, rather than the time of the injury, thus eliminating conflict with the statute. In *F & D Co.*, however, the supreme court read the policy literally and held that plaintiff's claim was barred by the provision unless it was commenced within one year of the injury.¹⁸⁰ Because the cause of action did not accrue until the claimant had filed proofs of loss and the company had denied payment, the policy limit conflicted with the protections of the statute.¹⁸¹ The court, therefore, held that the policy provision was void and plaintiff should be allowed to pursue his claim because he filed suit within one year of the expiration of the period reserved by the company for determining its liability.¹⁸²

175. *Id.* at 695, 286 S.E.2d at 883.

176. That the legislature has the authority to establish a condition precedent to what originally was a common law cause of action is beyond question. [T]he General Assembly is the policy-making agency of our government and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter.

McMichael v. Proctor, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956), *quoted in Bolick*, 306 N.C. at 370, 293 S.E.2d at 420.

177. 305 N.C. 256, 287 S.E.2d 867 (1982).

178. No company or order, domestic or foreign, authorized to do business in this State under this Chapter, may make any condition or stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit or action thereon may be brought, nor may it limit the time within which such suit or action may be commenced to less than one year after the cause of action accrues. . . .

N.C. GEN. STAT. § 58-31 (1982).

179. 152 N.C. 358, 67 S.E. 927 (1910).

180. 305 N.C. at 263-64, 287 S.E.2d at 871.

181. "If, at the end of the 30-day period after the proofs are filed, the company has not paid the insured's loss, its cause of action accrues." *Id.* at 264, 287 S.E.2d at 871.

182. *Id.* at 264-65, 287 S.E.2d at 871-72. The supreme court was unable to determine, from the record on appeal, when plaintiff's cause of action accrued. Consequently, the case was remanded to the trial court for a determination of the accrual date and a ruling on whether plaintiff commenced its action within one year of that date. *Id.*

L. Discovery

It has long been held that a defendant in a civil action may invoke the privilege against self-incrimination when the plaintiff is seeking punitive damages.¹⁸³ A recent ruling by the court of appeals, however, permitted sanctions against a defendant who, claiming the privilege, refused to allow discovery in defiance of an order to respond to interrogatories. In *Stone v. Martin*¹⁸⁴ plaintiff shareholder brought an action for damages, punitive damages, and arrest for the unlawful acts and omissions of the defendant corporate officer. Upon defendant's refusal to answer interrogatories, the trial court issued an order compelling him to respond; three questions were exempted by the court because they called for potentially incriminating replies. After defendant again asserted his claim of privilege and declined to respond, the court struck his answer to the complaint and entered default judgment for plaintiff.

The court of appeals upheld the sanctions on two grounds. First, the court stated that defendant could not himself determine the scope of the privilege.¹⁸⁵ Instead, defendant's proper remedy was to appeal the order compelling discovery.¹⁸⁶ Second, the interrogatories and requests for admission sought information to which the plaintiff was entitled as a shareholder.¹⁸⁷ Citing *United States v. White*,¹⁸⁸ the court held that one may not withhold information entrusted to him in a representative capacity, even though such information may tend to incriminate him.¹⁸⁹ Thus, the privilege did not apply and defendant had no grounds upon which to refuse to comply with the order.¹⁹⁰

183. See *Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964).

184. 56 N.C. App. 473, 289 S.E.2d 898, *disc. rev. denied*, 306 N.C. 392, 294 S.E.2d 220 (1982).

185. "Determination of whether the privilege applies must be by the court, not the individual claiming the privilege. . . . That plaintiffs seek punitive damages does not, *ipso facto*, entitle defendant to refuse, with impunity, to submit to the requested discovery." *Id.* at 477, 289 S.E.2d at 901.

186. In *Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 294 S.E.2d 386 (1982), defendant refused to make discovery, claiming a work product privilege. The trial court ordered the production of certain documents, and when they were not surrendered, ordered that sanctions were appropriate. The court of appeals held that defendant could not unilaterally determine which documents were privileged. "Absent a stay by virtue of appeal, defendant could not justifiably disobey the order." 58 N.C. App. at 736-37, 294 S.E.2d at 387.

187. "Plaintiffs thus had a statutory right, enforceable by an action in the nature of mandamus, to inspect the records of the corporation. G.S. 55-38." *Stone*, 56 N.C. App. at 478, 289 S.E.2d at 902.

188. 322 U.S. 694 (1944).

189. 56 N.C. App. at 478, 289 S.E.2d at 902.

190. Furthermore, sanctions may be imposed in the absence of an order compelling discovery. In *First Citizens Bank & Trust Co. v. Powell*, 58 N.C. App. 229, 292 S.E.2d 731, *disc. rev. denied*, 306 N.C. 740, 295 S.E.2d 477 (1982), the trial court struck defendant's answer and entered a default judgment for failure to answer interrogatories. The appellate court stated that while imposition of severe sanctions prior to an order to compel discovery was unusual, such sanctions were clearly authorized by rule 37(d) of the North Carolina Rules of Civil Procedure. Thus, the court of appeals held that the trial court did not abuse its discretion when there was no evidence in the record that injustice would result from the imposition of sanctions. See also *Carpenter v. Cooke*, 58 N.C. App. 381, 293 S.E.2d 630 (trial court properly dismissed plaintiffs' actions for failure to comply with discovery order), *cert. denied*, 306 N.C. 740, 295 S.E.2d 758 (1982).

In *Shepherd v. Oliver*¹⁹¹ sanctions were held inappropriate when plaintiff had no opportunity to supplement answers to interrogatories before trial. The defendant sought to exclude testimony by an expert witness, called by plaintiff, on the ground that he had not been listed as one whom plaintiff planned to call at trial.¹⁹² The court of appeals held that the trial court's exclusion of the testimony was erroneous. The court noted that plaintiff called the witness as a last resort when her own expert witness failed to testify as expected. Thus, plaintiff had no duty to supplement her responses to interrogatories when such information was not available to her before trial.

M. Dismissal

In *Dealers Specialties, Inc. v. Neighborhood Housing Services*¹⁹³ the supreme court took the opportunity to clarify in dictum the role of the trial judge in a nonjury trial when ruling on a motion to dismiss pursuant to rule 41(b).¹⁹⁴ The court of appeals had stated that in making such a ruling the evidence should be considered in the light most favorable to the plaintiff.¹⁹⁵ In *Bryant v. Kelly*¹⁹⁶ the court of appeals had earlier ruled, consistently with the federal practice, that the judge "is to evaluate the evidence without any limitations as to the inferences which the court must indulge in favor of the plaintiff's evidence on a similar motion for a directed verdict in a jury case."¹⁹⁷ The confusion over this standard was created by *Rogers v. City of Asheville*,¹⁹⁸ in which the court of appeals quoted *Bryant* but stated the limitation in favor

191. 57 N.C. App. 188, 290 S.E.2d 761, *disc. rev. denied*, 306 N.C. 387, 294 S.E.2d 212 (1982).

192. The excluded testimony was given by a doctor listed by defendant as his expert witness. The jury had been examined concerning him, and defendant was notified two days before his appearance that he would be called by plaintiff. *Id.* at 188-89, 290 S.E.2d at 762. Defendant's claim of surprise rings hollow under the circumstances.

193. 305 N.C. 633, 291 S.E.2d 137 (1982).

194. N.C.R. Civ. P. 41(b) provides:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after the dismissal.

195. 54 N.C. App. 46, 53, 283 S.E.2d 155, 160 (1981). The federal rule is to the contrary. The trial judge may consider all the evidence and weigh its probative value and credibility. *See* 5 J. MOORE, J. LUCAS & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶41.13[3] & n.11 (2d ed. 1982).

196. 10 N.C. App. 208, 178 S.E.2d 113 (1970), *rev'd on other grounds*, 279 N.C. 123, 181 S.E.2d 438 (1971).

197. *Id.* at 213, 178 S.E.2d at 116.

198. 14 N.C. App. 514, 188 S.E.2d 656 (1972).

of the plaintiff. A subsequent decision in *Sanders v. Walker*¹⁹⁹ then read *Rogers* as ascribing this limitation to the *Bryant* court as well. Although the issue was not essential to the disposition of the case, the supreme court in its reversal held in *Dealers* that *Bryant* was correct in removing the limitation on the trial judge in his consideration of the evidence.²⁰⁰

BARRY S. BROWN
JOHN BRENDAN KELLY
GLENN J. REID

199. 39 N.C. App. 355, 250 S.E.2d 84 (1979).

200. 305 N.C. at 639, 291 S.E.2d at 140. See also 1 A. MCINTOSH, NORTH CAROLINA PRACTICE & PROCEDURE § 1375 (2d ed. Supp. 1970).

III. COMMERCIAL LAW

A. Insurance

In *Butcher v. Nationwide Life Insurance Co.*¹ the North Carolina Court of Appeals confronted the issue of when a death is "accidental" under an Accidental Death Benefit rider to a life insurance policy.² Plaintiff in *Butcher*, the insured's wife, woke the insured as he was sleeping on a couch. The insured immediately began hitting and cursing plaintiff; he produced a knife, and in the ensuing struggle he was wounded in the heart and died. Plaintiff subsequently testified that she and her husband had fought several times before. On cross-examination, she admitted that she had been convicted of fighting in public and of trespass.³ The issue went to the jury phrased exactly according to the terms of the Accidental Death Benefit rider to the insurance policy: "Did the death of [the insured] result directly and independently of all other causes from bodily injury caused solely by external, violent and accidental means?"⁴ The jury answered in the affirmative, and the trial court denied defendant's motion for a judgment notwithstanding the verdict.

The court of appeals reversed. Citing several North Carolina cases,⁵ the court quoted from another North Carolina case containing similar facts:

Where the policy insures against loss of life through accidental means, the principle seems generally upheld that, if the death of the insured, although in a sense unforeseen and unexpected, results directly from the insured's voluntary act and aggressive misconduct, or where the insured culpably provokes the act which causes the injury and death, it is not death by accidental means, even though the result may be such as to constitute an accidental injury.⁶

Plaintiff relied upon a recent court of appeals case, *Logan v. Life Insurance Co. of North America*.⁷ In *Logan* plaintiff was the wife of the insured, from whom she was separated. When plaintiff refused to sleep with the in-

1. 56 N.C. App. 776, 290 S.E.2d 373 (1982).

2. It is common for life insurance policies to provide for payment of double the face amount of the policy if death results from an accident. These provisions generally exclude suicide, self-inflicted injury, military service during wartime, participation in riot or insurrection, and disease or bodily infirmity. J. MACLEON, *LIFE INSURANCE* 328-29 (3d ed. 1932).

3. 56 N.C. App. at 778, 290 S.E.2d at 374.

4. *Id.*

5. *Chesson v. Pilot Life Ins. Co.*, 268 N.C. 98, 150 S.E.2d 40 (1966) (insured died from voluntary jump backwards, apparently as a result of hypertension, delirium tremens, or some other mental or physical infirmity; death held not accidental); *Scarborough v. World Ins. Co.*, 244 N.C. 502, 94 S.E. 558 (1956) (insured started fight resulting in his own death; held not death by "accidental means"); *Clay v. State Ins. Co.*, 174 N.C. 642, 94 S.E. 289 (1917) (insured struck and threatened acquaintance, eventually leading to a gunfight in which insured was killed; held that aggression by insured will not by itself render the death nonaccidental; jury question remained whether aggression occurred under circumstances rendering a homicide likely, but if facts were found as they appeared on record, a directed verdict for defendant would be appropriate).

6. 56 N.C. App. at 780, 290 S.E.2d at 375 (quoting *Scarborough v. World Ins. Co.*, 244 N.C. 502, 505, 94 S.E.2d 558, 561 (1956)).

7. 46 N.C. App. 629, 265 S.E.2d 447, *disc. rev. denied*, 301 N.C. 93 (1980).

sured, he began to hit her and produced a gun. After a struggle in which plaintiff took control of the gun, the insured was shot and killed.

The trial court in *Logan* granted summary judgment for defendant. The court of appeals reversed and remanded, holding that the question whether the insured's death was accidental was for the jury. Citing a case relied upon in *Butcher*,⁸ the court stated that "the true test of liability in cases of this sort is not whether the insured was the aggressor in the affray that took his life, but whether he was 'the aggressor, under circumstances that would render a homicide likely as the result of his own misconduct.'"⁹ The court noted that the insured had assaulted plaintiff several other times but that she had withdrawn rather than resisted. Therefore, it was a question of fact whether the insured could have anticipated on the last occasion that plaintiff would struggle with him.¹⁰ Earlier North Carolina cases holding an aggressor's death nonaccidental as a matter of law¹¹ were distinguished on the ground that there had been no previous course of conduct between the parties to the fight that might have influenced the expectations of the insured. The *Logan* court did not cite any North Carolina case that dealt with previous course of conduct in a marital context; rather, the court's holding was based upon decisions from other jurisdictions involving similar facts.¹²

The court in *Butcher* distinguished *Logan* summarily, stating that it did not control because different language appeared in the *Logan* insurance policy.¹³ The *Logan* policy insured against death "by accident,"¹⁴ while the term in *Butcher* was "[by] accidental means."¹⁵ The court did not attempt to analyze the significance of the difference. The opinion mentions that North Carolina is one of the jurisdictions that differentiates between the two terms, giving a more limited interpretation to "accidental means."¹⁶ These comments, how-

8. *Clay v. State Ins. Co.*, 174 N.C. 642, 94 S.E. 289 (1917).

9. 46 N.C. App. at 630, 265 S.E.2d at 448 (quoting *Clay v. State Ins. Co.*, 174 N.C. 642, 94 S.E. 289, 290 (1917)).

10. 46 N.C. App. at 630, 265 S.E.2d at 448.

11. *Gray v. State Capital Life Ins. Co.*, 254 N.C. 286, 118 S.E.2d 909 (1961); *Scarborough v. World Ins. Co.*, 244 N.C. 502, 94 S.E.2d 558 (1956); *Clay v. State Ins. Co.*, 174 N.C. 642, 94 S.E. 289 (1917).

12. *Yeager v. Travelers Ins. Co.*, 515 P.2d 117 (Colo. App.), *reh. denied, cert. denied* (1973) (long history of aggressive conduct by husband with no resistance from wife until fatal shooting in self-defense); *Martin v. Massachusetts Mut. Life Ins. Co.*, 225 Tenn. 56, 463 S.W.2d 681 (1971) (wife shot husband as he held razor to her throat; previous conduct would not necessarily lead insured to foresee resistance leading to his death). See also *Macklin v. Commonwealth Life and Accident Co.*, 121 Ill. App. 2d 119, 257 N.E.2d 256 (1970); *Life and Casualty Co. v. Hulsey*, 109 Ga. App. 15, 134 S.E.2d 880 (1964); *General State Mut. Life Ass'n v. Gray*, 290 P.2d 217 (1955). But see *Wooden v. John Hancock Mut. Life Ins. Co.*, 205 Va. 750, 139 S.E.2d 801 (1965); Annot., 26 A.L.R.2d 399 (Supp. 1981).

13. 56 N.C. App. at 781, 290 S.E.2d at 376.

14. 46 N.C. App. at 629, 265 S.E.2d at 447.

15. 56 N.C. App. at 780, 290 S.E.2d at 373.

16. The term "accidental means" refers to the occurrence or event which produces death and not to the death itself. *Chesson v. Insurance Co.*, 268 N.C. 98, 150 S.E.2d 40 (1966). The word "accidental" describes the means of death. *Id.* "The motivating, operative and causal factor must be accidental in the sense that it is unusual, unforeseen and unexpected. . . . [T]he emphasis is upon the accidental character of the causation—not upon the accidental nature of the ultimate sequence of the chain of causation. *Fletcher v. Trust Co.*, 220 N.C. 148, 150, 16 S.E.2d 687, 688

ever, were made without reference to *Logan*. The court did not attempt to expand the analysis or state clearly why *Logan* should not control when an "accidental means" policy is involved.

The *Logan* opinion does not indicate that it would have been decided differently under an "accidental means" policy. Indeed, a careful reading of *Logan* indicates that the holding was meant to apply under either a "by accident" or an "accidental means" policy. The principal North Carolina authority relied upon in *Logan*, *Clay v. State Insurance Co.*,¹⁷ was a case involving an "accidental means" policy.¹⁸ Moreover, distinctions in wording were not an issue in either of the out-of-state cases cited in *Logan*.¹⁹

In cases involving the death of an insured as a result of his own aggression, *Clay* had established that foreseeability is an element that must be shown for death to be by non-"accidental means."²⁰ *Logan* applied this rule to cases in which there had been a previous course of conduct between the quarreling parties. If the insured had been the aggressor and had never before met with resistance, *Logan* directed that foreseeability should be a question of fact. It is clear that counsel for plaintiff in *Butcher* attempted to bring this case within the scope of the *Logan* holding. Although the opinion notes that plaintiff testified as to previous fights,²¹ the court did not elaborate upon the substance of that testimony or attempt any analysis of plaintiff's claim under the *Logan* criteria. Instead, the court dispensed with *Logan* merely on semantic grounds.

North Carolina continues to cling to the distinction between the terms "accidental" and "accidental means," despite a trend away from such an interpretation in other jurisdictions.²² Regardless of the merits of the distinction, it is difficult to discern a reason in policy, logic, or North Carolina authority for its application in distinguishing *Butcher* from *Logan*. Because the court offered no analytical justification for its decision, it appears that until the North Carolina Supreme Court clarifies the matter, the *Butcher* holding will leave the significance of *Logan* in doubt. Insurers, consumers, and counsel should carefully scrutinize the wording in Accidental Death Benefit riders to life insurance policies.

(1941). See *Butcher*, 56 N.C. App. at 779, 290 S.E.2d at 375. See also *Skillman v. Acacia Mut. Life Ins. Co.*, 258 N.C. 1, 127 S.E.2d 789 (1962); *Scarborough v. World Ins. Co.*, 244 N.C. 502, 94 S.E.2d 558 (1956); 26 AM. JUR. 2D *Insurance* § 562 (1982); Annot., 166 A.L.R. 469 (1947).

17. 174 N.C. 642, 94 S.E. 289 (1917).

18. *Id.*

19. In *Yeager v. Travelers Ins. Co.*, 515 P.2d 117 (Colo. App. 1973) there was no discussion of the terms of the policy. In *Martin v. Massachusetts Mut. Life Ins. Co.*, 225 Tenn. 56, 463 S.W.2d 681 (1971), the policy insured against death by "accidental bodily injury," however, the court's analysis did not refer to the specific wording of the terms.

20. See *supra* note 9 and accompanying text.

21. 56 N.C. App. at 778, 290 S.E.2d at 375.

22. The leading case rejecting the distinction is *Burr v. Commercial Travelers Mut. Accident Ass'n*, 295 N.Y. 294, 67 N.E.2d 248 (1966). For a listing of jurisdictions that have dropped the distinction see 26 AM. JUR. 2D *Insurance* § 562 (1982). This trend has been influenced by a criticism Justice Cardozo voiced in *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491 (1934), (Cardozo, J., dissenting).

In *Shew v. Southern Fire & Cas. Co.*²³ the North Carolina Court of Appeals reversed summary judgment for the defendant on an issue that had apparently never been litigated in North Carolina or any other jurisdiction. Plaintiff, the insured, was convicted on criminal traffic violations and sentenced to eighteen months imprisonment.²⁴ The sentence was suspended, and among the conditions for suspension was a requirement that plaintiff reimburse the county for damage done to a police car. The judgment stated that the reimbursement was "an addition to what insurance coverage fails to pay as a result of liability damages or if insurance refuses to pay such damage."²⁵ The insurance company refused to pay. Plaintiff took out a loan and paid the damages himself, then sued the insurance company for restitution.²⁶

At trial, the insurance company contended that the sum paid by plaintiff to the county was not money he was "legally required to pay"²⁷ within the meaning of the policy. Defendant argued that plaintiff paid the money voluntarily to comply with the conditions of probation and to avoid imprisonment. The trial court agreed and granted summary judgment for defendant.

The court of appeals reversed. The court held that plaintiff, in suing for reimbursement of money paid to the county, stood in the shoes of the county against defendant. The court stated that if the county had sued plaintiff, defendant would "without question" have had to defend the suit and pay any judgment rendered against plaintiff.²⁸ This result, the court said, fulfilled the purpose of liability insurance—to protect those damaged by negligent operation of an automobile.²⁹

Judge Becton dissented because he believed plaintiff could not recover since public liability insurance is designed to protect against civil liability only, and a contract insuring one against criminal liability would be void as against public policy.³⁰ Judge Becton did not believe that plaintiff was "legally obligated" to pay the county. "He was not *ordered* to pay restitution," Judge Becton contended, rather, "he was *allowed* to pay restitution."³¹ The dissent also suggested that the accident was not an occurrence under the terms of the policy, because the damages stemmed from plaintiff's admittedly intentional act.³²

23. 58 N.C. App. 637, 294 S.E.2d 233 (1982).

24. Plaintiff was a 17-year old insured under his stepfather-coplauntiff's liability insurance policy. He had led several sheriff's deputies on a chase that reached speeds of 130 miles per hour. The chase culminated with plaintiff crashing into a roadblock formed by deputies' cars.

25. 58 N.C. App. at 638, 294 S.E.2d at 234.

26. *Id.* See *Standard Accidental Ins. Co. v. Harrison-Wright Co.*, 207 N.C. 661, 178 S.E. 235 (1935).

27. The policy provided, "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of property damage to which this insurance applies." 58 N.C. App. at 639, 294 S.E.2d at 235.

28. *Id.* at 640, 294 S.E.2d at 236.

29. The court cited *Harrelson v. State Farm Mut. Auto Ins.*, 275 N.C. 603, 158 S.E.2d 812 (1968). See also N.C. Gen. Stat. §§ 20-309 to -319 (1978 & Supp. 1981).

30. See generally COUCH, *INSURANCE* 2D § 45:2 (rev. ed. 1981).

31. 58 N.C. App. at 643, 294 S.E.2d at 237.

32. It is, however, settled in North Carolina that under a claim by an injured party against an

The dissent also highlighted practical problems raised by the majority opinion. First, because the insurance company could not be a party to the criminal trial, and because damages are usually not argued in criminal cases, the insurance company would have no opportunity to be heard. In addition, Judge Becton was troubled by the implications of requiring insurers to pay restitution in criminal cases because such restitution is completely within the discretion of the trial court. Finally, Judge Becton argued that defendant may have had a defense in a civil trial based on the contributory negligence of the county's agents.³³ He argued that these civil issues should be resolved prior to a judgment of restitution in a criminal action.

There is very little authority regarding an insurer's obligation to pay restitution ordered by a court in a criminal case when the damages for which restitution is made were within the coverage of the policy. Therefore, the majority relied heavily on policy arguments, emphasizing the need to construe liability insurance policy provisions liberally in order to assure that innocent victims will be compensated.³⁴ In so doing, however, the court failed to analyze the crucial issue in the case: whether a reimbursement by the insured to the injured party in lieu of imprisonment, pursuant to a criminal judgment, constitutes a legal obligation to pay on the part of the insured. In holding for the plaintiff without directly addressing this issue, the majority in *Shaw* was unable to provide adequate answers to the questions raised by the dissent.

The court of appeals demonstrated further willingness to construe liberally liability insurance policy terms in *Ohio Casualty Insurance Co. v. Anderson*,³⁵ a case that focused upon the Financial Responsibility Act.³⁶ Defendant in *Ohio Casualty* purchased a car for his exclusive possession and use. Simultaneously with this transaction, however, legal title was transferred to his son. Defendant's son was unaware that the car was registered in his name. Plaintiff issued defendant an owner's policy of liability insurance.³⁷ While driving the

insurer under a policy of compulsory motor vehicle insurance, an "accident" occurs if the occurrence was accidental from the point of view of the injured party. *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 634 (1964). See also Note, 43 N.C.L. REV. 436 (1965).

33. "The Keystone comedy routine, which would be funny in a movie. . . had all the potential in the world for tragedy in the highways of Iredell County. . . [B]ased on plaintiff's testimony the conduct of Iredell County Sheriff's Department was equally as willful and wanton." 58 N.C. App. at 650, 294 S.E.2d at 238.

34. See N.C. GEN. STAT. § 20-309 (Supp. 1981). See also *Nationwide Mut. Ins. Co. v. Firemen's Fund Ins. Co.*, 279 N.C. 240, 182 S.E.2d 571 (1971); *Jones v. State Farm Mut. Auto Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967); *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964).

35. 59 N.C. App. 621, 298 S.E.2d 56 (1982).

36. N.C. GEN. STAT. §§ 20-279.1 to -279.39 (1978 & Cum. Supp. 1981). The Act provides for compulsory liability insurance for all motorists. Courts have held that the provisions of the Act are written into every automobile liability policy as a matter of law, and when terms of a policy conflict with the statute, the statute will prevail. See *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977); *Harrelson v. State Farm Mut. Auto Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968); *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 34, 152 S.E.2d 436 (1967); *Engle v. State Farm Ins. Co.*, 37 N.C. App. 126, 245 S.E.2d 532, *disc. rev. denied*, 293 N.C. 645, 248 S.E.2d 250 (1978); *Allstate Ins. Co. v. Webb*, 10 N.C. App. 672, 179 S.E.2d 803 (1971); *Lichtenberger v. American Motorists Ins. Co.*, 7 N.C. App. 269, 172 S.E.2d 284 (1970).

37. The Financial Responsibility Act provides for two kinds of liability insurance policies—

car, defendant collided with another vehicle. Plaintiff, claiming that defendant did not own the car, obtained a declaratory judgment in the trial court that its owner's policy did not cover the collision. The court of appeals reversed.

Two North Carolina cases³⁸ had previously given a strict interpretation to the definition of "owner" appearing in G.S. 20-4.01(26).³⁹ These cases held that an owner's liability insurance extends coverage only to the holder of legal title. In *Ohio Casualty*, however, the court distinguished these cases on the ground that they concerned attempts by vendees to claim coverage under owner's liability policies before the vendees had received legal title. In *Ohio Casualty* neither vendor nor vendee had title after the sale, because title was transferred to vendee's son.⁴⁰ The court held that under these circumstances, when defendant paid the entire purchase price, had exclusive possession and use of the vehicle, and had obtained insurance and paid the premiums, he likewise retained a clear equitable interest in the vehicle. This equitable interest was sufficient "to make him the 'owner' of the vehicle within the coverage intent of the policy, interpreted in light of the purpose and intent of the Financial Responsibility Act."⁴¹

The *Ohio Casualty* opinion makes it clear that under G.S. 20-4.01, the owner is the legal title holder "unless the context otherwise requires."⁴² The court appears to have balanced the underlying policy of the Financial Responsibility Act⁴³ against strong precedent holding to a strict construction of the

"owner's" (N.C. GEN. STAT. § 20-279.211 (1978)) and "operator's" (N.C. GEN. STAT. § 20-279.21(c) (1978)).

38. *Younts v. State Farm Mut. Auto Ins. Co.*, 281 N.C. 582, 189 S.E.2d 137 (1972); *Nationwide Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970). See also *Norris v. Insurance Co. of North America*, 26 N.C. App. 91, 215 S.E.2d 379 (aircraft liability insurance), cert. denied, 288 N.C. 242, 217 S.E.2d 666 (1975).

39. N.C. GEN. STAT. § 20-4.01(26) (Cum. Supp. 1981) defines "owner" as:

A person holding the legal title to a vehicle, or in the event a vehicle is the subject of a chattel mortgage or an agreement for the conditional sale or lease thereof or other like agreement, with the right of purchase upon performance of the conditions stated in the agreement, and with the immediate right of possession vested in the mortgagor, conditional vendee or lessee, said mortgagor, conditional vendee or lessee shall be deemed the owner for the purpose of this Chapter

40. 59 N.C. App. at 624-25, 298 S.E.2d at 59.

41. *Id.* at 624-25, 298 S.E.2d at 59. Two earlier cases, *Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 279 N.C. 240, 182 S.E.2d 571 (1971) and *Indiana Lumbermans Mut. Ins. Co. v. Parton*, 147 F. Supp. 887 (M.D.N.C. 1957), rejected the proposition that a holder of an equitable interest is an "owner" for liability purposes. The *Ohio Casualty* court distinguished these cases. In both *Nationwide* and *Indiana Lumbermans* the legal title holder was the insured; therefore, the court in both cases upheld coverage.

42. N.C. GEN. STAT. § 20-4.01 (Cum. Supp. 1981).

43. The court quoted a previous case defining the policy of the Financial Responsibility Act:

'The primary purpose of . . . compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially irresponsible motorists. The victim's rights against the insurer are not derived through the insured Such rights are statutory and become absolute upon the occurrence of injury or damage inflicted by the named insured, by one driving with his permission, or by one driving while in lawful possession of the named insured's car regardless of whether or not the nature and circumstances of the injury are covered by the contractual terms of the policy.'

59 N.C. App. at 625, 298 S.E.2d at 59 (quoting *Engle v. State Farm Mut. Auto Ins. Co.*, 37 N.C. App. 126, 245 S.E.2d 532 (1978)). See also *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431,

term "owner" in liability cases.⁴⁴ Policy considerations prevailed as the court decided that under "the discrete facts and circumstances"⁴⁵ of *Ohio Casualty*, "owner" should be liberally construed. The weight of authority, however, still favors a strict construction of ownership.⁴⁶ *Ohio Casualty* will probably be useful precedent only in cases in which the nontitle holder has a very strong equitable interest and strict construction of G.S. 20-4.01(26) would frustrate the purpose of the Financial Responsibility Act.

B. Antitrust and Unfair Trade Practices⁴⁷

In *Cameron v. New Hanover Memorial Hospital, Inc.*⁴⁸ plaintiffs, two podiatrists, alleged that defendants, a hospital and two orthopedic surgeons, conspired to prevent them from obtaining privileges to practice in the hospital. Both surgeons said they would no longer perform surgery in the hospital were plaintiffs given hospital privileges. Soon thereafter, the hospital staff voted not to amend institutional bylaws to grant plaintiffs hospital privileges. Plaintiffs charged that these actions constituted an illegal conspiracy under G.S. 75-1⁴⁹ and unfair methods of competition under G.S. 75-1.1.⁵⁰ Affirming a directed verdict for defendants, the North Carolina Court of Appeals found insufficient evidence of a boycott or conspiracy to support a claim under G.S. 75-1. In addition, the court held that members of learned professions who were engaged in the performance of professional services could not be sued under the

238 S.E.2d 597 (1977); *Nationwide Ins. Co. v. Firemans Fund*, 279 N.C. 240, 182 S.E.2d 571 (1971); *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964).

44. See *supra* note 38.

45. 59 N.C. App. at 626, 298 S.E.2d at 59.

46. See *supra* notes 36 & 38.

47. In *United States v. Southern Motor Rate Carriers Conference, Inc.*, 672 F.2d 469 (5th Cir. 1982), the United States Court of Appeals held that the North Carolina Motor Carriers Association (NCMCA) should be enjoined from meeting to discuss and agree upon intrastate transportation rates to be proposed to the appropriate state regulatory commission. The NCMCA had been conducting such activities under the auspices of N.C. GEN. STAT. § 62-152.1(b) (1982), which allows any party to a multicarrier agreement regarding uniform rates to apply to a state commission for approval of the agreement. Subsection (h) of the same statute relieves parties to an approved agreement from the operation of the antitrust laws. The NCMCA argued that this provision placed them under the state action exception to federal antitrust laws.

In cases in which governmental action supplants competition, courts have often recognized an exception to the Sherman Act, 15 USC § 1 (1976). See, e.g., *Parker v. Brown*, 317 U.S. 341 (1943). The court of appeals noted, however, that the exception applies only when anticompetitive activity is compelled by state action. N.C. GEN. STAT. § 62-152.1(b) (1982) allows but does not compel the rate agreements that the government claimed were price fixing. Therefore, the NCMCA was enjoined from any further collective rate-making activities.

48. 58 N.C. App. 414, 293 S.E.2d 901 (1982).

49. N.C. GEN. STAT. § 75-1 (1981) states, "Every contract, combination . . . or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal."

50. N.C. GEN. STAT. § 75-1.1 (1981) provided in part, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." This section was amended in 1977 to provide: "(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful . . . (b)'commerce' . . . does not include professional services rendered by a member of a learned profession."

superceded version of G.S. 75-1.1.⁵¹

In reaching its conclusion, the court observed that G.S. 75-1 was based upon section 1 of the Sherman Act.⁵² The court noted that federal law, though not binding, was instructive in interpreting the North Carolina statute.⁵³ The court then cited federal cases that have found unilateral acts to be insufficient to constitute a conspiracy.⁵⁴ Those cases, the court noted, required a showing of "some consciousness of commitment to a common scheme" in order to make out a claim of conspiracy under the Sherman Act.⁵⁵

Turning to North Carolina law, the court stated that G.S. 75-1 resembles the law regarding civil conspiracy: even though the conspiracy may be established by circumstantial evidence, "the evidence of the agreement must be sufficient to create more than a suspicion or conjecture [of conspiracy]."⁵⁶ The court had earlier noted that the only indications of an agreement in this case were defendant surgeons' statements and the hospital's subsequent refusal to grant privileges to plaintiffs. This evidence, said the court, showed merely "individual expression of like personal opinion."⁵⁷ Because plaintiffs had failed to show sufficient evidence of concerted acts by defendants, the court rejected their claim of conspiracy under G.S. 75-1.⁵⁸

Turning to the allegation that defendants had committed unfair trade practices under G.S. 75-1.1, the court held that plaintiff could not bring such a claim under the statute.⁵⁹ The court interpreted the terms "trade or commerce" to "include practically every business occupation . . . into which the elements of bargain and sale (or) barter . . . enter."⁶⁰ Defendants in *Cameron*, however, were doctors, not sellers.⁶¹ As a result, the court held that they did not fall under the rubric of G.S. 75-1.1⁶²

51. The court was considering the 1981 version of the statute under which plaintiff brought suit.

52. 15 U.S.C. § 1 (1981).

53. 58 N.C. App. at 293, 293 S.E.2d at 918. See *Ross v. Video Materials Co.*, 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973).

54. See *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

55. 58 N.C. App. at 442, 293 S.E.2d at 918 (quoting *United States v. Standard Oil, Inc.*, 316 F.2d 884, 890 (7th Cir. 1963)).

56. 58 N.C. App. at 438, 293 S.E.2d at 916 (quoting *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981)).

57. 58 N.C. App. at 439, 293 S.E.2d at 916.

58. *Id.* at 439, 293 S.E.2d at 918.

59. *Id.* at 446, 293 S.E.2d at 921.

60. *Id.* at 444, 293 S.E.2d at 920 (quoting *North Carolina ex rel. Edmisten v. J.C. Penny Co.*, 292 N.C. 311, 233 S.E.2d 895 (1977)).

61. The court relied on *Batiste v. American Home Prods. Corp.*, 32 N.C. App. 1, 231 S.E.2d 269 (holding that doctors do not engage in the sale of goods under the UCC), *disc. rev. denied*, 292 N.C. 466, 233 S.E.2d 921 (1977).

62. The court further stated that plaintiff could not have proceeded under the amended statute, *see supra* note 50, either, because it exempts those engaged in learned professions. See also *N. ALLEN, NORTH CAROLINA ANTITRUST AND TRADE REGULATION* § 2-10, at 21 (1982): "[T]he term 'learned profession' was determined to apply to physicians, attorneys, clergy, and related professions However, the Attorney General carefully noted that members of learned professions are not themselves exempt. Rather, professional services are not to be regarded as com-

The *Cameron* decision is a proper application of the law to the facts of the case. Under federal antitrust law, "[u]nrelated action, no matter what its motivation cannot violate § 1 [of the Sherman Act]." ⁶³ Similarly, case law is unanimous in requiring that evidence of a conspiracy do more than create mere suspicion of conspiracy. ⁶⁴ In *Cameron*, the only signs of conspiracy were the doctors' complaint and the subsequent denial of hospital privileges to plaintiffs. No evidence was introduced to show agreement, explicit or implicit, between the doctors and the hospital. Therefore, the court correctly followed the example of federal cases which have held that evidence equally indicitive of either independent or concerted activity is insufficient to prove a conspiracy. ⁶⁵

In *American Motors Sales Corp. v. Peters* ⁶⁶ the court of appeals had to determine whether G.S. 20-305 ⁶⁷ is unconstitutional under the antimonopoly provisions of the North Carolina Constitution. ⁶⁸ The case arose when the Commissioner of Motor Vehicles issued an injunction under G.S. 20-305 that prohibited plaintiff from granting an additional Jeep franchise in an area where it already had an established dealer. Plaintiff obtained a stay of the order, but the superior court subsequently denied the dealer's motion that the stay be continued pending outcome of a hearing on the injunction order. Plaintiff appealed on the grounds that G.S. 20-305 was unconstitutional on its face because it allows monopolies and that it was unconstitutional in this case because it granted a monopoly to the existing dealer.

The court of appeals held G.S. 20-305 to be constitutional and found the Commissioner to be within his power in granting the order. ⁶⁹ The court observed that plaintiff could by contract with the existing dealer legally grant an exclusive dealership to sell Jeeps in the trade area. ⁷⁰ The state did not grant a monopoly when it required plaintiff to do what plaintiff could voluntarily do

merce under the statute. (citing Opinion of Attorney General to Representative Robert L. Farmer, 47 N.C.A.G. 118 (1977)).

63. *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d, 105, 110 (3d Cir. 1980).

64. *See, e.g., Edward J. Sweeney & Sons, Inc. v. Texaco Inc.*, 637 F.2d 105 (3d Cir. 1980); *Coughlin v. Capital Constr. Co.*, 571 F.2d 290 (5th Cir. 1978); *United States v. Standard Oil Inc.*, 316 F.2d 884 (7th Cir. 1963).

65. *See Edward J. Sweeney & Sons, Inc. v. Texaco Inc.*, 637 F.2d 105 (3d Cir. 1980).

66. 58 N.C. App. 684, 294 S.E.2d 764 (1982).

67. N.C. GEN. STAT. § 20-305 (1978) states:

It shall be unlawful for any manufacturer:

(5) to grant an additional franchise for a particular line-make of motor vehicle in a trade area already served by a dealer . . . in that line-make unless the franchisor first advised in writing such other dealers . . . provided that no such additional franchise may be established in the trade area if the Commissioner has determined . . . that there is reasonable evidence that after the grant of the new franchise, the market will not support all of the dealerships in that line-make in the trade area.

68. N.C. CONST. art. I, § 34 provides, "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."

69. 58 N.C. App. at 688, 294 S.E.2d at 769. The court cited N.C. GEN. STAT. § 20-301(b) (1978), which reads, "The Commissioner shall have power to prevent unfair methods of competition and unfair or deceptive acts or practices." The court stated that the granting of a franchise in violation of N.C. GEN. STAT. § 20-305 (1978) would be an unfair trade practice that the Commissioner was empowered to prevent.

70. *See, e.g., Waldron Buick Co. v. General Motors Corp.*, 254 N.C. 117, 118 S.E.2d 559 (1969) (a contract giving two dealerships exclusive trading areas was not a restraint of trade).

by contract. Furthermore, the court noted that the Commissioner's order did not effect a horizontal agreement not to compete between competitors. Finally the court stated that the case was distinguishable on its facts from *In Re Certificate of Need for Aston Park Hospital*.⁷¹

The dissent focused upon *In Re Hospital* as precedent for its contention that G.S. 20-305 is unconstitutional to the extent it encourages monopolies. The dissent failed to grasp the distinction between *In Re Hospital* and the *Peters* case: American Motors could have granted an exclusive franchise to its dealer by contract; the other hospitals in *In Re Hospital* had no right to exclude an additional hospital.

*Abernathy v. Ralph Squires Realty Corp.*⁷² addressed the issue whether a real estate company had engaged in unfair and deceptive acts under G.S. 75-1.1.⁷³ Plaintiff engaged defendant real estate company to aid him in selling his house and in locating a new one. Defendant located a house suitable for plaintiff before a buyer for plaintiff's house could be found. Plaintiff contracted to buy the house. The contract provided for the seller to finish insulating the house before closing and granted plaintiff the right to inspect the entire house. To ensure that plaintiff would have sufficient funds to purchase the house, defendant contracted to purchase plaintiff's former residence. Plaintiff was to receive fifty percent of the net proceeds from the resale of the house by defendant. Before plaintiff closed the deal for the new house, he asked defendant's agent if the house had been put in proper condition. When the agent replied in the affirmative, plaintiff took title and moved into the new residence.

Subsequently, plaintiff discovered that the roof leaked and that the seller had not provided complete insulation. He then learned that defendant had sold the old residence for a net loss after expenses. Plaintiff brought suit, charging defendant with unfair and deceptive trade practices under G.S. 75-1.1. Plaintiff contended that defendant had willfully misrepresented the condition of the house and had added unnecessary expenses to the sale of the house to reduce the net profit.⁷⁴ The court granted summary judgment for defendant and plaintiff appealed.

The court of appeals first stated that an unfair practice is one that is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."⁷⁵ A deceptive practice was defined as one with a "capacity or tendency to deceive."⁷⁶ The court then held that defendant's subtraction of expenses from the gross proceeds of the sale of plaintiff's house was neither unfair nor deceptive. These deductions, said the court, were contemplated by

71. 282 N.C. 542, 193 S.E.2d 729 (1973) (holding unconstitutional a statute that gave a state commission the right to deny a private corporation a certificate of need required to build a hospital).

72. 55 N.C. App. 354, 285 S.E.2d 325 (1982).

73. See *supra* note 50.

74. 55 N.C. at 356, 285 S.E.2d at 326. Plaintiff listed the unnecessary expenses as loan fees, title examination, insurance fees, and survey fees.

75. *Id.* at 357, 285 S.E.2d at 327 (quoting *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 262-63, 266 S.E.2d 610, 621 (1980)).

76. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 265, 266 S.E.2d 610, 622 (1980).

the term "net proceeds" in the contract.⁷⁷ The court also held that plaintiff's evidence of willful misrepresentation was insufficient to go to the jury. The affirmative response by defendant's agent "to . . . a broad question" did not amount to misrepresentation since plaintiff had a right to inspect the property for himself.⁷⁸

C. Business Associations

1. Partnerships⁷⁹

In *Zickgraf Hardwood Co. v. Seay*,⁸⁰ the court of appeals held that, on the facts before the court, a businessman's wife was not a partner in his business. Ralph Seay was the owner of the Twin Oaks Company, and plaintiff was a corporation engaged in the business of selling building materials. Seay had a credit account in the name of "Ralph Seay, Builder." All invoices and statements of the account were addressed to Ralph Seay, and all payments on the account were paid by cashier's checks with Ralph Seay as payor, or by Twin Oaks Company checks. Although Twin Oaks checks were generally signed by Ralph Seay, one was signed by Mrs. Seay at her husband's direction.⁸¹

Plaintiff brought suit against Mr. and Mrs. Seay as principal owners of the business alleging a balance due on the Seay account of \$8,186.49. Mrs. Seay denied she had ever purchased any materials from plaintiff in any capacity and moved for a directed verdict. The trial court denied the motion, and the jury, finding Mrs. Seay to be a principal owner of the business, returned a verdict against both defendants. Mrs. Seay then appealed the denial of her motion for a directed verdict.

Plaintiff argued that Mrs. Seay worked as a part-time employee in the office of the Twin Oaks Company without pay and in return received her support and maintenance from the profits of the business. This benefit, plaintiff argued, made her a principal in the business, chargeable with the account of her husband. Plaintiff also argued that a partnership existed by virtue of Mrs. Seay's participation in the management and control of the business as co-owner.⁸²

The court of appeals rejected both of plaintiff's arguments and held that the evidence was insufficient as a matter of law to sustain a verdict against

77. 55 N.C. App. at 354, 285 S.E.2d at 327.

78. *Id.* at 359, 285 S.E.2d at 328.

79. In *Davis v. Davis*, 58 N.C. App. 25, 293 S.E.2d 268 (1982), the court of appeals found there was sufficient evidence that a partnership existed despite the absence of a written agreement. The actions of the partners were sufficient indicia of the existence of a partnership. The court, citing *Eggleston v. Eggleston*, 288 N.C. 668, 674, 47 S.E.2d 243, 247 (1948), stated that a partnership agreement could be express or implied. Evidence that plaintiff and defendant had shared profits constituted prima facie evidence of a partnership under N.C. GEN. STAT. § 59-37 (1982). The existence of the partnership was further supported by evidence that defendant had filed a partnership tax return.

80. 60 N.C. App. 128, 298 S.E.2d 208 (1982).

81. *Id.* at 130, 298 S.E.2d at 209.

82. Plaintiff's claim was based on N.C. GEN. STAT. § 59-36(a) (1982), which defines a partnership as "an association of two or more persons to carry on as co-owners of a business for profit.

Mrs. Seay.⁸³ The court stated that the only evidence to support plaintiff's claim that Mrs. Seay received the benefits of the business was that the money generated by the business provided Mrs. Seay with support and income. This evidence only showed that Mrs. Seay received support she was entitled to receive from her husband under the law, and was not sufficient to establish a business agreement between Mrs. Seay and her husband.⁸⁴

Furthermore, the court could find no evidence that Mrs. Seay had exercised any managerial or independent control over the affairs of the business. The evidence showed only that Mrs. Seay performed duties as a secretarial employee; the fact that Mrs. Seay received no paycheck did not imply that she received a share of the profits as co-owner rather than as an employee.⁸⁵ Thus, there was no evidence of Mrs. Seay's co-ownership of the Twin Oaks Company, and plaintiff was not entitled to collect from her.⁸⁶

Another partnership case involved an action by a limited partner against the general partners to recover the amount of his investment. In *Roper v. Thomas*⁸⁷ the court held that the limited partner was entitled to recover his investment in a partnership formed to construct an apartment complex, when the mortgage on the complex was foreclosed because of the general partner's failure to obtain permanent financing pursuant to their obligation under the partnership agreement. This negligent breach of the partnership agreement was the direct cause of plaintiff's loss and entitled him to recover his investment.

The court also stated that plaintiff had standing to sue even though the partnership had not wound up its partnership affairs.⁸⁸ North Carolina law allows a partner to sue his co-partner when the partnership was formed for a single venture that has been completed.⁸⁹ The partnership at issue was formed for the single purpose of erecting an apartment complex, and that venture came to an end when all of its assets were extinguished by foreclosure. Thus, the court reasoned that plaintiff's suit was not premature.

In *Dixon, Odom & Co. v. Sledge*⁹⁰ the North Carolina Court of Appeals upheld the enforcement of a contract between two partners upon the dissolution of their partnership. Under the terms of the contract, defendant bound himself for ten years to pay plaintiff fifty percent of fees received from former clients of plaintiff. As consideration, plaintiff released defendant from all debt

83. 60 N.C. App. at 134, 298 S.E.2d at 211.

84. *Id.* at 133, 298 S.E.2d at 211. The court cited *Supply Co. v. Reynolds*, 249 N.C. 612, 107 S.E.2d 80 (1959).

85. The court relied upon N.C. GEN. STAT. § 59-37(4)(b) (1982), which provides: "(4) [T]he receipt . . . of a share of the profits of a business is prima facie evidence that . . . [the receiver] is a partner . . . but no such inference shall be drawn if such profits were received: . . . (b) as wages of an employee."

86. 60 N.C. App. at 134, 298 S.E.2d at 211.

87. 60 N.C. App. 64, 298 S.E.2d 424 (1982).

88. The court cited *Bennett v. Trust Co.*, 265 N.C. 148, 143 S.E.2d 312 (1965) for the general rule that one partner cannot sue another partner until there has been a complete settlement of partnership affairs.

89. See *Pugh v. Newbern*, 193 N.C. 258, 261, 136 S.E. 707, 708-09 (1927).

90. 59 N.C. App. 280, 296 S.E.2d 512 (1982).

obligations to plaintiff, and agreed to pay a yearly sum to defendant for ten years. Defendant later refused to pay the fees on the grounds that they were unreasonable and that the agreement constituted an unenforceable covenant not to compete.

Upon appeal the court affirmed summary judgment for plaintiff. The court ruled that the agreement was not a covenant not to compete because it neither restricted the area in which defendant could compete, nor forbade him from serving plaintiff's former clients. The court ruled the contract was a proper means of settling the affairs of the partnership upon dissolution and thus was enforceable.⁹¹

2. Corporations

In *Meiselman v. Meiselman*⁹² the court of appeals examined the circumstances under which a minority shareholder in a corporation is entitled to have the corporation or its other shareholders buy out his interest under G.S. 55-125.1(a)(4).⁹³ In addition, the court confronted the issue of whether a minority shareholder is entitled to recover in a derivative action the profits diverted to another corporation owned solely by the majority shareholder.

Plaintiff and defendant were brothers who had inherited their interest in Eastern Federal Corporation from their father, the founder of the corporation. Eastern Federal was a holding company that owned the stock of several small theater management corporations.⁹⁴ At the time of suit, defendant controlled sixty to seventy percent of the defendant corporations, while plaintiff controlled thirty to forty percent.⁹⁵

Plaintiff alleged that defendant had denied him any voice in the management of the defendant corporations or in the distribution of dividends. Plaintiff also claimed that defendant, as managing officer of the defendant corporations, had entered into a contract whereby Republic Management Corporation, a company owned solely by defendant, was to manage the defendant corporations' properties. As a result of this contract, plaintiff alleged, profits

91. *Id.* at 284-85, 296 S.E.2d at 515.

92. 58 N.C. App. 758, 295 S.E.2d 249 (1982).

93. N.C. GEN. STAT. § 55-125.1(a)(4) (1982) provides:

(a) In any action filed by a shareholder to dissolve the corporation under G.S. 55-125(a), the court may make such order or grant such relief . . . as in its discretion it deems appropriate, including . . . an order: . . .

(4) Providing for the purchase . . . of shares of any shareholder, either by the corporation or by other shareholders.

The court's discretion under G.S. 55-125.1 has been called the "most sweeping authority granted by any state statute, other than the South Carolina statute from which it was taken." R. ROBINSON, NORTH CAROLINA CORPORATION LAW AND PRACTICE § 29-14, at 596 (2d ed. 1974).

94. The small corporations all held stock in each other. They were joined as defendants in the lawsuit along with the brother and Eastern Federal Corporation. 58 N.C. App. at 760, 295 S.E.2d at 252. Hereinafter the term "defendant corporations" shall be used in the text to denote jointly Eastern Federal Corp. and the smaller management companies.

95. The trial court found that defendant held 39.07% of the stock, plaintiff held 29.82%, and defendant corporations held the remaining 31.11% among themselves. *Id.* at 760-61, 295 S.E.2d at 252.

were transferred from the defendant corporations to Republic. In his first claim, plaintiff sought either dissolution of the defendant corporations under G.S. 55-125 (A)(4),⁹⁶ or a forced purchase, by defendant or by the defendant corporations, of plaintiff's shares in the corporations. In his second claim, a derivative action, plaintiff sought the return of the funds of the defendant corporations that had been paid under the contract with Republic. The trial court dismissed both claims.⁹⁷

The court of appeals reversed, and held that plaintiff was entitled to an order requiring defendants to purchase plaintiff's stock under G.S. 55-125.1. Furthermore, the court ruled that defendant would have to refund the profits "diverted into his solely owned corporation."⁹⁸ After discussing the legislative history of G.S. 55-125 and G.S. 55-125.1, the court stated that the two statutes give the trial court "plenary power to frame whatever order it sees fit to protect the rights of a complaining shareholder."⁹⁹ Because G.S. 55-125 (a)(4) requires the complaining shareholders to show only that basic fairness compels dissolution, the court reasoned that a shareholder need only show real harm to be entitled to relief under G.S. 55-125.1.¹⁰⁰

In ruling that plaintiff had suffered real harm, the court relied upon evidence that plaintiff had been denied any voice in either management or dividend policies of the corporations. The court also found that plaintiff had been discharged from employment by the corporation and had occasionally been, at the order of his brother, denied access to corporate offices, account books, and records. Noting that defendant's actions had deprived plaintiff of all control over his inheritance, the court ruled that the harm to plaintiff was sufficient to entitle him to relief under G.S. 55-125.1, even though the value of his interest in the corporation had increased 300% under defendant's management.¹⁰¹

The court also held that it was unlawful for defendant as majority share-

96. N.C. GEN. STAT. § 55-125(a)(4) (1982) authorizes involuntary dissolution of a corporation when "reasonably necessary for the protection of the rights or interests of the complaining shareholder."

97. The trial court found a lack of evidence of any "oppression, overreaching on the part of management, the taking of any unfair advantage . . . or any other wrongful conduct on the part of the majority stockholder . . ." that would entitle plaintiff to relief under his first claim. 58 N.C. App. at 768, 295 S.E.2d at 255-56. Furthermore, the court concluded that "[t]here has been no actionable breach of fiduciary duty by any of the defendants" that could justify relief for the plaintiff under his second claim. *Id.* at 774, 295 S.E.2d at 259.

98. *Id.* at 775, 295 S.E.2d at 260.

99. *Id.* at 765, 295 S.E.2d at 254. "It [G.S. 55-125.1] appears to permit the superior court . . . to fashion virtually any type of relief it feels is equitable." R. ROBINSON, *supra* note 93, § 29-14, at 596. The court pointed out that G.S. 55-125.1 was copied from an identical provision in the South Carolina Business Corporation Act, S.C. CODE ANN. § 12-22.23 (Law. Co-op. 1962), subsequently recodified as S.C. CODE ANN. § 33-21-230 (Law. Co-op. 1976). 58 N.C. App. at 764, 295 S.E.2d at 254. The court also stated that the two statutes were enacted as part of a trend to liberalize standards for dissolution by court order and to recognize the need for equitable alternatives to dissolution. *Id.*

100. 58 N.C. App. at 766, 295 S.E.2d at 254-55.

101. *Id.* at 769-70, 295 S.E.2d at 256-57. The court noted that although its liberal interpretation of G.S. 55-125 and G.S. 55-125.1 created the potential for abuse of the statute by disgruntled minority shareholders, the courts would have to decide on a "case by case" basis whether relief was appropriate. *Id.* at 772, 295 S.E.2d at 258.

holder and managing officer of the defendant corporations, to enter into a contract that generated profit for his solely owned corporation when plaintiff objected to that contract. The court observed that case law¹⁰² and statute¹⁰³ impose on corporate officers and directors a fiduciary duty of good faith extending to both the corporation and the shareholder. Officers and directors are guilty of breaching their duty whenever they use their position to acquire "an advantage to themselves not common to all."¹⁰⁴ Thus, the court found that defendant was in breach of his fiduciary duty to the defendant corporations and should not be allowed to retain the profits derived from that breach.¹⁰⁵

In dissent, Judge Hill rejected the conclusions reached by the majority concerning both of plaintiff's claims.¹⁰⁶ The dissent rejected the court's interpretation of G.S. 55-125 and G.S. 55-125.1 as overly broad and conducive to abuse by minority stockholders. In addition, because plaintiff received substantial dividend income from his holdings and had realized a large increase in the value of his interest because of defendant's management of the corporations, Judge Hill contended that plaintiff had not been harmed. Finally, the dissent argued that the contract between Republic and the defendant corporations was "just and reasonable"¹⁰⁷ and did not constitute a breach of duty by defendant.

Meiselman represents the first occasion a North Carolina court has granted relief under G.S. 55-125.1 as a matter of law. The liberal interpretation of the dissolution statutes¹⁰⁸ contained in the case does nothing to weaken North Carolina's reputation as the state most receptive to corporate dissolution as a means of protecting the interests of minority shareholders.¹⁰⁹ Nevertheless, Judge Hill's fear that the decision will lead to abuse of the remedies provided in G.S. 55-125 and G.S. 55-125.1 seems unfounded.¹¹⁰ In affirming the principle that suits by minority shareholders seeking involuntary dissolution be assessed on a case by case basis, the court of appeals lessened the potential impact of *Meiselman* and preserved an important barrier against undeserving plaintiffs. Finally, the court's decision in *Meiselman* to ignore the increase in value of plaintiff's stock in the defendant corporations was appropriate. Because of the dominant position occupied by the majority stockholder in the closely held defendant corporations, it is unlikely that plaintiff could have found an outside purchaser for his shares. Only by compelling the purchase of his shares under G.S. 55-125.1 could plaintiff realize the full value of his interest.

102. *Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E.2d 897 (1981).

103. N.C. GEN. STAT. § 55-35 (1982).

104. 58 N.C. App. at 774, 295 S.E.2d at 259 (quoting *Pender v. Speight*, 159 N.C. 612, 615, 75 S.E. 851, 852 (1912)).

105. *Id.* at 775, 295 S.E.2d at 259.

106. *Id.* at 776-78, 295 S.E.2d at 260-61 (Hill, J., dissenting).

107. *Id.* at 777, 295 S.E.2d at 261.

108. N.C. GEN. STAT. §§ 55-125 to -125.1 (1982).

109. See *supra* notes 93 & 101.

110. The dissent could offer no authority for a different interpretation of the statute.

In *Onslow Wholesale Plumbing v. Fisher*¹¹¹ the court of appeals addressed the question whether defendant, who served as general manager, agent, officer, and director of a corporation, breached a fiduciary obligation to the corporation by purchasing a shareholder's stock for himself while under orders from the corporation to purchase the stock for the corporation. Defendant in *Onslow* was a vice president and director of the plaintiff corporation.¹¹² The plaintiff corporation held a right of refusal or first option to purchase any shareholder's stock. At the meeting with the corporation's president and chairman of the board, defendant was instructed to purchase for the corporation all outstanding shares of stock other than those owned by the president, defendant, and one other stockholder. Defendant testified that he at no time objected to this order. Defendant later purchased shares of stock in his own name from three other shareholders.¹¹³

The corporation brought suit on the grounds that defendant, as a director and officer of the corporation, had breached both a fiduciary and a statutory duty owed to the plaintiff corporation. The trial court granted defendant's motion for summary judgment and denied plaintiff's motion for partial summary judgment. Plaintiff corporation appealed on the grounds that the contradicted facts showed defendant had breached his fiduciary duty as a general manager, agent, officer, and director.¹¹⁴

The court of appeals held that defendant breached his fiduciary duty as a matter of law when he purchased the stock of two of the three shareholders for himself, and that plaintiff was, therefore, entitled to summary judgment based upon these two transactions. Defendant's testimony that the president of the corporation had told him not to purchase the third shareholder's stock at the price quoted raised an issue of material fact that should have been decided by a jury.¹¹⁵

The court observed that defendant had a statutory fiduciary duty to the corporation under G.S. 55-35.¹¹⁶ Furthermore, defendant had a contractual duty to follow the orders of the corporation's board of directors. According to the court, defendant breached both obligations when he disobeyed the order to purchase the stock for the corporation. The court also found that defendant breached his fiduciary duty as an agent of the corporation. The court noted that an agent breaches his fiduciary duty when he deals in an agency matter for his own benefit without the consent of his principal.¹¹⁷

111. 60 N.C. App. 55, 298 S.E.2d 718 (1982).

112. Defendant was employed under a contract in which he agreed to be "subject to the general supervision and pursuant to the orders, advice and direction of the corporation's Board of Directors." *Id.* at 57, 298 S.E.2d at 720 (quoting the contract).

113. *Id.* at 57-58, 298 S.E.2d at 720.

114. *Id.* at 56, 298 S.E.2d at 719.

115. *Id.* at 58, 298 S.E.2d at 720. The court reasoned that if the jury found this testimony to be true, plaintiff would have exercised its right of first refusal on the stock. *Id.*

116. N.C. GEN. STAT. § 55-35 (1982) which provides that "[o]fficers and directors shall be deemed to stand in a fiduciary relation to the corporation . . . and shall discharge the duties of their respective positions in good faith . . ."

117. 60 N.C. App. at 60, 298 S.E.2d at 721-22. The court relied on 3 AM. JUR. 2D *Agency*

The court found defendant's contention that he had no duty to purchase the stock absent an instruction from the full board of directors to be without merit. The court observed that a board of directors can take action without meeting if the directors normally take action informally and if no director objects to the action taken.¹¹⁸ The court stated that there was clear evidence that plaintiff corporation's board regularly took such informal action, and that two of the four directors had given their express consent to the purchase of the stock. As a director, defendant had given consent to the action by failing to object to the order to purchase the stock. The fourth director was one of the shareholders from whom the defendant purchased his stock. The court stated that defendant's actions prevented that fourth director from giving consent; the court refused to allow defendant to benefit from his wrongdoing in this manner. Thus, like *Meiselman*, the *Onslow* decision sent a stern message to officers of North Carolina corporations that the courts will not tolerate self-serving actions that work to the detriment of their corporations.

In *Foreman v. Bell*¹¹⁹ a shareholder brought suit under G.S. 55-71¹²⁰ on the grounds that the board of directors had been improperly elected and that all its actions should be declared void. Plaintiff contended that the trustees who elected the board were improperly selected under the terms of the declaration of trust, which empowered them to vote 73% of the corporation's stock.¹²¹

The trial court dismissed plaintiff's action and the court of appeals affirmed on jurisdictional grounds. The court held that the shareholder had no standing to sue under the statute because the statute only applied to corporate elections. Plaintiff's complaint concerned the selection of the trustees who voted the stock for others, a matter that was neither a corporate concern nor directed to the validity of the election of the directors.¹²²

D. Contracts

1. Employment Contracts

The court of appeals also decided two cases concerning employment contracts. In *Roberts v. Wake Forest University*¹²³ plaintiff sought to recover for breach of an oral employment contract. The term was not fixed, but plaintiff alleged that the parties intended for the contract to extend for at least six

§ 220 (1962), which states in part that an agent "cannot be permitted to deal in the agency matter on his own account"

118. See N.C. GEN. STAT. § 55-29(a)(3) (1982).

119. 56 N.C. App. 625, 289 S.E.2d 567, *disc. rev. denied*, 306 N.C. 383, 294 S.E.2d 207 (1982).

120. N.C. GEN. STAT. § 55-71(a) (1982) provides that "[a]ny shareholder . . . may commence a summary proceeding in the superior court to determine any controversy with respect to any election or appointment of any director or officer of such corporation"

121. 56 N.C. App. at 626-27, 289 S.E.2d at 567-68.

122. *Id.* at 628, 289 S.E.2d at 569.

123. 55 N.C. App. 430, 286 S.E.2d 120 (1982).

years.¹²⁴ The evidence showed that plaintiff's dismissal resulted from his unsatisfactory performance as golf coach at defendant university. The court held that the contract was governed by the general rule that contracts for an indefinite term are terminable at will by either party.¹²⁵

Plaintiff relied upon dicta contained in an earlier North Carolina case, *Still v. Lance*,¹²⁶ in which the court stated that a contract for an indefinite term may be enforced for a fixed term if business usage or other circumstances indicate the parties intended to contract for a fixed term.¹²⁷ Plaintiff in *Roberts* offered evidence showing that golf coaches customarily serve long periods and that he was classified as a permanent employee under classifications contained in defendant's personnel and policy manual. The court of appeals, however, found this evidence insufficient to establish a business usage.¹²⁸ The court held further that action by the Employment Security Commission granting unemployment benefits is not res judicata on the issue whether plaintiff was dismissed due to his own misconduct.¹²⁹ The court noted that the doctrine of res judicata is inapplicable to adjudication by unemployment compensation agencies.¹³⁰

In *Humphrey v. Hill*¹³¹ plaintiff also contended that he had made a contract for "permanent employment." The court reiterated the rule that a contract for permanent employment for an indefinite term is terminable at will.¹³² The court acknowledged, however, that a "permanent" employment contract may be enforced if the employee gives some consideration in addition to serv-

124. *Id.* at 431, 286 S.E.2d at 121. The contract was for employment as the University's golf coach and associate athletic director. *Id.*

125. *Id.* at 434, 286 S.E.2d at 123. See *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971); *Tuttle v. Lumber Co.*, 263 N.C. 216, 139 S.E.2d 249 (1964).

126. 279 N.C. 254, 182 S.E.2d 403 (1971) (dismissal of school teacher without cause held to be appropriate at end of school year; indefinite contract not terminable at will until end of school year).

127. *Id.* at 259, 182 S.E.2d at 406-07. The court observed:

Where, however, there is a business usage, or other circumstance, appearing on the record, or of which the court may take judicial notice, which shows that, at the time the parties contracted, they intended the employment to continue through a fixed term, the contract cannot be terminated at an earlier period except for cause or by mutual consent.

Id. See *Malever v. Kay Jewelry Co.*, 223 N.C. 148, 25 S.E.2d 435 (1943); 53 AM. JUR. 2D *Master and Servant* § 27 (1970); Annot., 161 A.L.R. 706 (1946).

128. 55 N.C. App. at 435, 286 S.E.2d at 123-24. The court said that under North Carolina law the term "permanent" employment simply refers to a position of some permanence as contrasted with temporary employment and that "ordinarily, where there is no additional expression as to duration, a contract for permanent employment implies an indefinite general hiring terminable at will." *Id.* at 436, 286 S.E.2d at 124. See *Howell v. Credit Corp.*, 238 N.C. 442, 78 S.E.2d 146 (1953); *Malever v. Kay Jewelry Co.*, 223 N.C. 148, 25 S.E.2d 436 (1943).

129. 55 N.C. App. at 436, 286 S.E.2d at 124. Plaintiff based his contention upon the rule that an employee is disqualified for benefits if he leaves work voluntarily without good cause attributable to the employer, or if he is discharged for misconduct connected with his work. SEE N.C. GEN. STAT. §§ 96-14(1) & (2) (Cum. Supp. 1981). *Roberts* is apparently the first time a North Carolina court has addressed this question. See *Empire Star Mines Co. v. California Employment Comm.*, 28 Cal. 2d 33, 168 P.2d 686 (1946); *Waterbury Sav. Bank v. Danaher*, 128 Conn. 78, 20 A.2d 455 (1941).

130. See 76 AM. JUR. 2D *Unemployment Compensation* § 93 (1975).

131. 55 N.C. App. 359, 285 S.E.2d 293 (1982).

132. See *supra* note 128.

ices rendered.¹³³ Plaintiff in *Humphrey* claimed that by giving up another job he had furnished additional consideration¹³⁴ because even though "the giving up of present or future jobs may be a detriment to the employee, it is also an incident necessary to place him in a position to accept and perform the contract."¹³⁵ In dictum, the court suggested that if plaintiff agreed not to go into business with a competitor, and defendant's position were thereby enhanced, a contract for permanent employment might be enforced.¹³⁶

2. Building and Construction Contracts

The court of appeals considered several issues concerning building and construction contracts in *Triangle Air Conditioning v. Caswell County Board of Education*.¹³⁷ The parties in that case had contracted for the construction of part of an addition to a school. The contract required that any additional work, change in work, change in contract sum or contract time be authorized by written change order from the owner or architect.¹³⁸ A separate clause provided that, should the contractor wish to make a claim for an increase in the contract sum, "he shall give the Architect written notice thereof within twenty days after the occurrence of the event giving rise to such claim."¹³⁹

133. 55 N.C. App. at 360-61, 285 S.E.2d at 295. See *F.S. Royster Guano Co. v. Hall*, 68 F.2d 533 (4th Cir. 1934); *Tuttle v. Kernersville Lumber Co.*, 263 N.C. 216, 139 S.E.2d 249 (1964); *Stevens v. Southern R.R.*, 187 N.C. 528, 122 S.E. 295 (1924); *Fisher v. John L. Roper Lumber Co.*, 183 N.C. 485, 111 S.E. 857 (1922).

134. The court listed some additional factors that would constitute sufficient consideration to render such a contract enforceable: "Where the employee gives some special consideration in addition to his services, such as relinquishing a claim for personal injuries against the employer, removing his residence from one place to another in order to accept employment, or assisting in breaking a strike, such a contract may be enforced." 55 N.C. App. at 362, 285 S.E.2d at 296 (quoting *Burkholder v. Gealy*, 39 N.C. App. 450, 454, 250 S.E.2d 678, 682, cert. denied, 297 N.C. 298, 254 S.E.2d 918 (1979)).

135. 55 N.C. App. at 362, 285 S.E.2d at 296. See *Winand v. Case*, 154 F. Supp. 529 (D. Md. 1957); *Malever v. Kay Jewelry Co.*, 223 N.C. 148, 25 S.E.2d 436 (1943); *Minter v. Tootle, Campbell Drygoods Co.*, 187 Mo. App. 16, 173 S.W. 4 (1915).

136. 55 N.C. App. at 363, 285 S.E.2d at 296. See *Fletcher v. Agar Mfg. Corp.*, 45 F. Supp. 650 (W.D. Mo. 1942); 60 A.L.R.3d 266 (1974).

137. 57 N.C. App. 482, 291 S.E.2d 808 (1982).

138. The relevant provision of the contract stated:

12.1 CHANGE ORDERS

12.1.1. The Owner, without invalidating the Contract, may order Changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and the Contract Time being adjusted accordingly. All such Changes in the Work shall be authorized by Change Order, and shall be executed under the applicable conditions of the Contract Documents.

12.1.2. A Change Order is a written order to the Contractor signed by the Owner and the Architect, issued after the execution of the Contract, authorizing a Change in the Work or an adjustment in the Contract Sum or the Contract Time. Alternatively, the Change Order may be signed by the Architect alone, provided he has written authority from the Owner for such procedure and that a copy of such written authority is furnished to the Contractor upon request. A Change Order may also be signed by the Contractor if he agrees to the adjustment in the Contract Sum or the Contract Time. The Contract Sum and the Contract Time may be changed only by Change Order.

Id. at 484-85, 291 S.E.2d at 810.

139. *Id.* at 485, 291 S.E.2d at 810. The provision in full provided:

12.2 CLAIMS FOR ADDITIONAL COST

12.2.1. If the Contractor wishes to make a claim for an increase in the Contract Sum, he

The same section also provided that "[a]ny change in the Contract Sum resulting from such claim shall be authorized by Change Order."¹⁴⁰

The court of appeals found that plaintiff incurred increased costs due to delay caused by other contractors on the project. This delay, the court noted, did not occur on a specific date. Therefore, written notice of plaintiff's claim forty-nine days after the completion date of the contract was sufficient despite the twenty-day provision in the contract.¹⁴¹ In addition, the court held that defendant, through its conduct, had waived the requirement of a written change order. Evidence showed that although plaintiff made two written requests for additional compensation, defendant did not reply.¹⁴² Plaintiff continued work thereafter only because its bonding company required it to do so.

The court cited no authority in ruling on the twenty-day notice provision; the point apparently has not been frequently litigated. There is certainly a good argument that the provision was breached. Though the date on which delay in a construction project occurs cannot always be specified, it seems obvious that a delay has occurred when the completion date of the contract passes and the project remains unfinished. At the very least a contractor giving notice of a claim arising from a delay under a provision such as the one in *Triangle Air Conditioning* should be expected to give notice within twenty days of the completion date of the contract.

The court's decision was probably influenced by the inequitable result such a rule would have imposed in the case. Plaintiff had clearly suffered losses through no fault of its own. Moreover, defendant had been apprised of plaintiff's extra expense by plaintiff's requests for additional compensation.

The court in *Triangle Air Conditioning* was on more solid ground in holding that defendant had waived the requirement for a written change order. It is settled that parties may waive a contract provision through a course of conduct.¹⁴³ Although courts generally are reluctant to find a waiver of provisions requiring a written change order in cases involving public works,¹⁴⁴ the facts in this case were strong enough to warrant a finding of waiver. Defendant's

shall give the Architect written notice thereof within twenty days after the occurrence of the event giving rise to such claim. This notice shall be given by the Contractor before proceeding to execute the Work No such claim shall be valid unless so made. If the Owner and the Contractor cannot agree on the amount of the adjustment in the Contract Sum, it shall be determined by the Architect. Any change in the Contract Sum resulting from such claim shall be authorized by Change Order.

Id.

140. *Id.*

141. *Id.* at 488, 291 S.E.2d at 411-12. See *Shalman v. Board of Educ.*, 31 A.D.2d 338, 297 N.Y.S.2d 1000 (1969) (similar facts, but notice provision was incorporated in statute; claim for loss because of delay does not accrue until extent of damages can be ascertained). See also *Annot.*, 88 A.L.R. 1223 (1934).

142. "The event which gave rise to the plaintiff's demand was the delay in the construction. It did not occur on a specific date. We hold that under the forecast of evidence in this case that the plaintiff complied with the notice requirement . . ." 57 N.C. App. at 488, 291 S.E.2d at 811-12.

143. *General Specialties Co. v. Teer Co.*, 41 N.C. App. 273, 254 S.E.2d 658 (1979); *Garrison Grading Co. v. Piracci Constr. Co.*, 27 N.C. App. 725, 221 S.E.2d 512 (1975); *Graham and Son, Inc. v. Board of Educ.*, 25 N.C. App. 163, 212 S.E.2d 542 (1975).

144. See 65 AM. JUR. 2D *Public Works and Contracts* § 195 (1972).

inaction in response to plaintiff's request for a change order, coupled with its knowledge that plaintiff was continuing work on the project, seem sufficient to justify a holding that defendant waived the contractual requirement.¹⁴⁵

E. Uniform Commercial Code

1. Sales

In *Bernick v. Jurden*¹⁴⁶ the North Carolina Supreme Court held for the first time that the absence of privity between plaintiff and defendant does not bar plaintiff's action on an implied warranty. Plaintiff in *Bernick* was a college hockey player struck in the face with a hockey stick during a game. Although plaintiff was wearing a mouthguard at the time, it shattered; as a result, plaintiff suffered a fractured jaw and four broken teeth.¹⁴⁷ Plaintiff subsequently brought an action for breach of express and implied warranties against the manufacturer and seller of the mouthguard. The trial court granted defendants' motion for summary judgment.¹⁴⁸ Following dismissal of plaintiff's appeal by the court of appeals, the supreme court granted discretionary review.

The court first addressed plaintiff's express warranty claim. Although plaintiff's mother had purchased the mouthguard, the court ruled that under G.S. 25-2-318, "[p]laintiff as a third-party beneficiary of any express warranty made to his mother gets the benefit of the same warranty which she received as purchaser."¹⁴⁹ The absence of plaintiff's personal reliance upon the representations contained on the product was thus found to be "of no importance."¹⁵⁰

In ruling that plaintiff could maintain an implied warranty action against defendant manufacturer despite the absence of privity, the court relied upon *Kinlaw v. Long Mfg. Co.*¹⁵¹ In *Kinlaw* the court held that the absence of privity was not fatal to a claim by plaintiff for breach of express warranty. The court noted that "[t]he privity bound procedure whereby the purchaser claims against the retailer, the retailer against the distributor, and the distributor, in turn, against the manufacturer . . . is unnecessarily expensive and waste-

145. Annot., 2 A.L.R. 3d 620 (1965); Annot., 1 A.L.R. 173 (1919).

146. 306 N.C. 435, 293 S.E.2d 405 (1982).

147. *Id.* at 437, 293 S.E.2d at 407.

148. Among the grounds defendants offered in support of the trial court's action were that plaintiff had not himself relied upon any express warranty and that plaintiff's implied warranty claim was barred by lack of privity. 306 N.C. at 447-48, 293 S.E.2d at 413-14.

149. *Id.* at 448, 293 S.E.2d at 413. N.C. GEN. STAT. § 25-2-318 (1965) provides:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Official Comment 2 to N.C. GEN. STAT. § 25-2-318 (1965) states in part that "the purpose of this section is to give the buyer's family, household and guests the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to 'privity'."

150. 306 N.C. at 448, 293 S.E.2d at 413.

151. 298 N.C. 494, 259 S.E.2d 552 (1979).

ful.”¹⁵² The court in *Bernick* expressly adopted this rationale and concluded that plaintiff's claim for breach of implied warranty was not barred by lack of privity.¹⁵³ The court bolstered its conclusion that privity was not required by reference to G.S. 99B-2(b), North Carolina's product liability statute, which provides that as of October 1, 1979, lack of privity of contract shall not bar product liability actions against a manufacturer for breach of implied warranty.¹⁵⁴

Prior to the *Bernick* decision, at least one commentator urged that the rationale of *Kinlaw* did not extend to suits based upon breach of implied warranty.¹⁵⁵ The writer argued that “[b]ecause implied warranties are imposed by law and often have no real consensual basis, the *Kinlaw* court's objective of holding a manufacturer directly responsible for his assurances to the consumer does not extend to implied warranty.”¹⁵⁶ *Bernick* obviously rejects this reasoning. Two court of appeals cases decided after *Kinlaw*, both of which held that *Kinlaw* did not abolish privity as a prerequisite to implied warranty claims,¹⁵⁷ must now either be deemed overruled or distinguished as concerning actions filed before October 1, 1979.¹⁵⁸

Only seven days after *Bernick* was decided, the court of appeals concluded in *McCullum v. Grove Mfg. Co.*¹⁵⁹ that plaintiff could not recover on a breach of warranty theory because he lacked “the contractual privity necessary for an action based upon an implied warranty.”¹⁶⁰ Plaintiff in *McCullum* sued to recover damages for injuries sustained when he was struck by a crane designed and manufactured by defendant.¹⁶¹ Plaintiff sought to recover, in part, on a breach of warranty theory. The court of appeals, citing cases decided prior to *Bernick*,¹⁶² simply held that no action for breach of implied warranty would lie absent privity of contract.¹⁶³ The court of appeals was evidently unaware of the supreme court's holding in *Bernick*; nevertheless, *McCullum* may also be distinguishable because the claim in that case had been filed in September 1979.¹⁶⁴

In *Simmons v. C.W. Myers Trading Post, Inc.*¹⁶⁵ plaintiff leased a mobile

152. *Id.* at 500-01, 259 S.E.2d at 557.

153. 306 N.C. at 449, 203 S.E.2d at 414.

154. *Id.* at 449, 293 S.E.2d at 414. See N.C. GEN. STAT. § 99B-2(b) (1979). Plaintiff in *Bernick* filed his complaint on December 14, 1979. 306 N.C. at 436, 293 S.E.2d at 407.

155. See Note, *Products Liability—No Privity Requirement if Express Warranty Addressed to the Ultimate Consumer*, 16 WAKE FOREST L. REV. 857, 873 (1980).

156. *Id.*

157. *Davis v. Siloo, Inc.*, 47 N.C. App. 237, 246, 267 S.E.2d 354, 360 (1980); *Richard W. Cooper Agency, Inc. v. Irwin Yacht & Marine Corp.*, 46 N.C. App. 248, 251, 264 S.E.2d 768, 770 (1980).

158. See *supra* note 154 and accompanying text.

159. 58 N.C. App. 283, 293 S.E.2d 632 (1982).

160. *Id.* at 291, 293 S.E.2d at 638.

161. *Id.* at 284, 293 S.E.2d at 634.

162. *Davis v. Siloo, Inc.*, 47 N.C. App. 237, 267 S.E.2d 354 (1980); *Fowler v. General Elec. Co.*, 40 N.C. App. 301, 252 S.E.2d 862 (1979).

163. 58 N.C. App. at 291, 293 S.E.2d at 638.

164. *Id.* at 284, 293 S.E.2d at 634; see *supra* note 154 and accompanying text.

165. 56 N.C. App. 549, 290 S.E.2d 710, modified, 307 N.C. 122, 296 S.E.2d 294 (1982).

home from defendant under a contract that gave plaintiff ownership of the trailer upon completion of payments. After a fire destroyed the mobile home, plaintiff sued defendant to recover a portion of the payments made defendant. Plaintiff alleged that, before purchase of the trailer, defendant had agreed to make certain repairs, and that his failure to do so lowered the value of the trailer and entitled plaintiff to damages. The trial court directed a verdict for defendant. Although the written contract provided that the trailer was "leased as is," the North Carolina Court of Appeals reversed.¹⁶⁶

The court held that the Retail Installment Sales Act¹⁶⁷ prevented waiver of the express warranty. The court noted that the sales agreement came within the definition of a consumer credit sale under G.S. 25A-2(b).¹⁶⁸ G.S. 25A-20 prevents exclusion from the written agreement of any express warranty made as part of the bargain.¹⁶⁹ The court held that if plaintiff prevailed at trial, she could recover the difference between the value of the mobile home as warranted and the value as actually received.¹⁷⁰ The court also held that she would be entitled to treble damages under G.S. 25A-44.¹⁷¹ On appeal, the North Carolina Supreme Court modified the holding, stating that the treble damages issue should not have been decided before a jury verdict for plaintiff.¹⁷² The supreme court apparently based its ruling on the statutory requirement that the violation be "wilful;" under chapter 25A there appears to be no other barrier to an award of treble damages should plaintiff prevail at trial.¹⁷³

North Carolina courts have consistently been among those holding that the contributory negligence of a purchaser of defective goods bars recovery against the seller in a warranty action. In the leading North Carolina case on the issue, *Nationwide Mutual Insurance Co. v. Don Allen Chevrolet Co.*,¹⁷⁴ the supreme court held that a plaintiff who operated an automobile with knowledge that the engine leaked gasoline was barred from recovering damages caused by the explosion of the auto. In *Arrington v. Brad Ragan, Inc.*¹⁷⁵ the North Carolina Court of Appeals distinguished *Nationwide* and reversed summary judgment for the seller of an oil heater that exploded and caused the buyer's home to be destroyed by fire.

In *Arrington* plaintiff presented evidence that the heater made unusual

166. *Id.* at 555, 290 S.E.2d at 714.

167. N.C. GEN. STAT. § 25A-20 (Cum. Supp. 1981).

168. N.C. GEN. STAT. § 25A-2(b) (Cum. Supp. 1981). The apparent purpose of this section is to give a purchaser under a contract that is formally a lease or bailment the same rights that a buyer under an actual installment sales contract would have.

169. N.C. GEN. STAT. § 25A-20 (Cum. Supp. 1981).

170. The court relied upon N.C. GEN. STAT. § 25-2-714(2) (1965), which is a codification of the common law as it existed in North Carolina.

171. N.C. GEN. STAT. § 25A-44(4) (Cum. Supp. 1981) states that "the knowing and willing violation" of any provision of Chapter 25A is an unfair trade practice under G.S. 75-1.1. N.C. GEN. STAT. § 75-16 (1981) provides that a violation of any unfair trade practice rule under Chapter 75 entitles the injured party to treble damages.

172. 307 N.C. at 124, 296 S.E.2d at 295.

173. See *supra* note 171.

174. 253 N.C. 243, 116 S.E.2d 780 (1960).

175. 56 N.C. App. 416, 289 S.E.2d 122, *cert. denied*, 305 N.C. 759, 292 S.E.2d 573 (1982).

noises, gave off an odor of fuel oil, and overheated after twenty minutes if set on low or medium settings. Plaintiff testified, however, that the heater had never malfunctioned while set on pilot. While away overnight, plaintiff left the heater set on pilot. Evidence showed that the heater exploded and destroyed the house by fire. The court of appeals distinguished the case from *Nationwide* on the ground that plaintiff in *Arrington* did not know that the heater would malfunction if set on pilot.¹⁷⁶ The court stated that the question whether plaintiff knew or by reasonable diligence should have known that the heater would malfunction if set on pilot was an issue for the jury.¹⁷⁷ The facts in *Arrington* did not differ markedly from those in *Nationwide*. In both cases plaintiff knew that the product was at least partially defective. A strong argument can be made that plaintiff in *Arrington* should have realized the possible danger created by the defective heater, even though he noticed the odor only when the heater was set on low or medium. The court's decision to allow the case to go to the jury suggests that the court might now be willing to impose a less stringent burden upon the purchaser of a defective product than that imposed in previous cases.¹⁷⁸ Nevertheless, it should be noted that *Nationwide* concerned an express warranty; plaintiff in *Arrington* sued for breach of implied warranty. The *Arrington* result may, therefore, reflect a greater judicial reluctance to allow defendants to avoid warranty liability arising by operation of law.

The issue of plaintiff's negligence in *Arrington* may turn upon the "reasonable diligence" requirement articulated by the court.¹⁷⁹ What standard of care reasonable diligence requires of the purchaser, however, is unclear. While states differ on whether contributory negligence is a bar to recovery on warranty theory,¹⁸⁰ apparently all states recognize some form of purchaser's conduct as a bar to recovery.¹⁸¹ Both Prosser and the Restatement (Second) of

176. *Id.* at 418, 289 S.E.2d at 124.

177. *Id.*

178. Other North Carolina cases barring recovery on warranty because of the contributory negligence of plaintiff include *Douglas v. Mallory and Son*, 265 N.C. 362, 144 S.E.2d 138 (1965); *Veatch v. Bacon Am. Corp.*, 266 N.C. 542, 146 S.E.2d 793 (1966). Note, however, that both cases arose in a commercial setting.

179. 56 N.C. App. at 417, 289 S.E.2d at 123-124.

180. Cases holding that contributory negligence is not a defense include *Texsun Feed Yards, Inc. v. Ralston Purina Co.*, 447 F.2d 660 (5th Cir. 1971); *Dillon v. General Motors Corp.*, 315 A.2d 732 (Del. Super. Ct. 1974), *aff'd*, 367 A.2d 1020 (Del. 1976); *Gregory v. White Truck & Equip. Co.*, 163 Ind. App. 240, 323 N.E.2d 280 (1975); *Imperial Die Casting Co. v. Cavil Insulation Co.*, 264 S.C. 604, 216 S.E.2d 532 (1975). For another jurisdiction holding that contributory negligence is a defense to a warranty action see *Codling v. Paglia*, 32 N.Y.2d 330, 345 N.Y.S.2d 461, 298 N.E.2d 622 (1973). Some courts deal with the issue of plaintiff's negligent conduct in terms of proximate cause. *See, e.g.*, *Dallison v. Sears, Roebuck & Co.*, 313 F.2d 343 (10th Cir. 1962); *Ford Motor Co. v. Lee*, 137 Ga. App. 486, 224 S.E.2d 168, *aff'd in part, rev'd in part on other grounds*, 237 Ga. 554, 229 S.E.2d 379 (1976).

181. Assumption of risk is a defense in states in which contributory negligence is not. *See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE* § 11-8 (2d ed. 1980). Distinguishing the doctrines is difficult, however, because as White and Summers note, "one court's assumption of risk may be another's contributory negligence and vice versa." *Id.* at 412. *See infra* note 183. *See generally* Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 (1972); Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627 (1968).

Torts refer to an "assumption of risk" defense under which a purchaser who knowingly encounters a dangerous product is barred from recovery.¹⁸² This defense, however, places no burden upon the purchaser to inspect the product for defects. The formal difference between contributory negligence and assumption of risk as defenses to warranty actions thus appears to be that only under the former doctrine is the purchaser required to inspect for defects.¹⁸³ *Arrington*, in which plaintiff recovered despite failure to inspect, could be explained on the basis of this distinction had the court not stated that plaintiff did, indeed, have a duty to inquire reasonably into defects.¹⁸⁴ Plaintiff in *Arrington* had reason to inquire into defects in the heater, since it emitted oil fumes. On the other hand, the difference between *Nationwide* and *Arrington* may be explained because in *Nationwide*, plaintiff did nothing to repair the automobile, while plaintiff in *Arrington* sought to have the heater repaired.¹⁸⁵ The *Arrington* court may have viewed this action as lightening plaintiff's burden to inquire into defects later. If so, the result of *Arrington* could represent a partial reconciliation of the contributory negligence rule in North Carolina with the assumption of risk rule in other states. In the final analysis, the result in *Arrington* should turn on whether plaintiff's conduct was so unreasonable that he should not be permitted to rely upon the seller's implied warranty.¹⁸⁶ When any question exists on the issue, the best approach is to allow the jury to decide whether plaintiff should be barred from recovery.

In *Cudahy Foods Co. v. Holloway*¹⁸⁷ the North Carolina Court of Appeals addressed the issue of when a purchaser of goods is a "merchant" for purposes of applying the exception in G.S. 25-2-201(2) to the writing requirement of the statute of frauds.¹⁸⁸ Defendant in *Cudahy* was an experienced real estate bro-

182. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 670-71 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1976). The Restatement rule deals with strict liability. Because North Carolina has refused to adopt strict liability generally, the Restatement rule is perhaps not directly applicable, though warranty liability is analogous to strict liability.

183. Compare *Dillon v. General Motors Corp.*, 315 A.2d 732 (Del. Super. Ct. 1974), *aff'd*, 367 A.2d 1020 (Del. 1976) (plaintiff's contributory negligence no bar to warranty action absent knowledge of danger); *Texsun Feed Yards v. Ralston Purina Co.*, 447 F.2d 660 (5th Cir. 1971) (contributory negligence in failure to discover defect not a bar to warranty suit); *Gregory v. White Truck & Equip. Co.*, 163 Ind. App. 240, 323 N.E.2d 280 (1975); with *Codling v. Paglia*, 32 N.Y.2d 330, 345 N.Y.S.2d 461, 298 N.E.2d 622 (1973) (negligence in failing to discover defect bars recovery on warranty theory). But see *Bereman v. Burdolski*, 204 Kan. 162, 460 P.2d 567 (1969) (suggesting that the result in either assumption of risk or contributory negligence jurisdictions is likely to be the same because it is possible in most contributory negligence cases to find voluntary exposure to a known risk).

184. 56 N.C. App. at 417, 289 S.E.2d at 124. Given North Carolina's unwillingness to adopt strict liability, it is unlikely that a North Carolina court would allow recovery when plaintiff had unreasonably failed to discover a defect. In fact, U.C.C. § 2-715 Comment 5 (1978) suggests there is a duty to conduct a reasonable inspection of the goods.

185. 253 N.C. at 250, 289 S.E.2d at 123.

186. See *Erdman v. Johnson Bros. Radio and Television Co.*, 260 Md. 190, 271 A.2d 744 (1970), for a good discussion of the issues involved.

187. 55 N.C. App. 626, 286 S.E.2d 606 (1982).

188. N.C. GEN. STAT. § 25-2-201(2) (1965) provides that:

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such a party unless written notice of objection to its contents is given within ten days after it is received.

ker who had invested in a restaurant. Allegedly on the oral promise of defendant to guarantee payment, plaintiff sold cheese worth \$11,000 to the restaurant.¹⁸⁹ Plaintiff sent defendant an invoice,¹⁹⁰ and sued to collect the purchase price when the restaurant filed bankruptcy proceedings. The trial court granted summary judgment for plaintiff. The court of appeals reversed holding that the statute of frauds barred proof of the oral contract because defendant was not a "merchant" within the meaning of G.S. 25-2-201(2).

Plaintiff in *Cudahy* argued that defendant, as a businesswoman with twenty-four years of experience in a real estate development business, met the definition of "merchant" in G.S. 25-2-104.¹⁹¹ Plaintiff noted that Comment 2 to that section states that "every person in business" will be considered a "merchant" for "non-specialized business practices such as answering mail."¹⁹² Plaintiff argued that the cases dealing with this issue generally focus upon the "professionalism" of the party to be charged.¹⁹³ On this basis, plaintiff argued that general business knowledge acquired by defendant as a real estate broker was sufficient to make her a "merchant" for the purposes of G.S. 25-2-201(2).

In rejecting plaintiff's argument the court of appeals stressed that defendant did not deal in cheese, that she was not in the restaurant business, and that a real estate broker is not a dealer in "goods" under the definition contained in G.S. 25-2-105.¹⁹⁴ The court noted that familiarity with trade practices might sometimes be sufficient to confer "merchant" status: "However, the familiarity with trade customs test is not so broad as to extend to the isolated purchase of a type of goods unrelated and unnecessary to the business or occupation of the buyer."¹⁹⁵

The court's reasoning in this respect is somewhat confusing. Although the court referred to comment 2 of G.S. 25-2-104, which states that every person in business is a "merchant" for the purposes of G.S. 25-2-201(2) if he is acting in his "mercantile capacity,"¹⁹⁶ the court held that defendant was not a "merchant." The fact that the cheese in *Cudahy* was unrelated and unnecessary to defendant's real estate business should make no difference under the

189. Plaintiff knew that the restaurant was having financial difficulties, and claimed that it would ship the cheese only upon defendant's promise to guarantee payment. 55 N.C. App. at 627, 286 S.E.2d at 606.

190. Defendant admitted receipt of the invoice, but claimed that she immediately contacted plaintiff's offices and disclaimed the obligation to pay. 55 N.C. App. at 626, 286 S.E.2d at 606.

191. N.C. GEN. STAT. § 25-2-104 (1965) provides:

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who has by his knowledge or occupation held himself out as having such skill.

192. N.C. GEN. STAT. § 25-2-104 comment 2 (1978).

193. Brief for Plaintiff at 7-8, 55 N.C. App. 626, 286 S.E.2d 606. See *Dacatur Coop. Ass'n v. Urban*, 219 Kan. 171, 176, 547 P.2d 323, 328 (1976).

194. 55 N.C. App. at 627, 286 S.E.2d at 607.

195. *Id.*

196. See *supra* note 191.

Code. In addition, the general purpose of G.S. 25-2-201(2), to prevent abuse by the recipient of confirmatory memos, provides further support for interpreting the definition in comment 2 of "merchant" as "any person in business."¹⁹⁷

The more difficult issue concerning the application of the Code to *Cudahy* arises out of the court's statement that G.S. 25-2-201(2) applies only to a person in his "mercantile capacity."¹⁹⁸ The court of appeals apparently meant to suggest that defendant was not acting in her "mercantile capacity," but purely as a private investor, when she allegedly promised payment for the cheese.¹⁹⁹ It is not clear whether the court's interpretation of "mercantile capacity" is the one intended by the Code. Comment 2 to G.S. 25-2-104 gives the example of a lawyer or bank president who purchases fishing tackle for his own use as a transaction not within the purchaser's "mercantile capacity."²⁰⁰ The example could be interpreted as meaning that whenever a businessman engages in transactions unrelated to his business, he is not a "merchant". This interpretation would support the court's result. The example, however, could also be interpreted as meaning that a businessman is not a "merchant" when he acts only as a consumer, but is otherwise held to merchant standards.

The latter view appears preferable. The premise underlying G.S. 25-2-201(2) support this reasoning.²⁰¹ In these cases, most of which have involved farmers sued for breach of an oral contract to sell their crops, courts have generally focused upon the issue of "professionalism." Those courts holding that the farmer is not a "merchant" generally view the farmer as an inexperienced or casual seller.²⁰² Courts that find farmers to be "merchants" focus on the farmer's knowledge of the market and familiarity with nonspecialized business skills such as opening mail.²⁰³ Although defendant in *Cudahy* did not have experience in the cheese market, the facts suggest she possessed as much "business knowledge" as would an experienced farmer. Her alleged guarantee of payment was the action not of a casual purchaser but of an active participant in a business. Her experience in the real estate business for over

197. The purpose of N.C. GEN. STAT. § 25-2-201(2) (1965), as articulated by the drafters of the Code and other writers, was to prevent the unjust situation created by the practice of sending confirmations of oral contracts, thereby binding the sender but not the receiver. Because this practice was common among businesses, it was believed that any person in business should be bound by a confirmation if he did not respond within a reasonable period. See Malcolm, *The Proposed Commercial Code*, 6 BUS. LAW. 113, 182-83 (1951) (discussion before the Editorial Board of the U.C.C., Jan. 28, 1951). The discussion contained therein suggests that those provisions assuming ordinary business competence and experience, such as the duty to reply to a memorandum, have nothing to do with whether the receiver is an expert with respect to the particular goods. All purchasers except consumers should be bound by these duties.

198. U.C.C. § 2-104 comment 2 (1978).

199. The court noted that this was an "isolated purchase" of goods unrelated to defendant's occupation. 55 N.C. App. at 629, 286 S.E.2d at 607.

200. See *supra* note 191.

201. See *supra* note 196.

202. See *Loeb & Co. v. Schreiner*, 294 Ala. 722, 321 So. 2d 199 (1975); *Cook Grains, Inc. v. Fallis*, 239 Ark. 962, 395 S.W.2d 555 (1965).

203. See *Campbell v. Yokel*, 10 Ill. App. 3d 702, 313 N.E.2d 628 (1974); *Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n*, 555 S.W.2d 61 (Mo. Ct. App. 1977); *Nelson v. Union Equity Co-op. Exch.*, 548 S.W.2d 352 (Tex. 1977).

twenty years suggests she should have realized that an invoice received in the mail merits a prompt response.

Because North Carolina has held a farmer with minimal experience in the farming business to be a "merchant" for the purpose of enforcing an oral agreement to sell grain,²⁰⁴ the result is unexpected. The court may have been concerned that a real estate developer might be unaware of practices in a retail market. Such concern, however, is unjustified by the facts: defendant's real estate firm often installed heating systems and appliances in the homes it constructed.²⁰⁵ Furthermore, a businesswoman with defendant's experience should realize that the confirmation had the potential to render her liable. A holding that defendant was a "merchant" for G.S. 25-2-201(2) would not make defendant a "merchant" under other provisions of the Code, such as those imposing warranties of merchantability.²⁰⁶ To allow an experienced businesswoman to bind a plaintiff seller to that seller's confirmation, but not bind herself, preserves the very inequities that G.S. 25-2-201(2) was intended to remedy.

In *Wright v. O'Neal Motors, Inc.*²⁰⁷ the court of appeals examined the circumstances under which a buyer may revoke acceptance under G.S. 25-2-608.²⁰⁸ Plaintiff, the purchaser of an automobile, brought an action against the seller and the manufacturer to revoke his acceptance on the ground that the automobile had such defects that its value to plaintiff was substantially impaired.²⁰⁹ The trial court granted defendant's motion for summary judgment.²¹⁰

The court of appeals reversed in part and affirmed in part.²¹¹ The court

204. *Currick Grain Co. v. Powell*, 38 N.C. App. 71, 246 S.E.2d 853 (1978).

205. 55 N.C. App. at 626, 286 S.E.2d at 606.

206. N.C. GEN. STAT. § 25-2-201(2) comment 2 (1965), includes as a merchant "any person in business." The second group of sections includes the warranty of merchantability, and applies only to sellers of the particular goods involved in the transaction. The third group, dealing with "good faith" and other problems, restricts the definition of "merchant" to persons familiar either with the goods or the practices in the particular business.

207. 57 N.C. App. 49, 291 S.E.2d 165 (1982).

208. N.C. GEN. STAT. § 25-2-608 (1965) provides:

(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it:

(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

209. 57 N.C. App. at 49-50, 291 S.E.2d at 165. Plaintiff alleged that on the day after he purchased the automobile he experienced "a roaring noise while driving as well as excessive vibration, fluid leaks, poor gas mileage, a dead battery, the car would pull to the right and other serious defects." *Id.*

210. *Id.*

211. The court affirmed the grant of summary judgment for defendant manufacturer in light of the majority rule that revocation of acceptance is a remedy available to the buyer only against the seller, and that the manufacturer, in the absence of a contractual relationship with the ultimate consumer, is not a seller. See *Voytovich v. Bangor Punta Operations, Inc.*, 494 F.2d 1208 (6th Cir. 1974); *Cooper v. Mason*, 14 N.C. 472, 188 S.E.2d 653 (1972) (by implication); but see *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977), noted in Comment, *Uniform Commercial Code: Buyers of Nonconforming Goods Who Revoke Acceptance Under Section 2-608 May Recover*

first addressed the question of substantial impairment under G.S. 25-2-608. Adopting a two-part test, the court of appeals ruled that substantiality of impairment must be assessed under both (1) a subjective standard, measured by the buyer's needs, circumstances, and reaction to the nonconformity, and (2) an objective standard, measured by the product's market value, reliability, safety, and usefulness for purposes for which similar goods are generally used.²¹² Plaintiff had the burden of proof on these two standards at the start of trial; however, because defendant moved for summary judgment, the burden shifted.²¹³ The court held that because defendant attacked plaintiff's cause on only the objective standard, summary judgment was improper.²¹⁴

The court next examined defendant's contention that plaintiff's failure to inspect the car before purchase was a complete defense on the issue of defects that might have been discovered by inspection at the time of delivery.²¹⁵ The court held that the provisions of G.S. 25-2-608(1)(b) make it clear that "acceptance of goods without discovery of nonconformities must be judged in the light of whether such acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances."²¹⁶ Because there were different versions of what took place at the time of sale and delivery, it remained for the trier of fact to resolve those issues regarding plaintiff's opportunity to inspect.²¹⁷

2. Secured Transactions

In *Church v. Mickler*²¹⁸ the court of appeals held that a creditor's failure to notify a debtor of the sale of collateral does not absolutely bar the creditor's right to a deficiency judgment, provided that the creditor can prove the collateral was sold for its market value.²¹⁹ Following default by defendant, plaintiff in *Mickler* brought an action for deficiency judgment on a lease-purchase contract of farm machinery. Plaintiff had repossessed and sold the equipment at a private sale without notifying defendant. After the sale, plaintiff had repurchased some of the equipment from the foreclosure purchaser. Defendant contested plaintiff's right to a deficiency judgment and counterclaimed for recovery of the amount provided in G.S. 25-9-507(1) for plaintiff's failure to give notice of the sale.²²⁰ Defendant also charged that plaintiff's repurchase of col-

the Purchase Price From a Remote Supplier Despite Lack of Privity of Contract, 63 MINN. L. REV. 665 (1979).

212. 57 N.C. App. at 51-52, 291 S.E.2d at 167. See generally Annot., 98 A.L.R.3d 1183 (1980); J. WHITE & R. SUMMERS, *supra* note 181, § 8-3, at 308-09 (2d ed. 1980).

213. 57 N.C. App. at 54, 291 S.E.2d at 168.

214. *Id.*

215. *Id.* at 55, 291 S.E.2d at 168.

216. *Id.* See *supra* note 208.

217. 57 N.C. App. at 55, 291 S.E.2d at 168.

218. 55 N.C. App. 724, 287 S.E.2d 131 (1982).

219. *Id.* at 728, 287 S.E.2d at 134.

220. N.C. GEN. STAT. § 25-9-507(1) (Cum. Supp. 1981) provides:

If it is established that the secured party is not proceeding in accordance with the provisions of this part, disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notifica-

lateral constituted self-dealing.²²¹ The trial court awarded judgment for plaintiff and the court of appeals affirmed.

The court noted that, although G.S. 25-9-504(3)²²² mandates notification of sale, failure to notify the debtor simply causes the debt to be credited with the amount that could have been obtained through commercially reasonable sale of the collateral.²²³ In addition, lack of notice gives rise to a presumption that the collateral was worth at least the amount of the debt. This presumption, however, may be overcome if the creditor proves that the collateral was sold at market value and that market value was less than the amount of the debt.²²⁴ Courts in other jurisdictions have employed the same presumption.²²⁵ The argument in favor of allowing a creditor a deficiency judgment despite his misbehavior is that, because G.S. 25-9-507 constitutes a comprehensive codification of a debtor's remedies, and because that section makes no reference to denial of a deficiency judgment, such a denial is not a permissible remedy.²²⁶ This argument is bolstered by the statement in G.S. 25-9-201 that the creditor has all the rights that his agreement with the debtor gives him (except when the Code specifically provides otherwise).²²⁷

Unpersuaded by this reasoning, other courts have suggested that compliance with the provisions of part five, article nine is a condition precedent to recovery of a deficiency.²²⁸ Their stance is supported by G.S. 25-1-103,²²⁹ the Code's incorporation of the general rules of common law and equity. Under this provision, a court's denial of a deficiency merely represents the exercise of traditional equitable powers.²³⁰ The debtor can also argue that silence of part five in the face of this prior case law indicates that the Code leaves courts free

tion or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service plus 10 percent (10%) of the principal amount of the debt or the time price differential plus 10 percent (10%) of the cash price.

Because the farm machinery purchased in *Mickler* could not be classified as "consumer goods", the court denied defendant the sanction sought under G.S. § 25-9-507(1). 55 N.C. App. at 729, 287 S.E.2d at 134.

221. 55 N.C. App. at 726, 287 S.E.2d at 134. The court disagreed and noted that defendant provided no authority for the proposition that the repurchase of collateral is commercially unreasonable. *Id.* at 732, 287 S.E.2d at 136.

222. N.C. GEN. STAT. § 25-9-504(3) (Cum. Supp. 1981) provides for the methods to be followed by a secured party in disposing of collateral.

223. 55 N.C. App. at 728, 287 S.E.2d at 134. *See* *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

224. 55 N.C. App. at 728, 287 S.E.2d at 134.

225. *See, e.g.*, *United States v. Whitehouse Plastics*, 501 F.2d 692 (5th Cir. 1974), *cert. denied sub nom. Baker v. United States*, 421 U.S. 912 (1975); *In re Bishop*, 482 F.2d 381 (4th Cir. 1973); *Hall v. Owen County State Bank*, 370 N.E.2d 918 (Ind. App. 1977).

226. *J. WHITE & R. SUMMERS, supra* note 181, § 26-15, at 1127.

227. N.C. GEN. STAT. § 25-9-201 (Cum. Supp. 1981).

228. *See, e.g.*, *Skeels v. Universal C.I.T. Credit Corp.*, 222 F. Supp. 696 (W.D. Pa. 1963), *modified on other grounds*, 335 F.2d 846 (3d Cir. 1964); *Braswell v. American Nat'l Bank*, 117 Ga. App. 699, 161 S.E.2d 420 (1968).

229. N.C. GEN. STAT. § 25-1-103 (1965).

230. *J. WHITE & R. SUMMERS, supra* note 181, § 26-15, at 1127.

to reach this result.²³¹

Arguably, the rule adopted by the court in *Mickler* is the better rule. Abolition of the deficiency judgment because of the creditor's misbehavior may tend to restrict the availability of credit.²³² Furthermore, because failure to notify places a greater burden of proof on the creditor when he brings suit for deficiency judgment, it is unlikely that the *Mickler* rule will tempt a creditor to forego giving notice. As indicated, the presumption is that the value of the collateral is equal to the outstanding debt. The secured party can recover the deficiency only if it can convince the court that the reasonable value of the collateral was less than the outstanding debt.²³³ There have been cases in which the secured party failed to meet this burden of proof and judgment was ordered for the debtor.²³⁴ Admittedly, failure to notify frustrates the purpose of notification,²³⁵ nevertheless the presumption rule restricts an opportunity for abuse of the right of the debtor while preserving for the creditor what is rightfully his.

In *Barclays/American Credit Co. v. Riddle*²³⁶ the court of appeals held that "a general lender operating under G.S. 53-173 is entitled to secure any loan by taking a security interest in a motor vehicle."²³⁷ The case is significant because it represents the first time a North Carolina court has construed G.S. 53-173 and -176.1 as each provision relates to the other and to the overall policies of the Consumer Finance Act.²³⁸

Plaintiff in *Riddle* was engaged in the business of making small loans pursuant to G.S. 53-173.²³⁹ In 1979 plaintiff made a loan to defendant in return for a security interest in defendant's car and a signed promissory note. In 1981 plaintiff brought an action on the account and alleged that defendant was in arrears on the loan. The magistrate entered judgment for plaintiff. Defendant appealed to district court, denied liability, and alleged that the loan was void because it violated the North Carolina Consumer Finance Act. The trial judge granted defendant's motion for summary judgment on the grounds that plaintiff, though purporting to operate under G.S. 53-173, was in fact a motor vehicle lender under G.S. 53-176.1²⁴⁰ and thus was prohibited from charging

231. *Id.*

232. *Id.* at 1135.

233. See *supra* notes 222-24 and accompanying text.

234. *T & W Ice Cream, Inc. v. Carriage Barn, Inc.*, 107 N.J. Super. 328, 258 A.2d 162 (1969).

235. In *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976), the court noted that personal notice to the debtor is required under G.S. 25-9-504(3) to adequately inform the debtor to "protect his interest in the collateral by paying the debt, finding a buyer, or being present at the sale to the bid" *Id.* at 197, 223 S.E.2d at 850.

236. 57 N.C. App. 662, 292 S.E.2d 177 (1982).

237. *Id.* at 665, 292 S.E.2d at 179.

238. *Id.* at 663, 292 S.E.2d at 178. The North Carolina Consumer Finance Act is codified at N.C. GEN. STAT. §§ 53-164 to -191 (1982).

239. N.C. GEN. STAT. § 53-173 (1982) states the maximum rates that can be charged by lenders licensed to make small loans under N.C. GEN. STAT. § 53-168 (1982). Currently, the maximum rate for loans not exceeding \$3000 is 36% on that portion of the unpaid principal balance not exceeding \$600 and 15% on the remainder.

240. N.C. GEN. STAT. § 53-176.1 (1982) provides:

No office holding a license under the provisions of this section and making loans secured

more than sixteen percent interest per annum. The trial judge, concluding that plaintiff violated G.S. 53-176.1 by charging defendant an interest rate of 23.27% per annum, held the loan contract void.²⁴¹

The court of appeals reversed. The court noted that plaintiff was licensed as a general lender under G.S. 53-168²⁴² and operated pursuant to G.S. 53-173. In addition, the court stated that the only section of the Consumer Finance Act that limits the type of collateral available to a general lender under G.S. 53-173 is G.S. 53-180(f), which states that "[n]o loan made pursuant to the provisions of G.S. 53-173 shall be secured in any way by an interest in real property."²⁴³ A lender under G.S. 53-173 is not subject to any other restrictions regarding the type of collateral that may be used to secure its loan. The court, however, went beyond consideration of the plain meaning of the Consumer Finance Act in an effort to determine whether G.S. 53-176.1 should be construed as an implied limitation on G.S. 53-173.²⁴⁴ After a brief examination of the legislative history and the purpose and policy behind these provisions, the court held that G.S. 53-173 does not limit the type of security that may be taken by a lender. Had the legislature intended to prohibit the use of motor vehicles as security for loans made under G.S. 53-173, it would have so stated.²⁴⁵

3. Commercial Paper

*Ind-Com Electric Co. v. First Union National Bank*²⁴⁶ concerned a bank's duty to examine its customer's checks for forgeries before making payment of the checks. Plaintiff's employee forged thirty-seven checks drawn over a fourteen month period against plaintiff's account at defendant bank. Plaintiff sued the bank to recover the amount paid out of its account on the forged checks. Although plaintiff stipulated that it had been negligent in failing to examine its bank statements,²⁴⁷ it alleged that the bank's negligence in failing to discover the forgeries entitled it to recover under G.S. 25-4-406(3).²⁴⁸ In arguing that

by motor vehicles may make loans under the provisions of G.S. 53-166, G.S. 53-173, G.S. 53-180, or G.S. 52-141, nor shall such office allow or admit loans under the other provisions of this Article to be made on its premises or any connecting premises. All other provisions of this Article not inconsistent with this section shall apply to a "motor vehicle lender."

The maximum amount that can be loaned under G.S. 53-176.1 is \$5000 at a rate not to exceed 16%.

241. 57 N.C. App. at 663, 292 S.E.2d at 178.

242. See *supra* note 239.

243. N.C. GEN. STAT. § 53-180(f) (1982).

244. 57 N.C. App. at 663-64, 292 S.E.2d at 178.

245. *Id.* at 665, 292 S.E.2d at 179. The court rejected defendant's contention that a general lender should be precluded from "having the advantage of a higher interest rate [coupled with] the low risk security of a motor vehicle." *Id.*

246. 58 N.C. App 215, 293 S.E.2d 215 (1982).

247. Under N.C. GEN. STAT. § 25-4-406(2)(b) (Cum. Supp. 1981), if a customer fails to notify a bank of any forgeries shown on his bank statement within fourteen days of receipt, the customer will be precluded from asserting claims on later forgeries by the same person.

248. Under N.C. GEN. STAT. § 25-4-406(3) (Cum. Supp. 1981), if both the bank and the customer are negligent, the customer will prevail.

the bank had used inadequate protective measures, plaintiff noted that the bank employed only five clerks to compare endorsements against customer signature cards, that each clerk handled between 4,000 and 10,000 checks each day, and that the clerks' training was inadequate.²⁴⁹ The trial court granted summary judgment for defendant, apparently on the basis of plaintiff's stipulation that the bank had complied with generally accepted commercial standards, thereby satisfying its duty under G.S. 25-3-406.²⁵⁰

On appeal plaintiff argued that section 4-406(3) imposed a duty of ordinary care on the bank in payment of checks, that section 3-406 was inconsistent with this duty, and that section 4-406 should govern the transaction. On this basis plaintiff argued that its stipulation as to the bank's compliance with generally accepted commercial standards should not bar its claim. The court did not reach this issue,²⁵¹ because it found that plaintiff had not met its burden of proving that the bank had not acted with ordinary care.²⁵² The court's holding that plaintiff had not proved negligence on the part of the bank is supported both by the Code and by other courts. G.S. 25-4-103(3) provides that compliance with general banking usage is prima facie evidence of ordinary care, and clearly places the burden upon plaintiff to show lack of care. Most courts have held that measures such as those employed by defendant are adequate, and in the absence of suspicious circumstances on the face of the check, those courts have held in favor of the bank in cases like *Ind-Com Electric*.²⁵³

The result in *Ind-Com Electric* seems proper. As one court has noted, a bank cannot reasonably be expected to scrutinize each signature with the expertise of a handwriting expert.²⁵⁴ Because the cost of such a practice would be prohibitive, the only rationale for imposing liability upon the bank in such circumstances would have to be based upon "enterprise" notions.²⁵⁵ When a customer has been negligent in examining statements, thereby allowing forger-

249. Brief for Plaintiff at 5, 58 N.C. App 215, 293 S.E.2d 215. A former handwriting expert for the North Carolina State Bureau of Investigation later testified for defendant that the forgeries were so good that even an expert could not easily have detected the forgery. Brief for Defendant at 9-10, 58 N.C. App. 215, 293 S.E.2d 215.

250. N.C. GEN. STAT. § 25-3-406 (1965) provides that "any person who by his negligence substantially contributes to . . . an unauthorized signature is precluded from asserting (his claim) . . . against the drawee . . . who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's . . . business."

251. N.C. GEN. STAT. § 25-4-406 (Cum. Supp. 1981) should prevail over N.C. GEN. STAT. § 25-3-406 (1965) for two reasons: N.C. GEN. STAT. § 25-4-102(1) (1978) provides that Article 4 governs over the provisions of Article 3; in addition, N.C. GEN. STAT. § 25-4-406 (Cum. Supp. 1981) is more closely tailored to the specific issues in this case.

252. 58 N.C. App. at 217, 293 S.E.2d at 216.

253. See *Industrial Sys. of Huntsville, Inc. v. American Nat'l Bank*, 376 So.2d 742 (Ala. App. 1979); *Nu-Way Servs., Inc. v. Mercantile Trust Co. Nat'l Ass'n*, 530 S.W.2d 743 (Mo. App. 1975); *Zenith Sys. Inc. v. Marine Midland Bank*, 23 U.C.C. REP. SER. (Callaghan) 1267 (N.Y. Civ. Ct. 1978). But see *First Nat'l Bank and Trust Co. v. Cutright*, 189 Neb. 805, 205 N.W.2d 542 (1973) (refusing to overturn a verdict for the consumer on facts very similar to *Ind-Com Electric*).

254. *Zenith Sys., Inc. v. Marine Midland Bank*, 23 U.C.C. Rep. Serv. (Callaghan) 1267, 1269 (N.Y. Civ. Ct. 1978).

255. In other words, the bank, despite its relative lack of fault, should suffer liability as a cost of doing business.

ies to continue, no reason exists for giving the customer this benefit. Absent a showing of special circumstances, a finding of lack of care by the bank in cases such as *Ind-Com Electric* would effectively defeat the rule of G.S. 25-4-406(2) that a customer who fails to examine his bank statement, thereby contributing to further forgeries, is barred from recovery.

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IV. CONSTITUTIONAL LAW

A. Freedom of Speech

In *Fehlhaber v. North Carolina*¹ the United States Court of Appeals for the Fourth Circuit rejected the argument that North Carolina's obscenity nuisance statute, G.S. 19,² constitutes an illegal prior restraint³ on first amendment freedom of speech.⁴ The obscenity nuisance statute, relatively simple in design, grants the state courts power to issue an injunction against the sale or exhibition of obscene pictorial materials when such activity is deemed to constitute a nuisance.⁵ A nuisance is defined as any place or business where obscene films are shown as a "predominant and regular course of business" or where obscene publications are "a principal or substantial part of the stock in trade."⁶ As a preliminary matter, the court may order a temporary restraining order for the purpose of preserving the evidence.⁷ Upon determining that a nuisance exists, the court will issue an abatement injunction prohibiting the defendant from maintaining or resuming the activity in question.⁸ Violation of the injunction triggers criminal contempt sanctions.⁹ In any contempt proceeding, however, the state must establish not merely an occasional sale or exhibition of obscene material, but rather the resumption of activity rising fully to the level of nuisance.¹⁰ Any lesser offense falls short of a violation of the order. Nevertheless, the contempt mechanism provides Chapter 19 the substantive power of a criminal statute.¹¹

Plaintiffs in *Fehlhaber* argued that G.S. 19 is unconstitutional to the extent that it empowers the courts to enjoin the sale or exhibition of materials

1. 675 F.2d 1365 (4th Cir. 1982). For a discussion of *Fehlhaber* and N.C. GEN. STAT. §§ 19-1 to -21 (1978), see Comment, *The Constitutionality of North Carolina's Nuisance Abatement Statute: A Prior Restraint on Nonobscene Speech*, 61 N.C.L. REV. 685 (1983).

2. N.C. GEN. STAT. §§ 19-1 to -21 (1978).

3. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-31 to -36 (1978); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955).

4. U.S. CONST. amend. I.

5. N.C. GEN. STAT. § 19-2.1 (1978).

6. *Id.* § 19-1.2. The definition of obscenity incorporates the "contemporary community standards" test of *Miller v. California*, 413 U.S. 15 (1973). See N.C. GEN. STAT. § 19-1.1(2) (1978).

7. During the period in which the temporary restraining order is in effect, the defendant may continue to distribute the challenged materials, but must provide a full accounting of all such transactions. N.C. GEN. STAT. § 19-2.3.

8. *Id.* § 19-2.1. Specifically, the defendant is prohibited from maintaining the nuisance at the place in question and from resuming the activity at any other place in North Carolina; in addition, all persons are prohibited from maintaining the nuisance at the place which is the subject of the complaint. *Id.* Enforcement of the injunction against defendant's successors in interest, provided they have notice, probably raises no substantial due process issues. See generally D. DOBBS, REMEDIES § 2.9, at 101-03 (1973).

9. The defendant may be subject to a fine not to exceed \$1000 or imprisonment not to exceed six months, or both. N.C. GEN. STAT. § 19-4 (1978).

10. See *State ex rel. Andrews v. Chateau X, Inc.*, 296 N.C. 251, 250 S.E.2d 603 (1979).

11. Under a criminal statute, however, the defendant would be entitled to a jury trial. U.S. CONST. amend. VII. The defendant is entitled to a jury trial during the injunctive proceeding, N.C. GEN. STAT. § 19-2.4 (1978), but not during any subsequent contempt proceeding, since the penalty imposed may not exceed six months' imprisonment. See *State ex rel. Andrews v. Chateau X, Inc.*, 296 N.C. 251, 250 S.E.2d 603 (1979).

not yet judicially declared obscene.¹² The district court agreed, declaring the statute facially unconstitutional.¹³ The court of appeals, however, reversed. While acknowledging that the abatement injunction operates as a prior restraint,¹⁴ the court nevertheless found the statute to be constitutionally sound, primarily because of two redeeming features. First, unlike the statute struck down by the United States Supreme Court in *Vance v. Universal Amusement Co.*,¹⁵ G.S. 19 authorizes no preliminary restraints of an indefinite nature.¹⁶ Under the statute, the court may advance the trial on the merits to the time of the hearing on the motion for a preliminary injunction.¹⁷ Even if that provision is not used, the trial on the merits must be held at the next term of court following the filing of the complaint and is given priority over most other civil cases.¹⁸ Second, in any contempt proceeding under G.S. 19, the state must prove beyond a reasonable doubt that the defendant has resumed activity constituting a nuisance.¹⁹ Noting that "[i]f any prior restraint is ever justified, the area of pictorial obscenity is the place,"²⁰ the court concluded that the statute, as interpreted by the North Carolina Supreme Court, contains sufficient procedural safeguards to survive first amendment scrutiny.²¹

Judge Phillips, dissenting, focused on the distinction between criminal statutes directed at specific material already adjudicated obscene and civil injunctions proclaiming, in effect, a general prohibition against pornography.²² The latter, he argued, present "an inherently vague command" not counte-

12. 675 F.2d at 1366.

13. 445 F. Supp. 130 (E.D.N.C. 1978).

14. 675 F.2d at 1370-71.

15. 445 U.S. 308 (1980). For a full discussion of the issues raised by *Vance*, see Comment, *Prior Restraint of Obscenity as a Public Nuisance—Vance v. Universal Amusement Co.*, 26 N.Y.L. SCH. L. REV. 1122 (1981).

16. 675 F.2d at 1370.

17. N.C. GEN. STAT. § 19-2.4 (1978).

18. *Id.* § 19-3.

19. 675 F.2d at 1370. The North Carolina Supreme Court so construed the statute in *State ex rel. Andrews v. Chateau X, Inc.*, 296 N.C. 251, 250 S.E. 2d 603 (1979). For a brief discussion of *Chateau X*, see *Survey of Developments in North Carolina Law, 1981—Constitutional Law*, 60 N.C.L. REV., 1272, 1273-75 (1982).

20. 675 F.2d at 1371. The court observed that "[e]xplicit photographic portrayals of natural and deviant sexual activity stand upon a plain far below [the spoken or written word]." *Id.* That approach, however, is suspect, as the following passage from Professor Tribe's well-known treatise makes clear:

Nor does it help to distinguish situations in which the "speech" involved does not merit first amendment protection from those in which it does merit such protection, the latter alone deserving the benefit of the full-blown presumption against prior restraints. A particular communication cannot authoritatively be called protected or unprotected at a point when, by definition, no court has yet determined the constitutional question.

L. TRIBE, *supra* note 3, § 12-33, at 729. Nevertheless, when pictorial pornography is involved, the distinction drawn by the court in *Fehlhaber* may be defensible, even though a similar distinction involving written or verbal language would not be.

21. 675 F.2d at 1371. Strangely, the court did not cite or discuss *Freedman v. Maryland*, 380 U.S. 51 (1964), in which the Supreme Court held that prior restraints on motion pictures are constitutionally permissible as long as procedural safeguards are used to avoid the dangers of censorship. The safeguards established in *Freedman* are similar to those deemed critical in *Fehlhaber*. See *id.* at 58-59.

22. 675 F.2d at 1372 (Phillips, J., dissenting).

nanced by the federal constitution.²³ Moreover, Judge Phillips criticized the majority's distinction between verbal political speech and pictorial nonpolitical speech.²⁴ Finally, he argued that the "chilling effect" of an obscenity nuisance statute falls squarely within the doctrine of *Near v. Minnesota*,²⁵ the seminal Supreme Court prior restraint case.²⁶

B. Right to Jury Trial

In 1975 the North Carolina General Assembly eliminated the statutory right to a jury trial in attorney disciplinary proceedings.²⁷ In *North Carolina State Bar v. DuMont*²⁸ an attorney challenged that amendment on the grounds that the adoption of the 1970 state constitution extended the right to a jury trial to all situations in which the right existed at common law, or by statute, at that time.²⁹ The 1868 constitution had been so construed by the North Carolina Supreme Court in *Groves v. Ware*.³⁰ In *DuMont*, however, the supreme court refused to apply a similar construction to the 1970 revision. In making its determination, the court focused on the intent of the drafters, the purpose of the new constitution, and the evils which that document sought to remedy.³¹ The court concluded that the revision was largely editorial³² and was intended to preserve, not extend, the rights existing under the 1868 constitution:

[T]he new document enacted in 1970, of which Article I, § 25 is a part, was not a fundamentally new constitution. It was an exten-

23. *Id.* One answer to that argument is that the term "nuisance," which is used in the injunction, is specifically defined by the statute. See *supra* note 8 and accompanying text. Thus, the injunction does indeed make clear what conduct is prohibited.

24. 675 F.2d at 1372 (Phillips, J., dissenting). There is merit to Judge Phillips' criticism of the majority's distinction between protected and unprotected communications. See *supra* note 20.

25. 283 U.S. 697 (1931) (striking down an injunction prohibiting the distribution of written materials not yet judicially declared outside first amendment protection).

26. 675 F.2d at 1372. The Court in *Near* recognized in dictum that prior restraints may be constitutionally permissible in the enforcement of obscenity laws, one of several "exceptional cases" noted by Chief Justice Hughes. 283 U.S. at 716. Judge Phillips accorded the issue superficial treatment.

27. Act of June 13, 1975, ch. 582, § 5, 1975 N.C. Sess. Laws 657 (1st Sess.) (codified at N.C. GEN. STAT. § 84-28 (1981)). The right to jury trial in attorney disciplinary proceedings had existed more than forty years in North Carolina. See Act of April 3, 1933, ch. 210, § 11, 1933 N.C. Sess. Laws 313 (1st Sess.) (codified at N.C. GEN. STAT. § 84-28(3)(d)(1) (1975)).

28. 304 N.C. 627, 286 S.E.2d 89 (1982).

29. *Id.* at 632, 286 S.E.2d at 92-93. N.C. CONST. art. I, § 25 provides the following mandate: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable."

30. 182 N.C. 553, 109 S.E. 568 (1921). The court in *Groves* offered the following interpretation of article I, section 25:

The right to a trial by jury, which is provided in this section, applies only to cases in which the prerogative existed at common law, or was procured by statute at the time the Constitution was adopted, and not to those where the right and the remedy with it are thereafter created by statute.

Id. at 558, 109 S.E. at 571.

31. 304 N.C. at 633-34, 286 S.E.2d at 93-94.

32. The document adopted in 1970 did not include important substantive changes; rather, the General Assembly submitted such changes to the voters in the form of separate amendments. *Id.* at 636, 286 S.E.2d at 95.

sive editorial revision of the 1868 document. The evils sought to be remedied were obsolete language, outdated style and illogical arrangement. The intent, object and purpose of the framers and adopters was to correct those evils.³³

Consequently, the "critical point of reference"³⁴ for determining the right to a jury trial recognized at common law or by statute, and thus preserved in the constitution, is 1868, not 1970.³⁵ Under that test, the right to a jury trial in attorney disciplinary proceedings is not within the scope of the constitution, since no such right existed in 1868.³⁶ Rather, the prerogative was both created and eventually withdrawn by legislative action.

C. Fourteenth Amendment: Due Process³⁷

In *Harrell v. Wilson County Schools*³⁸ the parents of a hearing-impaired child were dissatisfied with a public school committee's decision not to subsidize the child's education at an out-of-state school for the deaf.³⁹ The committee denied the subsidy after determining that the needs of the student could be met by the public school system through an individualized education program.⁴⁰ During the decision-making process, however, one member of the committee expressed a strong professional preference for mainstreaming rather than residential placement.⁴¹ The parents argued that the member's

33. *Id.* at 636-37, 286 S.E.2d at 95.

34. *Id.* at 641, 286 S.E.2d at 94.

35. *Id.* at 641, 286 S.E.2d at 97.

36. *Id.* at 633, 286 S.E.2d at 93.

37. Nearly half a decade ago, the North Carolina Supreme Court held that N.C. GEN. STAT. § 29-19 (1979 & Cum. Supp. 1981), which restricts the right of illegitimate children to inherit through or from their putative fathers, violates neither the equal protection nor due process clause of the federal constitution. *Mitchell v. Freuler*, 297 N.C. 206, 254 S.E.2d 762 (1979). In a recent case, *Herndon v. Robinson*, 57 N.C. App. 318, 291 S.E.2d 305 (1982), the state court of appeals declined an invitation to reexamine the constitutionality of the statute. In addition, the court rejected an appealing argument based on a constructive compliance theory.

38. 58 N.C. App. 260, 293 S.E.2d 687, *cert. denied*, 306 N.C. 740, 295 S.E.2d 759 (1982), *cert. denied*, 103 S. Ct. 1251-52 (1983).

39. *Id.* at 261, 293 S.E.2d at 689.

40. *Id.* N.C. GEN. STAT. § 115-363 (1978), *amended by* Act of May 20, 1981, ch. 423, § 1, 1981 N.C. Sess. Laws 510, 552 (1st Sess. 1981) (codified at N.C. GEN. STAT. § 115C-106 (Cum. Supp. 1981)), provided at the time the action was brought that "[t]he policy of the State is to provide a free appropriate publicly supported education to every child with special needs." Thus, the issue before the committee was whether the public school could develop an individualized education program that would provide an "appropriate" education in a mainstream environment. See *infra* note 42. If that determination were negative, the school system would subsidize the child's education in a special institution elsewhere.

The statute, as rewritten, now provides that "the policy of the state is to ensure every child a fair and full opportunity to reach his full potential . . ." N.C. GEN. STAT. § 115C-106 (Cum. Supp. 1981).

41. That member was employed by the public schools as a consultant for developing programs for the hearing impaired. 58 N.C. App. at 265, 293 S.E.2d at 691. Mainstreaming arose as an alternative to the once prevalent "practice of removing identified handicapped children from regular education and placing them in special classes or schools for special instruction." Miller & Miller, *The Handicapped Child's Civil Right As It Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming*, 54 IND. L.J. 1, 2 (1978). In contrast to the exclusionary approach, mainstreaming involves placing "a handicapped child in the 'least restrictive environment' and providing an appropriate program in the mainstream of regular education." *Id.* at 6.

predisposition regarding mainstreaming precluded a fair and impartial decision by the school committee.⁴² The court of appeals rejected that argument. Citing various state and federal authorities for the proposition that members of administrative tribunals may perform adjudicatory roles despite having already formed and expressed professional opinions at a policy level, the court concluded that the "predisposition or professional theory which [the member] had, and brought to the Committee, was not enough to constitute bias and a violation of due process."⁴³

While the holding in *Harrell* is logical, the analysis supporting it is not clear. Under the court's analysis, the existence of a constitutional violation depends upon a finding of bias. The court did not articulate, however, the factors that it considered important in determining whether the committee member's predisposition reached the level of bias for purposes of due process analysis. For that reason, *Harrell* sheds little light on the underlying issues.

D. Fourteenth Amendment: Equal Protection

Two recent North Carolina cases soundly rejected equal protection challenges to special statutes of limitations. In *State v. Beasley*⁴⁴ the court of appeals upheld G.S. 49-4(1),⁴⁵ which provides a three-year statute of limitations for prosecution of persons who willfully fail to provide support for their illegitimate children.⁴⁶ The state argued that G.S. 49-4(1), in effect, discriminates against illegitimate children, since there is no limitations period applicable to willful nonsupport of legitimate children.⁴⁷ Essential to the state's argument was the notion that the limitations period deprived illegitimate children of the right to parental support.⁴⁸ The court, however, rejected that theory, and noted that the right to parental support is enforced in civil actions,⁴⁹ not criminal proceedings, and that the statutory bar to criminal prosecution, therefore, has no effect on the rights of the children.⁵⁰

In *Roberts v. Durham County Hospital*⁵¹ plaintiff argued that G.S. 1-15(c),⁵² a statute of limitations designed to decrease the number of medical

42. 58 N.C. App. at 265, 293 S.E.2d at 691.

43. *Id.* at 267, 293 S.E.2d at 692.

44. 57 N.C. App. 208, 290 S.E.2d 730 (1982).

45. N.C. GEN. STAT. § 49-4(1) (1976).

46. Willful nonsupport of illegitimate children is a misdemeanor under N.C. GEN. STAT. § 49-2 (Cum. Supp. 1981).

47. 57 N.C. App. at 209, 290 S.E.2d at 731. Willful nonsupport of legitimate children is a misdemeanor under N.C. GEN. STAT. § 14-322(d) (1981).

48. 57 N.C. App. at 209, 290 S.E.2d at 731.

49. *Id.* at 210, 290 S.E.2d at 731 (citing N.C. GEN. STAT. §§ 49-14 to -15 (1976)). In an earlier case, *County of Lenoir ex rel. Cogdell v. Johnson*, 46 N.C. App. 182, 264 S.E.2d 816 (1980), the court had held that a discriminatory statute of limitations on an illegitimate child's civil action for parental support violated the equal protection clause. In *Beasley* the State sought to extend the holding of *Johnson* to criminal prosecutions.

50. 57 N.C. App. at 210, 290 S.E.2d at 731. Furthermore, the court suggested that even if G.S. 14-4(1) were discriminatory, the state would have no standing to bring suit. *Id.*

51. 56 N.C. App. 533, 289 S.E.2d 875 (1982).

52. N.C. GEN. STAT. § 1-15(c) (Cum. Supp. 1981). The statute establishes, with one exception, an outside limit of four years from the occurrence of the last act of the defendant giving rise

malpractice suits,⁵³ discriminates against persons engaged in nonmedical professions.⁵⁴ Applying a rational basis test,⁵⁵ the court held that the statute, enacted in response to a malpractice crisis, was "rationally related to maintaining sufficient medical treatment" in North Carolina.⁵⁶ The court noted that medical malpractice insurance premiums had increased so dramatically, and the continued availability of such insurance was so precarious, that legislative action was required to ensure the survival of the health services industry.⁵⁷

E. Freedom of Religion

In *Vaughn v. Garrison*⁵⁸ plaintiff alleged that prison regulations restricting inmate requests for Islamic prayer rugs violated the first amendment right to freedom of religion.⁵⁹ Two regulations were at issue. First, prisoners were not permitted to order prayer rugs unless they first requested a pork-free diet.⁶⁰ Second, the rugs had to be purchased from distributors approved by prison authorities.⁶¹ The federal district court held that neither restriction constituted an unlawful deprivation of plaintiff's first amendment rights.⁶² Applying a rational basis test,⁶³ the court determined that the pork-free diet requirement was a reasonable means of obtaining a legitimate prison objective, the elimination of frivolous requests for prayer rugs.⁶⁴ Similarly, the court deemed the "approved distributor" requirement a reasonable means of promoting prison discipline and order, since rugs from unapproved vendors would present a threat of smuggled contraband and would impose an undue inspection burden

to the cause of action. The exception involves instances in which foreign objects are left inside the body following surgery, for which the limit is extended to ten years after the last act of the defendant. Subject to those limitations, all medical malpractice actions must be brought within one year after the injury is, or reasonably should have been discovered. In no event, however, shall the limitation period be less than three years. *Id.* For a discussion of such "statutes of repose" in a products liability context, see Dworkin, *Product Liability of the 1980's: "Repose Is Not the Destiny" of Manufacturers*, 61 N.C.L. REV. 33 (1982).

53. 56 N.C. App. at 541, 289 S.E.2d at 880.

54. Presumably, this class would include attorneys, accountants, engineers, architects, and other nonmedical professionals. Whatever the parameters of the class, however, plaintiffs were clearly outside it. For that reason, the court ruled that plaintiffs had no standing to challenge the statute. *Id.* at 538-39, 289 S.E.2d at 878. Nevertheless, the court went on to consider the equal protection claim.

55. See *McGowan v. Maryland*, 366 U.S. 420 (1961).

56. 56 N.C. App. at 541, 289 S.E.2d at 880.

57. *Id.* at 540-41, 289 S.E.2d at 879-80.

58. 534 F. Supp. 90 (E.D.N.C. 1981).

59. U.S. CONST. amend. I.

60. 534 F. Supp. at 92.

61. *Id.*

62. *Id.* at 92-93.

63. See *McGowan v. Maryland*, 366 U.S. 420 (1961).

64. 534 F. Supp. at 92. The constitutional legitimacy of that objective, however, is questionable, particularly since the danger posed by "insincere" Moslems was neither alleged nor demonstrated. Upon what basis do prison authorities restrict prayer rugs to "genuine members of the Islamic Faith"? *Id.* Similar requests for bibles or rosary beads, for example, probably could not be scrutinized to determine whether the prisoner making the request was a sincere or genuine Christian. Unfortunately, the court does not discuss the possible valid reasons for eliminating frivolous requests for prayer rugs.

upon prison staff.⁶⁵

F. Power to Tax

In *In re Housing Bonds*⁶⁶ the North Carolina Supreme Court held that G.S. 122A-5.4,⁶⁷ which extends the reach of the North Carolina Housing Finance Agency⁶⁸ to moderate income families, serves a public purpose and is a valid exercise of the power to tax.⁶⁹ The court stated:

[W]e find that the public purpose of the Act has not changed, only the economy has. The legislature has appropriately responded to the changing conditions in the residential housing market, and the benefits flowing from the 1979 amendment to the Act are, in our opinion, benefits for the common good of all the people of the State. The increase in available housing which would result from the proposed bonds would further the aim of promoting the health, safety and general welfare of our people.⁷⁰

Prior to the amendment, the agency could issue housing finance bonds only for lower income families.

G. Separation of Powers

In *Advisory Opinion In re Separation of Powers*⁷¹ the North Carolina Supreme Court examined G.S. 143-23(b),⁷² involving state budget transfers, and G.S. 120-84,⁷³ involving federal block grants, and determined that both statutes violate the separation of powers provision of the North Carolina Constitution.⁷⁴ G.S. 143-23(b) grants a joint legislative committee on governmental operations⁷⁵ the power to control budget transfers proposed by the governor. Under the state constitution, however, the governor, not the General Assembly, is the administrator of the budget.⁷⁶ Since the duties envisioned by G.S. 143-23(b) are essentially administrative, the court concluded that the statute both exceeds the power vested in the General Assembly⁷⁷ and encroaches upon the constitutionally mandated role of the governor.⁷⁸

The court's analysis of G.S. 120-84 focused upon the question whether the

65. *Id.* at 93.

66. 307 N.C. 52, 296 S.E.2d 281 (1982).

67. N.C. GEN. STAT. § 122A-5.4 (1981).

68. *Id.* §§ 122A-1 to -23.

69. N.C. CONST. art. V, § 2(1).

70. 307 N.C. at 61, 296 S.E.2d at 286-87.

71. 305 N.C. 767, 295 S.E.2d 589 (1982).

72. N.C. GEN. STAT. § 143-23(b) (1983).

73. N.C. GEN. STAT. § 120-84 (Cum. Supp. 1981).

74. "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. CONST. art. I, § 6.

75. The commission was established by Act of June 6, 1975, ch. 490, 1975 N.C. Sess. Laws 498 (1st Sess.) (codified at N.C. GEN. STAT. § 143-16.1 (1983)).

76. N.C. CONST. art. III, § 5(3).

77. The General Assembly has the constitutional authority to enact the budget. N.C. CONST. art. II, § 1.

78. 305 N.C. at 776-77, 295 S.E.2d at 594.

General Assembly had delegated its own legislative powers too extensively, not whether it had delegated powers properly belonging to the governor. Through its power to enact the budget, the General Assembly has the power to accept and use federal block grants.⁷⁹ G.S. 120-84 purports to delegate that power to a joint legislative committee whenever the full assembly is not in session. The court determined that the statute effects an unconstitutional delegation of legislative powers and violates the separation of powers doctrine.⁸⁰

PAUL ABBOTT PARKER

79. *See supra* note 77.

80. 305 N.C. at 780-81, 295 S.E.2d at 596.

V. CRIMINAL LAW

A. Armed Robbery

The North Carolina statutory definition of armed robbery states that any person "who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement, or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another" is guilty of a felony.¹ Two 1982 decisions, *State v. Alston*² and *State v. Thompson*,³ suggest that courts will distinguish between a "firearm" and a "dangerous weapon" in determining whether use of an instrument falls under the statute. The supreme court stated in *Alston* that the use of a "dangerous weapon" must actually endanger or threaten life.⁴ The *Thompson* decision, on the other hand, implies that when a "firearm" is used, the victim's awareness of the firearm will be crucial, even if there is evidence that the firearm did not actually endanger or threaten life.⁵

In *State v. Alston* the state's evidence showed that defendant's accomplice pointed a rifle at a store attendant during a robbery. The jury found each defendant guilty of armed robbery. The supreme court reversed, finding error in the trial court's failure to submit to the jury the lesser included offense of common law robbery. The court based its conclusion upon the accomplice's testimony that the weapon was in fact a BB rifle. This evidence, the court said, affirmatively identified the instrument as something other than that which it appeared to be to the victims. The witnesses testified that the weapon was a firearm.⁶

Given evidence that the gun was a BB rifle, the court next faced the ques-

1. N.C. GEN. STAT. § 14-87 (1981). The court of appeals recently declined to answer whether the danger or threat may be posed to a third person rather than the victim of the robbery in *State v. Irwin*, 55 N.C. App. 305, 285 S.E.2d 345 (1982).

2. 305 N.C. 647, 290 S.E.2d 614 (1982).

3. 57 N.C. App. 142, 291 S.E.2d 266, *aff'd per curiam on other grounds*, 307 N.C. 125, 296 S.E.2d 297 (1982).

4. 305 N.C. at 651-52, 290 S.E.2d at 616.

5. 57 N.C. App. at 147, 291 S.E.2d at 272.

6. 305 N.C. at 650, 290 S.E.2d at 615. The court considered the accomplice's testimony as falling within the rule stated in *State v. Thompson*, 297 N.C. 285, 254 S.E.2d 526 (1979). In *Thompson*, the witness was uncertain whether a gun used during a robbery was fake or real. The court held that the witness' testimony was not sufficient basis for submission to the jury of the lesser included offense of common law robbery. The court concluded that when a person uses a weapon that appears to be a firearm or dangerous weapon, in the absence of evidence to the contrary, the law will presume the instrument to be that which the defendant's conduct represents it to be. *Id.* at 289, 254 S.E.2d at 528. This conclusion overruled a contrary holding in *State v. Baily*, 278 N.C. 80, 178 S.E.2d 801 (1971), *cert. denied*, 409 U.S. 948 (1972). See *Survey of Developments in North Carolina Law, 1981—Criminal Law*, 60 N.C.L. REV. 1294 (1982).

In *Alston* witnesses to a robbery testified that the weapon used was a firearm. Moreover, the accomplice testified on direct examination that the gun was a Remington pellet rifle. He stated on cross examination, however, that it was a BB rifle. The court noted that this testimony, unlike the witness' statement in *Thompson*, was not a mere failure to testify positively that the instrument was a firearm or dangerous weapon. On the contrary, the accomplice's statement affirmatively identified the instrument. Thus, the presumption articulated in *Thompson* may be rebutted by testimony from a participant in the robbery that the weapon is not what the witnesses perceived it to be.

tion whether it was a firearm or dangerous weapon within the armed robbery statute. Because the court did not consider a BB rifle to be a firearm, the issue was whether a BB rifle is a dangerous weapon. If it is not a dangerous weapon, the lesser included offense of common law robbery as well as armed robbery should have been submitted to the jury. In making its determination, the court rejected dicta in civil cases suggesting that a BB gun is a dangerous instrument. Neither did the court compare a BB rifle to other instruments that have been held dangerous weapons under the armed robbery statute.⁷ The court instead asked whether the evidence was sufficient to support a jury finding that a life was in fact endangered or threatened.⁸ While testimony that the rifle was a firearm was sufficient to support such a finding, testimony that it was a BB gun was not sufficient. Thus, for an instrument to be a dangerous weapon under the statute, it is not sufficient that the victim perceives it to be a threat to his life. The court reaffirmed the rule that a person's life must be in fact endangered or threatened by the weapon.⁹

The *Alston* holding appears to be contrary to the result in *State v. Thompson*. In *Thompson* the court of appeals concluded that defendant was guilty of armed robbery (if he was guilty at all) despite an accomplice's testimony that the gun used in the robbery was not loaded.¹⁰ Defendant argued that even though the weapon was a firearm, this testimony presented evidence from which a jury could conclude that the instrument was not a dangerous weapon. Defendant thus argued that the lesser included offense of common law robbery should be submitted to the jury. The court was unpersuaded by the defense argument, and stated that there was evidence showing the use or threatened use of a dangerous weapon. The court noted as evidentiary support for its finding the facts that weapons were pointed at the witnesses, the witnesses were bound, and defendant relied on an alibi.¹¹

The court's reliance upon the alibi defense and the binding of the victims is confusing because these facts are irrelevant to the nature of the weapon used in the crime. Evidence that guns were pointed at the victims, however, is significant in light of two prior supreme court decisions. In *State v. Gibbons* the victims did not see defendant's shotgun and was not threatened with it.¹² The court concluded that mere possession of the shotgun was not sufficient to support a conviction. In *State v. Evans*¹³ defendant unloaded the shotgun at the

7. Instruments held to be dangerous weapons within the statute include: a knife, *State v. Norris*, 264 N.C. 470, 141 S.E.2d 869 (1965); a crowbar, *State v. Lilly*, 32 N.C. App. 467, 232 S.E.2d 495, cert. denied, 292 N.C. 643, 235 S.E.2d 64 (1977); a board, *State v. Horne*, 21 N.C. App. 197, 203 S.E.2d 636 (1974); non-chukkas, *State v. Mullen*, 47 N.C. App. 667, 267 S.E.2d 564, disc. rev. denied, 301 N.C. 103, 273 S.E.2d 308 (1980), appeal after remand, 53 N.C. App. 106, 280 S.E.2d 11 (1981). In *State v. Gibbons*, 303 N.C. 484, 279 S.E.2d 574 (1981), the court found it was unnecessary to determine whether fists could be dangerous weapons.

8. 305 N.C. at 351-52, 290 S.E.2d at 616. See *State v. Moore*, 279 N.C. 455, 183 S.E.2d 546 (1971).

9. 305 N.C. at 651-52, 290 S.E.2d at 616.

10. 57 N.C. App. at 145-46, 291 S.E.2d at 268.

11. *Id.* at 145, 291 S.E.2d at 268.

12. 303 N.C. 484, 490-91, 279 S.E.2d 574, 578 (1981).

13. 279 N.C. 447, 183 S.E.2d 540 (1971).

victim's request. Submission of armed robbery to the jury was error, said the court, since there was no evidence that a life was endangered or threatened.¹⁴ Like the defendants in *Gibbons* and *Evans*, defendant in *Thompson* may be viewed as merely possessing a firearm without threatening or endangering life. Nonetheless, the distinguishing feature is that the *Thompson* defendant pointed the weapon at a victim. Thus, the court's conclusion in *Thompson* emphasizes the victim's perception of danger instead of the firearm's actual ability to threaten or endanger life.

Arguably, *Thompson* impliedly modifies the rule that threat or danger to life is an essential element of the armed robbery offense.¹⁵ *Thompson* suggests that mere possession of a firearm may be enough to support a charge of armed robbery, if the victim perceives a threat to his life. *Thompson* indicates that this result will be possible even if there is evidence that the weapon did not actually endanger life. The status of this decision as the last word on the matter is, however, open to question. Although the supreme court affirmed the decision, the court declined to address the issue.¹⁶ In sum, there is a discernible distinction in the court of appeals' treatment of "firearm" and the supreme court's treatment of "dangerous weapon." If the instrumentality is not a firearm, *actual* threat or danger to life determines whether it is a weapon under the armed robbery statute. The victim's knowledge of the character of the weapon is irrelevant. If the instrumentality is a firearm, however, the court of appeals suggest that the victim's awareness of the firearm may be crucial, despite evidence that the firearm is incapable of endangering life.

B. Arson

Arson is a nonstatutory common-law offense,¹⁷ defined in North Carolina as "the willful and malicious burning of the dwelling house of another person."¹⁸ The gravamen of the offense is the danger to persons who might be in the dwelling,¹⁹ and G.S. 14-58 makes both first and second degree arson a felony.²⁰ In *State v. Shaw*²¹ the North Carolina Supreme Court held that the common-law requirement that the dwelling burned be that "of another" is satisfied by a showing that some other person or persons and defendant jointly occupied the dwelling.

In *Shaw* defendant was convicted of setting fire to a house in which he

14. *Id.* at 451, 183 S.E.2d at 542.

15. See *State v. Gibbons*, 303 N.C. 484, 279 S.E.2d 574 (1981); *State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978); *State v. Moore*, 279 N.C. 455, 183 S.E.2d 546 (1971).

16. 307 N.C. at 121, 296 S.E.2d at 297.

17. *State v. Long*, 243 N.C. 393, 90 S.E.2d 739 (1956).

18. *Id.*; *State v. Porter*, 90 N.C. 719 (1884); *State v. Arnold*, 21 N.C. App. 92, 203 S.E.2d 395, *aff'd*, 285 N.C. 751, 208 S.E.2d 646 (1974).

19. *State v. White*, 288 N.C. 44, 215 S.E.2d 557 (1975).

20. The offense is first degree arson if the building is occupied at the time of the burning and second degree if it is not. N.C. GEN. STAT. § 14-58 (1979) was amended 1977, effective July 1, 1981. Prior to amendment, the statute did not distinguish between an occupied and unoccupied dwelling.

21. 305 N.C. 327, 289 S.E.2d 325 (1982).

lived with his wife, three nieces, and father-in-law. Although the court concluded that defendant's mere occupancy of the house did not prevent a conviction of arson,²² it also noted that the dwelling was rented by defendant's father-in-law, that defendant was a transient, and that he had been forced by his father-in-law at gunpoint to leave the house. The majority's consideration of these facts intimates that it felt defendant had little interest in the dwelling itself. Nevertheless, the court found the need for protection against willful and malicious burning of a dwelling so compelling that it extended its holding to any situation in which a defendant and any other person or persons are joint occupants of a dwelling unit.²³ Relying upon *State v. Jones*,²⁴ the court noted that the main purpose of the law governing arson is protection of those who might be in the burned dwelling. In *Jones* the court did not comment upon defendant's argument that, because he was an occupant of the apartment burned, he did not set fire to the dwelling of another.²⁵ Instead, the court based its decision upon the presence of three other occupied apartments in the building.²⁶ Responding to the same argument in the instant case, the court in *Shaw* noted that the need for protection is as compelling when a dwelling is jointly occupied as when there are adjoining apartments.²⁷

State v. Shaw suggests that the court may be expected to interpret the common-law definition of arson in a flexible policy-oriented manner, rather than in a rigid, technical fashion. Given this orientation, it is interesting to speculate upon the result should a defendant burn down a building owned by himself but occupied by another. If the underlying policy of the rule—protection of persons in the building—is to be effected, the court would have to find that even actual ownership of a building by a defendant does not prevent it from being treated as a "dwelling of another." The decision in *Shaw* makes this result considerably more likely.

C. Assault With Intent to Kill

In *State v. Irwin*²⁸ the North Carolina Court of Appeals held that proof of a defendant's conditional intent to kill was inadequate to support submission to the jury of the question whether defendant had a specific intent to kill. The evidence in *Irwin* showed that defendant held a hostage at knifepoint and verbally threatened to kill the hostage if his demands were not met. Persons present complied with his demands, and he subsequently released the hos-

22. *Id.* at 337, 289 S.E.2d at 331.

23. *Id.* at 338, 289 S.E.2d at 331.

24. 296 N.C. 75, 248 S.E.2d 858 (1978).

25. This issue was not even presented in *State v. Reavis*, 19 N.C. App. 497, 199 S.E.2d 139 (1973). In *Reavis* defendant, who was in the process of separation from his wife, burned the mobile home owned and occupied by his wife. Evidence showed that he kept his clothes in the dwelling.

26. 296 N.C. at 77, 248 S.E.2d at 859. See also *State v. Wyatt*, 48 N.C. App. 709, 269 S.E.2d 717 (1980) (apartment building is a single dwelling and occupancy of one apartment satisfies requirement of occupancy for purposes of statute).

27. 305 N.C. at 337-38, 289 S.E.2d at 331.

28. 55 N.C. App. 305, 285 S.E.2d 345 (1982).

tage.²⁹ The court of appeals reversed defendant's conviction for assault with intent to kill on the grounds that the State had proved only conditional intent to kill. In other words, the court found that defendant never actually intended to kill the hostage by means of the assault. His intent to kill was conditioned entirely upon the nonperformance of the acts he required of those present. Proof of this conditional intent was insufficient to submit the "intent to kill" issue to the jury, and thus all the elements of the crime charged had not been adequately proved by the State.³⁰

Traditionally, in North Carolina proof of assault with intent to kill has required proof of specific intent to kill.³¹ Moreover, under North Carolina law specific intent to kill may be inferred from the nature of the assault, the manner in which the assault is made, the conduct of the parties, and other relevant circumstances.³² For example, in *State v. Cauley*³³ there was evidence that defendant severely beat his stepdaughter with a heavy belt. The beating lasted through the night, and almost caused the child to die. This evidence was held to be sufficient support for an inference of intent to kill; the charge of assault with intent to kill was thus allowed to go to the jury. Similarly, in *State v. Thacker*³⁴ proof that defendant intentionally stabbed a woman, who subsequently required six days of hospitalization, was sufficient evidence of intent to take the issue of assault with intent to kill to the jury. And finally, in *State v. Revels*³⁵ proof that defendants indiscriminately inflicted knife wounds on three victims was sufficient evidence of intent to support the submission of the jury charge of assault with intent to kill. As these and other cases demonstrate, intent to kill can be proved circumstantially, and ordinarily the issue of intent has been a jury question.³⁶

By adopting the conditional intent theory in *Irwin*, the court has taken the intent issue from the jury. In addition to *Irwin*, the conditional intent theory has been applied in other limited and fairly well-defined circumstances, including two Mississippi cases relied upon in *Irwin* to support the conditional intent theory. In *Stroud v. State*³⁷ defendant threatened to kill the victim if he refused to sign certain papers. The victim signed the papers and was not killed. The court overturned defendant's conviction for assault with intent to

29. *Id.* at 306, 285 S.E.2d at 347.

30. *Id.* at 309-10, 285 S.E.2d at 349-50. In overturning the assault with intent to kill conviction, the court stated that the evidence was sufficient to allow submission of the offense of assault with a deadly weapon to the jury. The court also said that since the jury found defendant guilty of assault with intent to kill, it necessarily found him guilty of assault with a deadly weapon. The lower court was thus ordered to enter a verdict of guilty of assault with a deadly weapon.

31. *State v. Cooper*, 8 N.C. App. 79, 173 S.E.2d 604 (1970) (instruction that proof of intent to kill may be found from evidence of intent to kill or inflict great bodily harm held improper, because assault with intent to kill requires specific intent to kill as essential element).

32. *See State v. Thacker*, 281 N.C. 447, 189 S.E.2d 145 (1972).

33. 244 N.C. 701, 94 S.E.2d 915 (1956).

34. 281 N.C. 447, 189 S.E.2d 145 (1972).

35. 227 N.C. 34, 40 S.E.2d 474 (1946).

36. *State v. Allen*, 186 N.C. 302, 119 S.E. 504 (1923) (issue of intent to rape, or lack thereof, was jury question).

37. 131 Miss. 875, 95 So. 738 (1923).

kill, because the only proof of intent to kill was proof of conditional intent.³⁸ Similarly, in *Craddock v. State*³⁹ a Mississippi court held that a defendant who threatened to shoot a deputy if the deputy moved had only a conditional intent to kill. Since the deputy did not move, and defendant did not shoot, the intent to kill never became actual.⁴⁰ *Irwin* is factually similar to, and closely follows the principles enunciated in, *Stroud* and *Craddock*.⁴¹

Irwin represents the first time the Mississippi conditional intent theory had been adopted as North Carolina law. This new theory will occasionally take the intent issue from the jury. Nonetheless, *Irwin* does not radically change prior North Carolina law. The *Irwin* rule would have no effect on the aforementioned cases of *Cauley*, *Thacker*, and *Revels*,⁴² since none of those cases involved anything approximating a conditional intent to kill. Also, in a case containing evidence of a conditional intent to kill, the courts will probably hold the evidence sufficient to submit the intent to kill issue to the jury.⁴³ Finally, although it can be argued that *Irwin* gives the court too much power by placing the conditional intent determination in its hands, it seems clear that the conditional intent situation is sufficiently circumscribed to prevent any substantial abuse of this power.

D. Defenses

1. Duress Defense for Prison Escapees

Since 1974 courts in many jurisdictions have struggled to define the conditions that would legally excuse an inmate's escape from prison.⁴⁴ The most widely recognized decision in the area is *People v. Lovercamp*,⁴⁵ and since that 1974 decision many courts have adopted the *Lovercamp* elements of the duress defense in prison escape cases. In *State v. Watts*⁴⁶ the North Carolina Court of Appeals was confronted with the issue for the first time and adopted the *Lovercamp* elements for this defense.⁴⁷

38. *Id.* at 879, 95 So. at 738.

39. 204 Miss. 606, 37 So. 2d 778 (1948).

40. *Id.* at 609, 37 So. 2d at 778.

41. In light of the two Mississippi cases and *Irwin*, it seems unlikely that the conditional intent theory would be applied unless a conditional threat was specifically made and its terms met. It also seems unlikely that the theory would be applied when the defendant threatens conditional harm and in fact harms the victim in spite of the nonoccurrence of the condition.

42. See *supra* notes 33-35 and accompanying text.

43. Judge Martin, who dissented in *Irwin*, refused to accept the conditional intent theory and believed there was sufficient evidence of assault with intent to kill to support the submission of the charge to the jury. 55 N.C. App. at 312-13, 285 S.E.2d at 351 (Martin, J., dissenting).

44. See *United States v. Bailey*, 444 U.S. 394 (1980); *People v. Lovercamp*, 43 Cal. App. 3d 823, 188 Cal. Rptr. 110 (1974); *People v. Unger*, 33 Ill. App. 3d 770, 338 N.E.2d 442 (1975), *aff'd*, 66 Ill. 2d 333, 362 N.E.2d 319 (1977); *People v. Harmon*, 53 Mich. App. 482, 220 N.W.2d 212 (1974), *aff'd*, 394 Mich. 625, 232 N.W.2d 187 (1975); *People v. Field*, 28 Mich. App. 476, 184 N.W.2d 551 (1971); *Esquivel v. State*, 91 N.M. 498, 576 P.2d 1129 (1978).

45. 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974). For a discussion of *Lovercamp*, see Note, *Availability of the Duress Defense in Prison Escapes: People v. Lovercamp*, 12 WAKE FOREST L. REV. 1102 (1976).

46. 60 N.C. App. 191, 298 S.E.2d 436 (1982).

47. This was a case of first impression in the North Carolina Court of Appeals. In *State v.*

The five *Lovercamp* elements are as follows:⁴⁸

- (1) The prisoner is faced with a specific threat of death, forcible sexual attack, or substantial bodily injury in the immediate future;
- (2) There is no time for a complaint to the authorities, or there exists a history of futile complaints that make any result from such complaints illusory;
- (3) There is no time or opportunity to resort to the courts;
- (4) There is no evidence of force or violence used toward prison personnel or other "innocent" persons in the escape; and
- (5) the prisoner immediately reports to the proper authorities when he had attained a position of safety from the immediate threat.

The jury will be instructed on the duress defense in prison escape cases only if the defendant presents evidence on all five elements of the defense.

In *Watts* defendant claimed that he had been threatened with serious bodily injury by a Department of Correction officer, and that he had reported this threat to the prison superintendent, who ignored the complaint. There was no evidence that he had used force in escaping. The court of appeals found, however, that defendant failed to meet the fifth requirement of the defense—to report immediately to the authorities once he escaped from the immediate threat. *Watts* was captured thirteen days after escape. Although he testified that he planned to surrender that day, the court held that a delay of thirteen days was unjustifiable under the circumstances of the case.⁴⁹

The significance of *Watts* is not yet clear. Jurisdictions accepting the *Lovercamp* elements have applied them with different degrees of flexibility,⁵⁰ and clarification of how strictly North Carolina will interpret these elements awaits further case development. Also unclear is whether the defendant or the State has the burden of proving or disproving the elements of the defense. Although affirmative defenses usually require the defendant to carry the burden of proof,⁵¹ this rule has not been followed in North Carolina cases involving the duress defense.⁵² States that have adopted the *Lovercamp* elements are

Carver, No. 81CRS49172, (Superior Court, Wake County June 30, 1982), however, defendant was acquitted of escape by means of a more conventional formulation of the duress defense. In *Carver* the judge simply gave normal jury instructions for the duress defense as found in North Carolina Pattern Jury Instructions—Crim. 310.10. According to that formulation of the defense, the defendant is not guilty of a crime if his action was prompted by a reasonable fear of immediate or imminent bodily harm or sexual assault. In North Carolina, once a defendant submits evidence of duress, the burden of proof is upon the state to prove that those conditions did not exist. See N.C. Pattern Jury Instructions—Crim. §310.10; *State v. Sherian*, 234 N.C. 30, 65 S.E.2d 331 (1951).

48. As set out in *State v. Watts*, 60 N.C. App. at 193, 298 S.E.2d at 437.

49. *Id.* at 194, 298 S.E.2d at 437.

50. See *supra* note 44.

51. *State v. Brown*, 250 N.C. 209, 213, 108 S.E.2d 223, 236 (1959); *State v. Johnson*, 229 N.C. 701, 706, 51 S.E.2d 186, 190 (1949).

52. In North Carolina, once the defendant presents evidence of duress, the state has burden of proving that duress should not apply. See North Carolina Pattern Jury Instructions—Crim. 310.10; *State v. Sherian*, 234 N.C. 30, 65 S.E.2d 231 (1951). The court in *Sherian* implied that the duress defense negates the element of intent. The State, therefore, must prove beyond a reasonable doubt that the crime was committed with "felonious intent" and "not under compulsion or through fear of death or great bodily harm." *Id.* at 33, 65 S.E.2d at 232. Another possible rationale for giving the State the burden of disproving duress is that duress is a "hybrid"—it has some

split on this issue.⁵³

The merits of the *Lovercamp* defense have been hotly debated. On the one hand, there is concern that the availability of the defense will prompt "hordes of prisoners [to leap] over the walls screaming 'rape'."⁵⁴ There seems to be little evidence to support this fear, however, since the defense is limited, and the defendant must demonstrate that he was in actual danger of serious bodily harm.⁵⁵ Furthermore, the availability of the defense may encourage prison administrators to improve prison conditions, thereby reducing the need for prisoners to escape to avoid serious bodily harm.⁵⁶ One State court concluded:

[O]ur decision may well produce a result entirely opposite to that feared. . . . If the conditions of our penal institutions have reached the point where the only recourse to free one's self from unwanted personal attacks is to flee, then any improvements made in our prisons with respect to assuring the personal safety of the inmates could only serve to eliminate from the ranks of escapees those who do so solely in an effort to protect themselves. The result, therefore, might well be fewer prison escapes rather than more.⁵⁷

In this light, the *Lovercamp* defense is not a magic formula that should be applied with rigidity, but rather is an attempt to balance the need for prison discipline with fundamental fairness. When prisoners escape solely to avoid the unpleasant conditions of incarceration, they should be duly punished for escape. But fundamental fairness requires that the defendant be afforded the chance to demonstrate that his escape was prompted by fear of imminent bod-

characteristics of an element of the offense charged, and some of an affirmative defense. This approach was exemplified in a case that dealt not with duress, but with another legal excuse. The court in *State v. Trimble*, 44 N.C. App. 659, 262 S.E.2d 249 (1980), held that the placing of poison in public places to exterminate rats constitutes an exception to the crime of putting poisonous foodstuffs in public places. The court noted:

[T]he State has no initial burden to show that defendant's actions do not fall within the exception; however, once the defendant in a non-frivolous manner, puts forth evidence to show that his conduct is within this exception, the burden of persuading the trier of fact that the exception does not apply falls upon the State.

Id. at 666, 262 S.E.2d at 303-304. For a further discussion of the burden of proof, see Dutile, *The Burden of Proof in Criminal Cases: A Comment on the Mullaney-Patterson Doctrine*, 55 NOTRE DAME LAW. 380 (1980); *Survey of Developments in North Carolina Law, 1980—Criminal Law*, 59 N.C.L. REV. 1123-39 (1981).

53. See *supra* note 44. Courts in Michigan and New Mexico hold that the state has the burden of proving that the elements of the duress defense have not been met. Courts in California and Illinois, as well as the federal courts, hold that the defendant has the burden to show by a preponderance of the evidence that all the elements are present.

54. 43 Cal. App. 3d at 832, 118 Cal. Rptr. at 119.

55. *Id.*

56. *People v. Harmon*, 53 Mich. App. 482, 487, 220 N.W.2d 212, 215 (1974).

57. *Id.* The court continued:

Human nature being what it is, defendants who have escaped from prison for reasons unconnected with those presented here will undoubtedly argue that they did so because of homosexual attacks. These claims, however, will be judged within the framework of the fact-finding process where the traditional safeguards for determining the truth of a tale will be applied. To us this is extremely more desirable than relegating the actual victims of such attacks to years more of the same treatment where no workable safeguards are employed to protect their safety. *Id.*

ily harm rather than by mere desire to escape confinement. Since this is a question of intent, the jury should be given every reasonable opportunity to make this determination.⁵⁸

2. Entrapment

A successful defense of entrapment requires proof that there have been acts of persuasion, trickery or fraud by law enforcement officers or their agents that seek to induce a defendant to commit a crime. Second, the criminal design must originate in the minds of the government officials rather than in the mind of the defendant.⁵⁹ In North Carolina, the jury will be instructed on the entrapment defense only when evidence of both elements is present: government agents induced commission of the crime and the intention to commit the crime originated not with the defendant, but with the law enforcement officers.⁶⁰ In *State v. Luster*⁶¹ the supreme court addressed the meaning of "agents of law enforcement" as applied to the entrapment defense. The court held that defendant was not entitled to an instruction on entrapment by an agent when an unknowing third party was given the opportunity by an undercover officer to commit an offense and then, without the officer's specific direction, induced defendant's participation in the crime.

In *Luster*⁶² State's evidence showed that public safety officials and State Bureau of Investigation agents operated an undercover fencing operation. The officers encouraged those who had delivered stolen goods to get other people to bring merchandise to them.⁶³ As further encouragement for new "business," the officers offered "the regulars" less money on succeeding purchases. As a result, a "regular" asked defendant to transact a deal for him.

58. *Id.*

59. *Sherman v. United States*, 356 U.S. 369 (1958); *State v. Stanley*, 288 N.C. 19, 215 S.E.2d 589 (1975); *State v. Burnette*, 242 N.C. 164, 87 S.E.2d 191 (1955). In *State v. Hageman*, 307 N.C. 1, 296 S.E.2d 433 (1982), the court reaffirmed prior holdings that the defendant has the burden of proving entrapment. When the defendant presents evidence of entrapment, the burden does not shift to the prosecution to prove predisposition beyond a reasonable doubt. The court reasoned that entrapment is not a defense negating an essential element of the crime but is rather a defense in the nature of confession and avoidance. In another 1982 entrapment case, the North Carolina Court of Appeals held that failing to mention the defense in the final mandate to the jury was not error when the judge explained the defense in the body of instructions immediately prior to the mandate. *State v. Tate*, 57 N.C. App. 350, 294 S.E.2d 16, *cert. denied*, 306 N.C. 750, 295 S.E.2d 763 (1982). *But cf.* *State v. Dooley*, 285 N.C. 158, 203 S.E.2d 815 (1974) (failure to mention self-defense in the final mandate error); *State v. Patterson*, 50 N.C. App. 280, 272 S.E.2d 924 (1981) (failure to mention defense of others in the final mandate error).

60. *See State v. Fletcher*, 279 N.C. 85, 181 S.E.2d 405 (1971); *State v. Coleman*, 270 N.C. 357, 154 S.E.2d 485 (1967).

61. 306 N.C. 566, 295 S.E.2d 421 (1982).

62. *Luster* involved two separate trials consolidated for appellate review. At the trial level, defendant was found guilty of felonious larceny of a vehicle (Case No. 79CRS22551) and of felonious possession of a second vehicle (Case No. 79CRS28603). The court of appeals found no error. The supreme court, with Justice Exum dissenting and Justice Carlton joining, affirmed. The issue before the court in Case No. 79CRS28603 was whether the trial judge erred in not instructing on entrapment by an agent, and in Case No. 79CRS22551, whether the trial judge erred in refusing to give an instruction on the general defense of entrapment.

63. The S.B.I. agents did not actually say they would buy "stolen property," but said they would buy only quality merchandise. 306 N.C. at 569, 295 S.E.2d at 423.

Defendant denied knowing that the car he subsequently delivered to the fencing operation was stolen. On appeal, defendant argued that the police, through financial manipulation, induced an unwitting third party to become their agent. The principal issue was whether the trial judge, though he gave an instruction on entrapment, erred in not instructing on entrapment by an agent.⁶⁴ The court concluded that there was not sufficient evidence to indicate that the "regular" was an agent of the police.⁶⁵

While the court's conclusion was limited to the facts of the instant case, analysis of its rationale suggests that a middleman's unawareness that the persons for whom he acts are police officers will preclude the existence of an agency relationship. Basic to the court's reasoning is that entrapment is a defense in North Carolina only when the entrapper is an officer or agent of the government.⁶⁶ The court noted that an agency relationship must be created by mutual agreement.⁶⁷ Therefore, if the government denies that the entrapper is its agent, the defendant must produce substantial credible evidence of an agency relationship.⁶⁸ This, said the court, the defendant failed to do.

The dissenting opinion noted that the courts are divided on whether an unsuspecting middleman can be an agent of officers for purposes of the entrapment defense.⁶⁹ Crucial to the dissent's reasoning is the policy underlying the entrapment defense—to deter officers from creating a crime solely to prosecute and punish it.⁷⁰ In light of this policy, it may be of little significance that the third party who induces another to commit a crime is unaware that he is being used by the government.

The majority in *Luster* did not directly state whether an unsuspecting third party can be an agent of the police. Instead, it simply stated that there was no evidence of an agency relationship between the "regular" and the of-

64. *Id.* at 571, 295 S.E.2d at 423-24. Defendant also contended that he was not otherwise predisposed to commit the crime, but was induced by the "regular" to become involved. The court stated that there was ample evidence to show defendant's predisposition. *Id.* at 572, 295 S.E.2d at 426.

65. *Id.* at 573-74, 295 S.E.2d at 425.

66. See *State v. Jackson*, 243 N.C. 216, 90 S.E.2d 507 (1955); *State v. Whisnant*, 36 N.C. App. 252, 243 S.E.2d 395 (1978); Note, *Criminal Law—A Survey and Appraisal of the Law of Entrapment in North Carolina*, 54 N.C.L. REV. 982 (1976).

67. 306 N.C. at 574, 295 S.E.2d at 421.

68. *Id.* at 581, 295 S.E.2d at 433. See also *State v. Yost*, 9 N.C. App. 671, 177 S.E.2d 320 (1970).

69. 306 N.C. at 588, 295 S.E.2d at 433. See Note, *Entrapment Through Unsuspecting Middlemen*, 95 HARV. L. REV. 1122 (1982); Note, *Entrapment: An Analysis of this Agreement*, 45 B.U.L. REV. 542, 563-65 (1965). The dissent argued that the "regular" was an agent of the police and that defendant's predisposition to commit the crime should be a question for the jury.

70. *Butts v. United States*, 273 F. 35 (2d Cir. 1921). The dissent cited *State v. Whisnant*, 36 N.C. App. 252, 243 S.E.2d 395 (1978). In *Whisnant* defendant's conviction was reversed and a new trial ordered because the trial judge failed to instruct on the entrapment defense. Nothing in the opinion indicated that the friend who arranged a drug purchase between defendant and a State Bureau of Investigation agent knew the true identity of the agent. Yet, the court of appeals said, "[i]f Ms. Reynolds was acting as agent for SBI Agent Prillman and she as such agent induced the defendant to commit the crime charged, the SBI agent would be responsible for her actions and the defense of entrapment would be available to the defendant." *Id.* at 254, 243 S.E.2d at 396-97.

ficers.⁷¹ Yet, examination of the facts of the case clearly suggests an ongoing relationship: the officers encouraged regular customers to solicit others to deal with the operation, both indirectly, by offering less money on succeeding purchases, and directly, by suggesting that they attract others to the operation. Indeed, defendant entered the transaction at the request of a regular customer who, encouraged by the officers, had brought in five or six people. Nonetheless, to constitute sufficient evidence of a mutual agreement, the court seemed to require an acknowledged agency relationship between the police and a knowing middleman.

3. Self-defense

A person may justifiably kill another in self-defense if he meets two conditions: he must not have initiated the incident, and it must be necessary, or appear to him to be necessary, to kill his adversary to save himself from death or great bodily harm.⁷² The North Carolina Supreme Court, in *State v. Hunter*,⁷³ made several significant statements in dicta that broaden the concept of self defense. The court adopted a court of appeals holding which said that for the purpose of self-defense, a male who fears homosexual assault is put in fear of great bodily harm.⁷⁴

Furthermore, the court approved a model jury instruction dealing specifically with defense from sexual assault that differs from the instruction on self-defense.⁷⁵ The approved instruction states that the defendant must believe it is necessary to kill the deceased in order to save herself [himself] from death, great bodily harm, or sexual assault.⁷⁶ This instruction differs from the usual self-defense instruction in two ways. Aside from the obvious addition of the words "or sexual assault," the jury is permitted to consider the defendant's knowledge of the deceased's reputation for sexual attacks.⁷⁷ The court in *Hunter*, however, may have limited the effect of its dicta when it found no prejudicial error in the judge's instructions on ordinary self defense.⁷⁸

In *Hunter* defendant signed a confession stating that the deceased attempted to sodomize him. When defendant resisted, the initial aggressor got a knife and continued the attempted sexual assault. When the deceased then

71. The majority stated that the evidence shows the "regular" acted solely to further his own economic interests. 306 N.C. at 574, 295 S.E.2d at 426.

72. *State v. Deck*, 285 N.C. 209, 203 S.E.2d 830 (1974); *State v. Gladden*, 279 N.C. 566, 184 S.E.2d 249 (1971); *State v. Kirby*, 273 N.C. 306, 160 S.E.2d 24 (1968).

73. 305 N.C. 106, 286 S.E.2d 535 (1982).

74. *State v. Molko*, 50 N.C. App. 551, 274 S.E.2d 271 (1981). The supreme court has said in dictum that a female may use deadly force to protect herself from rape. *State v. Neville*, 51 N.C. (6 Jones) 413, 421 (1859).

75. 305 N.C. at 114-15, 286 S.E.2d at 540.

76. N.C. Pattern Jury Instructions—Crim. § 308.70.

77. 305 N.C. at 114, 286 S.E.2d at 540.

78. *Id.* at 115, 286 S.E.2d at 541. Other courts have held that an ordinary self-defense instruction is inadequate when evidence raises the issue of defense from sexual assault. *Commonwealth v. Mitchell*, 460 Pa. 665, 334 A.2d 385 (1975); see *State v. Robinson*, 328 S.W.2d 667 (Mo. 1959). But see *State v. Milbradt*, 68 Wash. 2d 684, 415 P.2d 2 (prosecution allowed to present evidence of defendant's alleged homosexual tendencies), cert. denied, 385 U.S. 905 (1966).

struck defendant with the knife, defendant grabbed the weapon and stabbed him.⁷⁹ Defendant, appealing his conviction of second degree murder, assigned as error the trial court's failure to instruct the jury on his right to defend himself from sexual assault.

On appeal, the court reasoned that the cause of defendant's fear of death or great bodily harm was the threat posed by the knife, and not the attempted sexual assault. The assault, said the court, was not a separate substantial feature of the case and thus did not require a jury charge. Instead, it was merely one aspect of assault with a deadly weapon.⁸⁰ Thus, the court implied that the sexual assault itself must produce fear of death or great bodily harm for the court to instruct on defense from sexual assault. Even so, the approved jury instructions say "fear of bodily harm *or* sexual assault," not "*from* sexual assault." Since the words indicate that the latter is not dependent upon the former, the implication is quite different from an instruction on ordinary self defense. In addition, the court indicated that had no deadly weapon been involved, defendant would have been entitled to the charge requested.⁸¹ The attacker's use of a weapon, therefore, may be cause to refuse to instruct on defense from sexual assault. The model jury instruction that the court approved, however, lists the attacker's use of a weapon as an element for the jury to consider. The instruction, then, certainly does not contemplate the rule implied by the court: that use of a weapon in the course of sexual assault renders the more specific instruction inappropriate.

The court's reasoning indicates that it may not consider the right to defend oneself from sexual assault to be separate and distinct from the right to defend oneself from death or great bodily harm. The court seemed to require that the sexual assault produce fear of death or bodily harm. A sexual assault, however, may take place without serious bodily injury to or death of a victim. Thus, it is arguable that the court's analysis of defense from sexual assault in *Hunter* and the jury instructions it approved are inconsistent.

E. Drug-Related Offenses

The rules governing criminal indictments in North Carolina are well-established. A felony indictment must contain a pleading of the criminal charges against the defendant,⁸² and the pleading must list separately each offense charged and must contain a supporting factual statement for each count.⁸³ Charges in two indictments can be treated as separate counts of the

79. 305 N.C. at 107-08, 286 S.E.2d at 536-37.

80. *Id.* at 115, 286 S.E.2d at 241.

81. *Id.*

82. N.C. GEN. STAT. § 15A-644(a)(3) (1978): "An indictment must contain criminal charges as provided in Art. 49 of this Chapter, Pleadings and Joinder".

83. N.C. GEN. STAT. §§ 15A-644 (a)(2), (5) (1978) states:

A criminal pleading must contain a separate count addressed to each offense charged, but allegations in one count may be incorporated by reference in another count. A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's

same indictment.⁸⁴ The defendant can be convicted of the offense charged in the indictment or of a lesser offense, provided that all the elements of the lesser offense are included in the crime charged in the indictment.⁸⁵

In *State v. Gooche*⁸⁶ defendant argued that he had been convicted of an offense in violation of these well-established rules: the offense of which he was convicted, he said, was not listed in the indictment. Defendant was indicted for felonious possession "with intent to sell and deliver a controlled substance 59.9 grams of marijuana which is included in Schedule VI of the North Carolina Controlled Substances Act."⁸⁷ In addition to submitting to the jury the possible verdict of guilty of possession of marijuana with the intent to sell or deliver, the trial court also submitted a separate offense — possession of more than one ounce of marijuana.⁸⁸ The defendant was convicted of the latter offense; he subsequently contended on appeal that the court erred in submitting this possible verdict because he had not been charged with this offense; moreover, the offense is not a lesser included offense of possession of marijuana with the intent to sell or deliver.

Although the court of appeals supported defendant's latter contention,⁸⁹ it rejected his claim that he had not been charged with possession of more than one ounce, since both elements of that offense were set out in the indictment.⁹⁰ The court relied upon *State v. McGill*⁹¹ in upholding the trial judge's submission of both crimes to the jury. In *McGill* defendant was charged in separate indictments with possession of marijuana with the intent to sell or deliver, and possession of more than one ounce of marijuana.⁹² The judge submitted both offenses to the jury. Stating that the separate indictments could be considered as separate counts of the same indictment, the North Carolina Supreme Court

commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation

84. *State v. Stephens*, 170 N.C. 745, 87 S.E. 131 (1915).

85. *State v. Aiken*, 286 N.C. 202, 209 S.E.2d 763 (1974).

86. 58 N.C. App. 582, 294 S.E.2d 13, *rev'd*, 307 N.C. 253, 297 S.E.2d 599 (1982).

87. *Id.* at 582, 294 S.E.2d at 13. The Controlled Substance Act, N.C. GEN. STAT. § 90-95(a) (1981) states in pertinent part: "Except as authorized by this Article, it is unlawful for any person: (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance."

88. N.C. GEN. STAT. § 90-95(d) (1981) states in pertinent part:

Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-05(a)(3) with respect to: . . . (4) A controlled substance classified in Schedule VI shall be guilty of a misdemeanor and shall be fined not more than one hundred dollars (\$100); but if the quantity of the controlled substance exceeds one ounce (avoirdupois) of marijuana or one tenth of an ounce (avoirdupois) of the extracted resin of marijuana . . . the violation shall be punishable as a Class I felony.

The amount of marijuana defendant in *Gooche* allegedly possessed (59.9 grams) was greater than one ounce.

89. To prove the possession charge, the state must show that defendant possessed the drug and that the amount possessed exceeded one ounce. To prove possession with intent to sell or deliver, the state must show possession of any amount, and that defendant intended to sell or deliver the marijuana. Each crime contains one element absent the other, and thus one cannot be a lesser offense of the other. 58 N.C. at 584, 294 S.E.2d at 15.

90. *Id.*

91. 296 N.C. 564, 251 S.E.2d 616 (1979).

92. *Id.*

in *McGill* upheld the trial court's action. The court of appeals in *Gooche* noted that the defendant in *McGill* was properly charged with both offenses in separate indictments, but despite this distinction the court held that the defendant in *Gooche* was properly charged because the *elements* of both offenses were set forth in the indictment. Thus, the trial judge acted properly in submitting alternative verdicts to the jury.

This decision appears to be in direct conflict with G.S. 15A-924, which requires that an indictment contain "[a] separate count addressed to each offense charged."⁹³ The reason for this requirement is suggested by statutory subsection (a)(5), which requires that the facts of each count be stated "with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation"⁹⁴ The purpose of the separate count, then, is to notify and allow the defendant to meet the charges against him. In *McGill* the defendant had proper notice of both charges; in *Gooche* the defendant was notified only of the offense of possession with intent to sell or deliver, and thus was prepared to controvert only the elements of that offense.

On appeal the supreme court said that it was unnecessary for the court of appeals to have heard the indictment issue; that portion of the lower court opinion was vacated without discussion.⁹⁵ The court did not reach the issue because it found reversible error elsewhere: defendant's conviction for possession of more than one ounce of marijuana was vacated because the trial judge did not submit to the jury an essential element of the crime—the amount of marijuana possessed.⁹⁶ The supreme court was unpersuaded by the court of appeals' argument that the trial judge was entitled to decide the amount question as a matter of law since all the evidence showed that defendant possessed either none of the drug or more than one ounce.⁹⁷

After vacating defendant's conviction for possession of more than one ounce of marijuana, the court turned to the question of remedy. The court found it unnecessary to grant defendant a new trial, and held instead that defendant had been convicted of simple possession of marijuana.⁹⁸ It is on this point that the court's reasoning is most open to criticism. The court correctly stated that possession is a lesser included offense of possession with intent to sell or deliver.⁹⁹ The weakness in the court's analysis, however, is that defendant was not convicted of possession with intent to sell or deliver. The jury's refusal to convict defendant of possession with intent to sell or deliver, suggests it must have believed either that he did not possess the marijuana, or that he did not intend to sell or deliver it. Because the jury did not indicate why it failed to return a guilty verdict on this charge, the supreme court could

93. N.C. GEN. STAT. § 15A-924(a)(2) (1978).

94. N.C. GEN. STAT. § 15A-924(a)(5) (1978).

95. 307 N.C. at 255, 297 S.E.2d at 601 (1982).

96. *Id.* at 256, 297 S.E.2d at 599.

97. *Id.*

98. N.C. GEN. STAT. § 90-95(a)(3) (1981) states in pertinent part: "Except as authorized by this Article, it is unlawful for any person: . . . (3) To possess a controlled substance."

99. See, e.g., *State v. Aiken*, 286 N.C. 202, 209 S.E.2d 763 (1974).

not rely upon this offense to find defendant guilty of simple possession. Thus, the court was compelled to turn again to the offense for which defendant *was* convicted—possession of more than one ounce of marijuana.¹⁰⁰

The court's reasoning in finding that a conviction for simple possession may be based upon the original conviction of possession of more than one ounce certainly appeals to logic. Since the jury convicted defendant for possession of more than one ounce of marijuana, so the argument goes, it necessarily must have determined that defendant possessed marijuana. Further, the fatal flaw in that conviction—failure to submit the amount question to the jury—has no relation to a charge of simple possession and thus had no prejudicial effect. But the court ignored the issue it had earlier found unnecessary to reach—possession of more than one ounce of marijuana was not charged in the indictment. Defendant was thus deprived of notice that he was being charged with this offense, a serious deprivation in any criminal case.

In addition to the possessory offenses noted above, the North Carolina statutes also declare unlawful the manufacture of a controlled substance.¹⁰¹ Manufacture means the "production, preparation, propagation, compounding, conversion, or processing"¹⁰² of a controlled substance, and marijuana is a Schedule VI controlled substance.¹⁰³ There are limited exceptions to this prohibition: one exclusion covers the preparation or compounding of a controlled substance for an individual's own use;¹⁰⁴ a second exclusion covers the "preparation, compounding, packaging, or labeling of a controlled substance by a practitioner as an incident to his professional practice."¹⁰⁵ The burden of proof for an exemption rests upon the defendant.¹⁰⁶

In *State v. Piland*¹⁰⁷ defendant doctor, was convicted of possession and manufacture of marijuana. Defendant claimed that the marijuana growing in

100. 307 N.C. at 278, 297 S.E.2d at 602.

101. N.C. GEN. STAT. § 90-95(a) (1981): "Except as authorized by this Article, it is unlawful for any person: (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance."

102. N.C. GEN. STAT. § 90-87(15) (Cum. Supp. 1981) states:

"Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally, or by extraction from substances of a natural origin, or independently by means of chemical synthesis; and "manufacture" further includes any packaging or repackaging of the substance or labeling or relabeling of its container

103. N.C. GEN. STAT. § 90-94 (Cum. Supp. 1981).

104. *See supra* note 102.

105. N.C. GEN. STAT. § 90-87(15) (Cum. Supp. 1981) states:

"[m]anufacturing . . . does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging, or labeling of a controlled substance: a. By a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice."

106. N.C. GEN. STAT. § 90-113.1(a) (1981) states:

It shall not be necessary for the State to negate any exemption or exemption set forth in this Article in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this Article, and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit.

107. 58 N.C. App. 95, 293 S.E.2d 278 (1982).

his backyard was to administered to his patients.¹⁰⁸ He asserted that the only way to be certain the marijuana had not been treated with harmful chemicals was to grow it himself.¹⁰⁹ Although defendant testified at trial that he was going to use the marijuana to treat a patient who was experiencing nausea from chemotherapy, that patient denied being under defendant's care.¹¹⁰ Defendant also claimed that he did not try to obtain a special license for marijuana because he felt the attempt would be futile.¹¹¹

On appeal defendant claimed he was exempted from the manufacture of offense by virtue of the practitioner's exception, G.S. 90-87(15).¹¹² The court of appeals found no exemption applicable because defendant "was doing more than preparing or compounding marijuana; he was growing it."¹¹³ Growing marijuana as an incident to dispensing marijuana in the course of his practice, said the court, was forbidden by law.

Close examination of the statute supports the court's decision. G.S. 90-87(15)(a) exempts the preparation, compounding, packaging, or labeling of a controlled substance. While growing marijuana comes under the heading of manufacture,¹¹⁴ it is not included within the definitions of preparation, compounding, packaging, or labeling. Growing, according to the statute, means production,¹¹⁵ and production is not exempted by G.S. 90-87(15)(a). Thus, a doctor in North Carolina cannot grow marijuana even if he has a proper license.

Defendant also argued that G.S. 90-101(g) & (h)¹¹⁶ is unconstitutionally vague.¹¹⁷ He stated that since the term "tetrahydrocannabinols" reasonably includes marijuana, he was led to believe he could grow and possess marijuana for patient use.¹¹⁸ The court replied that even if the statute allows a physician to possess tetrahydrocannabinols, or marijuana, in pharmaceutical form, a physician could not reasonably believe the statute permits him to grow marijuana and possess it in unprocessed form. Although the court of appeals

108. *Id.* at 97, 293 S.E.2d at 279.

109. *Id.*

110. *Id.*

111. *Id.* Expert medical testimony was given to the effect that marijuana is useful for alleviating side effects of chemotherapy and that a license to dispense marijuana is very difficult to obtain in North Carolina.

112. N.C. GEN. STAT. § 90-87(15) (Cum. Supp. 1981).

113. 58 N.C. App. at 100, 293 S.E.2d at 280.

114. *See, e.g., State v. Whitfield*, 51 N.C. App. 241, 275 S.E.2d 540 (1981).

115. N.C. GEN. STAT. § 90-87(24) (Cum. Supp. 1981). "Production includes the manufacture, planting, cultivation, growing or harvesting of a controlled substance."

116. N.C. GEN. STAT. §§ 90-101 (g), (h) (Cum. Supp. 1981) states:

(g) Practitioners licensed in North Carolina by their respective licensing boards may possess, dispense or administer controlled substances to the extent authorized by law and by their boards.

(h) A physician licensed by the Board of Medical Examiners pursuant to Article I of the Chapter may possess, dispense or administer tetrahydrocannabinols in duly constituted pharmaceutical form for human administration for treatment purposes pursuant to regulations adopted by the Commission.

117. 58 N.C. App. at 101, 289 S.E.2d at 281.

118. *Id.* Defendant noted that the North Carolina Drug Commission had adopted no interpretive regulations for the statute.

delivered a close and arguably correct reading of current statutory provisions, the decision in *Piland* reemphasizes the complex tensions that exist for medical practitioners between serving the best interests of the patient and observing the letter of North Carolina law.

F. Felony Murder

In *State v. Davis*¹¹⁹ the North Carolina Supreme Court held that North Carolina does not recognize the offense of felony murder in the second degree.¹²⁰ In *Davis* the evidence showed that after breaking into the victim's home, defendant hit and stabbed her repeatedly. On appeal from his conviction of first degree murder, defendant assigned as error the failure of the trial court to instruct the jury that they could return a verdict of felony murder in the second degree.¹²¹

In finding no error and holding that North Carolina does not recognize the offense of felony murder in the second degree, the court construed G.S. 14-17, the North Carolina murder statute that categorizes murder in two degrees.¹²² Under G.S. 14-17, first degree murder is specifically defined and includes murders committed during or while attempting to commit a felony in which a *deadly weapon* is used, as well as murder committed in the course of certain specified felonies, whether or not a weapon is used.¹²³ Second degree murder is defined as "[a]ll other kinds of murder" This statutory division has existed in a similar form in North Carolina since 1893. Since that time the courts have held that the statute merely restates common law definitions of murder, rather than creating any new statutory offenses.¹²⁴

In construing G.S. 14-17, the *Davis* court did not fully explain why felony murders that do not fulfill the first degree murder standard of G.S. 14-17 cannot be second degree murder under the same statute.¹²⁵ The court apparently assumed that felony murder, or felony murder other than that described as first degree murder under G.S. 14-17, did not exist at common law and thus

119. 305 N.C. 400, 290 S.E.2d 574 (1982).

120. *Id.* at 422, 290 S.E.2d at 588. As a logical corollary of this holding, the court also stated that the North Carolina pattern jury instruction on "Second Degree Murder in Perpetration of Felony" should no longer be used by trial courts. *Id.* at 425, 290 S.E.2d at 589.

121. *Id.* at 422, 290 S.E.2d at 588.

122. N.C. GEN. STAT. § 14-17 (1981) states in pertinent part:

A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree All other kinds of murder . . . shall be deemed murder in the second degree

123. 305 N.C. at 424, 290 S.E.2d at 589.

124. *Id.* at 422, 290 S.E.2d at 588 (citing *State v. Streeton*, 231 N.C. 301, 56 S.E.2d 649 (1949)).

125. A possible explanation for the holding is that the court believed proof of felony murder would not constitute proof of an intentional and unlawful killing with malice aforethought, as required for second degree murder. This explanation fails under the common-law theory that malice is implied in a felony murder situation. See *People v. Bauman*, 39 Cal. App. 2d 587, 103 P.2d 1020 (1940).

cannot be part of the "other kinds of murder" mentioned in G.S. 14-17. Such an assumption is ill-founded since felony murder itself, including murder other than that which would comprise first degree murder under G.S. 14-17, was recognized at common law.¹²⁶ This fact has been noted by the North Carolina court on at least one previous occasion.¹²⁷ In any event, it is clear that a common-law felony murder will not support a conviction of second degree murder under G.S. 14-17, unless the evidence shows the usual elements of the offense: intentional, unlawful killing with malice but without premeditation and deliberation.

G. Receipt of Stolen Goods

In *State v. Hageman*¹²⁸ the North Carolina Supreme Court ruled upon three significant issues concerning receipt and attempted receipt of stolen property. First, the court held that the crime of attempted receipt of stolen property is punishable as a misdemeanor, not as a felony.¹²⁹ Second, the court held that when stolen property is recovered by the police it loses its status as stolen property.¹³⁰ Thus, recovery of stolen property by the police makes it legally impossible for a defendant who subsequently gains possession of that property (through an undercover sale) to have committed the crime of receiving stolen property. The court narrowed the effect of this ruling, however, in its third holding that despite the technical status of the property, a defendant may be convicted of attempted receipt of stolen property. The court stated that:

when a defendant has the specific intent to commit a crime and under the circumstances as he reasonably saw them did the acts necessary to consummate the substantive offense, but, because of facts unknown to him essential elements of the substantive offense were lacking, he may be convicted of an attempt to commit the crime.¹³¹

By refusing to limit its holding to the facts of the instant case or the particular crime involved, the supreme court has indicated that neither legal nor factual impossibility will prevent conviction when one charged with a crime has clearly demonstrated criminal intent and has taken all steps to complete the crime.

Defendant in *Hageman* was the operator of a company that purchased scrap gold and silver. On December 5, 1980, one Johnson stole silverware, rings, and other jewelry from a residence. Johnson testified that before his arrest on December 6, he sold several items to defendant. Prior to Johnson's

126. See *State v. Jones*, 95 Ariz. 4, 385 P.2d 1019 (1963). Generally, felony murder at common law involved a killing committed during the perpetration or attempted perpetration of a felony dangerous to human life. The *Davis* court recognizes that this type of felony murder is no longer first degree murder, but it advances no clear reason for its decision that it is not second degree murder under the statute.

127. *State v. Shrader*, 290 N.C. 253, 261, 225 S.E.2d 522, 528 (1976).

128. 56 N.C. App. 274, 289 S.E.2d 89, *aff'd*, 307 N.C. 1, 296 S.E.2d 433 (1982).

129. 307 N.C. at 9-10, 296 S.E.2d at 439.

130. *Id.* at 11, 296 S.E.2d at 439.

131. *Id.* at 13, 296 S.E.2d at 441.

preliminary hearing, the police took possession of the silver, but decided not to seize the rings. In exchange for a lighter sentence, Johnson agreed to wear a microphone and transmitter into defendant's shop and to offer to sell the silver and a ring; he subsequently sold the goods to defendant. After purchasing the silver, defendant telephoned a police "hot line" to obtain a standard informational report on stolen items. The police officer did not identify the ring or silver, and defendant did not inquire about them.¹³²

Defendant was charged with the misdemeanor offense of receiving stolen property (a jade ring), and the case was consolidated for trial with an indictment charging defendant with the felony of receiving stolen property (the silver).¹³³ The jury found defendant guilty of attempted nonfelonious receipt of stolen property (the ring) and guilty of attempted felonious receipt of stolen property (the silver).¹³⁴ The court of appeals found no error in the first verdict but concluded that defendant was guilty of a misdemeanor in the latter case.¹³⁵ The supreme court affirmed.

In resolving the first issue, the supreme court applied a two-step analysis to conclude that attempted receipt of stolen property is not a felony. First, the court noted that absent contrary statutory provision, an attempt to commit a felony is a misdemeanor.¹³⁶ Second, the court considered whether attempted receipt of stolen property fell within the class of misdemeanors punishable as a felony under G.S. 14-3(b).¹³⁷ The court noted the statutory requirements and concluded that an attempt to receive stolen property did not fulfill them. The misdemeanor, said the court, is not infamous, not done in secrecy or with malice, and not done with deceit and intent to defraud. In reaching its decision, the court compared the *Hageman* facts to attempted crimes that do constitute a felony.¹³⁸ Because the latter are crimes against persons or involve a direct

132. *Id.* at 4-5, 296 S.E.2d at 436-37.

133. *Id.* at 4, 296 S.E.2d at 436.

134. In North Carolina, one can be convicted of attempting to receive stolen goods on an indictment for receiving stolen goods. N.C. GEN. STAT. § 15-170 (1978). *State v. Parker*, 224 N.C. 524, 31 S.E.2d 531 (1944).

135. 307 N.C. at 6, 296 S.E.2d at 437.

136. *Id.* at 8, 296 S.E.2d at 438. See *State v. Hare*, 243 N.C. 262, 90 S.E.2d 550 (1955); *State v. Spivey*, 213 N.C. 45, 195 S.E. 1 (1938); *State v. Stephens*, 170 N.C. 745, 87 S.E. 131 (1915); *State v. Jordan*, 75 N.C. 27 (1876).

The court overruled a portion of *State v. Parker*, 224 N.C. 524, 31 S.E.2d 531 (1944), which had found no error in defendant's conviction of an attempt to feloniously receive stolen property. 307 N.C. at 8, 296 S.E.2d at 438.

137. "If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony." N.C. GEN. STAT. § 14-3(b) (1981).

138. Crimes within the purview of N.C. GEN. STAT. § 14-3(b) (1981) include: attempted armed robbery, *State v. Parker*, 262 N.C. 679, 138 S.E.2d 496 (1964); attempted common-law robbery, *State v. McNeely*, 244 N.C. 737, 94 S.E.2d 853 (1956); attempted burglary, *State v. Surles*, 230 N.C. 272, 52 S.E.2d 880 (1949); attempt to commit a crime against nature, *State v. Spivey*, 213 N.C. 45, 195 S.E.1 (1938); attempt to obtain property by false pretenses, *State v. Page*, 32 N.C. App. 478, 232 S.E.2d 460, *disc. rev. denied*, 292 N.C. 643, 235 S.E.2d 64 (1977). In *State v. Grant*, 291 N.C. 652, 135 S.E.2d 666 (1964), the court held that an attempt to break and enter is a misdemeanor punishable under N.C. GEN. STAT. § 14-3(b) (1981).

confrontation with the victim, attempt to receive stolen property is easily distinguishable.

The courts turned to other jurisdictions to decide the second issue whether stolen property loses its stolen character when it is recovered by the police prior to its delivery to the defendant. The weight of authority, said the court, is that "once stolen property is recovered, it loses its status as stolen property."¹³⁹ Thus, when the police recovered the silver, it was no longer stolen property. The court, however, rejected defendant's argument that the ring had been constructively recovered by police.¹⁴⁰ Since the supreme court agreed without discussing this issue, the court of appeals' reasoning is significant. The court of appeals based its holding upon *Copertino v. United States*,¹⁴¹ which held that property did not lose its stolen character when the authorities did not take physical possession of it, but merely observed the place in which it was hidden. Arguably, the facts in *Hageman* point to a different conclusion. The agents in *Copertino* did not exercise any dominion and control over the property as did the police in *Hageman* through Johnson, who acted as their agent. Moreover, in *Copertino* the detectives were passive; they did not cause the property to be delivered to the defendant as did the police in *Hageman*. The *Hageman* court, however, may have been considering the practical implications of its decision. The court's holding allows law enforcement officers to preserve the property's stolen character by letting an informant retain the goods. This course of action, then, can preserve the possibility of obtaining a conviction for receipt of stolen goods.

The court of appeals pointed out that *Hageman* therefore could have been convicted of receipt of the stolen ring, but not of receipt of the stolen silver,¹⁴² which had come into police possession. The court did not address the obvious question why a conviction for receipt of stolen property should depend upon whether the police decided to take possession of the goods for a brief moment. The distinction appears arbitrary, but should be of some interest to both defense counsel and law enforcement officials.

The third and most significant aspect of *Hageman* concerns whether there can be a conviction for attempting to commit an offense when the offense in fact could not have been committed. The court held that a defendant may be charged with attempt to commit a crime when he has the specific intent to commit the crime and commits the acts necessary to consummate the substantive offense under the circumstances as he saw them. This is so even if essential elements of the substantive offense are lacking.¹⁴³ In *Hageman* the court concluded that even if the silver had lost its character as stolen property, thereby preventing a conviction for receipt of stolen property, defendant could still be convicted of attempted receipt of stolen property.¹⁴⁴ The holding,

139. 307 N.C. at 11, 296 S.E.2d at 439.

140. *Id.*

141. 256 F. 519 (3d Cir. 1919).

142. 56 N.C. App. at 287, 289 S.E.2d at 97.

143. 307 N.C. at 13, 296 S.E.2d at 441.

144. *Id.*

however, reaches beyond a conclusion affecting only the instant case and encompasses all crimes in which "attempt" is a lesser included offense.

The court examined two lines of cases in other jurisdictions to reach its conclusion that defendant's conviction for attempted receipt of stolen property was not erroneous. In *People v. Jaffe*¹⁴⁵ the New York Court of Appeals overturned a conviction based on attempted receipt of stolen property. The court in *Jaffe* reasoned that if an individual attempts actions that do not constitute a crime, the mere attempt cannot itself constitute a crime. The *Jaffe* court distinguished a line of "pickpocket" cases in which convictions for attempted larceny were sustained, even though the targeted pockets were empty.¹⁴⁶ The distinction is between legal and factual impossibility. In deciding *Hageman*, the North Carolina Supreme Court recognized, but rejected as unconvincing, the New York Court's distinction.¹⁴⁷ The court's holding in *Hageman* does not distinguish between legal and factual elements that are lacking; dicta indicated that the holding applies to both.¹⁴⁸ There is an essential difference, however, that the supreme court failed to discuss. If, in the attempted larceny cases, the defendant had been able to complete that which he attempted to do, the act would have constituted a crime. In *Hageman*, if the defendant had accomplished that which he attempted to do, the act would not have been criminal because the goods were not technically stolen goods.

Perhaps a more compelling reason for the court's rejection of *Jaffe* is a concern that one charged with an attempt to commit a crime should not escape prosecution.¹⁴⁹ This policy was expressed in *People v. Rojas*,¹⁵⁰ upon which the North Carolina Supreme Court relied. In *Rojas* the California Supreme Court considered the controlling factor to be the specific intent of the actor, not the external realities to which the intention refers. The statement by the *Hageman* court that neither legal nor factual impossibility should be used as a shield was a product of two policy arguments made in *Rojas*: the police should not be discouraged from alert and efficient action to recover stolen property; moreover, the defendant should not receive a windfall because timely police action eradicated the projected criminality.¹⁵¹ Thus, the majority's adoption of these policy arguments illustrates a strong emphasis upon preventing acquittals because of technicalities. Even though stolen property may lose its "stolen character" thereby preventing conviction for receipt of

145. 185 N.Y. 497, 78 N.E. 169 (1906).

146. *Id.* at 499, 78 N.E. 169.

147. 307 N.C. at 12-13, 296 S.E.2d at 440-41.

148. *Id.* at 13, 296 S.E.2d at 441.

149. *Id.*

150. 55 Cal. 2d 252, 358 P.2d 921, 10 Cal. Rptr. 465 (1961).

151. *Id.* at 257-58, 358 P.2d at 924, 10 Cal. Rptr. at 468 (quoted in *State v. Hageman*, 103 N.C. at 12-13, 296 S.E.2d at 440). The importance of these considerations is suggested by the court's failure to even discuss the arguments in Judge Becton's dissenting court of appeals opinion. 56 N.C. App. at 288-91, 289 S.E.2d at 98-100 (Becton, J., dissenting in part and concurring in part). Judge Becton argued that not only were the facts in *Hageman* different from those in *Rojas*, but that absent a statute defining the crime, the court must be guided by the legal requirements of *mens rea* and *actus reus*. The dissenting opinion acknowledged the policy arguments advanced by the majority, but noted other options available to apprehend "fences."

stolen property, the North Carolina Supreme Court has decided that a defendant who intends to commit a crime and takes all steps to commit it will not entirely escape the consequences of his actions.

H. Serious Injury

In *State v. Pettiford*¹⁵² the North Carolina Court of Appeals approved a peremptory instruction that "a bullet wound to the head with the bullet lodging in the head is serious injury." Defendant in *Pettiford* had been charged with a crime requiring proof of serious injury as an element.

Many courts have addressed the issue whether evidence in a particular case is sufficient to justify peremptory instructions. The question may arise when such an instruction is given,¹⁵³ when the defendant moves for nonsuit and contends that the state's evidence is insufficient to show serious injury,¹⁵⁴ or when the defendant properly requests instructions on a lesser included offense that does not involve the element of serious injury.¹⁵⁵

In the earlier decision of *State v. Jones*¹⁵⁶ the supreme court had found that the lower court had improperly defined serious injury. The supreme court also said that the issue whether serious injury had occurred should be determined according to the particular facts of each case.¹⁵⁷ In a later case, *State v. Ferguson*,¹⁵⁸ the court held that the trial court had erred in instructing the jury that the offense charged could be proved by evidence of intent to kill or inflict serious injury. The issue of serious injury, said the court, was one for the jury. The *Ferguson* court cited *Jones*, and stated that serious injury should be determined according to particular facts, on a case by case basis.

Recently, however, the North Carolina Court of Appeals has approved peremptory instructions that particular injuries shown in particular cases are serious injuries as a matter of law.¹⁵⁹ A similar result may be expected in future case involving gunshot wounds that result in permanent damage and require hospitalization, and when substantial hospital treatment and expense are shown. When the defendant presents conflicting evidence about the seri-

152. 60 N.C. App. 92, 298 S.E.2d 389 (1982).

153. *State v. Daniels*, 59 N.C. App. 63, 295 S.E.2d 508 (1982); *State v. Springs*, 33 N.C. App. 61, 234 S.E.2d 193, *disc. rev. denied*, 293 N.C. 163, 236 S.E.2d 707 (1977). *Cf.* *State v. Whitted*, 14 N.C. App. 62, 187 S.E.2d 391 (1972) (victim shot in abdomen and suffered apparent permanent nerve damage; evidence sufficient to go to jury on element of serious injury).

154. *State v. Rotenberry*, 54 N.C. App. 504, 284 S.E.2d 197 (1981), *cert. denied sub nom.* *State v. Dunn*, 305 N.C. 306, 290 S.E.2d 705 (1982); *State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978).

155. *State v. Pugh*, 48 N.C. App. 175, 268 S.E.2d 242 (1980); *State v. Davis*, 33 N.C. App. 262, 234 S.E.2d 762 (1977).

156. 258 N.C. 89, 128 S.E.2d 1 (1962).

157. *Id.* at 91, 128 S.E.2d at 3.

158. 261 N.C. 558, 135 S.E.2d 626 (1964).

159. *State v. Pettiford*, 60 N.C. App. 92, 298 S.E.2d 389 (1982) (gunshot wound to head with bullet lodged in head); *State v. Daniels*, 59 N.C. App. 63, 295 S.E.2d 508 (1982) (victim shot by two .32 caliber bullets, one of which was removed by surgery, and one of which remained near spine; victim in hospital twenty-one days); *State v. Springs*, 33 N.C. App. 61, 234 S.E.2d 193 (1977) (victim suffered from shotgun blast in chest, lost two ribs and lung); *State v. Davis*, 33 N.C. App. 262, 234 S.E.2d 762 (1977) (victim struck in back of head, surgery required, nine days in hospital, sixteen thousand dollar hospital bill).

ousness of the injury, however, the case should go to the jury.¹⁶⁰

Instructions about lesser included offenses not involving serious injury should not be submitted when the evidence points conclusively to an injury of a serious nature.¹⁶¹ Although the jury might ignore the nature of the injury and find the defendant guilty of the lesser charge, this potential result does not justify submission of the lesser offense.¹⁶²

In any event, *Pettiford* suggests that the rule set out in *Jones* and *Ferguson* may have been eliminated, at least when an obviously serious injury is involved. Since trial judges now have more power to decide the issue of serious injury, the jury will be able to focus its attention upon other questions of fact.

I. Sex Crimes¹⁶³

In *State v. Weaver*¹⁶⁴ the North Carolina Supreme Court was asked to determine whether the offenses of taking indecent liberties with a child under sixteen,¹⁶⁵ assault of a child under twelve,¹⁶⁶ and assault on a female by a male over eighteen,¹⁶⁷ were lesser included offenses of first degree rape of a

160. See *supra* note 158, and accompanying text.

161. *State v. Turner*, 21 N.C. App. 608, 205 S.E.2d 628, *appeal dismissed*, 285 N.C. 668, 207 S.E.2d 751 (1974).

162. *Id.*

163. In *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982), the supreme court held for the first time that proof of infliction of "serious personal injury," which is required for a conviction of first degree rape under G.S. 14-27.2 and first degree sexual offense under G.S. 14-27.4, could be met by a showing of mental injury. Although the court did not define the degree of mental injury that will satisfy the serious personal injury requirement, it did state that the injury must be greater than that generally present in cases of forcible rape and sexual offense. Following the precedent set by *State v. Jones*, 258 N.C. 89, 128 S.E.2d 1 (1962), which required the issue of "serious bodily injury" to be determined on a case by case basis, the *Boone* court said the issue of "serious personal injury" should similarly be determined on a case by case basis. 307 N.C. at 205, 297 S.E.2d at 589-90. See also *King v. Higgins*, 272 N.C. 267, 158 S.E.2d 67 (1967) (supports theory that mental injury is equivalent to personal injury).

In *State v. McGaha*, 306 N.C. 699, 295 S.E.2d 449 (1982), the court held that proof that "a child [is] of the age of twelve years or less," required for conviction of a first degree sexual offense under N.C. GEN. STAT. § 14-27.4(a)(1) (1981), requires proof that the child has not yet passed his twelfth birthday. The *McGaha* decision expressly overruled a 1981 North Carolina Court of Appeals ruling involving identical statutory language. *State v. Ashley*, 54 N.C. App. 386, 283 S.E.2d 381 (1981) (case holding that a child between her twelfth and thirteenth birthday, i.e. in her thirteenth actual year of life, was twelve or less), *cert. denied*, 305 N.C. 153, 289 S.E.2d 381 (1982).

In *State v. Booher*, 305 N.C. 554, 290 S.E.2d 561 (1982), the victim induced defendant to force him into a homosexual act, because the victim wanted to document the fact that he (the victim) was not a homosexual. While the victim was in the process of so inducing defendant, he secretly recorded their conversations, which recordings were later used at trial. The court found that a defendant can not be convicted of first degree sexual offense under N.C. GEN. STAT. § 14-27.4 (1981), unless the crime was committed without the victim's consent. *State v. Locklear*, 304 N.C. 534, 293, 284 S.E.2d 500, 503 (1981). The *Booher* court further held that a criminal offense that requires lack of consent cannot be committed against a victim who arranges for the crime to be committed. This rule also accords with the court's prior decision in *State v. Nelson*, 232 N.C. 602, 61 S.E.2d 622 (1950). In applying these rules to the *Booher* fact situation, the court overturned defendant's conviction for first degree sexual offense on the ground that there was insufficient evidence of lack of consent on the victim's part.

164. 306 N.C. 629, 295 S.E.2d 375 (1982).

165. N.C. GEN. STAT. § 14-202.1 (1981).

166. N.C. GEN. STAT. § 14-33(b)(3) (1981).

167. N.C. GEN. STAT. § 14-33(b)(2) (1981).

child aged twelve or less.¹⁶⁸ After defendant in *Weaver* had been indicted and convicted of first degree rape of a child of twelve or less, he contended on appeal that the trial court erred in failing to instruct on the purported lesser included offenses.¹⁶⁹ The court relied upon the "definitional test" and held that the indecent liberties offense and the two assault offenses were not lesser included offenses of first degree statutory rape.¹⁷⁰

The definitional test discussed in *Weaver* requires a comparison of the essential elements in the definitions of crimes. Unless the essential elements of the lesser crime are subsumed definitionally within the essential elements of the greater crime charged in the indictment, the lesser crime is not a lesser included offense. The essence of the definitional test is that the factual circumstances of a case are *not* controlling on the lesser included offense issue. In other words, if every element of the lesser offense cannot be found in the general statutory and common-law definition of the greater offense, then the lesser offense is not a lesser included offense. This result holds true even when the particular facts supporting the charge of the greater offense also support a charge of the lesser.¹⁷¹

When the court applied the definitional test to the crimes involved in *Weaver*, it found that none of the three "lesser" offenses were lesser included offenses of the "greater" offense. Essential elements of the crime of indecent liberties include age requirements and a sexual purpose or a lewd or lascivious act; these elements are not included in the definition of first degree rape of a child aged twelve years or less.¹⁷² Similarly, assault on a child under twelve and assault on a female both require assault as an essential element. Assault is not an essential element of statutory rape. Also, assault on a female has the essential element that the defendant be a male over eighteen. This element is not required for conviction of statutory rape.¹⁷³

The *Weaver* court noted that its decision accorded with the holdings in *State v. Williams*¹⁷⁴ and *State v. Ludlum*,¹⁷⁵ in which the court held that the crime of indecent liberties was not a lesser included offense of first degree sexual offense. The *Williams* court reasoned that the former crime had an essential element of sexual purpose, and that the latter did not.¹⁷⁶ The same result was reached in *Ludlum*.¹⁷⁷

The *Weaver* court also noted that its holding conflicted with *State v. Shaw*,¹⁷⁸ a case in which a defendant was convicted of statutory rape and

168. N.C. GEN. STAT. § 14-27.2(a)(1) (1981).

169. 306 N.C. at 633, 295 S.E.2d at 377.

170. *Id.*

171. *Id.* at 633-35, 295 S.E.2d at 377-79.

172. *Id.*

173. *Id.* at 637-38, 295 S.E.2d at 380.

174. 303 N.C. 507, 279 S.E.2d 592 (1981).

175. 303 N.C. 666, 281 S.E.2d 159 (1981).

176. 303 N.C. at 514, 279 S.E.2d at 596.

177. 303 N.C. at 674, 281 S.E.2d at 164.

178. 293 N.C. 616, 239 S.E.2d 439 (1977).

taking liberties. The *Shaw* court stated that statutory rape can only be committed by taking liberties with a female under sixteen, and that taking indecent liberties was therefore a lesser included offense of statutory rape. The *Shaw* court further reasoned that even though defendant had been convicted of both crimes, the imposition of consecutive sentences constituted unlawful double punishment for the same crime, since one was a lesser included offense of the other.¹⁷⁹ *Weaver* did not expressly overrule *Shaw*. To the extent *Shaw* held taking indecent liberties to be a lesser included offense of statutory rape, however, it is no longer controlling.

In a series of 1982 cases the North Carolina Court of Appeals was asked to determine a "lesser included offense" question similar to that dealt with by the supreme court in *Weaver*. The issue in the court of appeals cases was whether the statutory offense of crime against nature¹⁸⁰ is a lesser included offense of North Carolina's statutory crimes of first and second degree sexual offense.¹⁸¹ In two cases, *State v. Warren*¹⁸² and *State v. Hill*,¹⁸³ the court held that under certain circumstances a crime against nature is a lesser included offense of a sexual offense. In a third case, *State v. Barrett*,¹⁸⁴ the majority failed to reach the issue. The dissent in *Barrett*, however, did reach the issue and argued that a crime against nature is not a lesser included offense of the crime of first degree sexual offense.¹⁸⁵

The North Carolina Supreme Court had not specifically discussed the lesser included offense issue raised in *Warren*, *Hill*, and *Barrett*; the court filed an unpublished amended order in *Barrett*, however, in which it summarily stated that crime against nature is not a lesser included offense of a first degree sex offense.¹⁸⁶ Even though this order is unpublished and, therefore, has not

179. *Id.* at 632, 239 S.E.2d at 449.

180. Crime against nature is a punishable offense under N.C. GEN. STAT. § 14-177 (1981). Under North Carolina law, crime against nature requires proof of sexual intercourse contrary to the order of nature. *State v. Chance*, 3 N.C. App. 459, 165 S.E.2d 31 (1969). To show the unnatural sexual intercourse required by the crime, penetration of or by a sexual organ must be proved. *State v. Whittemore*, 255 N.C. 583, 122 S.E.2d 396 (1961).

181. The crime of first degree sexual offense, defined in N.C. GEN. STAT. § 14-27.4 (1981), generally involves a sexual act with a victim twelve years old or less, or with a nonconsenting victim. If the sexual act is committed with a nonconsenting victim over the age of twelve, a conviction must be predicated upon the use of a dangerous or deadly weapon, or the victim must have been seriously injured, or the defendant must have been aided or abetted by another. Absent proof of these additional features, a sexual act with a nonconsenting victim older than twelve years is a second degree sexual offense under N.C. GEN. STAT. § 14-27.5 (1981). The sexual act required in both first and second degree sexual offenses is defined in N.C. GEN. STAT. § 14-27.1(4) (1981) and includes both fellatio and cunnilingus.

182. 59 N.C. App. 264, 296 S.E.2d 671 (1982).

183. 59 N.C. App. 264, 296 S.E.2d 17, *disc. rev. allowed*, 307 N.C. 128, 297 S.E.2d 404 (1982).

184. 58 N.C. App. 515, 293 S.E.2d 896 (1982). The court of appeals judgment was arrested by amended order of the North Carolina Supreme Court. *See infra* note 186.

185. 58 N.C. App. at 519, 293 S.E.2d at 900. The majority stated no reason for its failure to reach the issue. The dissent thought the issue was properly before the court by virtue of defendant's motion for appropriate relief.

186. Amended Order, No. 525A82, Twenty-First District, From Forsyth, Nos. 81CRS8068 and 81CRS8069. If crime against nature is not a lesser included offense of first degree sexual offense, it cannot be a lesser included offense of second degree sexual offense, since the second degree offense has fewer essential elements definitionally than the first degree offense. *See supra* note 181.

been brought to the attention of practicing attorneys through normal channels, it is presumably the law in North Carolina. In the order, the court held defendant's appeal from the lower court's denial of his motion for appropriate relief to be improperly before it. Even so, the court stated that defendant's conviction for crime against nature was improper. Because the court did not discuss the merits of the lesser included offense issue in the amended order, the rationale for its holding is unclear. This failure to discuss the merits of the issue also brings into question the intended scope of the order. It seems probable from a "plain meaning" point of view that the court's brief statement that "crime against nature . . . is not a lesser included offense of a sexual offense in the first degree" is meant to be categorical in nature. If so, the trilogy of court of appeals cases, *Warren*, *Hill*, and *Barrett* may be of little import. On the other hand, it is possible, though certainly less likely, that the statement in the amended order was meant to apply only to the *Barrett* fact situation. If so, the court of appeals cases discussed below may still be important sources of North Carolina law on crime against nature as a lesser included offense.

In *Warren* defendant was indicted for second degree sexual offense under G.S. 14-27.4¹⁸⁷ and specifically charged with unlawfully forcing the victim to perform fellatio.¹⁸⁸ At trial defendant was convicted of a crime against nature. On appeal he urged that the charge of crime against nature should not have been submitted to the jury because a crime against nature is not a lesser included offense of the crime of second degree sexual offense.¹⁸⁹ Under the general rule, as explained in *Weaver*, a crime is a lesser included offense of another crime only if the greater crime definitionally includes all essential elements of the lesser.¹⁹⁰ Defendant reasoned that in light of the holding in *State v. Ludlum*,¹⁹¹ penetration is neither a necessary element of the crime of first degree sexual offense, nor a necessary element of second degree sexual offense. Since a sexual offense can be committed without penetration, and a crime against nature cannot, said defendant, crime against nature cannot be a lesser included offense of the sexual offense.¹⁹² Defendant's reasoning was in apparent accord with *Weaver*, because both the defendant in *Warren* and the court in *Weaver* reasoned that a lesser included offense determination should not be based upon the particular facts of the case, but rather upon whether the greater offense will *always* definitionally encompass the lesser. This analysis may well be the unstated basis for the *Barrett* order and would support a categorical application of the order.

The court of appeals in *Warren*, however, rejected defendant's arguments, distinguished *Ludlum*, and upheld defendant's conviction. The court observed

187. See *supra* note 181.

188. 59 N.C. App. at 270, 296 S.E.2d at 674.

189. *Id.*

190. See *supra* notes 164-170 and accompanying text. See also *State v. Davis*, 302 N.C. 370, 373, 275 S.E.2d 491, 493 (1981); *State v. Rorie*, 252 N.C. 579, 114 S.E.2d 233 (1960).

191. 303 N.C. 666, 281 S.E.2d 159. The issue in *Ludlum* was whether the sexual act of cunnilingus, defined in N.C. GEN. STAT. § 14-27.1(4) (1981), required penetration in all instances. The court relied upon the dictionary and upon common sense in holding that it did not.

192. 59 N.C. App. at 270, 296 S.E.2d at 674-75.

that *Ludlum* held only that the sexual act of cunnilingus can be performed without penetration, whereas the specific act of fellatio was charged in the *Warren* indictment. The *Warren* court used the same reasoning process as in *Ludlum*, discerning legislative intent about a statutory word from its dictionary meaning and then applying the meaning in a nontechnical way. The court concluded that fellatio usually, but not always, involves penetration by a sexual organ. Since the court found that fellatio usually involves penetration, it found that crime against nature is a lesser included offense of the specific crime charged in the indictment. The crime against nature charge, then, was properly submitted to the *Warren* jury.¹⁹³

The court in *Hill* held, as it had in *Warren*, that crime against nature was a lesser included offense of the crime of sexual offense.¹⁹⁴ In *Hill* defendant, with the help of two other persons, forcibly undressed the victim and then performed cunnilingus. He was indicted for a first degree sexual offense and convicted of a crime against nature. Defendant argued on appeal that crime against nature is not a lesser included offense of the crime of sexual offense, and that submission of the charge of crime against nature was therefore prejudicial.¹⁹⁵ The indictment in *Hill*, like the indictment in *Barrett* and unlike the indictment in *Warren*, did not charge a specific sexual act. Nevertheless, the *Hill* court held that when *proof* of the crime of which a defendant is indicted will prove all the elements of a lesser offense, a conviction of the lesser offense is proper.¹⁹⁶ It followed that since proof of the first degree sexual offense involved here would include proof of penetration, crime against nature was a properly submitted lesser included offense.¹⁹⁷

Warren, *Hill*, and *Barrett* make it clear that under North Carolina law conviction of a sexual offense does not necessarily require penetration as part of the charge or proof. It is also clear that penetration is always an essential element of crime against nature. A rule such as that proposed by the court of appeals cases—that a crime against nature is a lesser included offense of a sexual offense that involves penetration, but is not a lesser included offense of a sexual offense that does not involve penetration—conflicts with *Weaver*.¹⁹⁸ Under such a rule, the lesser included offense status of crime against nature

193. *Id.* at 271, 296 S.E.2d at 675. This result is not in accord with *Weaver*, because the *Weaver* test is not one of probabilities. Under *Weaver* the greater crime must always, rather than usually, definitionally encompass the lesser crime. See *supra* notes 164-172 and accompanying text.

194. 59 N.C. App. at 218, 296 S.E.2d at 19.

195. *Id.* at 217, 296 S.E.2d at 18.

196. This result obviously counters the definitional test of *Weaver*. See *supra* notes m2-m8 and accompanying text.

197. 59 N.C. App. at 217-18, 296 S.E.2d at 18-19. Defendant also asserted that all the evidence tended to show that defendant was either guilty of first degree sexual offense or not guilty at all. Defendant argued that submission of the crime against nature charge was prejudicial. The court rejected this argument and stated that submission of a lesser included offense is generally harmless error. Since there was no evidence here to show that the submission of the crime against nature charge inhibited the jury from considering defendant's evidence, the charge was favorable to defendant, even if it was given in error.

198. 306 N.C. 629, 295 S.E.2d 375. See *supra* notes 164-170 and accompanying text.

turns upon the facts, rather than upon the definition, of the offense.¹⁹⁹ In addition to the failure of the proposed rule to comply with the definitional test, the reasoning of these cases is troublesome for another reason: crime against nature and sexual offense do not share the same focus; the former is primarily concerned with the "unnaturalness" of the sexual act, while the latter is primarily concerned with the nonconsensual nature of the sexual act. In the final analysis, a combination of *Weaver*, common sense, and the most logical reading of the *Barrett* amended order should definitively preclude crime against nature as a lesser included offense of sexual offense.

J. Liability for Failure to Act

In *State v. Walden*²⁰⁰ the North Carolina Supreme Court decided whether criminal liability may be imposed on a person not for actions affirmatively taken but rather for *failure* to act at all. The evidence in *Walden* showed that the defendant mother stood in a room with a third party and her small child while the third party beat the child with a belt for an extended period of time; the mother did and said nothing to stop the third party.²⁰¹ The state prosecuted the parent for the child's injury on an aiding and abetting theory. She was convicted of assault with a deadly weapon inflicting serious injury.²⁰² On appeal to the supreme court, defendant argued that criminal liability may not be imposed for *failure* to prevent wrongdoing by another.

The court in *Walden* was aware of the general rule in North Carolina that a person's mere presence at a crime, without some action or oral communication showing his consent or contribution to the crime, does not make him criminally liable on an aiding and abetting theory.²⁰³ The court found the general rule inapplicable to this case, however, and relied instead upon a combination of two theories.

The court first adopted the theory recognized both at common law and by statute that parents have an inherent duty to protect their children.²⁰⁴ The court added that when such a common law duty exists, an exception to the general rule of criminal nonliability for an act of omission may also exist.²⁰⁵

199. Application of *Weaver* to the "crime against nature as lesser included offense of sexual offense" question is difficult, because the sexual act required for proof of a sexual offense may be any one of many acts. See *supra* note 181. Depending upon which sexual act is charged, then, a sexual offense may or may not definitionally, as well as factually, encompass crime against nature.

200. 306 N.C. 466, 293 S.E.2d 780 (1982).

201. *Id.* at 469, 293 S.E.2d at 783.

202. *Id.* at 473, 293 S.E.2d at 786-87. N.C. GEN. STAT. § 14-32(b) (1981) provides in pertinent part, "Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a class H felon."

203. 306 N.C. at 471, 293 S.E.2d at 784. A frequently cited case for this proposition is *State v. Aycoth*, 272 N.C. 48, 157 S.E.2d 655 (1967). In that case the defendant merely sat in the passenger seat of his car as his friend robbed a storekeeper. The court held defendant not guilty of aiding and abetting an armed robbery.

204. 306 N.C. at 475, 293 S.E.2d at 786.

205. *Id.* at 475, 293 S.E.2d at 786. Although the court expressly reserved the question, it is reasonable to assume that this ruling could lead to imposition of criminal liability for failure to act in other situations when a common-law duty of some extraordinary nature exists.

The court relied upon *In Re TenHoopen*²⁰⁶ to support the theory of a common-law parental duty of protection. *TenHoopen*, however, did not refer to criminal liability for a failure to act.²⁰⁷ Nonetheless, the North Carolina statutes dealing with criminal liability for failure of parents to care for children²⁰⁸ do support a parental duty theory. The statutes do not, however, directly support the theory that a parent may be guilty of assault with intent to inflict serious injury for an omission of action.

The second major theory relied upon by the *Walden* court is that failure of a parent to take all reasonable steps to protect his child is an omission that constitutes "consent and contribution" to a crime. Proof of consent and contribution is normally necessary to support criminal liability on an aiding and abetting theory.²⁰⁹ As mentioned earlier, mere presence is not usually enough to show consent or contribution to a crime;²¹⁰ presence plus other factors, however, such as a special relationship between the parties involved, has traditionally supported a finding of consent and contribution.²¹¹ Thus, although the holding in *Walden* may be characterized as new law to a certain extent, it is not a complete departure from the previous North Carolina case law on aiding and abetting.

It is not entirely clear whether the *Walden* court believed that the parent-child relationship creates an exception to the general rule of no criminal liability for failure to act, or whether the court considered the failure to act as constituting the "consent and contribution" necessary to prove criminal liability on an aiding and abetting theory. It seems that a combination of the two theories best supports the *Walden* result. In any event, what is clear is that parents must do whatever is reasonable to protect their children from harm: failure to make a reasonable effort may well subject the parent to criminal liability.

In *State v. Willoughby*²¹² the North Carolina Court of Appeals also dealt with criminal liability based upon omission of action. Unlike the court in *Walden*, however, the court in *Willoughby* did not find an exception to the traditional common-law rule that a defendant is not criminally liable for fail-

206. 202 N.C. 223, 162 S.E. 619 (1932).

207. *Id.* at 224, 162 S.E. at 620.

208. See N.C. GEN. STAT. § 14-316.1 (1981) (titled "[c]ontributing to delinquency and neglect by parents and others"); N.C. GEN. STAT. § 14-318.2 (1981) (titled "[c]hild abuse a general misdemeanor").

209. 306 N.C. at 476, 293 S.E.2d at 787.

210. See *supra* note 203.

211. See *State v. Haywood*, 295 N.C. 709, 249 S.E.2d 429 (1978) (presence plus relationship of friendship that existed between defendant and perpetrator supported defendant's conviction on aiding and abetting theory) (quoting *State v. Holland*, 234 N.C. 354, 358, 67 S.E.2d 272, 275 (1951)). The relationship relied upon to support criminal liability based upon an aiding and abetting theory in *Haywood* and *Holland* is one that exists between "multiple" defendants. This "multiple" defendant relationship can easily be distinguished from the parent-child case. In spite of this easy distinction, the court's reliance upon *Haywood* and *Holland* is not totally misplaced. The real thrust of the aiding and abetting theory is whether all the particular circumstances support the theory. A close relationship between persons involved in the crime, regardless of the relationship those persons bear to the crime, would probably be an important factor in any court's decision.

212. 58 N.C. App. 746, 294 S.E.2d 407 (1982).

ure to act.²¹³

Willoughby involved neither a parent-child relationship nor criminal liability based on an aiding and abetting theory. The State's evidence in *Willoughby* showed that defendant had purposefully drowned the victim. Defendant's evidence showed that defendant, an adult male, invited the victim, also an adult male, to swim. When the victim began to drown, defendant failed to come to his aid. After defendant was convicted of second degree murder, he urged on appeal that the trial court had erred in failing to instruct on the lesser offense of involuntary manslaughter. Since defendant had proved that his negligent failure to act proximately caused the victim's death, defendant argued that the involuntary manslaughter instruction should have been given.²¹⁴ The appellate court stated that it could find no North Carolina case involving the issue of liability for manslaughter based upon omission of action. The court thus followed the common-law rule, which does not impose liability for manslaughter by omission.²¹⁵ Since no such crime exists in North Carolina, the failure of the trial court to instruct on the issue was not error.²¹⁶

KATHY JANE KING
STEPHANIE CLAVAN POWELL
JON HENRY SOMSEN

213. *Id.* at 747, 294 S.E.2d at 408.

214. *Id.* See *State v. Banks*, 295 N.C. 399, 415-16, 245 S.E.2d 743, 754 (1978), in which the court states the well established North Carolina rule that when there is some evidence that supports a lesser included offense, the defendant is entitled to an instruction on that offense.

215. 58 N.C. App. at 747, 294 S.E.2d at 408. As support for its statement that the common law did not impose liability for manslaughter by omission, the court cited, Frankel, *Criminal Omissions: A Legal Microcosm*, 11 WAYNE L. REV. 367 (1965); Hughes, *Criminal Omissions*, 67 YALE L.J. 590 (1958); and Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615 (1942).

216. 58 N.C. App. at 748, 294 S.E.2d at 408.

VI. CRIMINAL PROCEDURE

A. Search and Seizure

1. Searches Under Warrant

The North Carolina Court of Appeals handed down seemingly inconsistent opinions in two 1982 cases presenting the issue whether sufficient probable cause existed for the issuance of a search warrant. In *State v. Mavrogianis*¹ the court seemingly opened the door to warrants issued for multiple locations when police information relates to criminal activity in only one location. But *State v. Lindsey*² pushed that door firmly closed, leaving open only a small exception for the specific facts of *Mavrogianis*.

In *Lindsey* the court of appeals reversed a superior court's denial of defendant's motion to suppress evidence.³ The court noted that search warrants must be based on more than probable cause in the abstract. There must be probable cause that the objects sought will be found on the specific premises to be searched.⁴ Additionally, the information on which the warrant is issued must establish that probable cause exists at the time of issuance.⁵

The search warrant examined by the court authorized the search of defendant's home for marijuana. The court used both of the above requirements to invalidate the warrant. First, because the information that would have established probable cause for the search was more than a year old,⁶ the court held that it was too stale to establish present probable cause for a search of defendant's home.⁷ The court noted that marijuana is not "an item expected to be kept for extended periods of time or designed for long-term use."⁸ Further, recent information that defendant had sold marijuana in various *other* locations was deemed insufficient to establish probable cause that the drugs specified in the warrant would be found in his home.⁹

The court's careful examination of the facts before it and its intelligent application of the law of probable cause to those facts produced a wise result. The court shut the door that had been opened in *Mavrogianis* with regard to the necessity for locational specificity in the articulated facts constituting probable cause. In *Mavrogianis* the magistrate had information that a college student was selling drugs out of his dorm room and that he owned an automobile that he kept on campus.¹⁰ The court held that, based upon this information,

1. 57 N.C. App. 178, 291 S.E.2d 163 (1982).

2. 58 N.C. App. 564, 293 S.E.2d 833 (1982).

3. *Id.* at 567, 293 S.E.2d at 835.

4. *Id.* at 565, 293 S.E.2d at 834.

5. *Id.*

6. *Id.*

7. *Id.* at 567, 293 S.E.2d at 835.

8. *Id.* at 566-67, 293 S.E.2d at 834-35 (the court distinguished the relatively short period of time marijuana is kept in one place from the longer period of time such items as business records, a hatchet, and welder's gloves are kept in one place).

9. *Id.* at 567, 293 S.E.2d at 835.

10. 57 N.C. App. at 180, 291 S.E.2d at 164.

probable cause existed for issuance of a warrant to search both the room and the car.¹¹ The court cautioned that it was not "holding that the possession of an illicit drug at one place supports a finding of probable cause for the search of any other place or thing in the possession of the accused."¹² Three months later, in *Lindsey*, the court proved itself true to its word.

2. Legitimate Expectation of Privacy

In *State v. Kennedy*¹³ the court of appeals made a logical, but dangerous, extension of the concept of legitimate expectation of privacy. The facts presented were as follows: defendant wrote a letter to a prison inmate, and the letter was opened and searched for contraband. This search included an examination of every page to see if contraband was attached.¹⁴ The inspecting prison official noticed the words "20 gauge shotgun loaded" at the top of the fourth page of the letter.¹⁵ Suspicious, he proceeded to read the entire letter, which described an armed robbery committed by defendant.¹⁶ The court based its holding that the letter was not protected by the fourth amendment on its finding that defendant had no legitimate expectation of privacy in the letter.¹⁷

The legitimate expectation of privacy doctrine is composed of two subsidiary doctrines: the public exposure doctrine and the standing doctrine.¹⁸ The court did not attempt to apply the standing doctrine in *Kennedy*. The public exposure doctrine generally posits that an object held out to public exposure cannot be subject to a legitimate expectation of privacy, and thus does not merit fourth amendment protection.¹⁹ Examples include marijuana offered for sale to the public,²⁰ the sound of a person's voice,²¹ and the exterior characteristics of a car.²² Words spoken in a public telephone booth are not held out to public exposure, however,²³ and even retail stores do not consent to wholesale searches and seizures of the goods offered.²⁴

11. *Id.* at 181, 291 S.E.2d at 164.

12. *Id.*

13. 58 N.C. App. 810, 294 S.E.2d 770 (1982).

14. *Id.* at 811, 294 S.E.2d at 771.

15. *Id.*

16. *Id.*

17. *Id.* at 812, 294 S.E.2d at 772.

18. C. WHITEBREAD, CRIMINAL PROCEDURE 91 (1980).

19. *Id.* at 91-95.

20. *Lewis v. United States*, 385 U.S. 206 (1966). Defendant had invited the undercover federal agent into his house to buy marijuana. The court held that "the home is converted into a commercial center . . . [that] is entitled to no greater sanctity than if [the activity] were carried on in a store, a garage, a car, or on the street." *Id.* at 211. A crucial fact was that the agent was invited into this commercial center to do business. Compare *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *infra* text accompanying note 24.

21. *United States v. Dionisio*, 410 U.S. 1, 14-15 (1973) (voice exemplars).

22. *Cardwell v. Lewis*, 417 U.S. 583, 592 (1974) (examination of tires and taking of paint scrapings).

23. *Katz v. United States*, 389 U.S. 347, 352 (1967).

24. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979).

The *Kennedy* court, after noting the public exposure doctrine,²⁵ based its conclusion that defendant had no justifiable expectation of privacy in the letter upon the following rationale: "[O]nce the letter left defendant's hand, headed for delivery to a prison unit, the defendant's expectation should at least have been that the letter would be opened and examined for contraband or any other noticeable characteristics which posed a threat to prison security."²⁶ The analysis is somewhat circular: if a practice is widespread among government officials, one expects them to engage in it; therefore, one has no legitimate expectation that they will not engage in it. Consequently, one has no legitimate expectation of privacy with regard to items that may be subjected to that practice; therefore the practice does not violate the fourth amendment.

Although in this particular case the search may have been justifiable on other grounds,²⁷ the danger in the court's application of the legitimate expectation of privacy analysis is well illustrated. The North Carolina court's analysis, which removed fourth amendment protection based upon the expected actions of *public officials*, may not have been an intended extension of the doctrine enunciated by the United States Supreme Court. In the cases decided by the Supreme Court, removal of fourth amendment protection was based upon the actions of *defendants* in consciously exposing the objects in question to the public.²⁸ The expected actions of public officials were not a factor. The North Carolina Court of Appeals in *Kennedy* may have strayed from the doctrine as it was initially established. Some of the blame must go, however, to the Supreme Court for establishing that the "guiding principle" of the legitimate expectation of privacy doctrine is whether the defendant has a "reasonable expectation of freedom from governmental intrusion."²⁹ It might have been expected that a lower court would look at these words and apply them literally, without full understanding of the underlying protective policies of the fourth amendment. This is arguably the result in *Kennedy*.

3. Stop and Frisk

Two cases involving stop and frisk issues were decided by divided appellate courts in North Carolina in 1982. *State v. Fox*³⁰ involved a questionable investigatory stop, and *State v. Peck*³¹ involved a purported frisk. Both courts upheld the policemen's actions; both decisions may have eroded the fourth amendment protections previously embodied in rules governing authorized stop and frisk police activity.

25. 58 N.C. App. at 812, 294 S.E.2d at 772.

26. *Id.*

27. It is beyond the scope of this brief commentary to analyze the rules regarding the opening of prisoners' mail. The rights of prisoners, and perhaps of those corresponding with prisoners, are very narrow. See *Procunier v. Martinez*, 416 U.S. 396 (1974).

28. See *supra* notes 20-24 and accompanying text.

29. *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968); see also C. WHITEBREAD, *supra* note 18, at 101.

30. 58 N.C. App. 692, 294 S.E.2d 410 (1982).

31. 305 N.C. 734, 291 S.E.2d 637 (1982).

In *Peck* a campus security officer stopped a car³² and arrested the driver for driving without a permit. The officer called for assistance,³³ and a state highway patrolman responded. The patrolman opened the passenger door and addressed the passenger, Peck. When Peck complained of feeling sick, the patrolman noticed that he had red eyes, dilated pupils, and mucous on the corner of his mouth, and that he seemed "cottonmouthed."³⁴ The patrolman asked Peck whether he had "dope in here or on [him],"³⁵ whereupon Peck stuck his hand in his pants. The patrolman grabbed Peck's hand, and pulled it out of the pocket. This motion left a corner of a plastic bag protruding from Peck's pants. The two policemen together got Peck out of the car, and pulled the plastic bag from his trousers. The bag contained a white powder that proved to be "MDA," an illicit drug.³⁶

The North Carolina Supreme Court agreed with the court of appeals³⁷ that the seizure should be upheld on the basis of the plain view doctrine.³⁸ The first requirement of the plain view doctrine is that the officer must be in a legally justifiable position when he makes the observation.³⁹ If the patrolman's reaching into Peck's pants was an unlawful intrusion, any contraband brought into the patrolman's view by that unlawful intrusion would be ineligible for "plain view" treatment.⁴⁰ The court found that because a frisk was justified, the patrolman's reaching for Peck's hand was also justified.⁴¹

The classic standards for justifiable frisks were set out in *Terry v. Ohio*:⁴²

We merely hold today that where a police officer observes unusual conduct which *leads him reasonably to conclude* that criminal activity may be afoot *and* that the persons with whom he is dealing may be armed and presently dangerous, . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.⁴³

The purpose of the frisk, then, is to protect the officer and others from weapons, and the officer must reasonably conclude that the person to be frisked may be armed and dangerous. *Sibron v. New York*,⁴⁴ *Terry's* companion case,

32. The propriety of the stop was not at issue.

33. The campus security officer called for assistance because he had orders not to leave campus. *Id.* at 737, 291 S.E.2d at 639.

34. *Id.* at 738, 291 S.E.2d at 639-40.

35. *Id.* at 738, 291 S.E.2d at 640.

36. *Id.*

37. *State v. Peck*, 54 N.C. App. 302, 283 S.E.2d 383 (1981); see *Survey of Developments in North Carolina Law, 1981—Criminal Procedure*, 60 N.C.L. Rev. 1159, 1312 (1982).

38. 305 N.C. at 743, 291 S.E.2d at 642.

39. See *Coolidge v. New Hampshire*, 403 U.S. 443, 465-68 (1971) (initial intrusion must be justified by warrant or exception to warrant requirement).

40. See *id.* An object's being in plain view at the time it is seized does not necessarily justify the seizure. As the Court pointed out in *Coolidge*, "any evidence seized by the police will be in plain view, at least at the moment of seizure." *Id.* at 465 (emphasis in original).

41. 305 N.C. at 741, 291 S.E.2d at 641.

42. 392 U.S. 1 (1968).

43. *Id.* at 30 (emphasis added).

44. 392 U.S. 40 (1968).

emphasized that protection against dangerous suspects is the only permissible justification for a frisk. The right to frisk is not automatic when a lawful stop has been made,⁴⁵ and "a search motivated by a desire to discover evidence of a crime, rather than weapons, is constitutionally impermissible unless there is an adequate basis for arrest."⁴⁶

In *Peck* the patrolman testified at trial that he had no reason to believe that Peck had a weapon when he reached in his pants.⁴⁷ The court, however, gave little credit to the patrolman's testimony. The subjective belief of the police officer does not matter, said the court; the "search or seizure is valid when the objective facts known to the officer meet the standard required."⁴⁸ This is a conclusion of doubtful validity: since the standard is subjective, a proper motive is a prerequisite to a lawful frisk.⁴⁹ Indeed, the justification for the authority to frisk is the police officer's need to protect himself. The standard is broad enough to allow the police officer to be wrong about the danger without violating the fourth amendment, as long as the frisk is based upon facts that support "specific reasonable inferences" that justify the intrusion.⁵⁰ But as Justice Exum stated in dissent, "[t]he requirement of objective, articulable circumstances in a *Terry*-type, protective seizure is designed to be a limitation on, not a substitute for, the officer's subjective determination of what the circumstances required."⁵¹

The court in *Peck* stated that a court is not bound by a patrolman's conclusions of law about probable cause, for example. This is certainly true, and the cases cited in the opinion support this proposition.⁵² But the proposition is irrelevant to the question whether a court should adopt a patrolman's conclusions about his motive for a frisk:

Here Officer Cruzan declared, not as a matter of law, but as a matter of fact, that he had "no reason to believe that Defendant was going for a weapon." The Court is bound by this declaration of the officer's best professional *factual* determination. It may not go behind this determination to justify Officer Cruzan's actions on the basis of what, upon the objective, articulable circumstances, he, or some other reasonable officer, *might* have thought.⁵³

Aside from the faulty analysis of the frisk justification, the court also wrongly distinguished the Supreme Court's decision in *Sibron v. New York*,⁵⁴ as the dissent noted.⁵⁵ The factual circumstances of *Peck* and *Sibron* are re-

45. *Id.* at 64.

46. C. WHITEBREAD, *supra* note 18, at 176 (1980); see *Sibron*, 392 U.S. at 63-66.

47. 305 N.C. at 738, 291 S.E.2d at 640.

48. 305 N.C. at 741, 291 S.E.2d at 641-42.

49. C. WHITEBREAD, *supra* note 18, at 176; see *Sibron*, 392 U.S. at 63-66.

50. *Terry*, 392 U.S. at 27.

51. 305 N.C. at 746, 291 S.E.2d at 644 (Exum, J., dissenting).

52. See *id.* at 741, 746, 291 S.E.2d at 641-41, 644.

53. *Id.* at 746, 291 S.E.2d at 644 (Exum, J., dissenting).

54. 392 U.S. 40 (1968).

55. 305 N.C. at 746-47, 291 S.E.2d at 644 (Exum, J., dissenting).

markably similar.⁵⁶ In both cases, the arresting officer suspected drug activity.⁵⁷ In both cases, the officer made a somewhat accusatory statement to the subject, who then thrust his hand inside his clothing.⁵⁸ In both cases, the officer thrust his hand into the clothing after the subject's hand, pulled the subject's hand out, and thereby discovered drugs.⁵⁹ Neither officer claimed that he was searching for weapons or acting to protect himself.⁶⁰ On these facts, the Supreme Court held the officer's search of *Sibron* violative of fourth amendment guarantees.⁶¹ The North Carolina Supreme Court might well have followed this authority as anxiously as it does those higher court decisions that narrow fourth amendment protections,⁶² and thus have found the patrolman's search violated the fourth amendment.⁶³

The court of appeals considered the legality of an investigative stop of an automobile in *State v. Fox*.⁶⁴ Defendant was stopped late at night when he drove slowly down a dead-end street, and then backed up the street.⁶⁵ Some of the business establishments located along the street had suffered repeated burglaries, and the officer had received a report of a burglary that night.⁶⁶ Defendant, whose hair was in shoulder-length dreadnaughts,⁶⁷ "was dressed shabbily but drove a 'real nice' 1981 Chevrolet."⁶⁸ He appeared to avoid the officer's gaze when the two cars met, and he did not stop to ask directions.⁶⁹ The court upheld the stop on the basis of *Terry v. Ohio*.⁷⁰

Judge Becton, in his well-reasoned dissent, observed that the Supreme Court holding in *Delaware v. Prouse*⁷¹ directed a different result. In that case the Court said:

[W]e hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or

56. The *Peck* majority conceded that there were "certain similarities," and went on to catalogue the nearly perfect factual congruence. It then stated, unexplainably, that "*Sibron* is otherwise completely dissimilar." 305 N.C. at 738-39, 291 S.E.2d at 640.

57. *Sibron*, 392 U.S. at 45; 305 N.C. at 738, 291 S.E.2d at 640.

58. *Sibron*, 392 U.S. at 45; 305 N.C. at 738, 291 S.E.2d at 640.

59. *Sibron*, 392 U.S. at 45; 305 N.C. at 738, 291 S.E.2d at 640. There is a difference here, although the *Peck* court did not mention it. The officer in *Sibron* had the drugs in his hand when he pulled it out of his suspect's pocket. The officer in *Peck* did not; his motions simply caused part of the plastic bag to come out of the suspect's pants.

60. *Sibron*, 392 U.S. at 46 n.4; 305 N.C. at 738-39, 291 S.E.2d at 640.

61. *Sibron*, 392 U.S. at 65-66.

62. See, e.g., *State v. Cooper*, 304 N.C. 701, 286 S.E.2d 102 (1982) (following *New York v. Belton*, 453 U.S. 454 (1981)).

63. The court's reasoning as to the justification of the patrolman's search was overly conclusory. See 305 N.C. at 739, 742, 291 S.E.2d at 640, 642. No reasoned analysis of the facts available to the patrolman was made. See *id.* at 741, 291 S.E.2d 641-42.

64. 58 N.C. App. 692, 294 S.E.2d 410 (1982).

65. *Id.* at 692, 294 S.E.2d at 411.

66. *Id.*

67. *Id.* at 693, 294 S.E.2d at 411.

68. *Id.* at 695, 294 S.E.2d at 412.

69. *Id.*

70. 392 U.S. 1 (1968). There is some support for the court's analogy of the automobile stop to the on-the-street encounter in *Terry*. See *United States v. Brognoni-Ponce*, 422 U.S. 873, 881 (1975).

71. 440 U.S. 648 (1979).

that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of the law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.⁷²

In *Fox* there was no articulable and reasonable suspicion that defendant had committed a crime or motor vehicle violation. As Judge Becton noted, "dressed shabbily but driving a nice car" describes many of us on a late night trip to the grocery store.⁷³ "The law has yet to deem shoulder-length braids on males or any other non-mainstream style, even while worn in a Chevrolet, grounds for a suspicious inference."⁷⁴ Defendant's averted gaze, said the dissent, is as likely to have been to avoid the glare of the police car's headlights as to avoid eye contact.⁷⁵

The requirement of an articulable and reasonable basis for suspicion is of course partially motivated by concern that, without such limits, police officers might act on the basis of ill-founded, unreasonable assumptions in deciding who is "suspicious" and should therefore be searched. Because the officer in *Fox* articulated no reasonable basis for suspicion, the court did the citizenry a disservice in denying defendant's motion to suppress, and in implicitly approving the practice of making capricious vehicle stops.

The North Carolina courts should take care not to extend the stop and frisk authorization beyond its reason for existence. The Supreme Court in *Terry* did not rule that an investigative stop is not a seizure of the person, or that a frisk is not a search within the meaning of the fourth amendment.⁷⁶ It merely recognized some of the practical needs of police officers in the field. The stop and frisk authority does not give carte blanche for investigations of all citizens of unusual appearance or behavior,⁷⁷ nor does it automatically justify a frisk, even when a stop is justified.⁷⁸

B. *Miranda* Requirements

In *Miranda v. Arizona*⁷⁹ the Supreme Court ruled that the fifth amendment prohibition against compelled self-incrimination requires that certain warnings be given a defendant before interrogation if any evidence obtained as a result of custodial interrogation is to be admissible against him.⁸⁰ The

72. *Id.* at 663.

73. 58 N.C. App. at 696-97, 294 S.E.2d at 413 (Becton, J., dissenting).

74. *Id.* at 697, 294 S.E.2d at 413 (Becton, J., dissenting).

75. *Id.* at 697, 294 S.E.2d at 413-14 (Becton, J., dissenting).

76. C. WHITEBREAD, *supra* note 18, at 174-75.

77. See *supra* notes 64-75 and accompanying text.

78. See *supra* notes 42-46 and accompanying text.

79. 384 U.S. 436 (1966).

80. The defendant must be advised that he has a right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to questioning if he so desires. *Id.* at 444. See also, *State v. Crawford*, 58 N.C. App. 160, 293 S.E.2d 223, *disc. rev. denied*, 306 N.C. 745, 295 S.E.2d 481 (1982).

rationale behind the *Miranda* rule is that custodial interrogations are inherently coercive; the presumption is that inculpatory statements made while in custody and without representation are involuntary and thus inadmissible under the fifth amendment.⁸¹ Uncoerced admissions are admissible, however, if the defendant makes a voluntary, knowing, and intelligent waiver of his *Miranda* rights,⁸² if the statements are made before the individual is in custody,⁸³ or if the statements are "spontaneous" in the sense that interrogation by the police has not yet begun.⁸⁴ Several issues can arise when a defendant alleges that evidence was admitted at trial in violation of his *Miranda* rights: (1) whether the defendant was actually in custody so that the rights were triggered; (2) whether the statements were made as a result of interrogation; and (3) whether the defendant effectively waived his *Miranda* rights.⁸⁵ There were developments in North Carolina case law in each of these areas in 1982.

1. Custody

A defendant must be in custody before his *Miranda* rights are triggered.⁸⁶ In *State v. Davis*⁸⁷ the North Carolina Supreme Court was confronted with the issue of what constitutes custody. In *Davis* the court disapproved of the rule previously adopted in *State v. Clay*,⁸⁸ and stated that "[t]he determination whether an individual is 'in custody' during an interrogation so as to invoke the requirement of *Miranda* requires an application of fixed rules of law and results in a conclusion of law and not a finding of fact."⁸⁹

Defendant in *Davis* contended that his confession to police at the police station was coerced and admitted into evidence in violation of his fifth amendment right to be free from self-incrimination.⁹⁰ Defendant had twice been given *Miranda* warnings and had signed a waiver of his rights on both occasions; the presence or adequacy of the warnings was not at issue. After questioning had begun, however, defendant indicated that he did not wish to discuss the case further.⁹¹ The rule is well-established that:

If the individual indicates in any manner, at any time prior to or

81. 384 U.S. at 457.

82. *Id.* at 444.

83. *Id.*

84. *See id.* *See also* Rhode Island v. Innis, 446 U.S. 291 (1980).

85. *See* Sunderland, *Self-incrimination and Constitutional Principles: Miranda v. Arizona and Beyond*, 15 WAKE FOREST L. REV. 171 (1979).

86. 384 U.S. at 444. *See also* Smith, *The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?*, 25 S.C.L. REV. 699 (1974). In recent cases, the Supreme Court has rejected arguments that *Miranda* should be extended to cover noncustodial circumstances. The rationale for *Miranda* is the presumption of coercion in the custodial environment. "[S]uch an extension of the *Miranda* requirements would cut this Court's holding in that case completely loose from its own explicitly stated rationale." Beckwith v. United States, 425 U.S. 341, 345 (1976).

87. 305 N.C. 400, 290 S.E.2d 574 (1982).

88. 297 N.C. 555, 559, 256 S.E.2d 176, 180 (1979)(determination of custody is a finding of fact).

89. 305 N.C. at 414-415, 290 S.E.2d at 583.

90. *Id.* at 407, 290 S.E.2d at 579.

91. *Id.* at 406-07, 290 S.E.2d at 579.

during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.⁹²

Defendant argued, based upon this rule, that statements elicited from him after he indicated that he no longer wished to talk were a product of compulsion and involuntary as a matter of law.⁹³ The State argued that defendant was not in custody and, therefore, his *Miranda* rights had not attached.⁹⁴

The facts that gave rise to the custody issue were as follows: Davis was picked up, given *Miranda* warnings, and questioned about a murder. He was given a ride home; the officers indicated they would like to meet with him again later that evening, and he agreed. At that time, he was again given a ride to the police station. Once more he was informed of his rights, and he executed a written waiver. When he was questioned and shown photographs of the body of deceased, defendant then indicated he did not wish to discuss the case, began to cry, and pushed away the pictures. He asked to go to and was taken to a bathroom, accompanied by a detective. Davis was still upset when he returned to the conference room, and he stated that he needed to talk to someone. The detective said, "Well James, you can talk to us about it."⁹⁵ The detective gave defendant his written waiver to review, and defendant's confession followed. The trial court found on these uncontested facts that defendant was not in custody at the time he made the statements, and the supreme court upheld this determination.⁹⁶

The *Miranda* court defined "custodial interrogation" as questioning by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in a significant way.⁹⁷ The test for determining whether a suspect is in custody has been interpreted to be the same test that is used for ascertaining whether a person is "seized" for fourth amendment purposes.⁹⁸ The *Davis* court applied the standard for custody enunciated in *United States v. Mendenhall*,⁹⁹ a fourth amendment case: "Whether a reasonable person in the suspect's position would believe that he had been taken into custody or otherwise deprived of his freedom of action in any significant way

92. *Miranda*, 384 U.S. at 473-74.

93. 305 N.C. at 407, 290 S.E.2d at 579.

94. The State's argument is grounded in the rule that "[i]f it be determined that he was not in custody, then it may be concluded *ipso facto* that he was not interrogated for *Miranda* purposes, and the reviewing court is not required to consider whether the respondent waived his rights under *Miranda*." *Id.* at 409, 290 S.E.2d at 580 (citing *Rhode Island v. Innis*, 446 U.S. 291, 298 n. 2 (1980)).

95. *Id.* at 407, 290 S.E.2d at 579.

96. *Id.* at 417, 290 S.E.2d at 585.

97. 384 U.S. at 444.

98. See *Dunaway v. New York*, 442 U.S. 200 (1979); *State v. Simpson*, 303 N.C. 439, 279 S.E.2d 542 (1981); *State v. Reynolds*, 298 N.C. 380, 259 S.E.2d 843 (1979), *cert. denied*, 446 U.S. 941 (1980).

99. 446 U.S. 554 (1980).

or, to the contrary, would believe that he was free to go at will."¹⁰⁰ The standard is an objective one, based neither upon the subjective intent of the police to restrain defendant, nor upon the subjective belief of the defendant about the probable police reaction should he attempt to leave.¹⁰¹

Under this test, the court found that a reasonable person, taken for a second time to a police station at night, read *Miranda* rights, and questioned about a murder, would believe that he was free to go. The court made this finding even though Davis was not at any time advised that he was free to go, and was in fact accompanied by a detective each time he left the interrogation room.

Though the rules of law applied are well-established, the finding of the *Davis* court on these facts that as a matter of law defendant was not in "custody" seems contrary to the result in several Supreme Court cases. Relying on *Beckwith v. United States*¹⁰² the court in *Davis* emphasized that defendant was not told he was *not* free to go.¹⁰³ *Beckwith* is cited for the proposition that an individual is not in custody merely because he is the focus of an investigation at the time of his "interview."¹⁰⁴ It is true that, like *Beckwith*, Davis had not been placed under arrest and that "there was no probable cause to arrest [him] or take him into custody prior to his confession."¹⁰⁵ The cases are clearly distinguishable, however: in *Beckwith* defendant himself invited IRS agents into his home and sat with them when the investigation of his tax returns was discussed.¹⁰⁶

A case more factually similar to *Davis* is *Oregon v. Mathiason*,¹⁰⁷ in which the Supreme Court found no custodial interrogation. The *Mathiason* Court emphasized, however, that when the suspect voluntarily came to the location of the interview, he "was immediately informed that he was not under arrest."¹⁰⁸ By contrast, this important communication was not made to defendant Davis.

100. 305 N.C. at 410, 290 S.E.2d at 581 (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

101. Many believe that the objective standard is both more sensible and more consistent with *Miranda*'s rationale than is a subjective standard; the former avoids reliance on self-serving statements by either police or suspects, avoids inquiry into both defendant's and police officer's states of mind, and frees police from responsibility for the idiosyncrasies of particular suspects. See *United States v. Hall*, 421 F.2d 540 (2d Cir. 1969), cert. denied, 397 U.S. 990 (1970); *Hunter v. State*, 590 P.2d 888 (Alaska 1979). See also Kamisar, "Custodial Interrogation" *Within the Meaning of Miranda*, in *CRIMINAL LAW AND THE CONSTITUTION*, 335, 338-51 (1966).

102. 425 U.S. 341 (1976). See 305 N.C. at 408, 409, 290 S.E.2d at 580.

103. 305 N.C. at 417, 290 S.E.2d at 585.

104. 305 N.C. at 408, 409, 290 S.E.2d at 580.

105. *Id.* at 409, 290 S.E.2d at 580.

106. 425 U.S. at 342.

107. 429 U.S. 492 (1977). In *Mathiason* defendant met with police at the officer's invitation at a highway patrol station close to defendant's home. Defendant was told he was not under arrest and was free to leave. When confronted with evidence of involvement in a burglary, he confessed. He was then read his *Miranda* rights, and a taped confession was made. The Court found the evidence admissible because defendant was not in custody.

108. *Id.* at 495.

*Dunaway v. New York*¹⁰⁹ is another Supreme Court case presenting analogous facts but reaching a different result. In *Dunaway* police lacked probable cause to arrest. They found defendant at a neighbor's house, and he voluntarily accompanied the police to the station. The Supreme Court found that Dunaway was in custody for *Miranda* purposes because he was taken in a police car to the station, placed in an interrogation room, and "never informed that he was 'free to go.'"¹¹⁰ In light of the decisions in *Dunaway* and *Mathiason*, the *Davis* result is questionable. The argument made by the dissent in *Mathiason* is even more persuasive when applied to the *Davis* case:

Miranda requires warnings to "combat" a situation in which there are inherently compelling pressures which work to undermine the individual's will to resist . . . [E]ven if [Mathiason] were not in custody, the coercive elements in the instant case were so pervasive as to require *Miranda*-type warnings. Respondent was interrogated in "privacy" and in "unfamiliar surroundings," factors on which *Miranda* places great stress. The investigation had focused on respondent.¹¹¹

Not only are all of these factors present in the *Davis* case, but there also arises an additional "coercive element": unlike *Mathiason*, *Davis* was never told he was free to go.

2. Interrogation

Even though made by a suspect in custody, inculpatory statements are not subject to *Miranda* protection unless they result from interrogation. *Miranda* requires that the term "interrogation" be broadly construed to include "either express questioning or its functional equivalent."¹¹² The Supreme Court has defined interrogation, in *Rhode Island v. Innis*, as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminatory response from the suspect."¹¹³

When the North Carolina Court of Appeals applied this definition of in-

109. 442 U.S. 200 (1979).

110. *Id.* at 212. *But see* State v. Roberti, 293 Or. 59, 644 P.2d 1104 (1982) (suspect not in custody when stopped for speeding and driving under the influence of alcohol: "actual (not potential) custody or significant deprivation of freedom is what triggers *Miranda* safeguards").

111. 429 U.S. at 497-498 (Marshall, J., dissenting).

112. *Miranda v. Arizona*, 384 U.S. 436 (1966) cited in *Rhode Island v. Innis*, 446 U.S. 291, 301, 309 (1980). See State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982), for an example of interrogation without express questioning. See also *Brewer v. Williams*, 430 U.S. 387 (1977), in which the Supreme Court held that an officer's "Christian burial" speech constituted interrogation because it elicited inculpatory acts and statements from defendant. The evidence was inadmissible because defendant had previously invoked his right to counsel. *But see Rhode Island v. Innis*, 446 U.S. 291 (1980) in which a conversational remark about the crime by one arresting officer to another was not interrogation, even though it elicited a confession from defendant.

113. 446 U.S. at 301. For a discussion of the development of the Supreme Court's definition of interrogation see Kamisar, *Brewer v. Williams, Messiah and Miranda: What is "Interrogation"? When Does it Matter?*, 67 GEO. L.J. 1 (1978). See also White, *Interrogation Without Question: Rhode Island v. Innis and U.S. v. Henry*, 78 MICH. L. REV. 1209 (1980).

terrogation in *State v. Sellers*¹¹⁴ the court determined that interrogation was not present. In *Sellers*, the court addressed for the first time the issue whether routine questions incident to arrest must be preceded by a reading of *Miranda* rights and, as a corollary, whether answers to such questions may be introduced into evidence without a waiver of *Miranda* rights.¹¹⁵ After defendant Sellers was arrested for driving while intoxicated he was read, and expressly refused to waive, his *Miranda* rights. He was then asked routine questions: his name, address, general physical traits, place of employment, and date of birth. With this information, the arresting officer obtained defendant's driving record, which showed a permanent revocation of his license.¹¹⁶ Defendant was ultimately convicted of driving without a valid license. On appeal he alleged that his fifth amendment rights were violated by the use of this evidence, which was elicited after he had invoked his right to remain silent.

The court of appeals held that such routine questioning, necessary to identifying the person in custody, is not the type of interrogation proscribed by *Miranda*.¹¹⁷ When questions are for identification purposes and do not deal with the alleged crime per se, responses may be used to obtain other information (for example, driving records) even though this other information may ultimately lead to additional charges. Routine questions that may be reasonably expected to produce incriminatory responses, however, constitute interrogation within the scope of *Miranda*.¹¹⁸ For example, in *State v. Blakely*¹¹⁹ answers given by a defendant charged with drunk driving to questions on an "alcohol influence report form" were found subject to *Miranda*.¹²⁰ Thus, the rule adopted by the court in *Sellers* is clearly in accord with the *Innis* definition of interrogation, since that definition expressly excludes questioning normally attendant to arrest and custody.¹²¹

3. Waiver

Miranda requires that "if interrogation continues without the presence of an attorney, and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his [rights]."¹²² G.S. 15A-974 outlines the procedures that a trial court must fol-

114. 58 N.C. App. 43, 293 S.E.2d 226 (1982), *disc. rev. denied*, 306 N.C. 749, 295 S.E.2d 485 (1982).

115. *Id.* at 46, 293 S.E.2d at 228.

116. *Id.*

117. *Id.* at 47, 293 S.E.2d at 229. Other states have reached the same conclusion. See e.g., *State v. Cozad*, 113 Ariz. 437, 556 P.2d 312 (1976); *Mills v. State*, 278 Md. 262, 363 A.2d 491 (1976); *People v. Riviera*, 26 N.Y.2d 304, 258 N.E.2d 699, 310 N.Y.S.2d 287 (1970). North Carolina has also held that a breathalyzer test is not an interrogation for *Miranda* purposes. *State v. Sykes*, 285 N.C. 202, 203 S.E.2d 849 (1974).

118. 58 N.C. App. at 48, 293 S.E.2d at 229.

119. 22 N.C. App. 337, 206 S.E.2d 352 (1974).

120. *Id.*

121. See *supra* notes 112-13 and accompanying text.

122. 384 U.S. 436, 468. See also *State v. Biggs*, 289 N.C. 522, 223 S.E.2d 371 (1976) (state must affirmatively show defendant was fully informed of his rights and voluntarily waived them). See, e.g., *State v. Williams*, 59 N.C. App. 15, 295 S.E.2d 493 (1982), in which the State failed to

low at a preliminary hearing to determine whether a statement is admissible or must be excluded because it was obtained by coercion. The statute does not, however, articulate the quantum of proof required to establish the voluntariness of a statement and, prior to *State v. Johnson*,¹²³ the North Carolina Supreme Court had never articulated a standard.¹²⁴ In *Johnson*, the court adopted the rule that the State must prove voluntariness (i.e., knowing and intelligent waiver) by a preponderance of the evidence.¹²⁵

Defendant argued that the State's burden should be that adopted by several other jurisdictions: proof beyond a reasonable doubt.¹²⁶ In *Lego v. Twomez*¹²⁷ the Supreme Court required a minimum showing of voluntariness by a preponderance of the evidence. The decision left the states free to adopt a higher standard pursuant to their own laws.¹²⁸ The *Johnson* court noted that "[n]o provision in the North Carolina Constitution expressly or implicitly requires this Court to adopt a higher quantum of proof"¹²⁹

In *Lego* defendant argued that evidence offered at a criminal trial and challenged on constitutional grounds must be determined admissible beyond a reasonable doubt in order to give adequate protection to the values that exclusionary rules are designed to protect.¹³⁰ The Court found that "[t]he argument is straightforward and has appeal. . . . But, from our experience . . . no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence."¹³¹

The result of both *Lego* and *Johnson* is generated by a balancing of defendant's rights against the societal interest in law enforcement and expeditious judicial proceedings. *Miranda* itself would seem to demand that the heavier burden be imposed upon the state.¹³² As a practical matter, however, this has not been the case, and most courts have elected the preponderance standard permitted by *Lego*.¹³³ Further, in spite of the references to "heavy

meet its burden of proving knowing and intelligent waiver by a moderately retarded murder defendant. Compare *State v. Cass*, 55 N.C. App. 291, 285 S.E.2d 337, *disc. rev. denied*, 305 N.C. 396, 290 S.E.2d 336 (1982) in which defendant was found mentally competent to waive his rights in spite of psychiatric history.

123. 304 N.C. 680, 285 S.E.2d 792 (1982).

124. *Id.* at 684, 285 S.E.2d at 795.

125. *Id.* at 685, 285 S.E.2d at 795. This is the standard to be applied by the trial court in its preliminary hearing on voluntariness. The *Johnson* court observed that the standard to be applied by appellate courts in review of the trial court findings is unaffected by this new rule. *Id.* at 686, 285 S.E.2d at 796. The appellate standard of review remains the same: the trial court's findings are conclusive if supported by competent evidence. See, e.g., *State v. Barfield*, 298 N.C. 306, 339, 259 S.E.2d 510, 535 (1979), *cert. denied*, 448 U.S. 907, *reh'g denied*, 448 U.S. 918 (1980); *State v. Biggs*, 289 N.C. 522, 530, 223 S.E.2d 371, 376 (1976).

126. Among these jurisdictions are California, Indiana, Louisiana, Missouri, Mississippi, New Jersey, New York, South Dakota, Texas, and Wisconsin. For complete citation see 304 N.C. at 684, 285 S.E.2d at 795.

127. 404 U.S. 477 (1972).

128. 404 U.S. at 489.

129. 304 N.C. at 685, 285 S.E.2d at 796.

130. 404 U.S. at 488.

131. *Id.*

132. See *supra* note 122 and accompanying text.

133. See *Johnson*, 304 N.C. at 684, 285 S.E.2d at 795.

burden," most courts have held that the testimony of an officer that he gave the warnings is sufficient and need not be corroborated.¹³⁴ One possible explanation for this difference between theory and practice is that a violation of *Miranda* results in absolute exclusion of the inculpatory testimony, no matter how objectively reliable and probative the evidence is. The lower standard for a showing of voluntariness serves as a counterbalance to this blanket protection of the defendant.

*State v. Vickers*¹³⁵ is an example of a case in which the State met its burden of showing valid waiver. It is an interesting case because the court found "interrogation" even though there was no express questioning, and found a valid waiver even though defendant made no express written or oral statement to that effect. Defendant was arrested on a charge of arson. He was advised of his constitutional rights when placed in the squad car, and acknowledged that he understood them. While driving to the jail the arresting officer remarked that he did not understand why defendant had committed the crime, and defendant responded that he was giving the community a reason to get rid of him.¹³⁶ Upon arrival at the station he was again read his rights, and he signed a form acknowledging that he understood them. He responded negatively when asked if he wanted an attorney and confessed to setting the fires.

On appeal defendant argued that the confessions were inadmissible because the State failed to prove that he had knowingly and intelligently waived his right to remain silent and his right to counsel when he made the first incriminating remark in the squad car.¹³⁷ The court found the evidence admissible.¹³⁸ The remark of the officer certainly amounted to custodial interrogation under the *Innis* test discussed above. The court found that since defendant was apprised of his right not to talk, and was not coerced or promised any reward for talking, his voluntary response to the officer's remark amounted to a knowing and intelligent waiver of his rights.¹³⁹ The holding approves of the recent Supreme Court interpretation of *Miranda* in *North Carolina v. Butler*¹⁴⁰ that "[a]n express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of validity of that waiver but is not inevitably either necessary or sufficient to establish waiver."¹⁴¹

The problem with this rule is obvious: if it is true that the custodial setting is so inherently coercive that a suspect's confession is presumed involuntary, the same strong presumption arises that a waiver is likewise not knowingly and intelligently given under these circumstances. *Butler* indicates

134. MODEL PENAL CODE § 130.4 commentary at 346 (1980). See also Elsen & Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 645, 658-59, 666-67.

135. 306 N.C. 90, 291 S.E.2d 599 (1982).

136. *Id.* at 92, 291 S.E.2d at 602.

137. *Id.* at 95, 291 S.E.2d at 604.

138. *Id.* at 96, 291 S.E.2d at 604.

139. *Id.*

140. 441 U.S. 369 (1979).

141. *Id.* at 373.

that there may be cases in which even an express oral or written waiver "is not inevitably . . . sufficient to establish waiver." Defendant Vicker made an inculpatory statement shortly after being taken into custody. The North Carolina Supreme Court should have followed the subtle hint of *Butler* and scrutinized the facts carefully before finding waiver.

C. Right to Counsel

Both the United States Constitution and the North Carolina Constitution guarantee a criminal defendant's right to counsel.¹⁴² The right to counsel has been interpreted to include more than mere representation at trial by an attorney; it also encompasses: (1) representation that meets a minimum standard of competence;¹⁴³ (2) a reasonable opportunity for defendant and counsel to investigate, prepare, and present a defense;¹⁴⁴ and (3) the right to an attorney who functions in the role of an active advocate, unhobbled by divided loyalties.¹⁴⁵ Significant developments concerning all these right to counsel issues occurred in North Carolina case law in 1982.

1. Standard of Competence

Until recently the standard of effective assistance of counsel in North Carolina has been the "farce and mockery" standard.¹⁴⁶ In order to prove a violation of his sixth amendment right, a petitioner had to show that his attorney's representation had been so inadequate that his trial became a farce and mockery of justice.¹⁴⁷ The North Carolina Supreme Court has been aware of the many criticisms of this standard for some time.¹⁴⁸ In *State v. Weaver*¹⁴⁹

142. U.S. CONST. amend. VI; N.C. CONST. art. I, §§ 19, 23. See also *State v. Misenheimer*, 304 N.C. 108, 120, 282 S.E.2d 791, 799 (1981) (citing the landmark case of *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

143. See, e.g., *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981). See also *Avery v. Alabama*, 308 U.S. 444, 446 (1940) ("The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment").

144. *State v. Phillip*, 261 N.C. 263, 134 S.E.2d 386, cert. denied, 377 U.S. 1003, reh'g denied, 379 U.S. 874 (1964); *State v. Alderman*, 25 N.C. App. 14, 212 S.E.2d 205, cert. denied, 287 N.C. 261, 214 S.E.2d 433 (1975).

145. *State v. Sneed*, 284 N.C. 606, 201 S.E.2d 867 (1974); see also *Cuyler v. Sullivan*, 335 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Glasser v. United States*, 315 U.S. 60 (1942).

146. In *State v. Hughes*, 54 N.C. App. 117, 123, 282 S.E.2d 504, 508 (1981), the court of appeals found the general rule to be the "farce and mockery" standard, citing *State v. Sneed*, 284 N.C. 606, 612, 201 S.E.2d 867, 871 (1974).

147. *Hughes*, 54 N.C. App. at 123, 282 S.E.2d at 508.

148. See, e.g., *State v. Richards*, 294 N.C. 474, 498, 242 S.E.2d 844, 859 (1978). Criticisms of the "farce and mockery" standard include: (1) it is too vague, providing little guidance to courts or practitioners. Erikson, *Standards of Competence for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233, 239 (1979); (2) it is too narrow, since it may cause costly pretrial errors not appearing in the record to be overlooked. Note, *Ineffective Representation as a Basis for Relief from Conviction*, 13 COLUM. J.L. & SOC. PROB. 1, 32 (1977); (3) it is inadequate to meet the constitutional requirements of the sixth amendment. One respected jurist noted that "the mockery test requires such a minimum level of performance from counsel that it is itself a mockery of the sixth amendment." Bazelon, *The Defective Assistance of Counsel*, 42 U. CINN. L. REV. 1, 28 (1973). For an overview of various standards of competency required of criminal defense lawyers and a criticism of the "farce and mockery" standard and the standard enunciated in *McMann v.*

the court joined a growing number of state courts¹⁵⁰ in expressly rejecting the "farce and mockery" standard in favor of the higher federal standard recommended by the Supreme Court in *McMann v. Richardson*.¹⁵¹ representation must be "within the range of competence demanded of attorneys in criminal cases."¹⁵²

Defendant Weaver was convicted of first degree rape and appealed on the ground that he was denied effective assistance of counsel because the trial court denied his motion for a continuance.¹⁵³ On the day set for closing arguments, defendant's lead counsel was unable to attend because of an emergency. Another attorney who had assisted and participated throughout the trial asked for a continuance because she had not prepared closing argument and had never before argued to a jury. The court denied the motion and gave her a brief period in which to prepare.¹⁵⁴ Defendant did not contend that counsel did not present an adequate argument.¹⁵⁵ Defendant argued instead that counsel's inexperience and failure to request a recording of the closing argument demonstrated incompetence as a matter of law. Defendant urged that the court dispel existing confusion and adopt a clear standard for effective assistance.¹⁵⁶

Prior cases in which the North Carolina Supreme Court had confronted the issue were indeed inconclusive. In *State v. Misenheimer*¹⁵⁷ the court employed both the *McMann* standard and the ABA standards¹⁵⁸ when "the defendant had not pleaded guilty." In *State v. Maher*¹⁵⁹ the court noted that it had not yet determined the standard to be used.¹⁶⁰ It was assumed in *State v.*

Richardson, 397 U.S. 759 (1970) ("within the range of competency demanded of attorneys in a criminal case"), see Erickson, *supra*, cited in *State v. Misenheimer*, 304 N.C. 108, 121 n. 6, 282 S.E.2d 791, 800 n.6 (1981).

149. 306 N.C. 629, 295 S.E.2d 375 (1982).

150. For recent examples of state court rejection of the "farce and mockery," also called the "sham" standard, in favor of a reasonableness standard, see, e.g., *Meeks v. State*, 382 So.2d 673 (Fla. 1980); *State v. Rose*, 608 P.2d 1074 (Mont. 1980) (replacing "sham" with "reasonably competent attorney" test); *Johnson v. State*, 620 P.2d 1311 (Okla. Crim. 1980) (prospectively applying "reasonably competent assistance" test, replacing outmoded "sham" test); *Krummacher v. Gierloff*, 290 Or. 867, 627 P.2d 458 (1981) ("the phrase 'farce and mockery of justice' can no longer be deemed adequate to describe the quality of representation to which a defendant is constitutionally entitled"). See generally Annot., 2 A.L.R.4TH 27 (1980).

151. 397 U.S. 759 (1970).

152. *Id.* at 771. All federal circuit courts of appeal, with the exception of the Second Circuit, have adopted the "range of competence" or "customary skill" test. See *McMann v. Richardson*, 397 U.S. 759 (1970). See also *Survey of Developments in North Carolina Law, 1981—Criminal Procedure*, 60 N.C.L. Rev. 1302, 1347 n.411 (1982); Annot., 26 A.L.R. FED. 218 (1976) (federal court tests for effective representation).

153. 306 N.C. at 639, 295 S.E.2d at 381 (1982).

154. *Id.*

155. For a discussion of what a defendant must show to establish a prima facie case of ineffective assistance based upon an inadequate opening or final argument, see Annot. 6 A.L.R.4TH 16 (1981).

156. 306 N.C. at 640, 295 S.E.2d at 381.

157. 304 N.C. 108, 282 S.E.2d 791 (1981).

158. *Id.* at 120-21, 282 S.E.2d at 799-800, citing AM. BAR ASS'N STANDARDS RELATING TO THE DEFENSE FUNCTION (1980).

159. 305 N.C. 544, 290 S.E.2d 694 (1982).

160. *Id.* at 549 n.1, 290 S.E.2d at 697 n.1. In *Maher* defendant alleged on appeal that he had

*Vickers*¹⁶¹ that the *McMann* test had been adopted by the court.¹⁶² In *Weaver* the court resolved this confusion by expressly adopting the *McMann* "range of competence" standard.¹⁶³ Applying this standard to the facts in *Weaver*, the court found that neither failure to request a recording of the closing argument nor inexperience constitutes ineffective assistance.¹⁶⁴ The court also found that since an indigent does not have a constitutional right to the lawyer of his choice, his constitutional rights are not violated when he is represented by two lawyers and an attorney not of his choosing gives the final argument.¹⁶⁵

The *McMann* test adopted by the *Weaver* court offers several advantages over the "farce and mockery" test. It affords greater protection of the defendant's sixth amendment right because the reviewing court must scrutinize the particular acts or omissions of the defense attorney; the court is thus not limited by a requirement that the trial was a farce and mockery of justice in order to afford relief.¹⁶⁶ The test applies not only to the attorney's trial performance, but also to the entire period of representation.¹⁶⁷ Another advantage is that the standard is more objective because it is based upon a community standard of representation.¹⁶⁸ The adoption of the *McMann* test by the supreme court may not settle the controversy, however. The new standard is no less flawed by vagueness than the old, since "[l]ike the phrase 'farce and mockery,' the expression 'community standards of effective representation' has no obvious intrinsic meaning. Neither formulation provides guidance as to the standard to be met by defense counsel; both allow an individual court to apply its own conception of the meaning of effective representation."¹⁶⁹ *McMann* has given rise to varied and conflicting standards for determining competency in state and circuit courts.¹⁷⁰ As a remedy to this problem, many jurists and

received ineffective assistance, not because of attorney incompetence, but because his attorney was afforded inadequate time to prepare. Defendant's original counsel withdrew from the case because of conflict of interest on November 19. Defendant retained new counsel, and the case came to trial on November 24 after the court denied defendant's motion for a continuance. A new trial was granted on grounds of ineffective assistance.

161. 306 N.C. 90, 291 S.E.2d 599 (1982).

162. *Id.* at 93-94, 291 S.E.2d at 602-603. In *Vickers* the court refused to find ineffective assistance when defendant's attorney did not pursue an insanity plea. The court noted that defendant's counsel had arranged a psychiatric examination for his client, that the examination in fact took place, and that there were tactical reasons for not pursuing the defense. The court found that there was not sufficient evidence of insanity to conclude that the attorney was negligent or incompetent in choosing not to pursue the insanity plea.

163. 306 N.C. at 640-41, 295 S.E.2d at 382.

164. *Id.* For the proposition that mere inexperience does not constitute incompetence, see *State v. Poole*, 305 N.C. 308, 312, 289 S.E.2d at 335, 338 (1982).

165. 306 N.C. at 640-41, 295 S.E.2d at 382.

166. *See, e.g., Cooper v. Fitzharris*, 586 F.2d 1325, 1329 (9th Cir. 1978) (en banc).

167. *Id.*

168. *Id.* at 1329-30. *See also Marzullo v. Maryland*, 561 F.2d 540, 544 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978). The standard is subjective to the extent the court must determine the community standard.

See United States v. Decoster (Decoster III), 624 F.2d 196 (D.C. Cir. 1979)(en banc) for a discussion of issues arising out of the continuing debate over the appropriate standard of competence.

169. *Id.* at 241. For a thorough critique of the standard, see Erickson, *supra* note 148.

170. 624 F.2d at 251. The *McMann* court admitted this uncertainty of results, but stated:

authorities have recommended a more specific test based upon the ABA Defense Standards.¹⁷¹

In spite of its problems, however, *McMann* clearly requires a higher level of competence than that afforded by the "farce and mockery" standard. Its adoption represents a strengthening of the sixth amendment right to counsel and affords North Carolina courts the opportunity to develop more clearly defined guidelines to ensure this fundamental right.

2. Time to Prepare a Defense

In *State v. Maher*¹⁷² the North Carolina Supreme Court addressed the "relationship between the defendant's sixth amendment guarantee of effective assistance of counsel of his own choosing and the implicit constitutional guarantee that an accused and his counsel shall have a reasonable time to investigate, prepare and present defendant's defense."¹⁷³ Defendant's claim of ineffective assistance was based not upon his counsel's competence or performance, but rather upon the allegation that his attorney was denied adequate time to prepare a defense.

The facts giving rise to defendant's claim are as follows: On November 19 the court granted defense counsel's motion to withdraw from the case because of conflict of interest.¹⁷⁴ On the same day new counsel was retained and appeared through his associate. On November 20, the associate was informed that trial was set for Monday, November 24; the court was advised that counsel would be in federal court at that time, but defendant's motion for continuance was denied. On November 24 counsel appeared, again asked for a continuance, and advised the court that he was "totally unprepared to render to this defendant competent, effective assistance of counsel."¹⁷⁵ The court again denied the motion, recessed for fifteen minutes, and then proceeded with the trial. Defendant was convicted and appealed.

[W]e think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys

379 U.S. at 773. For an overview of the many standards that have been proposed, see Annot., 2 A.L.R.4TH 27 (1980) and Annot., 26 A.L.R. FED. 218 (1976).

171. See, e.g., *State v. Milano*, 297 N.C. 485, 495-96, 256 S.E.2d 154, 160 (1979); *Marzullo v. Maryland*, 561 F.2d 540, 547 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978). See also *Erickson*, *supra* note 148, at 242-248. For cases applying the ABA standards, see 2 A.L.R.4TH 27, 68-72 (1980).

172. 305 N.C. 544, 290 S.E.2d 694 (1982).

173. *Id.* at 547, 290 S.E.2d at 696.

174. Defendant was sharing counsel with a codefendant. For recent Supreme Court decisions regarding deprivation of effective assistance because of joint representation of codefendants, see *Holloway v. Arkansas*, 435 U.S. 475 (1978) (when trial court improperly requires joint representation over timely objection of defense counsel, upon showing of conflict of interest, reversal is automatic; prejudice not required); and *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (when defendant fails to object to joint representation at trial, on appeal he must show "an actual conflict of interest adversely affected his lawyer's performance").

175. 305 N.C. at 546, 290 S.E.2d at 695.

As a general rule, a trial court's ruling on a motion for a continuance is reviewable on appeal under the "abuse of discretion" standard.¹⁷⁶ The denial of a continuance when counsel cannot be present or has inadequate time to prepare, however, risks denial of defendant's right to select counsel and his right to effective representation by counsel.¹⁷⁷ When a motion to continue is based upon a constitutional right, such as the right to select¹⁷⁸ and receive effective representation, denial of the motion is reviewable as a matter of law.¹⁷⁹ Whether a defendant bases his appeal on abuse of judicial discretion or on denial of a constitutional right, the rule has been that he must show both error in the denial of continuance and prejudice before he is entitled to a new trial.¹⁸⁰

The court in *Maier* carved out a narrow exception to the general rule that a defendant must show prejudice to receive a new trial based upon an erroneous denial of a motion for continuance. When a defendant alleges denial of his sixth amendment right to effective assistance because his attorney was given inadequate time to prepare for trial, prejudice is presumed upon a showing of inadequate time to prepare.¹⁸¹ Then, "the burden falls on the State to show beyond a reasonable doubt that the error was harmless."¹⁸² The court emphasized that when a defendant alleges ineffective assistance based upon attorney incompetence, defendant must still show prejudice resulting from his attorney's performance.¹⁸³ But "the questions are altogether different" when it is the court that denies defendant effective counsel by denying "a motion to continue which is essential to allowing adequate time for trial preparation."¹⁸⁴

176. This rule is well established. See 4 N.C. INDEX 3d, Criminal Law § 91.4 (1976).

177. See *Survey of Developments in North Carolina Law, 1977—Criminal Procedure*, 56 N.C.L. REV. 983, 999 (1978).

178. The North Carolina Supreme Court has affirmed that "[b]oth the State and Federal Constitutions secure to every man the right to be defended in all criminal prosecutions by counsel whom he selects and retains." *State v. Speller*, 230 N.C. 345, 351, 53 S.E.2d 294, 298 (1949) (citing U.S. CONST. amend. XIV and N.C. CONST. art. I, § 11). See also *Powell v. Alabama*, 287 U.S. 45 (1932). But see *State v. Poole*, 305 N.C. 308, 318, 289 S.E.2d 335, 342 (1982) ("defendant's right to select his own counsel cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice"). It should be noted, however, that an indigent defendant does not have the right to court-appointed counsel of his choice. See, e.g., *State v. Sweezy*, 291 N.C. 366, 230 S.E.2d 524 (1976); *State v. Robinson*, 290 N.C. 56, 224 S.E.2d 174 (1976). Generally, the appointment is left to the court's discretion, assuming competent counsel is appointed. But see *Harris v. Superior Court*, 19 Cal. 3d 786, 567 P.2d 750, 140 Cal. Rptr. 318 (1977) (court's discretion is limited if indigent defendant can show an objective reason for his choice). See generally Annot., 66 A.L.R.3d 996 (1975) (indigent's right to particular counsel).

179. *State v. Poole*, 305 N.C. 308, 318, 289 S.E.2d 335, 342 (1982); *State v. McFadden*, 292 N.C. 609, 611, 234 S.E.2d 742, 744 (1977). See also *State v. Smathers*, 287 N.C. 226, 214 S.E.2d 112 (1975); *State v. Phillip*, 261 N.C. 263, 134 S.E.2d 386 (1964); *State v. Lane*, 258 N.C. 349, 128 S.E.2d 389 (1962).

180. *State v. Burney*, 302 N.C. 529, 532, 276 S.E.2d 693, 695 (1981). See also *State v. Robinson*, 283 N.C. 71, 194 S.E.2d 811 (1973).

181. 305 N.C. at 550, 290 S.E.2d at 697-98. The court cited G.S. 15A-1443(b) in support: "(b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it is harmless beyond a reasonable doubt. The burden is on the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. GEN. STAT. § 15A-1443(b) (1978).

182. 305 N.C. at 550, 290 S.E.2d at 697-98.

183. *Id.*

184. *Id.*

In these cases the burden is shifted to the State to prove absence of prejudice.

The court held that on the facts, when the attorney was retained four days before defendant's trial, two of which were a weekend, and thereafter was scheduled to appear in another court, defendant had met his burden of showing inadequate time to prepare.¹⁸⁵ Because the State did not meet its burden of rebutting the presumption of prejudice, defendant was granted a new trial.¹⁸⁶

In applying the above rules, the court attempted to strike a balance between safeguarding defendant's sixth amendment rights to effective counsel and encouraging an expeditious and orderly trial.¹⁸⁷ It is always possible that a liberal policy favoring continuance will encourage counsel to use his unavailability as a delaying tactic.¹⁸⁸ When a defendant is required to make an objective showing that the motion for continuance is necessary for adequate trial preparation, however, the possibility of dilatory tactics is reduced. If the motion for continuance is denied and results in inadequate time to pre-

185. *Id.* See also *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977) (defendant's retained counsel unable to attend trial; court denied motion for continuance by associate unfamiliar with case and ordered associate to represent defendant; defendant denied right to effective assistance and right to counsel of his choice); *State v. Alderman*, 25 N.C. App. 14, 212 S.E.2d 205 (error to deny motion for continuance made by indigent defendant's counsel when trial proceeded the day after appointment), *appeal dismissed*, 287 N.C. 261, 214 S.E.2d 433 (1975); *State v. Atkinson*, 7 N.C. App. 355, 172 S.E.2d 249 (1970) (denial of motion for continuance held error when counsel privately retained one hour before hearing). But see *State v. Whitfield*, 206 N.C. 696, 175 S.E. 93 (1934) (calling of case day or two after counsel appointed held not violative of sixth amendment when no complicated factual or legal questions involved and no witnesses to locate or interview), *cert. denied*, 293 U.S. 556 (1934); *State v. Williams*, 34 N.C. App. 408, 238 S.E.2d 668 (1977) (no violation of sixth amendment rights when principal counsel unable to attend and two associates familiar with case ordered to proceed with trial).

186. The dissent argued that a new trial should not be granted because defendant had not carried his burden of showing inadequate time to prepare. 305 N.C. at 552, 553, 290 S.E.2d at 699 (Britt, J., dissenting).

187. See, e.g., *State v. Little*, 56 N.C. App. 765, 290 S.E.2d 293 (1982). In *Little* defendant had been granted a new trial. On the day of trial, defendant moved to have his court-appointed counsel withdrawn because of friction over trial tactics and asked for a continuance to give his new private counsel time to prepare. The court denied the continuance and defendant proceeded to trial represented by the public defender. The court of appeals affirmed the lower court's ruling and noted:

Our Supreme Court has recognized, however, that the right to be defended by chosen counsel is not absolute. *State v. McFadden*, *supra*. Quoting from *People v. Brady*, 275 Cal. App. 2d 984, 993, 80 Cal. Rptr. 418, 423 (1969), our Court stated that . . . [d]ue process is not denied every defendant who is refused the right to defend himself by means of his chosen retained counsel; other factors, including the speedy disposition of criminal charges, demand recognition, particularly where defendant is inexcusably dilatory in securing legal representation. . . . *State v. McFadden*, *supra* at 613, 234 S.E.2d at 745. In the same vein, the Court observed, "[A]n accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial." *Id.* at 616, 234 S.E.2d at 747.

56 N.C. App. at 768, 290 S.E.2d at 295.

188. For the federal approach to granting a continuance, see *Giacalone v. Lucas*, 445 F.2d 1238, 1240 (6th Cir. 1971) ("surrounding facts and circumstances" test; factors include length of delay, convenience to participants, witnesses, and court, whether delay is for legitimate purpose, whether counsel's associates are sufficiently prepared to proceed). See also *Annot.*, 73 A.L.R.3d 725 (1976) (withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance).

pare, prejudice must be presumed. No one can be certain how trial counsel might have performed had he been given adequate time to prepare for trial.

3. Conflict of Interest

In *State v. Loye*¹⁸⁹ the North Carolina Court of Appeals extended to a new fact situation the reasoning and result of an established rule regarding ineffective assistance resulting from joint representation of codefendants with conflicting interests. Since *Glasser v. United States*¹⁹⁰ courts have recognized that when a single attorney represents two or more defendants, the possibility of a conflict of interests exists, with consequent abridgement of the sixth amendment right to effective counsel of at least one defendant.¹⁹¹ The rule developed in *Glasser* and subsequent cases is that whenever a trial court improperly requires joint representation over timely objection, reversal is automatic; prejudice is presumed upon a showing of conflict of interest.¹⁹² The rationale for the rule is that the right to effective assistance, "untrammelled and unimpaired,"¹⁹³ is "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."¹⁹⁴

State v. Loye is an example of a conflict of interest arising not between codefendants but rather between a defendant and his attorney. Defendant pleaded guilty to armed robbery on the advice of his privately retained counsel,¹⁹⁵ after damaging testimony was given by an accomplice at trial. Defendant was sentenced to a lengthy prison term.¹⁹⁶ Shortly thereafter, defendant's attorney was indicted for felonious receipt of stolen goods in connection with

189. 56 N.C. App. 501, 289 S.E.2d 860 (1982).

190. 315 U.S. 60 (1942). In *Glasser* the Supreme Court reversed a defendant's conviction for conspiracy when his attorney also represented a codefendant, and the trial court was aware of the conflict but refused to appoint another attorney.

191. *Id.* at 70, 71. See also *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978). Joint representation is suspect because of its potential for inhibition of the attorney's ability to protect adequately the interests of each client: what may be in the best interest of one defendant may prejudice the other. The conflict of interest can arise at any stage: plea bargaining, deciding whether to have defendants testify, closing argument, or sentencing. The various ways such a conflict can arise and the difficulty of searching the record for evidence of a conflict are discussed in Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119 (1978); Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939 (1978); Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 GEO. L.J. 1075 (1979); Comment, *Conflicts of Interests in Multiple Representation of Criminal Co-Defendants*, 68 J. CRIM. L. 226 (1977).

192. See *Holloway*, 435 U.S. at 488. The *Holloway* court noted, however, that joint representation "is not *per se* violative of constitutional guarantees of effective assistance of counsel. . . . [I]n some cases, certain advantages might accrue from joint representation." *Id.* at 482.

In both *Holloway* and *Glasser* defendants objected to joint representation. See *Cuyler v. Sullivan*, 446 U.S. 335 (1980), for a modification of the rule when the trial court was not advised of actual or possible conflict of interest. In such a case, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. *Id.* at 350.

193. *Glasser*, 315 U.S. at 70.

194. *Id.* at 76. See also *Chapman v. California*, 386 U.S. 18, 23 (1967) (assistance of counsel is constitutional right so basic to fair trial that infraction can never be harmless error).

195. In *Cuyler* the Court found that in evaluating claims of ineffective assistance there was "no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers." 446 U.S. at 344, 345.

196. 56 N.C. App. at 501, 289 S.E.2d at 861.

the same offense for which defendant was convicted. In his application for post-conviction relief, defendant alleged that the attorney knew the state was seeking the indictment for felonious receipt and yet failed to advise the court, the defendant, or co-counsel of the conflict of interest inherent in these circumstances.¹⁹⁷ Post-conviction relief was denied after the court found no conflict of interest. Defendant appealed, alleging that his guilty plea was not knowing and voluntary because it resulted from ineffective assistance of counsel.¹⁹⁸ The court of appeals granted certiorari.¹⁹⁹

Finding no case law on point, the court looked to cases involving ineffective assistance of counsel resulting from conflict of interest because of joint representation. The court cited *Glasser, Holloway, and Cuyler* with approval.²⁰⁰ Though there was a different source of the conflict of interest in these cases, the court found that the nature of the conflict gave rise to the same presumption—that the defendant was prejudiced by the divided interests of his attorney.²⁰¹ Since the defendant in *Loye* had shown a conflict, the court found that prejudice must be “conclusively presumed” and granted a new trial.²⁰²

The dissenting judge in *Loye* would have denied a new trial based on his belief that defendant failed to meet the stringent farce and mockery standard²⁰³ required for relief on grounds of ineffective assistance of counsel.²⁰⁴ The dissent’s argument did not recognize that there are two distinct issues: whether the attorney’s performance falls below a minimum standard for constitutionally adequate representation, and whether the attorney was hampered by conflict of interest. The dissent’s standard (more correctly, the *McMann* standard that recently replaced the “farce and mockery” standard in North Carolina) would apply to the former, which was not at issue in the case. The majority properly characterized the issue as conflict of interest and thus looked not to the attorney’s performance, but rather to the actual existence of a conflict. Thus, a *Glasser-Holloway-Cuyler*, rather than a *McMann*, analysis was applied.

The majority in *Loye*, however, oversimplified the rule in these cases by holding that when a conflict of interest is shown, prejudice is presumed and

197. *Id.* at 502, 289 S.E.2d at 861.

198. *Id.*

199. In granting certiorari, the court cited *Blackledge v. Allison*, 431 U.S. 63 (1977); G.S. 15A-1420(c); *State v. Roberts*, 41 N.C. App. 187, 254 S.E.2d 216 (1979) (a defendant is entitled to collaterally attack judgment on guilty plea on grounds that it was not knowingly and voluntarily given).

200. 56 N.C. App. at 503, 504, 289 S.E.2d at 862.

201. *Id.* at 504, 289 S.E.2d at 862.

202. *Id.*

203. *Id.* at 514, 289 S.E.2d at 867 (Martin, J., dissenting).

The North Carolina Supreme Court has since replaced the farce and mockery standard for finding ineffective assistance with the federal *McMann* standard. See *supra* notes 149-66 and accompanying text.

204. The dissent noted the presence of an able co-counsel who had no involvement in, or knowledge of, the conflict of interest arising from the pending indictment and whose assistance was presumably “effective.” 56 N.C. App. at 505, 289 S.E.2d at 863 (Martin, J., dissenting).

relief is automatic. Although this is a correct statement of the rule in *Glasser* and *Holloway*, *Cuyler* modified the rule. A showing of conflict of interest is sufficient (and a showing of actual prejudice is not necessary) only if defendant objected to the conflict at trial and the court improperly required joint representation.²⁰⁵ A defendant who raises no objection at trial "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."²⁰⁶

In *Loye* defendant did not raise the conflict of interest at trial, and if the Supreme Court cases cited by the court of appeals are to be applied by direct analogy, he should have been required to show an actual prejudice. The peculiar fact situation of *Loye*, however, demands the more liberal basis for relief articulated in *Glasser* and *Holloway*. It was defense counsel's unrevealed self-interest that gave rise to the conflict. When joint representation is the source of conflict, the attorney is still presumed to make a good faith effort on behalf of both defendants. By contrast, when the source of conflict is attorney self-interest, not only is the potential for prejudice greater, but the fact of the conflict is more likely to remain undisclosed. The greater danger of unremedied abridgement of the constitutional right to effective counsel justifies the court's finding that defendant need not show prejudice to receive a new trial.

D. Compelling Psychiatric Examinations

The question whether a trial judge has discretionary authority to compel an unwilling prosecution witness to submit to a psychiatric examination, when there is evidence that the examination may reveal mental deficiencies or defects bearing on the witness' credibility, has been answered in the affirmative in most jurisdictions addressing the issue.²⁰⁷ The North Carolina Supreme Court first confronted the issue in *State v. Looney*.²⁰⁸ In *Looney* the court rejected the reasoning of decisions from other jurisdictions,²⁰⁹ and held that defendant's need for the court-ordered exam was outweighed both by the jury's ability to assess credibility without the aid of expert testimony²¹⁰ and by the great burden upon witnesses ordered to submit to such examinations.²¹¹ In so holding, however, the *Looney* court left open the question whether a trial

205. As the *Cuyler* court stated:

[A] defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial. But unless the trial court fails to afford such an opportunity, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel.

446 U.S. at 348.

206. *Id.*

207. See cases cited in Note, *State v. Looney: Defendants' Need for Court-Ordered Psychiatric Evaluation of Witnesses' Credibility Outweighed by Witnesses' Right to Privacy*, 57 N.C.L. REV. 448, 453 n.37 (1979). See also Annot., 18 A.L.R.3d 1433 (1968). For an example of the judicial authority to compel psychiatric examination of witnesses, see *United States v. Benn*, 476 F.2d 1127, 1130 (D.C. Cir. 1973).

208. 294 N.C. 1, 240 S.E.2d 612 (1978).

209. *Id.* at 18-28, 240 S.E.2d at 622-27.

210. *Id.* at 18, 27, 240 S.E.2d at 622, 627.

211. *Id.* at 26-27, 28, 240 S.E.2d at 626, 627.

judge might under some circumstances properly compel psychiatric examination of an unwilling witness.²¹²

In the recent case of *State v. Clontz*²¹³ the North Carolina Supreme Court again had occasion to address the propriety of court-ordered psychiatric examinations of witnesses. In *Clontz* defendant was charged with second degree rape of a mentally retarded woman afflicted with cerebral palsy.²¹⁴ Defendant's indictment rested upon two alternative theories: (1) defendant had vaginal intercourse with the victim by force and against her will;²¹⁵ or (2) defendant had vaginal intercourse with a victim who was either "mentally defective, mentally handicapped, or physically helpless."²¹⁶ Defendant's pretrial motion to compel the prosecutrix to submit to a psychiatric examination to determine her credibility as a witness was denied,²¹⁷ as was his motion to suppress the victim's testimony.²¹⁸

Defendant appealed the trial court's refusal to order the psychiatric examination.²¹⁹ Borrowing heavily from the language of *Looney*, the court of appeals upheld the conclusion of the trial judge.²²⁰ Judge Becton argued in dissent that the *Looney* decision did not mandate a ruling that judges had no

212. Although the supreme court did not expressly hold that ordering a psychiatric examination would be beyond the authority of a trial judge, it strongly implied its disapproval of the practice and noted that, absent legislative decree, the court should not bestow upon trial judges such discretion. *Id.* at 28, 240 S.E.2d at 627. The specific holding of the *Looney* court was that if trial judges had the authority to order psychiatric examination of a witness, the trial judge in that case did not abuse his discretion by refusing to order an examination. *Id.*

In a concurring opinion, Justice Exum expressed the belief that North Carolina law should comport with "the well-considered opinions on the subject" from other jurisdictions and recognize the judicial authority to order psychiatric examinations when the defendant can make a "strong showing" that the examination will disclose a mental condition which subjects a witness' competence or credibility to serious question. *Id.* at 29, 240 S.E.2d at 628.

For a thorough analysis of the *Looney* opinion, see Note, *supra* note 208.

213. 305 N.C. 116, 286 S.E.2d 793 (1982).

214. *Id.* at 116-17, 286 S.E.2d at 793.

215. *Id.* at 124, 286 S.E.2d at 797 (citing N.C. GEN. STAT. § 14-27.5(a)(1) (1981)).

216. *Id.* (quoting N.C. GEN. STAT. § 14-27.5(a)(2) (1981)).

217. *Id.* at 116, 286 S.E.2d at 793.

218. *Id.* at 118-19, 286 S.E.2d at 794-95. In support of his motion to suppress the victim's testimony, defendant offered the testimony of a clinical psychologist who tested the victim six months before the rape and nine months prior to trial in connection with the victim's application to the North Carolina Department of Vocational Rehabilitation. The psychologist testified that the victim had a "tendency to project blame onto others and was afraid of men, believing them to be people who 'come to get you or hurt you, rape you.'" *Id.* at 118, 286 S.E.2d at 794. He further testified, however, that the victim had the ability to understand, remember, and relate facts while under oath. *Id.* at 118-19, 286 S.E.2d at 794-95. The trial judge also heard testimony from the victim and reviewed an affidavit executed by defendant's attorney before concluding that the victim was able to understand and relate under oath the facts to which she attested and therefore was a competent witness. *Id.*

219. *Id.* at 117, 286 S.E.2d at 794.

220. *State v. Clontz*, 51 N.C. App. 639, 641, 277 S.E.2d 580, 581 (1981). To support its denial of defendant's motion, the court of appeals cited *Looney*:

To require a witness to submit to a psychiatric examination, by a psychiatrist not selected by the witness, is much more than a handicap to the party proposing to offer him or her. It is a drastic invasion of the witness' own right of privacy. To be ordered by a court to submit to such an examination is, in itself, humiliating and potentially damaging to the reputation and career of the witness.

Id. at 640, 277 S.E.2d at 581 (quoting 294 N.C. at 26-27, 240 S.E.2d at 626).

discretionary authority to compel psychiatric examinations.²²¹ Rather, he felt that the balancing of interests between a defendant's need to determine a witness' credibility and competence, and the courts' desire to protect the witness' right to privacy, necessarily contemplates some situations in which a defendant's needs will prevail.²²² Judge Becton contended that the facts of the *Clontz* case presented precisely the proper circumstances for the exercise of such judicial discretion.²²³

On oral argument before the supreme court, defendant contended that the psychiatric examination should have been compelled not only to ascertain the credibility of the prosecutrix, but also to determine whether she was "mentally defective, mentally incapacitated, or physically handicapped" as required by the statute under which he was convicted.²²⁴ Because this theory was raised for the first time on oral argument, however, the supreme court refused to consider it.²²⁵

In upholding the court of appeals decision, the supreme court resolved much of the ambiguity that had shrouded the *Looney* opinion,²²⁶ stating unequivocally that, absent legislative decree, trial judges have no authority to order unwilling witnesses to submit to psychiatric examination.²²⁷ The court pointed to several factors in support of this decision. First, the court noted that the possible benefits of such an examination for the defendant were outweighed by the substantial invasion of the witness' privacy.²²⁸ The court added that if such authority were to be granted, it should derive from legislative mandate.²²⁹ The court also relied on the traditional rule that it is the proper province of the jury to decide the question of witness credibility.²³⁰ A fourth factor was the court's concern that to recede from the holding of *Looney* would contravene recently articulated legislative policy.²³¹ Finally, the court mentioned that court-ordered psychiatric examination of witnesses would deter victims from reporting sex crimes.²³²

221. 51 N.C. App. at 643-44, 277 S.E.2d at 582 (Becton, J., dissenting).

222. *Id.* at 644, 277 S.E.2d at 582.

223. *Id.*

224. 305 N.C. at 118, n.1, 286 S.E.2d at 794, n.1.

225. *Id.* In his dissent, Justice Exum conceded that the majority was "on sound ground" in refusing to hear this aspect of defendant's argument. *Id.* at 125-26, 286 S.E.2d at 798.

226. See Note, *supra* note 208. Trial Judge Albright read *Looney* to foreclose any opportunity for judicial discretion in compelling psychiatric examination of witnesses. 305 N.C. at 116, 286 S.E.2d at 793. While Judges Vaughn and Wells of the court of appeals agreed, 51 N.C. App. at 641, 277 S.E.2d at 581, Judge Becton argued in dissent that a proper reading of *Looney* would permit court ordered examinations in certain rare instances, a view specifically advocated by Justice Exum in his concurrence in *Looney*. 51 N.C. App. at 643, 277 S.E.2d at 582 (quoting *Looney*, 294 N.C. at 29, 240 S.E.2d at 628 (Exum, J., concurring)).

227. 305 N.C. at 123-24, 286 S.E.2d at 797.

228. *Id.* at 120, 286 S.E.2d at 795 (quoting *Looney*, 294 N.C. at 28, 240 S.E.2d at 627).

229. *Id.*

230. *Id.* at 121, 286 S.E.2d at 796 (quoting *Looney*, 294 N.C. at 26, 240 S.E.2d at 626).

231. *Id.* at 122-23, 286 S.E.2d at 796-97. G.S. 8-58.6, the "Rape Victim Statute," enacted just prior to *Looney*, has as one of its stated purposes the prevention of unnecessary intrusion into the privacy of sex crime victims. N.C. GEN. STAT. § 8-58.6 (1981).

232. 305 N.C. at 123, 286 S.E.2d at 797.

In dissent, Justice Exum reiterated his contention, first expressed in his concurrence in *Looney*,²³³ that trial judges should be vested with discretion to order psychiatric examinations.²³⁴ Justice Exum argued that such examinations are particularly appropriate when the mental condition of the prosecutrix is an element of the state's case.²³⁵ Justice Exum was not persuaded by the majority's argument that the presence of expert psychological testimony might invade the juries' province as the "lie detector in the courtroom."²³⁶ The dissent noted that such testimony would be considered by the trial judge in the context of a preliminary determination of the witness' competence to testify. Because this hearing would never be conducted in the jury's presence, it would present no danger of jury prejudice.²³⁷

The significance of the *Clontz* decision lies in the certainty of the holding. The opinion eliminates the confusion created by the equivocal language of *Looney* about North Carolina law regarding court ordered psychiatric examinations of witnesses. The strict position taken by the *Clontz* court, however, does not comport with the recent trend favoring judicial discretion in ordering psychiatric examinations.²³⁸ The court adopted a rule that places a premium on protecting the privacy rights of witnesses and preserving the sanctity of jury determinations on the credibility of such witnesses. Undoubtedly, these are noble goals. The position advocated by Justice Exum and Judge Becton, however, seems more tenable. This approach gives trial judges discretion to compel examinations only upon a strong showing by the defendant that an evaluation would reveal a mental condition raising serious doubts about a witness' credibility.²³⁹ Most jurisdictions that have confronted the issue have adopted this rule.²⁴⁰ As Justice Exum observed, the procedure would allow only the judge to hear the expert psychiatric testimony, thereby eliminating any danger of confusing or prejudicing the jury.²⁴¹ Finally, as Judge Becton noted in his dissent in *Clontz*, when the state does not object to questioning that reveals in explicit detail the "most personal and private relations and past history"²⁴² of the prosecutrix, the state should not be permitted to argue that compelling psychiatric examination would seriously invade her remaining right to privacy.²⁴³

233. 294 N.C. at 29, 240 S.E.2d at 628.

234. 305 N.C. at 124-25, 286 S.E.2d at 798 (citing *Looney*, 294 N.C. at 29, 240 S.E.2d at 628).

235. *Id.* Justice Exum conceded that ordering an examination to evaluate the possibility of mental deficiency at the time of the alleged rape was not properly before the court and thus could not be considered as a justification in this case. *Id.*

236. *Id.* at 121, 286 S.E.2d at 796 (quoting *Looney*, 294 N.C. at 26, 280 S.E.2d at 626, quoting *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974)).

237. *Id.* at 126, 286 S.E.2d at 798 (Exum, J., dissenting).

238. *See, e.g.*, *Forbes v. State*, 559 S.W.2d 318, 321 (Tenn. 1977).

239. 294 N.C. at 29, 240 S.E.2d at 628 (Exum, J., dissenting).

240. *See supra* note 208.

241. *See supra* note 238 and accompanying text.

242. 51 N.C. App. at 645, 277 S.E.2d at 583 (quoting *Looney*, 294 N.C. at 27, 240 S.E.2d at 627).

243. 51 N.C. App. at 645, 277 S.E.2d at 583.

E. Unanimous Verdict

The right of an accused to a unanimous jury verdict in criminal cases is guaranteed in North Carolina by both constitution²⁴⁴ and statute.²⁴⁵ In order to return a verdict of guilty, the jury must unanimously agree that the state has proved every element of an offense beyond a reasonable doubt.²⁴⁶ Relying upon a technical reading of these protections, defendant in *State v. Hall*²⁴⁷ asserted that he was denied his constitutional right to a unanimous verdict.²⁴⁸

In *Hall* defendant was charged on a three-count bill of indictment with armed robbery in violation of G.S. 14-87, kidnapping in violation of G.S. 14-39, and felonious assault in violation of G.S. 14-32(a).²⁴⁹ The uncontested facts²⁵⁰ showed that when defendant and an accomplice robbed a Texaco station, they took forty dollars from an attendant and cash, gas, cigarettes, and wine from the station.²⁵¹ The trial judge instructed the jury that to find defendant guilty of armed robbery, it must find, as one element of the crime, "that the defendant, individually or acting together with another, took property from the person of [the attendant] or in his presence."²⁵²

Defendant contended that the evidence offered by the state showed two counts of armed robbery: one of the attendant and one of the service station.²⁵³ Given the nature of the offenses and the instruction of the trial judge on only one act of robbery, defendant argued that the possibility of six jurors finding him guilty of the first instance of robbery, and six other jurors of the second, violated his constitutional right to a unanimous verdict.²⁵⁴ The supreme court, per Justice Huskins, found this argument "imaginative but wholly unpersuasive."²⁵⁵ Justice Huskins noted that the trial judge properly instructed the jury on the unanimity requirement and that the evidence over-

244. N.C. CONST. art. I, § 24 provides that no person shall be convicted for any crime "but by the unanimous verdict of a jury in open court."

245. N.C. GEN. STAT. § 15A-1235(a) (1978) provides that "[b]efore the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty." See also *State v. Williams*, 286 N.C. 422, 212 S.E.2d 113 (1975).

246. See *In re Winship*, 397 U.S. 358 (1970).

247. 305 N.C. 77, 286 S.E.2d 552 (1982).

248. *Id.* at 86-87, 286 S.E.2d at 558.

249. *Id.* at 79, 286 S.E.2d at 553-54.

250. *Id.* at 80, 286 S.E.2d at 554. The defendant confessed to the robbery and offered no evidence at trial. See *id.* at 81, 286 S.E.2d at 555.

251. *Id.* at 79-80, 286 S.E.2d at 554. The defendants then forced the service station attendant into their vehicle, drove him down an interstate service road, pushed him from the car, and shot him in the back. *Id.* at 80-81, 286 S.E.2d at 554-55.

252. *Id.* at 86, 286 S.E.2d at 557-58. G.S. 14-87(a) provides that:

Any person or persons who, having in possession or with the use or threatened use of any firearms . . . , whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, . . . shall be guilty of a Class D felony.

N.C. GEN. STAT. § 14-87 (a) (1981).

253. 305 N.C. at 86, 286 S.E.2d at 558.

254. *Id.*

255. *Id.* at 87, 286 S.E.2d at 558.

whelmingly supported the conviction.²⁵⁶ The court concluded that "the compelling inference" was that the verdict rested not upon partial agreement on the offenses committed, but rather upon a belief that defendant was guilty of both.²⁵⁷

In reaching its decision, the court reviewed several cases in which the factual setting gave rise to the question whether a single act or multiple acts of robbery occurred.²⁵⁸ Ultimately, however, the court found it unnecessary to characterize defendant's offense in *Hall* as belonging to either category.²⁵⁹ Apparently, therefore, the determinative issue is not whether single or multiple acts of robbery may be proved. Rather, under the *Hall* analysis, critical factors are whether the trial judge clearly states the necessity for a unanimous verdict, whether there is any indication of confusion or misunderstanding by the jury, and whether the evidence supports the verdict rendered.²⁶⁰ If these factors are present, the court seems willing to overlook the tenuous possibility that the jury verdict represents a mix of beliefs as to which crime was committed.²⁶¹

256. *Id.*

257. *Id.*

258. The court noted *State v. Potter*, 285 N.C. 238, 204 S.E.2d 649 (1974) (taking of an employer's property in presence of two employees held a single act of robbery); *State v. Gibbs*, 29 N.C. App. 647, 225 S.E.2d 837 (1976) (forcing an employee into a separate room to rob her and then returning to storeroom to take money held two acts of robbery); *State v. Johnson*, 23 N.C. App. 52, 208 S.E.2d 206 (armed robbery of two people at same time and place held two acts of robbery), *cert. denied*, 286 N.C. 339, 210 S.E.2d 59 (1974).

The court also considered *State v. Sellars*, 52 N.C. App. 380, 278 S.E.2d 907 (1981), in which the robberies of the prosecuting witness and of the business at which the witness worked were held to constitute only a single act of robbery. Although the court noted that the facts of *Sellars* were similar to those before the court in *Hall*, the majority "purposely express[ed] no opinion as to the correctness of the *Sellars* opinion . . ." 305 N.C. at 88, 286 S.E.2d at 558.

The question whether the factual situation present in *Hall* establishes a single or double count of armed robbery seems finally to have been resolved by the North Carolina Supreme Court in *State v. Beatty*, 306 N.C. 491, 293 S.E.2d 760 (1982). In *Beatty* defendant was tried upon two indictments, each charging him with armed robbery. The first count rested upon the robbery of an ABC store, and the second upon the robbery of the store manager. Defendant argued that the second count of robbery should be quashed to prevent multiple prosecution for the same offense. *Id.* at 496, 293 S.E.2d at 764. The supreme court, observing that the determinative issue was "[w]hether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment" or "whether the same evidence would support a conviction in each case," agreed with defendant. *Id.* at 496, 293 S.E.2d at 764 (quoting *State v. Hicks*, 233 N.C. 511, 516, 64 S.E.2d 871, 875 (1951)). The court concluded that the facts alleged in the second indictment, which charged defendant with armed robbery of the store manager, would also have sustained the conviction of robbery of the store, because all the necessary elements for each offense were the same. *Id.* at 500-01, 293 S.E.2d at 766. Essential to the court's holding was the consideration that there was only one person present and thus, only one "threatened use of a firearm" or assault, which is the main element of the offense. *Id.*

Beatty may be distinguished from *Hall* because the defendant in *Beatty* was charged with two counts of armed robbery rather than one, and because he raised the defense of double jeopardy instead of deprivation of the right to a unanimous verdict. Nonetheless, with respect to whether the robbery of both a business and its lone attendant gives rise to a single or double count of armed robbery, the court's holding in *Beatty* seems equally applicable to the facts of *Hall*.

259. "Here, regardless of whether defendant committed one armed robbery or two, the evidence amply sustains a conviction for either or both." 305 N.C. at 88, 286 S.E.2d at 559.

260. *Id.* at 88-89, 286 S.E.2d at 558-59.

261. The court stated:

Whether the verdict in this case was (1) a conviction for robbing [the attendant] of \$40,

Analysis similar to that employed in *Hall* prevailed in the recent North Carolina Supreme Court case of *State v. Jordan*.²⁶² In *Jordan* the court addressed the question whether the use of a disjunctive in an instruction violated defendant's right to a unanimous jury verdict.²⁶³ The defendant was charged with first degree burglary in violation of G.S. 14-51.²⁶⁴ The trial judge instructed the jury that to find defendant guilty, it must conclude that he intended "to commit rape and/or first degree sexual offense" at the time of the breaking or entering.²⁶⁵ Defendant contended that this instruction created the possibility that no unanimous agreement existed about which felony was intended, although each juror might believe defendant intended to commit one or the other of the felonies.²⁶⁶ In rejecting this argument, the court reiterated (without alluding to) the view expressed in *Hall* that the entire jury instruction must be examined to determine whether the trial judge properly apprised the jury of the unanimity requirement.²⁶⁷ The court offered the admonition that "[w]hile the defendant is correct as to the technical meaning of the instruction, the court must neither forget nor discount the common sense and understanding of the court and the jurors."²⁶⁸

or (2) a conviction for taking money and other property of Wright's Texaco Station from the presence of [the attendant] who was in possession of those goods and acting as the other's alter ego, or (3) a conviction for both, is entirely immaterial [I]f it be conceded that the defendant committed two armed robberies as argued in his brief and he got a free ride for one of them, it was a result favorable to him and affords no ground for complaint.

Id. at 88, 286 S.E.2d at 559.

Hall was followed in *State v. Yancey*, 58 N.C. App. 52, 293 S.E.2d 298 (1982). In *Yancey* defendant was charged with misdemeanor larceny for allegedly taking four items from the victim's home. The trial judge instructed the jury that it could find defendant guilty if it determined that he had stolen any of the four items. *Id.* at 58, 293 S.E.2d at 302. Defendant contended that this instruction violated his right to a unanimous jury verdict because, while the jury may be in agreement as to the fact that one of the items was stolen by defendant, it may disagree as to which item defendant took, therefore, there would be no unanimous verdict about the theft of any single item. *Id.* Without analyzing the merits of defendant's argument, the court of appeals tersely observed that it was bound by *Hall* to overlook this assignment of error. *Id.*

See also *State v. Thompson*, 57 N.C. App. 142, 291 S.E.2d 266 (1982). Defendants were charged with armed robbery of a restaurant. The trial judge instructed the jury that if the property of the restaurant had been taken in the presence of employees, then it could properly find defendants guilty. *Id.* at 146, 291 S.E.2d at 268. Defendants argued that the charge violated their right to a unanimous verdict, because the jury may agree about the fact of the robbery, but may disagree about which employees were present and unconsenting. *Id.* In rejecting this argument, the court noted that "[t]he gravamen of the offense is the taking of . . . property . . . by the use or threatened use of a firearm," and so long as the jurors agree that the property was taken in the presence of one of the employees, the verdict is unanimous. *Id.*

262. 305 N.C. 274, 287 S.E.2d 827 (1982).

263. *Id.* at 279, 287 S.E.2d at 831.

264. G.S. 14-51 provides in part:

There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree

N.C. GEN. STAT. § 14-51 (1981).

265. 305 N.C. at 279, 287 S.E.2d at 831.

266. *Id.*

267. *Id.*

268. *Id.* See also *State v. Rush*, 56 N.C. App. 787, 290 S.E.2d 383 (1982), in which the court of

F. Failure to Object to Improper Jury Charge

In *State v. Bennett*²⁶⁹ the court of appeals considered whether a defendant must object to a disputed jury instruction in order to preserve his assignment of error. In deciding this issue the court examined the conflict between rule 10(b)(2) of the Rules of Appellate Procedure, which precludes a party from assigning as error any jury charge unless it is objected to before the jury retires, and G.S. 15A-1446(d)(13),²⁷⁰ which likewise requires an appropriate objection or motion in order to preserve an assignment of error but excepts from that general rule errors of law in the charge to the jury. Noting that the supreme court in *State v. Elam*²⁷¹ held G.S. 15A-1446(d)(6) violated article IV, section 13(2) of the North Carolina Constitution²⁷² and that rule 10(b)(2) was to be considered authoritative, the *Bennett* court expanded *Elam* by declaring that rule 10(b)(2) "has by preemption abrogated G.S. 15A-1446(d)(13)."²⁷³

The *Bennett* court also considered a conflict between rule 21 of the Rules of Trial Court Procedure and G.S. 15A-1231(b). Rule 21 requires every trial judge to conduct an instruction conference at the close of evidence. G.S. 15A-1231(b), however, requires the judge to hold an instruction conference only if requested by either party.²⁷⁴ The court held that because G.S. 15A-1231(b) "clearly contemplates that defendant was required to request an instruction conference as a prerequisite for assigning error to the trial court's failure to conduct one,"²⁷⁵ G.S. 7A-34, which forbids the Supreme Court to prescribe trial court rules inconsistent with acts of the General Assembly, requires that

appeals held that the use of a disjunctive in the jury instruction on charges of felonious breaking and entering in violation of G.S. 14-54(a) did not abridge defendant's right to a unanimous jury verdict. *Id.* at 791, 290 S.E.2d at 386. The trial judge instructed the jury that in order to find defendant guilty on this count, it must determine that he "broke or entered" the victim's residence. *Id.* (emphasis in original). In upholding the jury instruction, the court of appeals noted that submitting the charge on alternative propositions was proper under G.S. 14-54(a). *Id.* See *State v. Boyd*, 287 N.C. 131, 145, 214 S.E.2d 14, 22 (1975). For examples of similar holdings under G.S. 14-54, see *State v. Brown*, 266 N.C. 55, 145 S.E.2d 297 (1965); *State v. Vines*, 262 N.C. 747, 138 S.E.2d 630 (1964); *State v. Best*, 232 N.C. 575, 61 S.E.2d 612 (1950); *State v. Mumford*, 227 N.C. 132, 41 S.E.2d 201 (1947); *State v. Houston*, 19 N.C. App. 542, 199 S.E.2d 668, cert. denied, 284 N.C. 426, 200 S.E.2d 662 (1973).

The *Jordan* court similarly rejected defendant's contention that the jury charge on felonious larceny violated his right to a unanimous jury verdict when the trial judge instructed that the jury need only find "either that the Defendant Rush took the reel to reel tape player, and other stereo equipment from the building after a breaking or entering, or that the reel to reel tape player and other stereo equipment was worth more than four hundred dollars." 56 N.C. App. at 792, 290 S.E.2d at 386 (emphasis in original). The court cited no authority for its holding that the trial court did not err in allowing these alternative propositions to be stated together, but the supreme court decisions in *Hall* and *Rush*, as well as the court of appeals opinion in *Yancey*, support this conclusion.

269. 59 N.C. App. 418, 297 S.E.2d 138 (1982), disc. rev. granted, 307 N.C. 469, 299 S.E.2d 222 (1983).

270. N.C. GEN. STAT. § 15A-1446(d)(13)(Supp. 1981).

271. 302 N.C. 157, 273 S.E.2d 661 (1981).

272. N.C. CONST. art. IV, § 13(2) gives the Supreme Court the exclusive authority to make rules of procedure and practice for the Appellate Division.

273. 59 N.C. App. at 423, 297 S.E.2d at 141.

274. N.C. GEN. STAT. § 15A-1231(b) (1978).

275. 59 N.C. App. at 423, 297 S.E.2d at 141.

rule 21 give way to G.S. 15A-1231(b).²⁷⁶

Bennett, then, contains two important clarifications for the practitioner interested in preserving a possible appeal. First, if counsel wants to assign as error "any portion of the jury charge or omissions therefrom," he must object to that instruction before the jury retires. Failure to so object will constitute a waiver of the right to assert the allegedly faulty charge on appeal. Second, counsel may not assign as error the trial court's failure to conduct an instruction conference unless counsel has requested one.

G. Sentencing

1. Fair Sentencing Act

A primary purpose of the Fair Sentencing Act²⁷⁷ is to ensure that sentences imposed upon persons convicted of a crime²⁷⁸ are "commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability."²⁷⁹ To aid judges in accomplishing this goal, the legislature enacted G.S. 15A-1340.4, which provides detailed guidelines that judges must follow in determining an appropriate sentence.²⁸⁰ Court of appeals cases decided in 1982 indicate that some trial courts are encountering difficulty interpreting and following those guidelines, thus demonstrating confusion in the implementation of the Fair Sentencing Act.

Section 15A-1340.4 of the Act provides that "[i]f the judge imposes a prison term . . . he must impose the presumptive term provided . . . unless, after consideration of aggravating or mitigating factors, or both, he decides to impose a longer or shorter term . . ."²⁸¹ Although judicial discretion in sentencing is preserved through this consideration of aggravating and mitigating factors, the legislature did not intend for that discretion to be unbridled. Before a judge may impose a sentence that is longer or shorter than the presumptive term, he must consider each of the sixteen aggravating and fourteen mitigating factors listed in G.S. 15A-1340.4(a)(1) and (2).²⁸² In addition, he may consider other aggravating or mitigating factors only upon a finding that they are "proved by the preponderance of the evidence and that they are reasonably related to the purposes of sentencing."²⁸³ It is this system of positives and negatives that has caused confusion. Most of the cases considered on appeal dealt in some respect with the statute's mandate to consider aggravating

276. *Id.*

277. N.C. GEN. STAT. § 15A-1340.1-7 (Cum. Supp. 1981).

278. G.S. 15A-1340.1(a) provides that the Act shall only apply to "persons convicted of felonies, other than Class A and Class B felonies."

279. N.C. GEN. STAT. § 15A-1340.3 (Cum. Supp. 1981).

280. Under G.S. 15A-1340.4(f) prison terms ranging from one to fifteen years are presumed for specific classes of felonies.

281. N.C. GEN. STAT. § 15A-1340.4(a) (Cum. Supp. 1981).

282. N.C. GEN. STAT. § 15A-1340.4(a)(1),(2) (Cum. Supp. 1981).

283. N.C. GEN. STAT. § 15A-1340.4(a) (Cum. Supp. 1981).

and mitigating factors and the discretionary outcome of that consideration.²⁸⁴

The types of errors alleged on appeal and the courts' varying disposition of them raise the question whether the guidelines of the Act are used as intended (as modifiers of a presumptive sentence), or whether they are instead being circumvented by the exercise of the courts' discretion. That discretion was clearly preserved and clarified by the court of appeals in *State v. Davis*.²⁸⁵ Defendant appealed the trial court's decision not to reduce his prison sentence after deleting one of the aggravating factors it had found earlier. The court of appeals upheld the judge's right to use discretion in weighing aggravating and mitigating factors, and interpreted G.S. 15A-1340(a) as follows:

The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. Although the court is required to consider all statutory factors to some degree, it may very properly emphasize one factor more than another in a particular case.²⁸⁶

This statement of the law serves as a refrain throughout the pertinent cases²⁸⁷ and the message is clear: the court's discretion in sentencing is modified very little by the enactment of the Fair Sentencing Act.

One check on trial court discretion, of course, is the power of appellate courts to remand for resentencing when the trial court commits errors that are expressly forbidden by the Act. Unfortunately, there is some disagreement among judges as to when remand is required. The following cases exemplify this disagreement.

284. See, e.g., *State v. Davis*, 58 N.C. App. 330, 293 S.E.2d 658 (1982) (upholding trial court's discretion in failing to reduce prison term after deleting a previously found aggravating factor); *State v. Ahearn*, 59 N.C. App. 44, 295 S.E.2d 621 (1982) (erroneous consideration of aggravating factors must cause reversible prejudice to defendant before remand for resentencing will be allowed); *State v. Leeper*, 59 N.C. App. 199, 296 S.E.2d 7 (1982) (fourteen year minimum sentence required by G.S. 14-87(d) for robbery with firearms or other dangerous weapons controls over twelve-year presumptive sentence set by Fair Sentencing Act for Class D felonies; mitigating factors make no difference); *State v. Morris*, 59 N.C. App. 157, 296 S.E.2d 309 (1982) (an element of the offense in question cannot be used as a factor in aggravation; but no finding of aggravating and mitigating circumstances is required when a presumptive sentence is imposed by a controlling statute that conflicts with the Fair Sentencing Act); *State v. Goforth*, 59 N.C. App. 504, 297 S.E.2d 128 (1982) (the same item of evidence may not be used to prove more than one factor in aggravation; court did not award retrial because defendant was not prejudiced); *State v. Jones*, 59 N.C. App. 472, 297 S.E.2d 132 (1982) (remanding for resentencing because trial judge relied on the same evidence to prove a fact in aggravation that was necessary to prove an element of the offense); *State v. Thobourne*, 59 N.C. App. 584, 297 S.E.2d 774 (1982) (remanding for resentencing on finding that consideration of the following two aggravating factors was "punishment" for a "potential infringement on (defendant's) right to plead not guilty": (1) defendant did not at any time render assistance to the arresting officer or the District Attorney; (2) defendant did not offer aid in the apprehension of other felons).

285. 58 N.C. App. 330, 293 S.E.2d 658 (1982).

286. *Id.* at 333, 293 S.E.2d at 661.

287. *State v. Ahearn*, 59 N.C. App. 44, 50, 295 S.E.2d 621, 625 (1982); *State v. Morris*, 59 N.C. App. 157, 162, 296 S.E.2d 309, 313 (1982); *State v. Goforth*, 59 N.C. App. 504, 507, 297 S.E.2d 128, 130 (1982); *State v. Jones*, 59 N.C. App. 472, 476, 297 S.E.2d 132, 135 (1982); *State v. Thobourne*, 59 N.C. App. 584, 591, 297 S.E.2d 774, 779 (1982); *State v. Abee*, 60 N.C. App. 99, 104, 298 S.E.2d 184, 187 (1982).

*State v. Ahearn*²⁸⁸ involved an appeal from conviction of felonious child abuse. The age of the victim was both a necessary element of felonious child abuse²⁸⁹ and an aggravating factor considered by the court in sentencing. Though G.S. 15A-1340.4(a)(1) expressly forbids using evidence necessary to prove an element of an offense to prove a factor in aggravation, the court of appeals did not remand for resentencing. The court's decision was based upon defendant's failure to show that "had the court not considered the erroneous findings in aggravation a different result would have been reached in the court's balancing process."²⁹⁰ Judge Wells registered a dissent to this holding. Similarly, in *State v. Abee*,²⁹¹ on appeal from conviction of second-degree sexual offense, defendant correctly asserted that aggravating factors²⁹² were improperly considered because they were also evidence necessary to prove an element of the offense. Nonetheless, following the logic of *Ahearn*, the court of appeals found no reversible error. Judge Johnson, distinguishing *Ahearn* in dissent,²⁹³ argued that the trial court had "no discretion to even consider evidence necessary to prove an element of the offense" in determining aggravation and concluded he would hold that "consideration of evidence necessary to prove an element of the offense to prove any factor in aggravation violates the intent and spirit of basic fairness of the Fair Sentencing Act and is, therefore, reversible per se."²⁹⁴

Any guidance to be found in these and the other 1982 Fair Sentencing Act cases²⁹⁵ is minimal at best. Trial judges may be sure that they will continue to have wide discretion in applying aggravating and mitigating factors to the presumptive sentences provided in G.S. 15A-1394.4(f). Whether or not the exercise of such discretion will survive appeal will depend upon whether the purposes of the Act are to be meticulously served or blatantly thwarted, whether any of the defendant's fundamental rights have been violated, whether competing statutory sentencing provisions are present that override the Act, and whether defendant's case has been prejudiced. However unclear the guidance provided until now, it seems certain that the North Carolina Supreme Court will be called upon to interpret more precisely the guidelines and requirements of the Fair Sentencing Act.

2. Capital Punishment

G.S. 15A-2000(b) and (c)²⁹⁶ provide the procedure that must be followed

288. 59 N.C. App. 44, 295 S.E.2d 621 (1982).

289. See N.C. GEN. STAT. §14-318.4 (1981).

290. 59 N.C. App. at 50, 295 S.E.2d at 625.

291. 60 N.C. App. 99, 298 S.E.2d 184 (1982).

292. The aggravating factors included reported acts of fellatio.

293. The issue in *Ahearn*, Judge Johnson noted, was whether to remand for sentencing upon "consideration of some aggravating factors not supported by the evidence" or "the discretionary task of weighing mitigating and aggravating factors to increase or reduce sentences from the presumptive term." 60 N.C. App. at 106, 298 S.E.2d at 188 (Johnson, J., dissenting).

294. *Id.*

295. See cases cited *supra* note 285.

296. N.C. GEN. STAT. § 15A-2000(b), (c) (Cum. Supp. 1981).

by a jury in all cases in which the death penalty may be authorized. Subsection (b) provides in part that the jury:

(a) after hearing the evidence, argument of counsel, and instructions of the court, . . . shall deliberate and render a sentence recommendation to the court, based upon the following matters:

- (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;
- (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and
- (3) Based on these circumstances, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

When the jury unanimously recommends the death sentence subsection (c) requires that a signed writing be presented to the court showing the following:

- (1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and
- (2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,
- (3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

These sections have been interpreted in four recent supreme court cases to mean that if the conditions enumerated in subsections (b) and (c) are satisfied, then the jury has a *duty* to recommend a sentence of death.²⁹⁷

In *State v. Pinch*,²⁹⁸ the first of these cases, defendant was convicted of first degree murder. The judge in his instructions advised the jury that it had a duty to recommend the death penalty if it found the following: "(1) that one or more statutory aggravating circumstances existed; (2) that the aggravating circumstances were substantial enough to warrant the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt."²⁹⁹ The judge also advised the jury that if it did not find each of these criteria to be met, its duty was to recommend life imprisonment.³⁰⁰ Defendant appealed, claiming that the instruction was prejudicial because it did not give the jury the option of recommending a life sentence "notwithstanding its earlier findings."³⁰¹ In upholding the trial court's instructions the supreme court said that the jury has no such option and noted that the exercise of such "unbridled discretion" would be to "revert to a system pervaded by arbitrariness and caprice."³⁰² After *Pinch* the supreme court up-

297. *State v. Pinch*, 306 N.C. 1, 34, 292 S.E.2d 203, 227 (1982); *State v. Williams*, 305 N.C. 656, 688-90, 292 S.E.2d 243, 262-63 (1982); *State v. Smith*, 305 N.C. 691, 710, 292 S.E.2d 264, 276 (1982); *State v. Brown*, 306 N.C. 151, 184, 293 S.E.2d 569, 590 (1982).

298. 306 N.C. 1, 292 S.E.2d 203 (1982).

299. *Id.* at 32-33, 292 S.E.2d at 226-27.

300. *Id.* at 33, 292 S.E.2d at 227.

301. *Id.*

302. *Id.* (quoting *State v. Goodman*, 298 N.C. 1, 35, 257 S.E.2d 569, 590 (1979)).

held three similar jury instructions in *State v. Williams*,³⁰³ *State v. Smith*,³⁰⁴ (both decided June 2, the same day as *Pinch*), and *State v. Brown*³⁰⁵ (decided July 13). In all four of these decisions Justice Exum dissented from the majority's interpretation of G.S. 15A-2000(b) and (c),³⁰⁶ but expressed that dissent in full in *Pinch* only. The *Pinch* dissent is complete and well reasoned; it may well indicate that the majority's new interpretation³⁰⁷ of subsections (b) and (c) is not yet settled.

In his dissent in *Pinch* Justice Exum condemned the majority's reasoning as "a cursory treatment and a barebones analysis," and stated that G.S. 15A-2000 in no way provides that a jury has the duty to return a death sentence.³⁰⁸ He further noted that the United States Supreme Court has made it clear that G.S. 15A-2000 can survive constitutional attack without being construed as a mandate to the jury to recommend death in the circumstances described above.³⁰⁹ Noting that in G.S. 15A-2000(b) and (c) the legislature "sought to strike a balance between fairness to the individual defendant and consistency among the cases in which the death penalty is imposed,"³¹⁰ Justice Exum described the statute as one that, when properly construed, "avoids the two extremes of mandatory death penalties (and) unbridled discretionary action by juries."³¹¹ Emphasizing that jury recommendations are supposed to be "based on [the] considerations [of subsections (b) and (c)] not decreed by them," he concluded that nothing in the statutory scheme suggests legislative intent either to require the death sentence or to permit the jury to ignore "the delineated considerations in its deliberations."³¹²

Justice Exum noted that the majority's interpretation in *Pinch* is a "logical trap [that] is easily sprung"³¹³ and admitted that in his dissent in *State v. Rook*,³¹⁴ he had "lapsed into the same fallacy:" after reading the appellate briefs, listening to oral argument, and conducting his own research, he became

303. 305 N.C. 656, 688-90, 292 S.E.2d 243, 262-63 (1982).

304. 305 N.C. 169, 170, 292 S.E.2d 264, 276 (1982).

305. 306 N.C. 151, 184, 293 S.E.2d 569, 590 (1982).

306. *Pinch*, 306 N.C. at 38, 292 S.E.2d at 230 (Exum, J., dissenting); *Williams*, 305 N.C. at 691, 292 S.E.2d at 264 (Exum, J., dissenting); *Smith*, 305 N.C. at 712, 292 S.E.2d at 277 (Exum, J., dissenting); *Brown*, 306 N.C. at 186, 293 S.E.2d at 591 (Exum, J., dissenting).

307. 306 N.C. at 38, 292 S.E.2d at 230 (Exum, J., dissenting). Justice Exum noted in an introductory remark that he found himself "in strong disagreement with the majority on an extremely important new question dealing with the construction of our death penalty statute." *Id.*

308. *Id.*

309. Unsuccessful constitutional attack could be based upon the assertion that the jury is allowed to decide between life and death at its own "unbridled" discretion. *See Bullington v. Missouri*, 451 U.S. 430 (1981); *Gregg v. Georgia*, 428 U.S. 153 (1976).

310. 306 N.C. at 40-41, 292 S.E.2d at 231. Justice Exum further noted that the supreme court had three years earlier in *State v. Johnson* recognized that "neither unbridled, unguided discretion nor the absence of all discretion in the imposition of the death penalty is constitutionally permitted." *Id.* at 38, 292 S.E.2d at 230 (quoting *State v. Johnson*, 298 N.C. 47, 58, 257 S.E.2d 597, 607 (1979)).

311. 306 N.C. at 41, 292 S.E.2d at 231.

312. *Id.* at 41, 292 S.E.2d at 232 (emphasis in original).

313. *Id.*

314. 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038, (1982).

convinced his position in *Rook* had been wrong.³¹⁵ Obviously the statutory interpretation at issue is thought provoking and open to judicial wavering (as evidenced by Justice Exum's own turnabout). Because Justice Exum's position in *Pinch*, *Williams*, *Smith*, and *Brown* is as well reasoned as that of the majority, and because any doubts about the proper construction of the statute should be resolved in favor of fairness to defendants and the preservation of human life, it seems likely that Justice Exum's view may gain support. In any event, the present split on the death duty issue will continue until the majority changes its view or until some interpretive compromise can be found.

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315. 306 N.C. at 42, 242 S.E.2d at 232.

VII. EVIDENCE

A. Hearsay

North Carolina courts have employed two definitions of hearsay: evidence is hearsay (1) "when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it;"¹ and (2) "whenever the assertion of any person, other than that of the witness himself in his present testimony, . . . is offered to prove the truth of the matter asserted, the evidence so offered is hearsay."² Hearsay evidence that does not fall within a recognized exception to the hearsay rule is inadmissible.³

Since 1905 North Carolina courts have recognized a hearsay exception for business records.⁴ To be admissible under this exception entries must have been made in the regular course of business, at or near the time of the transaction involved, and must be authenticated by a witness familiar with them and the system under which they were made.⁵ The business records exception is based upon the assumption that such records are inherently trustworthy because their accuracy is ensured by business necessity.⁶

The business records exception was first applied in North Carolina to records that were assumed to be trustworthy because the businesses involved could not function effectively without accurate records.⁷ Admission of these business ledgers is further safeguarded by the fact that financial records must balance. Some items less inherently trustworthy than ledgers may also be admitted under the business records exception if the court considers the circumstances surrounding their execution sufficiently indicative of trustworthiness. Such items include school attendance records,⁸ motel registration cards,⁹

1. *Cameron v. New Hanover Memorial Hosp.*, 58 N.C. App. 414, 431, 293 S.E.2d 901, 912 (1982) (quoting 1 H. BRANDIS, *BRANDIS ON NORTH CAROLINA EVIDENCE* § 138, at 551-52 (2d rev. ed. 1982)).

2. *Cameron*, 58 N.C. App. at 431, 293 S.E.2d at 912; H. BRANDIS, *supra* note 1, § 138, at 552-53.

3. *Cameron*, 58 N.C. App. at 431, 293 S.E.2d at 912; H. BRANDIS, *supra* note 1, § 138, at 553.

4. *See Firemen's Ins. Co. v. Seaboard Air Line R.R.*, 138 N.C. 42, 50 S.E. 452 (1905).

5. *See Dairy & Ice Cream Supply Co. v. Gastonia Ice Cream Co.*, 232 N.C. 684, 686, 61 S.E.2d 895, 897 (1950); *State v. Barbour*, 43 N.C. App. 143, 151, 258 S.E.2d 475, 480 (1979); H. BRANDIS, *supra* note 1, § 155, at 617.

6. *See Firemen's Ins. Co. v. Seaboard Air Line R.R.*, 138 N.C. at 51, 50 S.E. at 455.

7. *See, e.g., State v. Dunn*, 264 N.C. 391, 141 S.E.2d 630 (1965) (ledger sheet identified by witness as made by his secretary); *State v. Shumaker*, 251 N.C. 678, 111 S.E.2d 878 (1960) (deposit slips); *Smith Builders Supply, Inc. v. Dixon*, 246 N.C. 136, 97 S.E.2d 767 (1957) (accounts and ledgers prepared in regular course of business authenticated by account supervisor); *Breneman Co. v. Cunningham*, 207 N.C. 77, 175 S.E. 829 (1934) (books of account in liquidation proceeding); *Edgerton v. Perkins*, 200 N.C. 650, 158 S.E. 197 (1931) (bank ledger produced by cashier and bank vice-president); *Flowers v. Spears*, 190 N.C. 747, 130 S.E. 710 (1925) (records of bank branch authenticated by cashier of main branch); *Stewart v. R.R.*, 141 N.C. 253, 53 S.E. 877 (1906) (time table and train sheets); *Firemen's Ins. Co. v. Seaboard Air Line R.R.*, 138 N.C. 42, 50 S.E. 452 (1905) (record of train positions telegraphed to train dispatcher from station agents); *State v. Barbour*, 43 N.C. App. 143, 258 S.E.2d 475 (1979) (bank ledger authenticated by assistant cashier with no personal knowledge or entries).

8. *See State v. Brunson*, 285 N.C. 295, 204 S.E.2d 661 (1974) (public school attendance records authenticated by records custodian, rather than by recording teacher).

apartment complex housing records,¹⁰ and daily work reports prepared on a construction site.¹¹ Social services case history records¹² and hospital staff meeting minutes¹³ were added to this list in 1982.

*In re Smith*¹⁴ was a proceeding initiated by the Durham County Department of Social Services to terminate the parental rights of a mother. The Department had records of the parent's case history dating back to 1971. Two social workers testified about matters in the mother's case history that had been recorded prior to June 1979. Although neither of the social workers had any personal knowledge about the basis for entries made before that date, one of them authenticated the case history records as having been made in the regular course of business at or near the time of the transactions involved. The court of appeals affirmed the trial court's decision that the case history records were properly admissible under the business records exception.¹⁵

In *Cameron v. New Hanover Memorial Hospital*¹⁶ two podiatrists sued two orthopedic surgeons and a hospital for conspiring to deny them hospital staff privileges. During a hospital staff meeting, one of the orthopedic surgeons had made disparaging remarks about podiatry. The court of appeals upheld the trial court's determination that the minutes of that meeting were admissible under the business records exception, and noted that "[t]he need for accuracy in these records is as important as that required of hospital patient records."¹⁷ While the court may have overstated the importance of the minutes, it was probably correct in upholding their admission. Although the minutes of the staff meeting amounted to little more than a record of opinion, they were properly authenticated as having been made in the regular course of business, contemporaneously with the transactions recorded.¹⁸

The North Carolina Court of Appeals has hesitated to extend the business records exception to summary-type documents lacking the inherent safeguards of trustworthiness associated with ledgers and similar records.¹⁹ In stating the

9. See *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978) (error because manager did not purport to identify defendant as the man who signed the card).

10. See *State v. Carr*, 21 N.C. App. 470, 204 S.E.2d 892 (1974) (residence records authenticated by manager who had been hired after records were made).

11. See *S.J. Groves & Sons v. State*, 50 N.C. App. 1, 273 S.E.2d 465 (1980) (daily work reports and cost compilations based on such reports), *cert. denied*, 302 N.C. 396, 279 S.E.2d 353 (1981).

12. See *In re Smith*, 56 N.C. App. 142, 287 S.E.2d 440, *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982).

13. See *Cameron v. New Hanover Memorial Hosp.*, 58 N.C. App. 414, 293 S.E.2d 901 (1982).

14. 56 N.C. App. 142, 287 S.E.2d 440, *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982).

15. *Id.* at 148, 287 S.E.2d at 444.

16. 58 N.C. App. 414, 293 S.E.2d 901 (1982).

17. *Id.* at 432, 293 S.E.2d at 912. The business records exception had been extended to hospital patient records in *Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 125 S.E.2d 326 (1962).

18. 58 N.C. App. at 433-34, 293 S.E.2d at 913.

19. See, e.g., *Ray D. Lowder, Inc. v. Highway Comm.*, 26 N.C. App. 622, 217 S.E.2d 682 (court did not admit compilation made, probably for use in litigation, four years after events, summarizing incomplete daily reports, subject to compiler's personal judgment and memory), *cert. denied*, 288 N.C. 393, 218 S.E.2d 467 (1975); *Thompson Apex Co. v. Murray Tire Serv. Inc.*, 4 N.C. App. 402, 166 S.E.2d 864 (court did not admit results of quality control tests without evi-

test for admissibility of these documents, the court of appeals has added a requirement that the entries they contain be based upon the personal knowledge of the preparer.²⁰ The justification for such a requirement is questionable. Personal knowledge of the preparer has never been required so long as the entries are duly authenticated as having been made in the regular course of business, contemporaneously with the transactions recorded.²¹ This new test, which confuses personal knowledge with trustworthiness, was applied in *Piedmont Plastics, Inc. v. Mize Co.*²²

In *Piedmont* third party defendants sought to introduce a tally sheet of service calls that was based upon the work orders of repairmen. A witness testified that he was responsible for servicing the equipment involved, that the tally sheet was kept in the regular course of business, and that he regularly made entries on the sheet contemporaneously with the repairs. The work orders themselves were not offered into evidence. The court of appeals upheld the trial court's exclusion of the tally sheet, and stated that the business records exception required the entries to be: (1) made in the regular course of business; (2) made contemporaneously with the events recorded; (3) original; and (4) based upon the personal knowledge of the individual making them.²³ The court stated that "to render the tally sheet admissible, the sources of information from which it was drawn, the method of its compilation, and the circumstances surrounding the entire matter, must have been such as to indicate its trustworthiness."²⁴

In concentrating upon the trustworthiness of the tally sheet (and requiring personal knowledge as an indicator of trustworthiness), the court ignored what should have been its basic inquiry: whether the tally sheet was a business record at all. The court could have reached the same result by stating that in the absence of supporting data, it was unable to determine whether the tally sheet was kept in the regular course of business; thus, the tally sheet was inadmissible because it had not been shown to be a business record.²⁵

dence of who had performed tests or what procedures were followed), *cert. denied*, 275 N.C. 501, 166 S.E.2d 864 (1969).

20. See *S.J. Groves & Sons v. State*, 50 N.C. App. at 65-66, 273 S.E.2d at 499; *Ray D. Lowder, Inc. v. Highway Comm.*, 26 N.C. App. at 652, 217 S.E.2d at 699.

21. See, e.g., *Brunson*, 285 N.C. 295, 204 S.E.2d 661 (authentication by custodian of attendance records, rather than by recording teacher); *Dunn*, 264 N.C. 391, 141 S.E.2d 630 (ledger sheet identified by witness as made by his secretary); *Smith Builders Supply, Inc.*, 246 N.C. 136, 97 S.E.2d 767 (authentication of accounts and ledgers by account supervisor who had no personal knowledge of entries); *Edgerton*, 200 N.C. 650, 158 S.E. 197 (bank ledger authenticated by cashier and bank vice-president); *Flowers*, 190 N.C. 747, 130 S.E. 710 (records of bank authenticated by cashier of main branch); *Barbour*, 43 N.C. App. 143, 258 S.E.2d 475 (bank ledger authenticated by assistant cashier with no personal knowledge of entries); *Carr*, 21 N.C. App. 470, 204 S.E.2d 892 (apartment residence records authenticated by manager employed after records were made).

22. 58 N.C. App. 135, 293 S.E.2d 219 (1982).

23. *Id.* at 137, 293 S.E.2d at 221. The court quoted the requirements from *Lowder*, 26 N.C. App. at 650, 217 S.E.2d at 699: the record is deemed admissible if "(1) the entries are made in the regular course of business; (2) the entries are made contemporaneously with the events recorded; (3) the entries are original entries; and (4) the entries are based upon the personal knowledge of the person making them."

24. 58 N.C. App. at 137, 293 S.E.2d at 221.

25. Although the court in *Lowder* spoke in terms of requiring personal knowledge, it rested

Piedmont may be a case that was decided the right way for the wrong reason. But the danger that the business records exception will be misapplied by requiring personal knowledge extends beyond the case itself. As noted above, North Carolina courts had never before required that the preparer of a business record have personal knowledge of the facts upon which the entries are based. Nonetheless, the case upon which the personal knowledge requirement in *Piedmont* is based, *Ray O. Lowder Inc. v. Highway Commission*,²⁶ has already been cited in *Strong's Evidence Index* for the proposition that personal knowledge of the preparer is required for a document to qualify under the business records exception.²⁷ While this statement accurately restates the holding in *Lowder*, courts and practitioners need to guard against allowing this overstated and ill-advised requirement to become the new general rule.²⁸

In a related development, the supreme court seems to have adopted a hearsay exception for statements with a "reasonable probability of truthfulness." In *State v. Davis*,²⁹ a murder prosecution, time of death was in issue. The court upheld the use of an entry in the victim's diary to prove she was still alive at the time the entry was made.³⁰ The court cited *State v. Vestal*³¹ for the proposition that exceptions to the rule against hearsay are justified when the evidence is necessary and has a reasonable probability of truthfulness.³² Applying these criteria, the court found that the evidence was necessary (since the victim was dead), and almost certainly truthful (since the victim would have had no reason to lie about the time she had awakened).³³ This exception is

its decision upon a determination that the report in question did not satisfy the business records exception because it was made neither in the regular course of business nor contemporaneously with the events recorded. 26 N.C. App. at 650, 217 S.E.2d at 699-700.

26. 26 N.C. App. 622, 217 S.E.2d 682, cert. denied, 288 N.C. 393, 218 S.E.2d 467 (1975).

27. 6 STRONG'S NORTH CAROLINA INDEX 3d EVIDENCE § 29.2, at 79 (1977).

28. Proposed N.C.R. EVID. 803(6) provides a statutory business exception:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time, by or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

LEGISLATIVE RESEARCH COMM., REPORT TO THE NORTH CAROLINA GEN. ASSEMBLY OF 1983 ON THE LAWS OF EVIDENCE, at 82-84 (1982). Although the rule requires a basic level of trustworthiness, it does not require that the preparer have personal knowledge of the entries. *Id.*

29. 305 N.C. 400, 290 S.E.2d 574 (1982).

30. *Id.* at 420-21, 290 S.E.2d at 586-87.

31. 278 N.C. 561, 582, 180 S.E.2d 755, 769 (1971), cert. denied, 414 U.S. 874 (1973).

32. 305 N.C. at 420, 290 S.E.2d at 587. The court in *Vestal* was faced with the question whether a widow should be allowed to testify about a conversation with her deceased husband before he left on a trip. Although stating seemingly broad criteria for admissibility of hearsay evidence (necessity and reasonable probability of truthfulness), the court found the husband's statements admissible under the traditional exception allowing declarations of a decedent to show his intention. Thus, the admission of the diary in *Davis* solely on the basis of necessity and reliability represents the extension of previous law.

33. *Id.* at 420-21, 290 S.E.2d at 586-87.

similar to the final exception in Federal Rules of Evidence 803 and 804,³⁴ and represents a sensible solution to the problem presented when trustworthy evidence does not readily fit into a recognized hearsay exception.

B. Impeachment

Evidence of prior misconduct may be used for impeachment purposes in North Carolina.³⁵ Although the avowed purpose of such evidence is to discredit a witness' testimony by attacking his credibility,³⁶ inquiry is not limited to acts that reflect negatively on credibility. A witness may be impeached by the introduction of any criminal conviction;³⁷ there is no requirement of a preliminary determination that the conviction is of a type reflecting negatively on credibility. Furthermore, a witness may be questioned about prior acts reflecting negatively upon general moral character.³⁸

Because evidence of prior misconduct is admissible, if at all, only for impeachment purposes in these cases, the jury is limited to consideration of the witness' answers to the cross-examiner's questions.³⁹ Theoretically, the questions themselves are not to be considered in evaluating witness credibility. Thus, when a witness denies an act, his credibility is ostensibly unimpeached. North Carolina courts have recognized the potential for serious abuse in the actual application of this procedure.⁴⁰ Two policing doctrines are designed to

34. FED. R. EVID. 803(24) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by the admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 804(5) is identical to FED. R. EVID. 803(24). Proposed N.C.R. EVID. 803(24) differs from FED. R. EVID. 803(24) only in that the North Carolina rule would require *written* notice to the adverse party, and that such notice must be given sufficiently in advance of offering the statement (rather than trial or hearing) to provide the adverse party with a fair opportunity to prepare to meet the statement. LEGISLATIVE RESEARCH COMM., REPORT TO THE NORTH CAROLINA GEN. ASSEMBLY OF 1983 ON THE LAWS OF EVIDENCE, at 88 (1982). Proposed N.C.R. EVID. 804(5) is identical with proposed N.C.R. EVID. 803(24). *Id.*

35. See H. BRANDIS, *supra* note 1, § 111, at 407, § 112, at 411.

36. *Id.* at § 38; State v. Purcell, 296 N.C. 728, 733, 252 S.E.2d 772, 775 (1979).

37. See Ingle v. Roy Stone Transfer Corp., 271 N.C. 276, 156 S.E.2d 265 (1967).

38. See State v. Purcell, 296 N.C. at 733, 252 S.E.2d at 775.

39. See State v. Finch, 293 N.C. 132, 142, 235 S.E.2d 819, 825 (1977). Thus, an actual record of convictions may not be introduced to contradict a witness' testimony. State v. Monk, 286 N.C. 509, 517, 212 S.E.2d 125, 132 (1975). State v. Daniels, 59 N.C. App. 442, 446, 297 S.E.2d 150, 153 (1982).

40. The possibility for such abuse has been frequently noted. See, e.g., Ingle v. Roy Stone Transfer Corp., 271 N.C. 276, 281-82, 156 S.E.2d 265, 270 (1967); State v. King, 224 N.C. 329, 332, 30 S.E.2d 230, 232 (1944); Comment, *Impeachment of the Criminal Defendant by Prior Acquittals—Beyond the Bounds of Reason*, 17 WAKE FOREST L. REV. 561 (1981); Note, *The Fourth Circuit*

limit prejudice: the trial judge has discretionary control over the scope of the cross-examination,⁴¹ and the questions must be asked in good faith.⁴²

In 1971, the North Carolina Supreme Court held that prior arrests, indictments, and accusations of misconduct not connected with the case at bar were inadmissible for impeachment purposes.⁴³ The court, however, continued to allow questions about the conduct underlying these events.⁴⁴ Two cases decided in 1982 by the supreme court illustrate this use of prior "bad acts."

In *State v. Shane*⁴⁵ a defendant charged with sex crimes was asked on cross-examination whether he had resigned from the intelligence unit of the Fayetteville Police Force because of allegations of sexual misconduct. The supreme court held that the question was improper because it did not expressly and directly ask whether the defendant had actually committed a certain moral or legal infraction.⁴⁶ The court implied that a question about a particular act would have been appropriate.⁴⁷

In *State v. Sparks*⁴⁸ defendant, a former convict, was prosecuted for committing a first-degree sex offense involving anal intercourse with his son. The prosecutor, ostensibly for the purpose of impeaching defendant's testimony, asked defendant whether he had become "acquainted with" consensual anal intercourse while in prison.⁴⁹ The supreme court held that the specific question was improper because it did not identify a specific instance of criminal or degrading conduct on the part of defendant.⁵⁰ Again, the negative implication was that a properly framed question would have been permissible.⁵¹

Although the court refused to enlarge the scope of permissible inquiry for impeachment purposes, its decisions in *Shane* and *Sparks* remain troubling. The decisions imply that questions about a particular prior sex offense would be appropriate to impeach a witness charged with a different sex offense, despite the limited relevance of such acts to the question of veracity and the strong possibility of substantive prejudice.

Two factors have weakened the effectiveness of the professed good faith

Threatens Impeachment With Prior Acts of Misconduct in North Carolina, 15 WAKE FOREST L. REV. 447 (1979); *Survey of Developments in North Carolina Law, 1981—Evidence*, 60 N.C.L. REV. 1359-61 (1982); *Survey of Developments in North Carolina Law, 1980—Evidence*, 59 N.C.L. REV. 1176-80 (1981); *Survey of Developments in North Carolina Law, 1978—Evidence*, 57 N.C.L. REV. 1069-77 (1979).

41. *State v. Williams*, 279 N.C. 663, 675, 185 S.E.2d 174, 181 (1971); H. BRANDIS, *supra* note 1, § 111, at 409-10.

42. *State v. Williams*, 279 N.C. at 675, 185 S.E.2d at 181; H. BRANDIS, *supra* note 1, § 111, at 408-10.

43. *State v. Williams*, 279 N.C. at 672, 185 S.E.2d at 180. The court of appeals recently reiterated this rule. *See State v. Woodrup*, 60 N.C. App. 205, 207, 298 S.E.2d 439, 440 (1982).

44. *See, e.g., State v. Gainey*, 280 N.C. 366, 373, 185 S.E.2d 874, 879 (1971); *Williams*, 279 N.C. at 675, 185 S.E.2d at 181.

45. 304 N.C. 643, 285 S.E.2d 813 (1982).

46. *Id.* at 651, 285 S.E.2d at 818.

47. *Id.* at 651, 285 S.E.2d at 818.

48. 307 N.C. 71, 296 S.E.2d 451 (1982).

49. *Id.* at 72, 296 S.E.2d at 453.

50. *Id.* at 77-78, 296 S.E.2d at 455.

51. *Id.* at 77-78, 296 S.E.2d at 455.

limitation upon the use of prior acts for purposes of impeachment. First, North Carolina courts have adopted a broad view of what constitutes a question asked in good faith.⁵² Second, North Carolina courts have made it difficult for a litigant to raise the issue of good faith on appeal.⁵³ Both of these propositions were illustrated in *State v. Robertson*.⁵⁴

In *Robertson* defendant was charged with larceny by trick involving the purported sale of marijuana. On cross-examination, the district attorney asked defendant whether on three prior occasions he had sold drugs and whether on one prior occasion he had stolen a diamond ring. The court of appeals first held that the questions were appropriate because they related to specific bad acts.⁵⁵ The court then held that the prosecutor asked the questions about prior drug sales in good faith. It justified this determination by noting that the state had a good reason to ask about prior sales because the case at bar involved marijuana.⁵⁶ The court did not address the argument that the good faith requirement is meant to ensure that there is some basis in fact for the actual occurrence of the prior acts subject to question. By deciding that questions about prior acts similar to the one at issue were asked for good reason, and equating good reason with good faith, the court opened the door for such acts to be raised in the very situation in which their use has the most potential for substantive prejudice.

While the *Robertson* court acknowledged that the record was silent as to whether the district attorney had any information upon which to base his question about the theft of the ring, it observed that the burden was upon the defendant on appeal to affirmatively show that the question was asked in bad faith.⁵⁷ Since the defendant had not done so, the court held that the trial court committed no error.⁵⁸

The proposed North Carolina Rules of Evidence,⁵⁹ while allowing con-

52. See *State v. Royal*, 300 N.C. 515, 268 S.E.2d 517 (1980) (inquiry about prior criminal act based on charge that had been dismissed at probable cause hearing); *State v. Herbin*, 298 N.C. 441, 259 S.E.2d 263 (1979) (questions about whether defendant had committed rape, even though defendant had been convicted only of lesser included offense of assault on a female); *State v. Ross*, 295 N.C. 488, 246 S.E.2d 780 (1978) (questioning about drugs discovered in search subsequently held illegal, no discussion of the sufficiency of the factual basis for the questioning).

53. See *State v. Dawson*, 302 N.C. 581, 586, 276 S.E.2d 348, 352 (1981) (questions of prosecutor considered proper unless record shows questions asked in bad faith). It is difficult to show abuse of good faith when the record of purported convictions is inadmissible. See *State v. Monk*, 286 N.C. 509, 517, 212 S.E.2d 125, 132 (1975); *State v. Daniels*, 59 N.C. App. 442, 446, 297 S.E.2d 150, 153 (1983).

54. 55 N.C. App. 659, 286 S.E.2d 612 (1982).

55. *Id.* at 662, 286 S.E.2d at 613-14.

56. *Id.* at 662, 286 S.E.2d at 614.

57. *Id.*

58. *Id.*

59. Proposed N.C.R. EVID. 609(a): "General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than 60 days confinement shall be admitted if elicited from him or established by public record during cross-examination or thereafter." LEGISLATIVE RESEARCH COMM. REPORT TO THE NORTH CAROLINA GEN. ASSEMBLY OF 1983 ON THE LAWS OF EVIDENCE, at 59 (1982). Cf. FED. R. EVID. 609(a) (evidence of prior conviction admissible if (1) punishable by death or imprisonment for more than one year and probative value outweighs prejudice, or (2) conviction involves dishonesty or false statement).

tinued broad use of prior convictions, would permit a record of convictions to be entered into evidence. This much-needed modification would be useful when a witness with a record denies a prior conviction, as well as when a witness who was previously found not guilty of a crime is questioned about a conviction. In both cases, admission of the record into evidence allows the jury to evaluate the witness' testimony in light of the official record.

The proposed rules purport to limit inquiry into prior acts to those concerning character for truthfulness or untruthfulness.⁶⁰ The danger exists, however, that in interpreting Rule 608(b) the North Carolina courts might read "acts concerning character for truthfulness or untruthfulness" so broadly as to continue much of the current practice. In light of the obvious danger of highly prejudicial substantive use of this evidence by the jury, such a development would be unfortunate.

C. Privileges

In 1981 the North Carolina Legislature enacted a statute that restricts the admissibility of records, proceedings, and other materials generated by medical review committees in civil actions against providers of health services.⁶¹ In *Cameron v. New Hanover Memorial Hospital*⁶² filed before, but decided after, the enactment of G.S. 131-170, the court of appeals created a similar privilege at common law. In effect, the court's decision allowed the statute to be applied retroactively.⁶³ An analysis of the decision reveals the questionable basis

60. Proposed N.C.R. EVID. 608(b):

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

LEGISLATIVE RESEARCH COMM. REPORT TO THE NORTH CAROLINA GEN. ASSEMBLY OF 1983 ON THE LAWS OF EVIDENCE, at 56-57 (1982). The proposed rule tracks the language of FED. R. EVID. 608(b).

61. N.C. GEN. STAT. § 131-170 (Supp. 1981):

The proceedings of, records and materials produced by, and the materials considered by a committee are not subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by the committee, and no person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee nor should any person who testifies before the committee or who is a member of the committee be prevented from testifying as to matters within his personal knowledge, but the witness cannot be asked about his testimony before the committee or opinions formed by him as a result of the committee hearings.

62. 58 N.C. App. 414, 293 S.E.2d 901 (1982).

63. While the court in *Cameron* was retroactively applying the terms of a statute by creating

upon which the medical review committee privilege rests, and illustrates how this privilege is unusual.

In *Cameron* two podiatrists sued two orthopedic surgeons and a hospital for conspiring to deny them hospital staff privileges. Prior to the presentation of evidence, counsel for the hospital objected to plaintiffs' request to review certain documents the trial judge had ordered defendant hospital to produce. The judge sustained the objection based upon an assertion of the attorney-client privilege.⁶⁴ While the court of appeals did not endorse the hospital's assertion of this privilege, it upheld the trial court's exclusion of the documents.⁶⁵ The court observed that the documents would have been excluded under G.S. 131-170, and determined that even though the law of privileged communications with respect to medical review committees was unsettled at the time the case was filed, the policy enunciated in G.S. 131-170 was grounded in the common law.⁶⁶ Thus, the court recognized a common law privilege that embodies the protections of G.S. 131-170.⁶⁷ The court identified the policy underlying the privilege as one that seeks to encourage medical staff candor and objectivity by protecting committee records from public access.⁶⁸

The court labeled the privilege as a qualified one, and stated that a qualified privilege arises when: (1) a communication is made in good faith; (2) the subject and scope of the communication is made in good faith; (3) the communication is made to a person or persons having a corresponding interest, right, or duty.⁶⁹ The court found a qualified privilege in *Cameron* because the documents for which protection was sought recorded good faith communications of the hospital committees in which those present had a corresponding interest in the administration of the hospital.⁷⁰

Historically, courts have allowed a defense of qualified privilege to be raised in defamation cases,⁷¹ since the law views certain statements that would

a common law privilege, the court in *State v. Funderbunk*, 56 N.C. App. 119, 286 S.E.2d 884 (1982), retroactively applied the rule announced in *State v. Freeman*, 302 N.C. 591, 276 S.E.2d 450 (1981), which limited the common law privilege against adverse spousal testimony to testimony involving confidential communications within the marriage. For a detailed discussion of the *Freeman* case, see Note, *Evidence—State v. Freeman: Adverse Marital Testimony In North Carolina Criminal Action: Can Spousal Testimony Be Compelled?*, 60 N.C.L. REV. 874 (1982).

64. The documents were records of a hospital review committee. The defendant argued that the records were privileged because of the subject matter of the meetings and because counsel was present at committee meetings. The trial court accepted the latter argument. 58 N.C. App. at 435, 293 S.E.2d at 914.

65. *Id.* at 438, 293 S.E.2d at 915.

66. *Id.* at 439, 293 S.E.2d at 915.

67. In contrast, the supreme court had earlier refused to extend the physician-patient privilege to communications between a patient and his optometrist. In *State v. Shaw*, 305 N.C. 327, 289 S.E.2d 325 (1982), the court stated, "[t]he physician-patient privilege is limited to those authorized to practice physic (i.e. medicine or surgery). An optometrist is not a licensed physician and is not authorized to practice medicine or surgery." *Id.* at 334, 289 S.E.2d at 329.

68. 58 N.C. App. at 438, 293 S.E.2d at 914.

69. *Id.* at 439, 293 S.E.2d at 915 (quoting *Presnell v. Pell*, 298 N.C. 715, 720, 260 S.E.2d 611, 614 (1979)).

70. *Id.* at 439, 293 S.E.2d at 915.

71. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 115 (4th ed. 1971).

otherwise be defamatory as deserving of protection.⁷² Indeed, all the cases cited by the court in *Cameron* to support its holding that medical committee records were protected by a qualified privilege involved defamation.⁷³ If a qualified privilege for review committee records is justified at all, it would be to protect those who have spoken frankly at a committee meeting from being sued for defamation by the staff member whose credentials they were reviewing. The so-called qualified privilege in *Cameron* and G.S. 131-170, however, does not operate like a traditional qualified privilege. It does not work to protect someone who has made an otherwise defamatory statement from suit by the person defamed; instead, it operates to protect someone who has not made a defamatory statement (either the hospital or the staff member being reviewed), from someone (a member of the public) who is not seeking to charge him with defamation.

The privilege for medical review committee records is unusual in another respect. Typical privileges are personal to the party protected by them,⁷⁴ and may only be waived with that party's consent.⁷⁵ The review committee privilege may be viewed as protecting either the hospital's interest in a forum that encourages medical staff candor (directly), or the staff member whose conduct is in question (indirectly). One would expect that the privilege could only be waived by one of these parties. Yet any person present at a committee meeting apparently may waive the privilege.⁷⁶

In enacting G.S. 131-170, the legislature apparently was seeking to balance the hospital's interest in a forum that encourages medical staff candor with a public plaintiff's interest in discovering the results of an internal investigation relevant to his case. Instead of creating a blanket protection for all

72. A defendant is privileged to publish anything that reasonably appears to be necessary to defend his own reputation against the defamation of another. *Id.* at 786. A defendant is also privileged to defend the reputation of another when a legal relationship exists between the two. *Id.* at 787. A conditional privilege is recognized in many cases when the publisher and recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest. *Id.* at 789. Communications to one who may act in the public interest and fair comment upon matters of public concern are similarly protected. *Id.* at 791-92.

73. See *Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979) (defendant school principal unsuccessfully asserted qualified privilege in defense of statements that school cafeteria manager was distributing alcoholic beverages on school premises); *Stewart v. Nation-Wide Check Corp.*, 279 N.C. 278, 182 S.E.2d 410 (1971) (statements made by defendant's agent to plaintiff's relatives accusing plaintiff of embezzlement; held, not qualifiedly privileged); *R.H. Boulogny, Inc. v. United Steelworkers of Am.*, 270 N.C. 160, 154 S.E.2d 344 (1967) (defense of qualified privilege extended to reasonable statements made in good faith by a labor union in the course of a campaign to solicit members or to establish itself as authorized representative of employees); *Alexander v. Vann*, 180 N.C. 187, 104 S.E. 360 (1920) (no qualified privilege for letter defaming deputy sheriff when accusations not related to deputy sheriff's official duty).

74. See C. McCORMICK, *HANDBOOK ON THE LAW OF EVIDENCE* § 72, at 152 (2d ed. 1972) (describing husband/wife, attorney/client, and physician/patient privileges).

75. See *id.* at §§ 83, 93, 103.

76. N.C. GEN. STAT. 131-170 states in part: "[N]o person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or its members" (emphasis added). By negative implication it may be assumed that such a person may testify about these matters if they desire. The court in *Cameron* held that certain staff meeting minutes were properly admitted under the business records exception to the hearsay rule because they were authenticated by someone who was a witness to those meetings. 58 N.C. App. at 436, 293 S.E.2d at 914.

relevant internal communications, the legislature left open the possibility that a plaintiff could have access to review committee proceedings if he could get a participant in those proceedings to testify as to matters within his personal knowledge. Given the dynamics of the peer review system, however, one may question whether the legislature (and the court of appeals) has afforded sufficient consideration to the interest of the injured outsider.

D. Destruction of Evidence

Whenever law enforcement officers lose or destroy evidence, the possibility of a deprivation of discovery and due process rights as well as the right of confrontation arises. In *State v. Anderson*⁷⁷ the North Carolina Court of Appeals considered all three possibilities to determine whether the partial destruction of a large crop of marijuana violated the rights of defendants who had allegedly grown it. Law enforcement officers had discovered the growing marijuana, and had cut, stacked, and weighed it.⁷⁸ Because of a lack of storage facilities, the officers photographed the stacks of marijuana, took three or four pounds of random samples from the plants for S.B.I. analysis, and burned the remainder.⁷⁹

Defendants first claimed violation of their discovery rights under G.S. 15A-903(e).⁸⁰ Under that statute, the court must order the prosecutor to permit the defendant "to examine, and test . . . any physical evidence, or a sample of it, available to the prosecutor if the State intends to offer the evidence"⁸¹ In dismissing this claim since defendants did in fact have a sample, the court emphasized that the statute did not require the preservation of *all* physical evidence.⁸² Second, defendants claimed that the destruction of evidence denied them their rights of confrontation under article 1, section 23 of the North Carolina Constitution.⁸³ Again, the court denied this claim, explaining that the provision guaranteed defendants in criminal trials only the right to confront opposing witnesses and their accusers with other testimony.⁸⁴

Finally, the court examined the alleged infringement of due process rights under the state and federal constitutions. The court implied that when evidence has been destroyed, it would reverse defendants' conviction only if (1) the government had acted in bad faith *or* (2) defendants were prejudiced by

77. 57 N.C. App. 602, 292 S.E.2d 163 (1982).

78. Weight of the seized marijuana was one of the essential elements of the crime charged. The indictment alleged that the weight of the marijuana exceeded 2,000 pounds in violation of G.S. 90-95(h)(1)(c). The weight element upon a charge of trafficking in marijuana becomes more critical if the state's evidence of the weight approaches the minimum weight charged. 57 N.C. App. at 602-03, 292 S.E.2d at 163.

79. 57 N.C. App. at 603, 292 S.E.2d at 167.

80. N.C. GEN. STAT. 15A-903(e) (1978).

81. *Id.*

82. 57 N.C. App. 609, 292 S.E.2d at 167. (emphasis added)

83. N.C. CONST. art. 1, § 23 provides in part that "[i]n all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accuser and witnesses with other testimony"

84. 57 N.C. App. 610, 292 S.E.2d at 168.

the loss of evidence.⁸⁵ The court easily determined that the officers had acted in good faith, but it found the question whether defendants were prejudiced by the loss of evidence more difficult to decide. With no North Carolina cases on point, the court considered cases decided by the Court of Appeals for the Ninth Circuit.⁸⁶ In similar cases involving partial destruction of seized marijuana, the Ninth Circuit held that the destruction did not violate due process rights when random samples of the evidence were preserved.⁸⁷ Thus, defendants' opportunity to test independently the random samples of physical evidence was apparently determinative in the court's failure to find a due process violation in *Anderson*. As long as the samples were retained, defendants could establish whether the evidence was in fact marijuana and determine the approximate gross weight of all the evidence before it was destroyed.⁸⁸

The court's emphasis in *Anderson* upon the ability to test evidence independently contrasts markedly with another destruction of evidence case, *State v. Hudson*.⁸⁹ The *Hudson* court refused to find a constitutional violation of defendant's rights when the police inadvertently destroyed evidence, thereby preventing an independent analysis by defendant. In this case police found blood-stained paper towels on top of a knife handle at the scene of a murder. A laboratory analysis showed the blood stains had an enzyme component matching that found in defendant's blood. When defendant was arrested, he had a cut on each hand, and items found in his room had blood spots composed of a similar enzyme.⁹⁰ Although defense counsel was probably aware in December that the police had the paper towels, it did not request them until mid-June. After obtaining an order to conduct an independent analysis of the bloodstains, defense counsel learned that the police had inadvertently destroyed the paper towels a few days previously.⁹¹

To decide whether defendant's rights had been violated, the court applied the same two-pronged test articulated in *Anderson*. It concluded that the police had acted in good faith and that defendant was not prejudiced by the destruction of evidence.⁹² The court noted that defendant would have a full opportunity to cross-examine any expert witness called by the State and to challenge the admissibility of the evidence on other grounds.⁹³ Perhaps a

85. *Id.*

86. *Id.*

87. See *United States v. Benedict*, 647 F.2d 928 (9th Cir.), *cert. denied*, 102 S. Ct. 648 (1981); *United States v. Young*, 535 F.2d 484 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976); *United States v. Hediden*, 508 F.2d 898 (9th Cir. 1974).

88. See *supra* note 78. Defendants contended that the stalks of the marijuana plants (which do not qualify as "marijuana") were mature. If this contention were true, the weight of the mature stalks could possibly reduce the total weight of the "marijuana" below 2000 pounds. The court held that defendants bore the burden of showing that the stalks were mature or that any part of the material seized did not qualify as "marijuana" as defined by G.S. 90-87(16). 57 N.C. App. at 608, 292 S.E.2d at 167.

89. 56 N.C. App. 172, 288 S.E.2d 383 (1982).

90. *Id.* at 175-76, 288 S.E.2d 384-85.

91. *Id.* at 176-77, 288 S.E.2d at 385.

92. *Id.* at 177, 288 S.E.2d at 386.

93. *Id.* at 177-78, 288 S.E.2d at 386.

more persuasive factor in the court's conclusion, however, was defense counsel's delay in requesting the paper towels. The court apparently reasoned that defendant was not prejudiced by the destruction because if he had acted "in a timely fashion he could have had the independent analysis."⁹⁴

The rationale underlying the *Anderson* decision was the defendants' ability, if not right, to test the marijuana sample independently. Arguably, the defendant in *Hudson* should have had the same right. Although unlikely, independent analysis of the blood-stained towels may have indicated a blood type of neither defendant nor victim, which would have suggested someone else committed the crime. Fundamental fairness would seem to require that a criminal on trial for his life be given the right to have an expert of his choosing examine a piece of critical evidence, the nature of which is subject to varying expert opinion.⁹⁵ This conclusion is logical since the only means by which a defendant can defend himself against expert testimony by the State is to present expert testimony of his own.⁹⁶ The *Anderson* decision implicitly recognized this fact, but the *Hudson* case expressly denied it. A clear statement upon the issue by the North Carolina courts is badly needed.

Further, in cases similar to *Anderson*, in which evidence is destroyed purposefully, procedural safeguards should be followed. Destruction of evidence should occur only after law enforcement officers have petitioned and received an order encompassing the particular items. In addition, the defendant should be given notice and an opportunity to petition for access to evidence that has been seized. Since even partial destruction of evidence can be judged prejudicial and lead to reversal, these measures would ultimately aid law enforcement officers and protect defendants.

E. Rape Victim Shield Statute

North Carolina's Rape Victim Shield Statute, G.S. 8-58.6⁹⁷ is "nothing more . . . than a codification of this jurisdiction's rule of relevance as that rule applies to the past sexual behavior of rape victims."⁹⁸ Enacted in 1977, the statute declares that the "sexual activity"⁹⁹ of the complainant other than the sexual act which is at issue in the indictment on trial¹⁰⁰ is irrelevant. In order

94. *Id.*

95. The Fifth Circuit Court of Appeals has recognized this right. See *White v. Maggio*, 556 F.2d 1352 (5th Cir. 1977); *Barnard v. Henderson*, 514 F.2d 744 (5th Cir. 1975).

96. See *State v. Barnard*, 287 So. 2d 770, 776 (La. 1973) (Barham, J., dissenting).

97. N.C. GEN. STAT. § 8-58.6 (1981). See *Survey of Developments in North Carolina Law—Evidence*, 56 N.C.L. REV. 1069 (1978).

98. *State v. Fortney*, 301 N.C. 31, 37, 269 S.E.2d 110, 113 (1980). Prior to the enactment of this statute, the prosecuting witness' general reputation for unchastity was admissible during a rape trial for the purpose of attacking her credibility and showing her proneness to consent to sexual acts. Testimony of specific acts of unchastity with someone other than defendant, however, was deemed incompetent. *State v. Banks*, 295 N.C. 399, 245 S.E.2d 743 (1978).

99. In *State v. Bridwell*, 56 N.C. App. 572, 289 S.E.2d 842 (1982), the court ruled that evidence of the use of contraceptive pills at the time of the alleged rape was evidence of "sexual activity" within the meaning of G.S. 8-56.8 and was therefore excluded by the statute.

100. N.C. GEN. STAT. § 8-58.6 (1981).

to protect the defendant's sixth amendment right to confront witnesses,¹⁰¹ however, the statute provides four exceptions. Inquiry into a victim's sexual history is allowed if that evidence tends to show that (1) the victim and her assailant had sexual relations prior to the alleged rape; (2) the acts charged may not have been committed by the defendant; (3) the sexual history tends to prove a pattern of sexual behavior from which consent may be inferred in the present case; or (4) it appears that the victim fantasized the alleged rape.¹⁰²

The obvious effect of the statute is to bar much of the evidence of the complainant's prior conduct that previously had been admissible.¹⁰³ Although evidence of the complainant's reputation for general moral character apparently continues to be admissible,¹⁰⁴ the statute bars "volunteering" of testimony by a witness about any aspect of the complainant's sexual behavior.¹⁰⁵ Until recently, however, the statute's effect upon the admissibility of evidence of sexual activity submitted for impeachment purposes was less certain.

The North Carolina Supreme Court addressed the impeachment issue in *State v. Younger*.¹⁰⁶ The complainant in *Younger* told the examining physician that she was sexually active with a boyfriend and had last had sex one month prior to the alleged rape. She later testified at trial, however, that she had sex on the night of the alleged rape with defendant's roommate. Although defendant contended that he should be allowed to challenge the complainant's credibility based upon those two inconsistent statements, the trial judge forbade cross-examination of the witness about her statement to the physician. The judge concluded that defendant's question amounted to nothing less than evidence of complainant's sexual behavior, making it irrelevant to any issue in the case, according to G.S. 8-58.6.¹⁰⁷

101. The defendant in *State v. Bridwell* challenged the constitutionality of the rape victim shield statute. 56 N.C. App. at 572, 289 S.E.2d at 842 (1982). The appellate court easily disposed of the constitutional argument on the authority of *State v. Fortney*, 301 N.C. 31, 269 S.E.2d 110 (1980). In that case the court held that the statute did not deny the defendant his sixth amendment right to confront a witness. The court upheld the statute, stating: (1) that "there [was] no constitutional right to ask a witness questions that are irrelevant;" (2) that the statute was "primarily procedural and does not alter any of the defendant's substantive rights;" and (3) that the statute was supported by "valid policy reasons, aside from relevance questions . . ." *Id.*

102. N.C. GEN. STAT. § 8-58.6(b) (1981). In addition, the proponent must secure a ruling before asking any question in the presence of the jury. To determine the relevancy of such evidence, the court is to conduct an *in camera* hearing, with counsel for the complainant present. In the hearing, the proponent of the evidence must establish the basis of admissibility, and if the court finds it admissible, the court must specify the question permissible. The hearing record is open to all parties, the complainant, and their attorneys. *Id.* § 8-56.6 (c) and (d).

103. H. BRANDIS, *supra* note 1, § 105, at 391. See, e.g., *State v. Fortney*, 301 N.C. 31, 269 S.E.2d 110 (1980) (upholding exclusion of evidence of three different semen stains found on complainant's clothing); *State v. Smith*, 45 N.C. App. 501, 263 S.E.2d 371, *disc. rev. denied*, 301 N.C. 104, 273 S.E.2d 309 (1980) (statute barred evidence of sexual activity between complainant and others and of discussion between complainant and defendant of sexual problems of complainant and defendant's brother). See also *State v. Joyner*, 301 N.C. 18, 269 S.E.2d 125 (1980); *State v. McLendon*, 49 N.C. App. 459, 271 S.E.2d 552 (1980).

104. H. BRANDIS, *supra* note 1, § 105, at 392.

105. *Id.*

106. 306 N.C. 692, 295 S.E.2d 453 (1982).

107. *Id.* at 695, 295 S.E.2d at 455.

Reversing this decision, the North Carolina Supreme Court held that the trial judge had misconstrued the scope of the statute by "treating it as the sole gauge for determining whether evidence is admissible."¹⁰⁸ The court noted that "inconsistent statements are . . . an issue common to all trials," and that the statute "was not intended to act as a barricade against evidence which is used to prove issues common to all trials."¹⁰⁹ The court explained that defendant was not attempting to impeach the credibility of the witness by revealing acts of prior sexual conduct; rather, he was challenging her credibility through her own prior inconsistent statements.¹¹⁰ As a result, "the fact that this question includes a reference to previous sexual behavior does not prevent its admission into evidence, instead the sexual conduct reference goes to the degree of prejudice which must be balanced against the question's probative value."¹¹¹

Apparently the court in *Younger* reached its conclusion by interpreting the meaning of "sexual behavior" as it is stated in G.S. 8-58.6. Statements that refer to past sexual activity of a complainant are not in themselves identified as evidence of "sexual behavior," and therefore are admissible. This reasoning is consistent with the logic in *State v. Baron*,¹¹² in which the court of appeals concluded that evidence of complainant's falsely accusing others of improper sexual advances on previous occasions was not rendered inadmissible by the rape victim shield statute. In *Baron* the trial court interpreted "sexual behavior" to include these prior statements.¹¹³ It consequently determined that evidence sought to be elicited should have been excluded "in the absence of 'expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.'"¹¹⁴ The appellate court held that while the prior statements may have referred to sexual activities, they were not "sexual behavior or activity" as contemplated by the legislature when it enacted G.S. 3-58.6.¹¹⁵

Younger and *Baron* both clarify the extent to which evidence of prior sexual conduct may be admitted for impeachment purposes. Prior to these decisions, such evidence seemed admissible only if it impeached the complainant's testimony regarding her consent.¹¹⁶ Such evidence, even though technically limited to *statements* about prior sexual activity, now appears admissible in order to attack the general credibility of the prosecuting witness. Due to their extremely prejudicial nature, however, the probative value of such statements should be carefully weighed before they are admitted. Arguably, the court in *Younger* failed to evaluate adequately both the prejudicial and collat-

108. *Id.* at 698, 295 S.E.2d at 456.

109. *Id.*

110. *Id.* at 698, 295 S.E.2d at 457.

111. *Id.*

112. 58 N.C. App. 150, 292 S.E.2d 741 (1982).

113. *Id.* at 154, 292 S.E.2d at 743.

114. *Id.* (quoting N.C. GEN. STAT. §8-58.6(b)(4) (1981)).

115. *Id.*

116. H. BRANDIS, *supra* note 1, § 105, at 390.

eral nature of the prosecuting witness' statements. Thus, while the *Younger* court correctly decided that, as a general rule, statements of prior sexual activity may be admissible for impeachment purposes, it probably should not have admitted such evidence in that particular instance.

F. *Deadman's Statute*

G.S. 8-51,¹¹⁷ the so-called "Deadman's Act,"¹¹⁸ prohibits a party or interested person from testifying in his own interest against the personal representative of a deceased about a personal transaction or communication between the witness and the deceased.¹¹⁹ An opposing party may "open the door" to such testimony, however, either by testifying himself or by introducing the testimony of the deceased.¹²⁰

In *Wachovia Bank & Trust Co. v. Rubish*¹²¹ the North Carolina Supreme Court rejected the argument that *any* testimony by a personal representative about a transaction between the deceased and a party opens the door to *all* testimony by that party about the transaction.¹²² Defendant in *Wachovia* had signed a lease with the decedent which provided that defendant could renew the lease by giving the decedent written notice. Defendant maintained that the decedent had allowed him to renew the lease on two occasions after giving only oral notice. When the decedent's executors refused to allow defendant to renew the lease for a third time because he gave them only oral notice, defendant claimed that decedent's acceptance of oral notice operated as a waiver of the requirement for written notice that was binding on his executors. The parties had stipulated that the decedent had received "notice" on prior occasions, but did not specify whether that notice was oral or written. While the trial court viewed the executors' stipulation as "testimony," and allowed defendant to testify that he had given oral notice, it restricted his testimony to matters related to the ambiguity in the stipulation. The Supreme Court upheld the

117. N.C. GEN. STAT. § 8-51 (1981):

Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. Nothing in this section shall preclude testimony as to the identity of the operator of a motor vehicle in any case.

118. See *Wachovia Bank & Trust Co. v. Rubish*, 306 N.C. 417, 431, 293 S.E.2d 749, 758 (1982).

119. *Davis v. Flynn*, 57 N.C. App. 575, 576-77, 291 S.E.2d 818, 820 (1982); *Etheridge v. Etheridge*, 41 N.C. App. 39, 41, 255 S.E.2d 735, 737 (1979). The statute also applies to transactions between the witness and a lunatic, and the disqualification extends to persons who are successors in interest to a party or interested person. N.C. GEN. STAT. § 8-51 (1981).

120. See H. BRANDIS, *supra* note 1, §75, at 280. The "testimony" of a deceased person that will open the door for the other party includes his deposition or his testimony at a former trial. *Id.*

121. 306 N.C. 417, 293 S.E.2d 749 (1982).

122. *Id.* at 432, 293 S.E.2d at 758-59.

trial court's determination that G.S. 8-51 disqualified defendant from testifying that the decedent had told him that written notice was not necessary.¹²³

One justification advanced for the Deadman's Act is that it operates as a "shield" to protect a dead or insane person's estate against fraudulent and unfounded claims.¹²⁴ A corollary to this view is that the Act is not meant to operate as a "sword" with which the estate might attack the surviving party.¹²⁵ These propositions were correctly distinguished and properly applied by the North Carolina Court of Appeals in *Burns v. McElroy*.¹²⁶

In *Burns* plaintiff claimed that the decedent's estate owed him \$9000 for personal services performed for the decedent. The decedent's executor denied the claim, and counterclaimed to recover a check for \$4500; the executor claimed plaintiff had wrongfully retained the check after receiving it from the decedent for safekeeping. The executor admitted in his answer that the check had been delivered to plaintiff. The trial court refused to allow the plaintiff to testify about transactions between the decedent and himself,¹²⁷ and directed a verdict for the executor on the counterclaim.¹²⁸

The court of appeals first considered the Act as it applied to plaintiff's claim against the estate. In holding that the executor's admission that the check had been delivered did not open the door for plaintiff's testimony that the check was in partial payment for his services, the court noted that the executor was not using the Act as a sword to silence the plaintiff.¹²⁹ Rather, the Act was operating to shield the estate from the testimony of a surviving party claiming against it.

Turning to the Act's effect upon the counterclaim for recovery of the check, the court held that because the executor had the burden of showing that plaintiff's possession of the check was wrongful, the trial court had erred in directing a verdict for the executor.¹³⁰ The court recognized that it would be unfair to allow the Act to be used as a sword to silence plaintiff when the executor was trying to take something from him.¹³¹

The Deadman's Act did not bar testimony in another 1982 case, although the facts were somewhat similar to *Burns*. In *Davis v. Flynn*¹³² a husband and wife claimed they were entitled to collect from the decedent's estate for per-

123. *Id.*

124. *Carswell v. Greene*, 253 N.C. 266, 270, 116 S.E.2d 801, 804 (1960); H. BRANDIS, *supra* note 1, § 66, at 258-59 n.62.

125. *Carswell v. Greene*, 253 N.C. at 266, 116 S.E.2d at 804.

126. 57 N.C. App. 299, 291 S.E.2d 278 (1982).

127. *Id.* at 301, 291 S.E.2d at 280.

128. *Id.* at 302, 291 S.E.2d at 280.

129. *Id.* at 303, 291 S.E.2d at 281. The court also noted that (1) the admission in the executor's answer was not "testimony"; (2) because the admission supported plaintiff's claim that he was at some point in rightful possession of the check, it was not made on the executor's "own behalf"; and (3) the admission was forced by the requirement that the executor file an answer; traditionally, testimony by the personal representative had to be voluntary to open the door to a plaintiff's testimony. *Id.* at 303, 291 S.E.2d at 281.

130. *Id.* at 304, 291 S.E.2d at 282.

131. *Id.* at 304, 291 S.E.2d at 281.

132. 57 N.C. App. 575, 291 S.E.2d 818 (1982).

sonal services each had provided to the decedent. Although the case raised the same concerns about fraudulent or unfounded claims as did *Burns*,¹³³ the court of appeals upheld the trial court's decision allowing both the husband and wife to testify.¹³⁴ The husband testified about transactions between his wife and the decedent; the wife testified about transactions between her husband and the decedent. The court held that nothing in the statute prohibited such testimony: neither the husband nor his wife had testified to any personal transactions that he or she had had with the decedent.¹³⁵ If one were to glean any moral from reading *Burns* and *Davis* together, it might be this: If you are going to work for someone and expect to be paid after his death, bring your spouse along to help.

Such problems have not gone unnoticed. For over fifty years, North Carolina scholars have sought the abolition of the Deadman's Act.¹³⁶ Dean Brandis has stated, "[T]he statute has fostered more injustice than it has prevented and has led to an unholy waste of the time and ingenuity of judges and counsel. This situation calls for more than legislative tinkering. What is needed is repeal of the statute."¹³⁷ Repeal of the statute may be in the offing. The Legislative Research Commission has recommended that if Rule 601 of the proposed North Carolina Evidence Code is adopted, the "Deadman's Act" should be repealed.¹³⁸

G. Methods of Proof

1. Polygraphs†

North Carolina courts have consistently held that results of polygraph examinations either for¹³⁹ or against¹⁴⁰ a party are inadmissible. Inherent in the courts' reasoning is the belief that there is no "general scientific recognition

133. 57 N.C. App. 299, 291 S.E.2d 278.

134. 57 N.C. App. at 579, 291 S.E.2d at 820.

135. *Id.* at 579, 291 S.E.2d at 820.

136. See H. BRANDIS, *supra* note 1, § 66, at 258-59 n.62; Blakey, *Moving Towards An Evidence Law Of General Principles: Several Suggestions Concerning An Evidence Code For North Carolina*, 13 N.C. CENT. L.J. 1 (1981); *Proposals For Legislation In North Carolina*, 11 N.C.L. REV. 51, 61-63 (1932).

137. H. BRANDIS, *supra* note 1, § 66, at 259 n.62.

138. See LEGISLATIVE RESEARCH COMM., REPORT TO THE NORTH CAROLINA GEN. ASSEMBLY OF 1983 ON THE LAWS OF EVIDENCE, at 49 (1983). Proposed N.C.R. EVID. 601 would provide:

(a) General Rule. Every person is competent to be a witness except as otherwise provided in these rules.

(b) Disqualification of Witness. A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

† Editor's Note: *State v. Meadows*, 306 N.C. 683, 295 S.E.2d 394 (1982), discussed *infra* notes 145-151 and accompanying text, has been expressly overruled in *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983) (polygraph results never admissible; no exceptions).

139. See, e.g., *State v. Sauls*, 291 N.C. 253, 230 S.E.2d 390 (1976), *cert. denied*, (defendant not entitled to a new trial based upon newly discovered polygraph test, since such tests are inadmissible) 431 U.S. 916 (1977).

140. See, e.g., *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978); *State v. Jackson*, 287

of the efficacy of such tests."¹⁴¹ In addition, courts have refused to admit such evidence because it distracts the jury from the real issues before it and permits the defendant to have extrajudicial tests made without having to submit to a similar test by the prosecution.¹⁴² Despite these criticisms, some courts have allowed one exception to the general rule of inadmissibility: when a defendant voluntarily and knowingly enters into a valid stipulation concerning the admissibility of a lie detector test, the trial court has discretion to admit the results into evidence if the court finds that the examiner's qualifications and the conditions of test administration are acceptable.¹⁴³

Adopting a standard established in other jurisdictions,¹⁴⁴ the North Carolina Supreme Court in *State v. Meadows*¹⁴⁵ held that the parties involved must strictly comply with the provisions of the stipulation governing the admissibility of lie detector tests. In *Meadows* the State and defendant stipulated that defendant would submit to a polygraph examination and that the results would be admitted into evidence provided a number of conditions were met. One of the conditions was that the prosecuting witness would also "submit herself to a similar polygraph examination under the same terms, conditions and stipulations governing the defendant's examination"¹⁴⁶ and that her results would also be allowed into evidence. The stipulation further provided that the polygraph procedures, the wording of the test questions, and the examination conditions would be at the polygraphist's sole discretion. After testing the prosecuting witness, however, the polygraphist declared the results inconclusive because of an emotional upset caused by an encounter with defendant immediately before testing. The examiner therefore repeated the test, whereupon the witness "passed" the polygraph.¹⁴⁷

N.C. 470, 215 S.E.2d 123 (1975); *State v. Foye*, 254 N.C. 704, 120 S.E.2d 169 (1961); *State v. Fowler*, 29 N.C. App. 529, 225 S.E.2d 110 (1976).

141. *State v. Foye*, 254 N.C. 704, 708, 120 S.E.2d 169, 172 (1961).

142. *Id.* The court in *Foye* also noted that the results have been held inadmissible because "the lie detecting machine could not be cross-examined." *Id.*

143. *State v. Steele*, 27 N.C. App. 496, 500, 219 S.E.2d 540, (1975). Specifically, the court held that lie detector tests were admissible subject to the following qualifications: (1) that the county attorney, defendant and his counsel all sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the State. (2) that notwithstanding the stipulation the admissibility of the test results is subject to the discretion of the trial judge, i.e. if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence. (3) that opposing party should have the right to cross-examine the examiner respecting his qualifications, training, and conditions under which the test was taken, possibilities of error, and any other matter deemed pertinent, subject to the trial judge's discretion. (4) that the judge should instruct the jury that the evidence only indicates that at the time of the examination the defendant was not telling the truth. *Id.* See also *State v. Williams*, 35 N.C. App. 216, 214 S.E.2d 156 (1978). The North Carolina Supreme Court, however, did not hold polygraph examinations admissible under these specific qualifications until *State v. Milano*, 297 N.C. 485, 256 S.E.2d 154 (1976).

144. The court recognized *Chambers v. State*, 146 Ga. App. 126, 245 S.E.2d 467 (1978), *Butler v. Florida*, 228 S.E.2d 421 (Fla. Dist. App. 1969), and *People v. Reagan*, 395 Mich. 306, 235 N.W.2d 581 (1975).

145. 306 N.C. 683, 295 S.E.2d 394 (1982).

146. *Id.* at 685, 295 S.E.2d at 395.

147. *Id.*

The court held that in giving her the second examination, the polygraphist violated the provision of the stipulation that required that both defendant and prosecuting witness take a "similar polygraph examination under the same terms [and] conditions."¹⁴⁸ Strictly construing the terms, the court concluded that the stipulation requiring "similar tests," and "same conditions" meant that if one party was given two completed tests for whatever reason, the other party had to be given two tests at approximately the same time and place in the same manner by the same operator. Further, the stipulation granting the polygraphist sole discretion with regard to the manner in which the tests be conducted did not override the stipulation that the tests be "similar" and "under the same terms [and] conditions."¹⁴⁹

Although North Carolina courts have never before expressly required a strict compliance standard, they have indicated that such stipulations would be construed narrowly. Most notably, in *State v. Milano*¹⁵⁰ the supreme court held that polygraph results unfavorable to defendant but acquired pursuant to stipulation of admissibility could be admitted against defendant. Defendant was not entitled to enter into evidence the favorable results of a psychological stress evaluation, a test also designed to indicate the presence or absence of deception, however, because the stipulation did not by its terms cover the latter test.¹⁵¹ The implied requirement of strict compliance in *Milano* followed by the similarly expressed requirement in *Meadows* obviously indicates the court's desire to protect fully the interests of the stipulating parties. More importantly, though, the standard suggests the court's continuing skepticism of the trustworthiness of polygraph tests and consequent reluctance to find such evidence admissible.

2. Handwriting Comparison

Since the 1908 decision of *Martin v. Knight*¹⁵² North Carolina courts have allowed an opinion witness in cases involving handwriting comparisons to show both the disputed and genuine writings to the jury and explain the reasons for his opinion.¹⁵³ In *Martin* the court made it clear that even after comparison testimony was admitted, the jury would not be permitted to make its own comparison of the documents in the jury room;¹⁵⁴ the jury was to rely solely on what it heard and saw while the opinion witness testified. In 1913, however, the North Carolina legislature followed the *Martin* court's sugges-

148. *Id.* at 687, 295 S.E.2d at 397.

149. *Id.*

150. 297 N.C. 485, 256 S.E.2d 154 (1979).

151. *Id.* at 500, 256 S.E.2d at 162-63.

152. 147 N.C. 564, 61 S.E. 447 (1908). Prior to *Martin*, when the authenticity of a document was challenged the jury could not examine the documents either during or after the witness' testimony. See, e.g., *Fuller v. Fox*, 101 N.C. 119, 7 S.E. 589 (1888); *Outlaw v. Hurdle*, 46 N.C. (1 Jones) 150, 165 (1853) ("A jury is to hear the evidence but not see it").

153. 147 N.C. at 577-78, 61 S.E. at 452.

154. *Id.* at 579-80, 61 S.E. at 452. See *Nicholson v. Lumber Co.*, 156 N.C. 59, 72 S.E. 86 (1906); *Boyd v. Leatherwood*, 165 N.C. 614, 81 S.E. 1025 (1914).

tion and enacted G.S. 8-40¹⁵⁵ which allowed juries to compare documents for themselves. While it represented a definite step forward, the wording of the statute left unclear whether juries still had to hear opinion testimony before making a handwriting comparison. In *State v. LeDuc*¹⁵⁶ the supreme court finally addressed the question, and held that the statute does not prohibit handwriting comparisons by the jury without the aid of lay or expert opinion. In reaching its decision, the court reversed not only the lower court opinion in *LeDuc*,¹⁵⁷ but also an earlier court of appeals case¹⁵⁸ that had stated: "neither G.S. 8-40, nor our rules of evidence, permits the jury, unaided by competent opinion testimony to compare writings to determine genuineness."¹⁵⁹ The supreme court noted that "the statute does not mandate that writings be submitted *only* with evidence of witnesses; it merely states that writings and testimony may be submitted to the trier of fact as evidence of the authenticity of a contested document."¹⁶⁰

In view of the changing character of the average juror, the *LeDuc* decision was long overdue. The common law rule prohibiting jury comparison of handwriting without opinion testimony was a direct result of a period in which many jurors had little or no education. Certainly, increased education and common exposure has improved the ability of today's juror to make such comparisons. As the court noted, with the widespread use of credit cards and travelers' checks, merchants and others in the field of commerce are frequently confronted with the necessity of comparing signatures.¹⁶¹ In addition, the de-

155. N.C. GEN. STAT. § 8-40 (1981) states:

[I]n all trials in this State, when it may otherwise be competent and relevant to compare handwritings, a comparison of a disputed handwriting with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

North Carolina courts have interpreted this statute on several occasions. In *Fourth Nat'l Bank v. McArthur*, 168 N.C. 48, 84 S.E. 39 (1915), the new statute was held to allow a party to hand the jury the disputed document. The statute thus permitted independent examination, while the previous rule only allowed a witness to show the documents to the jury as he explained his testimony.

In *Newton v. Newton*, 182 N.C. 54, 108 S.E. 336 (1921), the court held that the statute changed the common law rule regarding permissible standards of comparison. The court concluded that under G.S. 8-40 testimony could be used to persuade the judge that "there is *prima facie* evidence . . . of the genuineness of writing admitted as a basis of comparison, and then the testimony of the witnesses and the writings . . . themselves are submitted to the jury." *Id.* at 55, 108 S.E. at 336.

The court in *Gooding v. Pope*, 194 N.C. 403, 140 S.E. 21 (1927), refused to interpret the statute restrictively, thereby allowing the jury to examine with a magnifying glass the handwriting on a contested receipt and on paper with genuine signatures.

156. 306 N.C. 62, 291 S.E.2d 607 (1982).

157. 48 N.C. App. 227, 269 S.E.2d 220 (1980).

158. *State v. Simmons*, 8 N.C. App. 561, 174 S.E.2d 627 (1970).

159. *Id.* at 563, 174 S.E.2d at 629.

160. 306 N.C. at 72, 291 S.E.2d at 613. To establish the new rule, the court also had to address common law rules of evidence that prohibited jury comparison of handwritings without aid of testimony. Rather than trying to distinguish past case law, the court simply explained that it possessed "the authority to alter judicially created common law when it deems it necessary in light of experience and reason." *Id.* at 73, 291 S.E.2d at 614 (quoting *State v. Freeman*, 392 N.C. 591, 594, 276 S.E.2d 450, 452 (1981)).

161. 306 N.C. at 73, 291 S.E.2d at 614.

cision reflects a natural (albeit slow) progression in the development of law governing handwriting comparisons. By enacting G.S. 8-40, the legislature took the first step in giving juries greater responsibility. Given the courts' growing confidence in the abilities of modern jurors, it was inevitable that the North Carolina courts would eventually vest juries with the power to compare handwriting samples without the aid of expert or lay opinion. The growing tendency in other jurisdictions to allow juries to make such comparisons unaided by opinion testimony also encouraged the North Carolina courts to change prior common law.¹⁶²

3. Fingerprints

When the State relies upon fingerprints found at the scene of a crime, there must be substantial evidence of circumstances from which the jury could find that the fingerprints could have been impressed *only* at the time the crime was committed.¹⁶³ If the State cannot present such evidence, it cannot withstand a motion to dismiss.¹⁶⁴ The court determines what evidence is substantial,¹⁶⁵ and the form of the evidence is immaterial. Acceptable evidence has included denials by the defendant that he has ever been on the premises,¹⁶⁶ voice identification by the victim,¹⁶⁷ and fruits¹⁶⁸ or instrumentalities¹⁶⁹ of the crime found in the defendant's possession. In *State v. Berry*¹⁷⁰ the North Carolina Court of Appeals considered whether testimony from the prosecuting witness that she did not know the defendant and had given no one permission to enter her house while she was away was sufficient to convict the defendant of breaking and entering.

In *Berry* the prosecuting witness testified that she had left her house for several hours and upon her return found the doors open and the window panes broken. A police officer found one identifiable latent print that he testified belonged to defendant. The court concluded that the fingerprint, when considered with the victim's testimony, was sufficient evidence to convict defendant: the victim's testimony was substantial evidence of the circumstances from which the jury could find that the fingerprint could have been impressed only at the time of the crime.¹⁷¹

In addition to her statements that she did not know defendant and that he

162. See, e.g., *Parker v. State*, 12 Md. App. 611, 280 A.2d 29 (1971); *Mitchell v. Mitchell*, 24 Wash. 2d 701, 166 P.2d 938 (1946); FED. R. EVID. 901(b)(3), CAL. EVID. CODE § 1417 (West 1966). But see *Clark v. State*, 114 So. 2d 197 (Fla. 1959).

163. *State v. Scott*, 296 N.C. 519, 251 S.E.2d 414 (1979); *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977); *State v. Miller*, 289 N.C. 1, 220 S.E.2d 572 (1975); *State v. Jackson*, 284 N.C. 321, 200 S.E.2d 626 (1973).

164. *State v. Miller*, 289 N.C. 1, 4, 220 S.E.2d 572 (1975).

165. *State v. Stephens*, 244 N.C. 380, 93 S.E.2d 431 (1956).

166. *State v. Miller*, 289 N.C. 1, 220 S.E.2d 572 (1975); *State v. Foster*, 282 N.C. 189, 192 S.E.2d 320 (1972).

167. *State v. Jackson*, 284 N.C. 321, 200 S.E.2d 626 (1973).

168. *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977).

169. *State v. Huffman*, 209 N.C. 10, 182 S.E. 705 (1935).

170. 58 N.C. App. 355, 293 S.E.2d 650 (1982).

171. *Id.* at 357, 293 S.E.2d at 652.

had no permission to enter her house, the prosecuting witness also stated that her children occasionally came home when she was not present.¹⁷² This fact was crucial to Judge Whichard's dissenting opinion, which stressed that the state's evidence did not exclude the possibility that defendant visited the house at the behest of the victim's children.¹⁷³ In considering this argument, the court examined two apparently conflicting North Carolina Supreme Court cases that concerned fingerprint evidence. In the first, *State v. Scott*,¹⁷⁴ the victim's niece lived in the house with him but left each morning for the day. Although she testified that to her knowledge defendant had never been in the house, the court held that the evidence of circumstances was inadequate to conclude that the prints could have been placed there only at the time of the crime.¹⁷⁵ In *State v. Tew*,¹⁷⁶ on the other hand, the court reached the opposite conclusion. The court in *Tew* based its decision on the grounds that the proprietor of a service station testified that she personally attended the station and that to her knowledge the defendant had never visited her station.¹⁷⁷

The dissent found *Scott* to be the controlling authority.¹⁷⁸ Judge Wichard argued that without evidence that the children had not granted defendant access, the State could not substantially exclude the possibility that defendant had visited the home with one of the children.¹⁷⁹ Relying on *Tew*, the majority found otherwise. At the heart of the majority decision was the belief that

"when the sole occupant of a house has testified that he or she does not know the defendant and to his or her knowledge the defendant has never been in his or her home, the State [need not] put on evidence from every person who might have brought a visitor to the house that he or she has not invited the defendant to the house."¹⁸⁰

The conflict between the majority and dissent demonstrates the underlying question presented in *Berry*: when defendant's fingerprints are the only evidence linking defendant to the crime, must all who have access to the scene of the crime testify about their acquaintance with defendant? The majority appears to suggest that a rule requiring testimony from persons other than the sole occupant would be too burdensome and would lead to abuse. Arguably, the majority has created a rule that is procedurally easy to apply, but may produce unjust results. If those who have access to a home are limited in number, as was the case in *Berry*, hearing testimony from all who have access could be easily required and possible injustice easily averted. Unfortunately, the rule in *Berry* fails to recognize this alternative.

172. *Id.* at 357, 293 S.E.2d at 651.

173. *Id.* at 359, 293 S.E.2d at 653 (Whichard, J., dissenting).

174. 296 N.C. 519, 251 S.E.2d 414 (1979).

175. *Id.* at 526, 251 S.E.2d at 419.

176. 234 N.C. 612, 68 S.E.2d 291 (1951).

177. *Id.* at 617-18, 69 S.E.2d at 295.

178. 58 N.C. App. 355, 358, 293 S.E.2d 650, 652 (Whichard, J., dissenting).

179. *Id.* at 359, 293 S.E.2d at 653.

180. *Id.* at 357, 293 S.E.2d at 652.

4. Scientific Proof

North Carolina courts generally find scientific methods of proof admissible when the accuracy and reliability of the process involved has been established and recognized by either judicial notice or to the satisfaction of the court through expert testimony.¹⁸¹ Following this rule, the North Carolina Supreme Court in 1981 in *State v. Temple*¹⁸² held that a dentist's expert testimony identifying bite marks on a murder victim's skin was admissible. The expert in *Temple* formed his opinion on the basis of a comparison between defendant's dental impressions from a plaster cast and the actual wound of the victim.¹⁸³ In *State v. Green*¹⁸⁴ the North Carolina Supreme Court not only reaffirmed this decision, but extended it to include a comparison between the defendant's dental impression and a photograph of the victim's wound.¹⁸⁵

Although the court had never addressed this specific issue, its decision to admit such evidence for comparison was a logical and predictable result. In an earlier decision, *State v. Hunt*,¹⁸⁶ the supreme court held "that a photograph of a shoe sole impression, when shown by extrinsic evidence to represent, depict or portray accurately the shoe sole print it purports to show, is admissible as substantive evidence."¹⁸⁷ At the time, the decision created an exception to the general rule in North Carolina that photographs are admissible only for the limited purpose of illustrating a witness' testimony and not as substantive evidence.¹⁸⁸ In 1981, however, the North Carolina General Assembly enacted G.S. 8-97,¹⁸⁹ allowing the introduction of photographs as substantive evidence. Given the *Temple* decision and the new statute, it would have been difficult, if not impossible, for the court to justify a refusal to compare dental impressions and a photograph of the wounds.

In addition, the court was probably persuaded to admit the evidence because this method of comparison¹⁹⁰ has been gaining judicial acceptance in

181. See, e.g., *State v. Powell*, 264 N.C. 73, 140 S.E.2d 705 (1965); H. BRANDIS, *supra* note 1, at § 86.

182. 302 N.C. 1, 273 S.E.2d 273 (1981). The *Temple* decision is significant because admissibility of evidence identifying the accused by his bite marks was first addressed in North Carolina in that case.

183. The expert concluded that defendant's teeth caused the bite marks found on the victim's body. 302 N.C. at 12, 273 S.E.2d at 280. On appeal, the supreme court rejected defendant's argument that the testimony was inadmissible because it was based on unreliable mathematical probability. The court relied upon the expert's years of practice and not upon mathematical probabilities. *Id.*

184. 305 N.C. 463, 290 S.E.2d 625 (1982).

185. Defendant had requested that the court reconsider its holding in *Temple* or distinguish it from the facts in *Green*.

186. 297 N.C. 447, 255 S.E.2d 182 (1979).

187. *Id.* at 451, 255 S.E.2d at 185. In *Hunt* the prosecution introduced photographs of shoe print impressions taken at the scene of the crime, and of impressions taken from shoes seized from defendant's home. The photographs were compared by an expert witness who noted the similarities between the two impressions.

188. See *Honeycutt v. Cherokee Brick Co.*, 196 N.C. 566, 146 S.E. 227 (1929). For a discussion on the early development of this rule in North Carolina, see Gardner, *The Camera Goes to Court*, 24 N.C.L. REV. 233 (1946).

189. N.C. GEN. STAT. § 8-97 (1981).

190. There are varying methods used by experts for bite mark identification. Apparently, the

other jurisdictions. Since the leading case of *People v. Marx*¹⁹¹ courts have recognized that bite mark identification, whether it entails a comparison of the defendant's dental impressions with photographs¹⁹² or casts¹⁹³ of the wound, is an applied scientific and professional technique.¹⁹⁴ After waiting so long to recognize photographs as substantive evidence, it is encouraging to note the North Carolina courts' ready acceptance of this new, but proven, scientific method.

5. Tape Recordings

Tape recordings, if related to otherwise competent evidence, are admissible if a proper foundation is laid for their admission.¹⁹⁵ The North Carolina Supreme Court enumerated the steps necessary for authentication of a tape recorded confession in *State v. Lynch*.¹⁹⁶ In *Lynch* the court specifically applied the steps necessary to lay a proper foundation for admission of a defendant's recorded confession or incriminating statements made to law enforcement officers. Eight years later, in *State v. Detter*,¹⁹⁷ it applied the same steps to authenticate a recorded conversation between a defendant and one who later became a witness for the State. In both instances, the *Lynch* requirements were applied to tape recordings made by witnesses with the aid or knowledge of law enforcement officers. In the recent case of *State v. Jarvis*,¹⁹⁸ however, the court of appeals concluded "that the requirements for admitting into evidence tape recordings made by witnesses after police inter-

expert in *Green* used the Sorup method. The expert makes a dental cast, applying printers ink to the incised surfaces and transferring the imprint onto transparent paper. This transparency is then superimposed upon a life-size photograph of the bite mark for comparison.

Similar to the Sorup method, the Furness method compares an enlarged photograph of the bite mark with a photograph of the front and top view of the casts of the defendant's dental impressions. Presumably, North Carolina courts would recognize this method as well. For a brief discussion on the different methods used for bite mark identification, see *State v. Sager*, 600 S.W.2d 541, 570 (Mo. App. 1980).

191. 54 Cal. App.3d 100, 126 Cal. Rptr. 350 (1975).

192. See, e.g., *People v. Watson*, 75 Cal. App. 3d 384, 142 Cal. Rptr. 134 (1977); *State v. Sager* 600 S.W.2d 541 (Mo. App. 1980), cert. denied, 450 U.S. 910 (1982); *People v. Smith*, 110 Misc. 2d 118, 443 N.Y.S.2d 551 (1981); *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979).

193. *Marx*, 54 Cal. App. 3d 100, 126 Cal. Rptr. 350 (1975).

194. *Id.* at 111-12, 126 Cal. Rptr. at 356.

195. *Levi v. Justice*, 27 N.C. App. 511, 219 S.E.2d 518 (1975).

196. 279 N.C. 1, 181 S.E.2d 561 (1971). According to *Lynch*, the trial court, upon objection to the introduction of the recording, must conduct a *voir dire* to determine (1) that the recorded testimony was legally obtained and otherwise competent; (2) that the mechanical device was capable of recording and that it was functioning properly at the time of the recording; (3) that the operator was competent and operated the machine properly; (4) that the recorded voices can be identified; (5) that the recording is accurate and authentic; (6) that the defendant's statement was recorded and no changes, additions or deletions have been made; and (7) that there was a proper custody and manner of preserving the recording since it was made. *Id.* at 17, 181 S.E.2d at 571. See also *State v. Detter*, 298 N.C. 604, 260 S.E.2d 567 (1979); *State v. Harmon*, 31 N.C. App. 368, 229 S.E.2d 233 (1976). The *Lynch* court further emphasized that a *voir dire* enables the trial judge to determine whether the tapes are audible, intelligible, or fragmentary and whether they contain improper or prejudicial matter. In addition, the *voir dire* provides counsel the opportunity to object to portions of the tape that he believes to be incompetent. 279 N.C. at 17-18, 181 S.E.2d at 571.

197. 298 N.C. 604, 260 S.E.2d 567 (1979).

198. 56 N.C. App. 678, 290 S.E.2d 228 (1982).

vention, should strictly apply to cases in which tape recordings are made by victims of an alleged crime before the police have intervened."¹⁹⁹

After extensive *voir dire*, the trial court in *Jarvis* allowed the State to put into evidence a tape recording allegedly made by the prosecuting witness while defendant was forcing her to have sexual intercourse. On appeal, defendant contended that the court erred in allowing the prosecuting witness to testify that the recording accurately reproduced everything that happened and that the recorder was capable of recording when she made the tape. Noting that the *Lynch* decision required the trial court to establish these facts in order to authenticate the tapes, the appellate court found that the prosecuting witness was the only person capable of producing evidence on these points. Thus, calling the defendant's contention "patently absurd,"²⁰⁰ the court upheld the admission of the testimony of the prosecuting witness.

The court of appeals in *State v. Shook*²⁰¹ also applied the *Lynch* requirements to determine whether defendant was prejudiced by admission of a tape recorded conversation between her and a vice squad detective. During examination, the detective revealed that large portions of the tapes were either inaudible or unintelligible. The trial court, after hearing one tape, asked him whether the recording would be audible if a different type of listening device were used. The appellate court concluded that the court's remark was prejudicial since it may have given the impression that the court believed the tape to be accurate.²⁰² Further, the court noted that since the publicity surrounding the Watergate hearings and particularly the infamous "gap" in the Nixon tapes, the public may be inclined to view such gaps or inaudible portions in a taped conversation between an accused person and others as evidence that incriminates the accused.²⁰³

Prior to *Shook*, a recording that was partially inaudible, or a recording that did not include an entire conversation, was generally admissible unless the unintelligible portions or admissions were so substantial as to render the recording as a whole untrustworthy as evidence.²⁰⁴ The *Shook* decision, however, seems to alter this proposition drastically by implying that any gaps make tape recordings automatically inadmissible by failing to meet the *Lynch* requirements.

H. Opinion Testimony

Unlike most jurisdictions, North Carolina has maintained the rule that prohibits opinion testimony on the ultimate issue to be decided by the jury.²⁰⁵

199. *Id.* at 681-82, 290 S.E.2d at 231.

200. *Id.* at 682, 290 S.E.2d at 231.

201. 55 N.C. App. 364, 285 S.E.2d 328 (1982).

202. *Id.* at 367, 285 S.E.2d at 330.

203. *Id.*

204. For cases upholding this general rule, see Annot., 57 A.L.R.3d 746, 752 (1979).

205. See, e.g., *Love v. Hall*, 227 N.C. 541, 42 S.E.2d 670 (1947) (error to admit direct testimony about amount of damages from breaking of contract); *State v. Carr*, 196 N.C. 129, 144 S.E. 698 (1928) (testimony of medical expert that he did not believe it possible for deceased to have

The state courts have reasoned that such testimony would usurp or invade the province of the jury.²⁰⁶ In recent years, however, commentators have attacked the rule as irrational,²⁰⁷ since the jury is as free to reject opinion testimony as any other testimony and usually resolves disputed questions of fact and opinion.²⁰⁸ Perhaps because of this criticism, North Carolina courts have partially circumscribed the traditional rules in this area.²⁰⁹ For example, an expert testifying without personal knowledge of the facts may now give more positive opinion about causation than was previously allowed.²¹⁰ In addition, admissibility of expert opinion no longer depends strictly upon whether it invades the jury's province; instead, it is evaluated primarily according to whether "the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact."²¹¹

The North Carolina Supreme Court in *State v. Hunt*²¹² has indicated, however, that these circumscriptions may not have gone far enough. The case involved a homicide, and a doctor testified that the body of the deceased did not bear the customary "hesitation marks" that he had personally observed in his examination of persons who had attempted suicide by slashing their wrists. Defendant appealed on the grounds that the expert witness had improperly answered the ultimate issue to be decided by the jury. Since the *Hunt* court concluded that the doctor had not stated an opinion on the ultimate issue, it had no reason to question the continuing validity of the ultimate issue rule. Nevertheless, the court implied that, given the opportunity, it would overturn the rule.

The growing acceptance of Federal Rule of Evidence 704 may be par-

fired gun that inflicted fatal wound invading the province of jury and therefore was reversible error); *State v. Metcalf*, 18 N.C. App. 28, 195 S.E.2d 592 (1973) (error to admit expert testimony that deceased could not have shot herself); *Daly v. Weeks*, 10 N.C. App. 116, 178 S.E.2d 30 (1970) (expert witness may not give opinion about amount of damages for breach of contract since it is ultimate issue to be determined by jury).

206. See, e.g., *State v. Fulton*, 299 N.C. 491, 263 S.E.2d 608 (1980) ("[o]rordinarily, opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury."); *State v. Summerlin*, 232 N.C. 333, 60 S.E.2d 322 (1950); *Marks v. Cotton Mills*, 135 N.C. 287, 47 S.E. 432 (1904); *State v. Williams*, 34 N.C. App. 408, 238 S.E.2d 668 (excluding psychiatrist's testimony about defendant's reliability as informant was proper since opinion invaded province of jury), *rev. denied and appeal dismissed*, 293 N.C. 743, 241 S.E.2d 72 (1977), *cert. denied*, 436 U.S. 906 (1978).

207. See 7 J. WIGMORE, EVIDENCE §§ 1921, 1929 (J. Chadbourne 1978); C. McCORMICK, LAW OF EVIDENCE § 12 (E. Cleary 2d ed. 1972); Blakey, *Examination of Expert Witnesses in North Carolina*, 61 N.C.L. REV. 2, 4 (1982).

208. H. BRANDIS, *supra* note 1, § 126, at 479-80.

209. See e.g., *State v. Miller*, 302 N.C. 572, 580, 276 S.E.2d 417, 422 (1981); *State v. Powell*, 238 N.C. 527, 530, 78 S.E.2d 248, 250-51 (1953).

210. See *State v. Atkinson*, 298 N.C. 673, 259 S.E.2d 858 (1979) (injuries and shock from assault contributed to death by heart attack); *State v. Dawson*, 278 N.C. 351, 180 S.E.2d 140 (1971) (blow from blunt instrumentality caused skull fracture); *Hollman v. Raleigh*, 273 N.C. 240, 159 S.E.2d 874 (1968) (electric shock caused blurred vision); *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E.2d 541 (1964) (whether accident was contributing cause of amnesia and depression); *State v. Knight*, 247 N.C. 754, 102 S.E.2d 259 (1958) (exertion, fear, and anger, rather than blows, caused death).

211. See *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978). See also *State v. Brown*, 300 N.C. 731, 268 S.E.2d 201 (1980); *State v. Sparks*, 297 N.C. 314, 255 S.E.2d 373 (1979).

212. 305 N.C. 238, 287 S.E.2d 818 (1982).

tially responsible for the court's position. That rule states that opinion testimony otherwise admissible cannot be excluded because it embraces "an ultimate issue to be decided by the trier of fact."²¹³ The abolition of the ultimate issue rule under rule 704, however, still does not admit all opinion testimony. Opinion must be offered through either a lay person with personal knowledge of the facts or through an expert with special qualifications, and it must be helpful to the trier of fact.²¹⁴ As the advisory committee for the Federal Rules of Evidence noted, the provisions offer ample assurance against the admission of opinion that would merely tell the jury which result to reach.²¹⁵ A rule more related to the underlying evidentiary policy is certainly attractive. The logical appeal of rule 704, coupled with the clear majority trend in its direction, is substantial incentive to both court and legislature to modernize this antiquated rule.

I. Introduction into Evidence

Although North Carolina courts often have been required to decide whether an object has been introduced into evidence,²¹⁶ they had never established an actual test for that determination until *State v. Hall*.²¹⁷ In an attempt to impeach the state's witness, defendant in *Hall* used a sweatshirt as an exhibit. During cross-examination defendant's counsel first questioned the witness as to the colors of the sweatsuit allegedly worn by defendant at the time of the crime. He then handed a sweatsuit to the witness and asked him to describe its colors. The suit was never given to the jury. The trial court concluded that defendant had offered the suit into evidence and therefore lost his right to make the final closing argument²¹⁸ under rule 10 of the Superior and District Courts Rules.²¹⁹

The court of appeals held that the trial court's refusal to allow defendant to argue last was reversible error since he had not in fact put the suit into evidence.²²⁰ It concluded that defendant did "not offer the sweatsuit for the purpose of impeachment but attempted to impeach the witness by cross-exam-

213. FED. R. EVID. 704.

214. FED. R. EVID. 701 & 702.

215. FED. R. EVID. 704 advisory committee notes, 56 F.R.D. 183, 289 (1972).

216. See, e.g., *State v. Knight*, 261 N.C. 17, 134 S.E.2d 101 (1964) (when defendant had prosecuting witness identify television interview he had given, and then showed interview to jury for purpose of impeaching, defendant was offering interview into evidence). *State v. Baker*, 34 N.C. App. 434, 238 S.E.2d 648 (1977) (defendant introduced picture into evidence when State witness identified it on cross-examination and defendant made motion to introduce it into evidence).

217. 57 N.C. App. 561, 291 S.E.2d 812 (1982).

218. *Id.* at 560, 291 S.E.2d at 813.

219. Rule 10, General Rule of Practice for the Superior and District Courts in North Carolina provides:

In all cases, civil or criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him. If a question arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final.

220. 57 N.C. App. at 565, 291 S.E.2d at 815.

ining him as to the sweatsuit.”²²¹ To explain the fine line of distinction, the court for the first time described the test for determining whether an object has been placed into evidence. The proper test, according to the court, is whether a party has offered the object either as substantive evidence or as evidence “that the jury may examine . . . and determine whether it illustrates, corroborates, or impeaches the testimony of a witness.”²²²

In view of the prior seemingly inconsistent decisions in North Carolina,²²³ this expressed test is long overdue. As North Carolina courts have applied different standards to determine whether an exhibit has been admitted, the *Hall* test should finally end the confusion.

ROBERT M. DIGIOVANNI
LEIGH L. PURYEAR

221. *Id.* at 564, 291 S.E.2d at 814.

222. *Id.*

223. The courts have been inconsistent in their decisions regarding the jury's examination of the exhibit. *See, e.g.*, *State v. Spillars*, 280 N.C. 341, 185 S.E.2d 881 (1972) (when a document is admitted, it is presumed that its contents are made known to the jury as long as the jury is in the courtroom); *Pence v. Pence*, 8 N.C. App. 484, 174 S.E.2d 860, *cert. denied*, 277 N.C. 111, — S.E.2d — (1970) (when defendant offered medical records as corroboration of her contentions about her medical treatment, judge told jury it was not necessary to read the exhibit).

VIII. FAMILY LAW

A. The Parent-Child Relationship

1. Termination of Parental Rights

"A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one."¹ It is not surprising, therefore, that there has been much litigation concerning the interpretation of North Carolina's statute providing for the termination of parental rights.² In *In re Moore*³ the North Carolina Supreme Court focused upon the portion of the statute allowing termination of parental rights because of neglect. Mrs. Moore's twin children had been placed in foster homes in the mid-1970s after the Department of Social Services (DSS) alleged neglect. Mrs. Moore visited the children several times in those years, but during a three-year period there were no visits to the foster homes nor any communication with the children at all. Mrs. Moore at no time paid anything for the cost of the children's foster care.

While the court found that the grounds for termination of parental rights had been met under G.S. 7A-289.32(2),(3), and (4),⁴ its treatment of the neglect aspect of the case is most noteworthy, if only for the confusion it creates. Under G.S. 7A-517(21) a child is neglected if he or she does not receive proper care, discipline, supervision, or medical treatment.⁵ The court found that while

1. *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 27 (1981).

2. N.C. GEN. STAT. §§ 7A-289.22 to -289.34 (1981 & Supp. 1982). See, e.g., *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18 (1981) (limited constitutional right to appointed counsel in termination hearings). But see *In re Ferguson*, 50 N.C. App. 681, 274 S.E.2d 879 (1981) (no right to jury trial in termination hearings); *In re Biggers*, 50 N.C. App. 332, 274 S.E.2d 236 (1981) (statute not unconstitutionally vague).

N.C. GEN. STAT. § 7A-289.32, which defines six grounds for the termination of parental rights states, in part:

The court may terminate the parental rights upon a finding of one or more of the following:

- (2) The parent has abused or neglected the child. The child shall be deemed to be abused or neglected if the court finds the child to be an abused child within the meaning of G.S. 110-117(1)(a), (b), or (c), or a neglected child within the meaning of G.S. 7A-278(4).
- (3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.
- (4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

3. 306 N.C. 394, 293 S.E.2d 127 (1982).

4. *Id.* at 404-05, 293 S.E.2d at 132-33. The court also affirmed that these statutory grounds were not unconstitutionally vague or overbroad.

5. The statute specifies that neglect should be defined according to N.C. GEN. STAT. § 7A-278(4) (1969), but this section was superseded by N.C. GEN. STAT. § 7A-517(21) (1979):

Neglected Juvenile. — A juvenile who does not receive proper care, supervision, or disci-

the children were in her custody, Mrs. Moore failed to care properly for them, and after they were placed under DSS supervision she made little effort to visit or provide for them.⁶ Justice Carlton's dissent, however, noted that the only neglect revealed by the record had occurred almost five years before the petition to terminate was filed. Carlton based his dissent upon the premise that the statutory provision refers to neglect that occurred "within a reasonable period prior to the filing of the petition to terminate."⁷

The court of appeals in a subsequent case, *In re Warren*,⁸ carried the majority's reasoning in *Moore* to an extreme by holding that "DSS presented sufficient grounds for terminating parental rights by merely showing that the twins had earlier been adjudicated to be neglected."⁹ Although the court based its holding partially upon *Moore*, the majority in *Moore* never discussed the issue of when neglect must have taken place, much less whether a prior adjudication of neglect operates as an estoppel as to the issue of neglect.

Since in both *Moore* and *Warren* there were other grounds upon which a court could base a finding that parental rights should be terminated, the courts did not have to justify their holding solely on the issue of prior neglect. But the language in *Warren* concerning this matter raises serious statutory and constitutional questions. First, it is doubtful that the legislature intended to allow courts to terminate parental rights because of a parent's neglect in the distant past. Justice Carlton argues this point convincingly in his dissent in *Moore*.¹⁰ Second, it is doubtful that the *Warren* interpretation could withstand a constitutional attack on due process grounds. For the neglect to have any rational relation to the state's interest in terminating parental rights, it must have occurred within a reasonable time of the proceedings seeking to

pline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

6. Abandonment is clearly a part of "neglect" as well, according to the definition of a neglected child in N.C. GEN. STAT. § 7A-517(21) (1979). See *In re Apa*, 59 N.C. App. 322, 296 S.E.2d 811 (1982); *In re Smith*, 56 N.C. App. 142, 287 S.E.2d 440 (1982).

7. 306 N.C. at 409, 293 S.E.2d at 135. He added that any other interpretation would be unconstitutional on due process grounds. If the "reasonable time period" test were not applied, it would be questionable whether the purpose of the statute—to remove neglected children from harmful parents—would be carried out. The state could terminate parental rights at any time; even if the neglect occurred many years before the petition to terminate. *Id.* at 409-410, 293 S.E.2d at 135-36.

8. No. 8229DC505 (N.C. App. Dec. 7, 1982) (unpublished opinion).

9. *Id.* at 6.

10. Justice Carlton stated in *Moore*:

[A] parent who might be neglectful as contemplated by the statute, to a one-year old child resulting from that parent's alcoholism, might well be reformed and be capable of becoming a model parent several years later. In such a case, it would be surely unjust to allow that parent's parental rights to be terminated some four or five years later on the basis of his or her prior conduct. In this example, if the DSS had received custody of the child at the time the parent was neglectful due to his or her alcoholism and had not instituted an action for termination of parental rights due to the resulting neglect within a reasonable time after receiving custody, then I do not believe that this statutory ground should have any application whatsoever to a later proceeding to terminate parental rights.

306 N.C. at 409, 293 S.E.2d at 135 (Carlton, J., dissenting).

terminate these rights.¹¹ The supreme court should reconsider Justice Carlton's dissent in *Moore* and hold that for purposes of G.S. 7A-289.32(2), the neglect must have occurred within a reasonable period prior to the filing of the petition to terminate.¹²

Another ground for termination of parental rights is willfully leaving a child in foster care for more than two years without showing positive response to the diligent efforts of social workers to correct the conditions that make the parent unfit to be a custodian.¹³ In *re Wilkerson*¹⁴ required the court of appeals to interpret this portion of the termination statute. First, the entrusting of the child to foster care must be willful. This does not mean that the parent must desire that the child remain in foster care; rather, the parent must take some action—or willfully abstain from some action—that causes the child to remain in foster care. In *Wilkerson* the father was employable but failed to obtain regular employment sufficient to support his child. Similarly, the father did not take advantage of alcohol counseling that was made available to him. The court held that “by failing, for more than six years, to take steps to become responsible so as to be able to remove [their son] from foster care, respondents clearly fulfilled the willfulness requirement.”¹⁵ Second, there must be diligent efforts on the part of social workers to improve the familial situation. These efforts must continue regularly over the two-year statutory period, and must include treatment of the problems that led to the initial withdrawal of custody, as well as specific suggestions regarding how custody may be regained.¹⁶ Finally, there must be a lack of progress over the two-year period. This requirement means that the parent must have failed to comply with the specific suggestions made by the social workers or to make other significant improvements in the conditions that caused the child to be removed from his or her custody.¹⁷

Another ground for terminating parental rights is the failure of a parent to pay a reasonable portion of the child's foster care costs for six months prior to the filing of the petition.¹⁸ In *re Biggers*,¹⁹ a 1981 court of appeals case,

11. *Id.* at 409, 293 S.E.2d at 136.

12. It is important to note that the majority in *Moore* neither accepted nor rejected Justice Carlton's argument on this issue. It simply held that there was sufficient evidence to uphold the finding of neglect. *Id.* at 404-05, 293 S.E.2d at 132-33.

13. N.C. GEN. STAT. § 7A-289.32(3) (1981).

14. 57 N.C. App. 63, 291 S.E.2d 182 (1982).

15. *Id.* at 68, 291 S.E.2d at 185.

16. *Id.* at 69, 291 S.E.2d at 185. In this case, the social workers arranged home visits and made available parenting programs, psychological therapy, and alcoholic rehabilitation. They also encouraged a strengthening of the relationship between parent and child. Their efforts were continuous throughout the six-year period the child was in foster care. *Id.*

17. *Id.* Mrs. Wilkerson failed to attend the parenting classes, psychological therapy, and alcoholic rehabilitation. Mr. Wilkerson enrolled in an alcohol rehabilitation program but left without finishing it. Both parents showed a lack of interest in visiting the children regularly and did not appreciate the efforts of the social worker in this area. *Id.* at 67, 291 S.E.2d at 184. For other 1982 cases in which G.S. § 7A-289.32(3) was used to terminate parental rights, see *In re Moore*, 306 N.C. 394, 293 S.E.2d 127 (1982); *In re Burney*, 57 N.C. App. 203, 291 S.E.2d 177 (1982); *In re Smith*, 56 N.C. App. 142, 287 S.E.2d 440 (1982).

18. N.C. GEN. STAT. § 7A-289.32(4) (1981).

19. 50 N.C. App. 332, 274 S.E.2d 236 (1981).

made clear that in determining what a "reasonable" amount is, the judge must consider both "the amount of support necessary to 'meet the reasonable needs of the child'" and "the relative ability of the parties to provide that amount."²⁰ This consideration of earning capacity was the focus of *In re Bradley*.²¹ Mr. Bradley, a prisoner on work release, contributed to his children's care until he lost his work release status as punishment for returning intoxicated to prison. The court stated:

Where, as here, the parent had an opportunity to provide for some portion of the cost of care of the child, and forfeits that opportunity by his or her own misconduct, such parent will not be heard to assert that he or she has no ability or means to contribute to the child's care and is therefore excused from contributing any amount.²²

Although Judge Becton's dissent did not challenge the idea that potential earning capacity should be considered in determining "ability to pay," it did suggest that the nonpayment must be "willful."²³ In other words, the state must prove that the parent has *intentionally* forfeited his potential earning capacity before that capacity can be considered as part of his ability to pay, a level of proof not met in *Bradley*. Becton's argument is especially persuasive when one considers that prison officials have broad discretion in granting or denying work release status. Prisoners are entitled to very limited due process rights in the disciplinary and classification hearings that control work release status. When and if work release privileges are revoked, the inmate has no means with which to support his family. Therefore, the court should make an independent determination whether the inmate has *intentionally* forfeited his potential earning capacity in these situations.

2. Adoption

One of the legislative policies declared by the General Assembly in the Termination of Parental Rights Act is to provide a permanent plan of care for children.²⁴ This policy favors a stable, permanent home situation for a child rather than a series of foster home placements. To pursue this purpose, the legislature added two important sections to the Act in 1982.²⁵ Together, these sections provide that after parental rights have been terminated, the DSS or licensed child-placing agency must make diligent efforts to place the child for adoption. Until the child has been adopted, the judge must hold periodic reviews every six months to determine whether "every reasonable effort is being

20. *Id.* at 341, 274 S.E.2d at 242.

21. 57 N.C. App. 475, 291 S.E.2d 800 (1982).

22. *Id.* at 479, 291 S.E.2d at 800.

23. *Id.* at 481, 291 S.E.2d at 804 (Becton, J., dissenting).

24. N.C. GEN. STAT. § 7A-289.22(2) (1981) states:

(2) It is the further purpose of this Article to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severance of a relationship with biological or legal parents.

25. For the wording of these sections, see *infra* note 26.

made to provide for a permanent plan."²⁶ The judge will either affirm the adequacy of the steps taken, or require specific additional steps to be taken by the DSS or licensed child-placing agency. In this way, early adoption is encouraged.²⁷

Judicial encouragement of adoption in 1982 was also evident in *Adoption of Kasim*.²⁸ In that case, the husband and wife separated after the filing of their adoption petition, and the husband withdrew from the petition. At this point, the natural mother attempted to withdraw her consent to give the child up for adoption. The court held that once the six-month statutory period had passed, the right of the natural parents to revoke their consent to adoption terminated. Thus, the natural mother had no right to intervene in the adoption proceeding.²⁹ The court also ruled that since a single parent can adopt in North Carolina, the withdrawal of one adoptive parent from the petition does not automatically invalidate the petition.³⁰ The court of appeals emphasized that the trial court had wide discretion in deciding whether to dismiss the petition. The key issue in such a determination should be what action would be in the best interest of the child.³¹

3. Other Developments

The question arose in *Wake County v. Townes*³² whether a defendant in a civil paternity suit is constitutionally entitled to counsel to preserve his due process rights. While the trial court ruled that there was no constitutional right to counsel in a civil paternity suit, the court of appeals reversed and held that there was an absolute right to counsel in such hearings.³³ The North Carolina Supreme Court took an intermediate view, and applied a case-by-

26. N.C. GEN. STAT. § 7A-289.31(c)(1) (Interim Supp. 1982) reads in part:

(c1) Should the court issue an order terminating the parental rights of a parent, the court shall schedule a review hearing to be conducted within six months after the entry of the order terminating parental rights. The purpose of the review is to ensure that every reasonable effort is being made to provide for a permanent plan for the child which is in the best interest of the child.

N.C. GEN. STAT. § 7A-289.35(a) (Interim Supp. 1982) provides that these reviews shall be continued "at least every six months thereafter until the child has been placed for adoption."

27. The North Carolina Court of Appeals has made it clear that the Department of Social Services has wide discretion in overseeing and supervising the adoption of minor children in its care. In *Jenkins v. Craven County Dept. of Social Services*, No. 8135C1088 (N.C. App. Dec. 21, 1982) (unpublished opinion), the court said, "[The Department of Social Services] must be given the liberty to make the proper placement in keeping with the best interests of these children. This decision should normally be made by the Department and while reviewable by the courts, must be presumed to have been made in good faith."

28. 58 N.C. App. 36, 293 S.E.2d 247 (1982).

29. *Id.* at 40, 293 S.E.2d at 250. The court cited N.C. GEN. STAT. § 48-11 (1976) for this finding, and stated, "The purpose of this statute seems obvious: to give stability to the adoptive process." *Id.*

30. 58 N.C. App. at 42, 293 S.E.2d at 247. This result holds true even though the spouse must join the action if the petitioner for adoption has a spouse competent to join in the petition. *Id.* at 41, 293 S.E.2d at 251. In this case, however, the husband withdrew because he and his wife were separating and in the process of divorce.

31. *Id.* at 42, 293 S.E.2d at 251.

32. 306 N.C. 333, 293 S.E.2d 95 (1982).

33. *Id.* at 335, 293 S.E.2d at 97.

case test³⁴ similar to the test enunciated by the Supreme Court in *Lassiter v. Department of Social Services*.³⁵ This test requires the trial judge to consider the complexity of the particular issues and evidence to be presented, and the ability of the defendant to conduct his own defense. If fundamental fairness requires that he be provided counsel, the judge must so hold.³⁶

B. Separation Agreements

The court of appeals held in *Henderson v. Henderson*³⁷ that a separation agreement adopted by the court is enforceable by civil contempt, even if the terms of the agreement provide that the alimony provisions are not modifiable. Normally, a separation agreement is either "adopted" (meaning the agreement loses its contractual nature, becoming an order of the court which is both modifiable and enforceable by contempt) or merely "approved" (meaning the agreement is not modifiable without the consent of the parties, and is enforceable only as an ordinary contract).³⁸ In *Henderson* the trial judge expressly adopted the agreement as a court order, but the terms of the agreement specifically provided that the alimony provisions were nonmodifiable. After defendant husband had defaulted on alimony payments, plaintiff brought an action for civil contempt. Defendant argued that because the agreement provided for nonmodifiable alimony payments and contemplated a full and final settlement, the court could not enforce the provisions through civil contempt proceedings.³⁹ The court refused to accept this argument, holding that "it is not the intent of the parties, but the intent of the judges [in choosing to adopt or approve the agreement] which controls."⁴⁰ The court further stated that the questions of enforcement and modification were separate determinations.⁴¹

34. *Id.*

35. 452 U.S. 18 (1981). In *Lassiter*, a North Carolina case concerning the right to counsel in proceedings for the termination of parental rights, the United States Supreme Court held that the court must appoint counsel to indigents in these proceedings if it would be necessary under the totality of the circumstances to ensure fundamental fairness. *Id.* at 32-33. North Carolina has since provided by statute that all indigent persons must be provided counsel for these proceedings. See N.C. GEN. STAT. § 7A-289.30(a)(1) (1981).

36. 306 N.C. at 340-41, 293 S.E.2d at 100. The court added that the presumption is that the defendant is not entitled to the appointment of counsel in a proceeding which does not present an immediate threat to personal liberty. *Id.* at 335-36, 293 S.E.2d at 97-98. This presumption, however, must be taken in light of the court's earlier explanation of due process and fundamental fairness:

[D]ue process *presumptively* requires the appointment of legal counsel to represent an indigent defendant *if* his *actual* imprisonment, or comparable confinement, is a likely result in the *present* proceeding concerned. [citations omitted]. This essential guarantee of fundamental fairness means quite simply that an indigent person cannot be sent to jail, in any later proceeding to enforce the support order, unless he had the benefit of legal assistance and advocacy at the proceeding in which paternity was determined.

Id. (emphasis in original).

37. 55 N.C. App. 506, 286 S.E.2d 657, *aff'd*, 307 N.C. 401, 298 S.E.2d 345 (1983).

38. *Id.* at 510-11, 286 S.E.2d at 661.

39. *Id.* at 509, 286 S.E.2d at 660.

40. *Id.* at 511, 286 S.E.2d at 661.

41. *Id.* at 512, 286 S.E.2d at 662. The court noted that it was possible to enforce a nonmodifiable separation agreement by civil contempt if the dependent spouse had first obtained a decree of specific performance. This procedure was first upheld in North Carolina in *Moore v. Moore*, 297

Although an adopted separation agreement is ordinarily modifiable, there are situations in which it may not be, and an agreement of nonmodifiability falls within that class.⁴² Thus, once it has been determined that the lower court adopted a separation agreement, (and adoption is normally presumed), the agreement is enforceable by civil contempt, notwithstanding provisions in the agreement for nonmodifiable property settlements or alimony.⁴³ This result furthers the important public policy of aiding the enforceability of alimony payments.⁴⁴

*Harris v. Harris*⁴⁵ considered the question whether the court could order a husband to assign his army retirement pay to comply with an order of specific performance in a separation agreement. The court held that according to federal caselaw⁴⁶ the Army retirement pay could not be assigned or garnished.⁴⁷ Although Mrs. Harris could sue for arrearages, the court could not order an assignment of the retirement pay. After this case was decided, however, Congress passed the Uniformed Services Former Spouses' Protection Act, effective February 1, 1983, allowing state courts to garnish up to fifty percent of military retirement pay, subject to certain limitations.⁴⁸ Presumably Mrs. Harris can now obtain a court order to garnish her husband's pay prospectively.⁴⁹ Nevertheless, the impact of this change in federal law is minimal in North Carolina, since the Equitable Distribution Act⁵⁰ specifically excludes retirement rights from marital property available for distribution.⁵¹ When a valid

N.C. 14, 252 S.E.2d 735 (1979), and discussed further in *Williford v. Williford*, 56 N.C. App. 610, 289 S.E.2d 907 (1982). The *Henderson* court said, "[I]t seems appropriate to recognize a distinction between modification and enforcement of these judgments and to permit a court to do directly what it may do indirectly." 55 N.C. App. at 512, 286 S.E.2d at 662.

42. 55 N.C. App. at 512-13, 286 S.E.2d at 662. Also, if the property settlement and alimony payments are mutually dependent, the alimony is not modifiable. See *White v. White*, 296 N.C. 661, 252 S.E.2d 698 (1979).

43. 55 N.C. App. at 512-13, 286 S.E.2d at 662.

44. *Moore v. Moore*, 297 N.C. 14, 252 S.E.2d 735 (1979), was the most important North Carolina case simplifying the enforceability of alimony payments. *Moore* provided that even if the separation agreement is only "approved" by the court, the dependent spouse can obtain a decree of specific performance on the contract and then file a civil contempt suit if the supporting spouse refuses to comply. In reaching this result, the *Moore* court stressed the importance of an adequate remedy enabling the dependent spouse to enforce the separation agreement.

45. 58 N.C. App. 175, 292 S.E.2d 775 (1982).

46. See *McCarty v. McCarty*, 453 U.S. 210 (1981) (holding that military retirement pay is a personal entitlement and not subject to property division upon divorce).

47. 58 N.C. App. at 179-80, 292 S.E.2d at 778.

48. 10 U.S.C. § 1408 (1982). That section reads in pertinent part:

(d)(1) After effective service on the Secretary concerned of a court order with respect to the payment of a portion of the retired or retainer pay of a member to the spouse or former spouse of the member, the Secretary shall, subject to the limitation of this section, make payments to the spouse or former spouse in the amount of the disposable retired or retainer pay of the member specifically provided for in the court order

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

49. Mrs. Harris is presently attempting to obtain such an order. *Law Seeks to Give Military Ex-wives a Fairer Shake*, Raleigh News and Observer, Feb. 9, 1983, at 14A, col. 1.

50. N.C. GEN. STAT. § 50-20 (Cum. Supp 1981).

51. *Id.* at § 50-20(b)(2) ("Vested pension or retirement rights and the expectation of non-vested pension or retirement rights shall be considered separate property.").

separation agreement specifically awards a spouse a portion of military pay, the court can order such pay garnished and require that up to fifty percent be paid directly to the dependent spouse.⁵²

In *Harris v. Harris*,⁵³ the court of appeals held that prior enforcement of a child support provision in a separation agreement did not prevent the trial court from making a later award of alimony. Relying upon the language of the contract itself,⁵⁴ the court held that the separation agreement releasing the husband from his marital support obligation, did not bar the defendant from suing for alimony pursuant to a later breach of the contract.⁵⁵ The court stated that the effect of the alimony award was to rescind the agreement, but that it did not eradicate the debt that arose from plaintiff's failure to meet the child support obligations established in the agreement.⁵⁶ Thus, although the defendant wife was obligated to restore to the plaintiff husband any benefits she had received under the contract, a prior child support judgment for plaintiff's debt was not a component of that restitution.⁵⁷

The appeals court also held that if an agreement to rescind a separation agreement is supported by the consideration of a release of a spouse's parental rights, the attempted rescission is void as against public policy. In *Foy v. Foy*⁵⁸ plaintiff sued for enforcement of a separation agreement in which defendant had agreed to pay plaintiff \$10,000 in monthly installments. Defendant offered as a defense an agreement signed by the parties in which plaintiff agreed to relinquish her rights under the agreement in exchange for defendant's waiver of his parental rights in his adopted son.⁵⁹ The court held that relinquishment of parental rights could not constitute valid consideration since such an agreement would deprive the court of its power to act in the best interests of the child.⁶⁰

52. 10 U.S.C. § 1408 (1982).

53. 58 N.C. App. 314, 293 S.E.2d 602 (1982).

54. Paragraph 19 of the separation agreement provided:

Breach. *If the Husband breaches any provision of this agreement*, the Wife shall have the right, at her election, to sue for damages for such breach, rescind this agreement, and maintain an action for separation or *alimony pendente lite or permanent*, or seek other remedies or relief as may be available to her.

Id. at 317, 293 S.E.2d at 604 (emphasis added by the court).

55. 58 N.C. App. at 318, 293 S.E.2d at 605. The court also referred to N.C. GEN. STAT. § 50-16.6(b) (1976) which provides: Alimony, alimony pendente lite, and counsel fees may be barred by an express provision of a valid separation agreement so long as the agreement is performed. 58 N.C. App. at 317, 293 S.E.2d at 604-05.

56. *Id.*

57. *Id.* The court further held that since the consideration given by the plaintiff husband to the defendant wife in exchange for the release of her marital rights was nominal, there was no benefit for her to return as restitution.

58. 57 N.C. App. 128, 290 S.E.2d 748 (1982).

59. *Id.* at 130-31, 290 S.E.2d at 749-50.

60. *Id.* at 131, 290 S.E.2d at 750. The case exemplifies the general judicial principle that parents cannot deprive the State of jurisdiction over the welfare of the child. See, e.g., *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963); *Hinkle v. Hinkle*, 266 N.C. 189, 146 S.E.2d 73 (1966). See generally 2 R. LEE, FAMILY LAW § 151 (4th ed. 1980).

C. Child Support and Custody

In *Walker v. Walker*⁶¹ the court of appeals held that the resumption of periodic sexual relations between the parties to a divorce will not automatically void a judgment for child support.⁶² The North Carolina courts in prior cases have held that the resumption of sexual relations renders alimony awards void⁶³ and invalidates the executory portions of a separation agreement⁶⁴—including the provisions governing child support.⁶⁵ Nevertheless, in *Walker* the court drew a distinction between agreements for child support and judgments for child support.⁶⁶ Finding the case of *Jackson v. Jackson*⁶⁷ controlling, the court affirmed the lower court decision denying defendant's motion to have the child support judgment declared void. By refusing to hold judgments for child support void due to resumption of sexual relations by the parents, the court recognized that the needs of the children remain unchanged by the temporary resumption of marital relations.⁶⁸

The same policy considerations hold true when the resumption of sexual relations occurs after the execution of a separation agreement—the needs of the children remain unchanged. Since the cases are analytically indistinguishable, the refusal of the court to extend the reasoning invalidating alimony awards and child support provisions when the parties resume sexual relations to cases involving judgments for child support denotes an implicit criticism of that line of cases and casts doubt on their continued authoritative value.

The court of appeals also recommended the use of standardized formulas for determining the amount of child support to be provided by each parent. In *Hamilton v. Hamilton*⁶⁹ the court expressly recognized the efficacy of using standard formulas in making just apportionments of the support burden,⁷⁰ and implied that a "substantial departure" from the standard award must be supported by specific factual findings justifying that departure.⁷¹ The court

61. 59 N.C. App. 485, 297 S.E.2d 125 (1982).

62. *Id.* at 489, 297 S.E.2d at 128.

63. *Id.* at 487, 297 S.E.2d at 127. See *Hester v. Hester*, 239 N.C. 97, 79 S.E.2d 248 (1953); *Pennington v. Pennington*, 42 N.C. App. 83, 255 S.E.2d 569 (1979); *O'Hara v. O'Hara*, 46 N.C. App. 819, 266 S.E.2d 59 (1980).

64. *Walker*, 59 N.C. App. at 487, 297 S.E.2d at 127. See, e.g., *Murphy v. Murphy*, 295 N.C. 390, 245 S.E.2d 693 (1978); *Moore v. Moore*, 185 N.C. 332, 117 S.E. 12 (1923).

65. See *Campbell v. Campbell*, 234 N.C. 188, 66 S.E.2d 672 (1951).

66. 59 N.C. App. at 488, 297 S.E.2d at 127.

67. 14 N.C. App. 71, 187 S.E.2d 490 (1972). In *Jackson* the court's statement that a judgment for child support would not be rendered void by the temporary reconciliation of the husband and wife was dictum. The court had already reversed the lower court decision on the ground that there was insufficient evidence of defendant's ability to pay child support.

68. 59 N.C. App. at 489, 297 S.E.2d at 128.

69. 57 N.C. App. 182, 290 S.E.2d 780 (1982).

70. *Id.* at 183-84, 290 S.E.2d at 781. Nevertheless, the court refused to apply a formula in the instant case because the formulas had not been introduced into evidence at trial and, therefore, could not be considered on appeal.

71. 57 N.C. App. at 184, 290 S.E.2d at 781. The court stated:

In cases where the trial judge determines, in his discretion, that considerations of fairness dictate a substantial departure from the standard award, we would recommend strongly that the court set forth specific findings of fact in support thereof. This would provide

approved the use of formulas on the grounds that such formulas lend consistency to child support awards.⁷² Nevertheless, any formula used in determining the level of child support must take into account the resources and earnings of both parents and the needs of the children.⁷³ In *Fuchs v. Fuchs*, however, the North Carolina Supreme Court had expressly disapproved of the use of a pro rata formula in setting child support payments.⁷⁴ Nevertheless, the holding in *Fuchs* may not accurately predict the supreme court's ultimate disposition on the use of formulas in determining child support, since in *Fuchs* the needs of the children had not been considered by the lower court.⁷⁵

In a case of first impression, the court of appeals upheld a lower court order requiring a supporting parent to maintain life insurance policies with his children as beneficiaries. In *Loeb v. Loeb*⁷⁶ the court held that when a father does not dispute an order requiring him to maintain life insurance policies with his children as beneficiaries, a mother cannot challenge that order.⁷⁷ The court in *Loeb* focused upon the father's terminal illness and the need to secure support for his children should he die prematurely.⁷⁸ While this reasoning contradicts the general common-law proposition, which is effective in North Carolina, that a father's duty of support terminates at his death, several states have upheld divorce decrees requiring the father to maintain life insurance policies naming his children as beneficiaries for support and maintenance during their minority.⁷⁹ Further, by limiting the decision to those cases in which the father consents to the maintenance of a life insurance policy, the court avoided the contention that the father is being required to build an estate for

appellate courts with something more than the skeletal findings and conclusions on which we often must base a review of support orders.

72. Those courts approving the use of formulas have generally relied upon this ground. See *Bragdon v. Bragdon*, 393 So. 2d 73, 75 (Fla. App. 1981) (use of formula is appropriate to set general guidelines so that consistency and uniformity of support can be achieved); *Smith v. Smith*, 290 Or. 675, 680, 626 P.2d 342, 345 (1981) (use of formula is proper "to the end that similar cases will be treated similarly"). But see *Lindsey v. Lindsey*, 131 So. 2d 601, 602 (Ala. Civ. App. 1978) (amount of child support to be awarded is determined on facts of each case); *Pierce v. Pierce*, 241 Ga. 96, 97, 243 S.E.2d 46, 48 (1978) (questions of alimony and child support cannot be determined by mathematical formula). See generally *Bair, How Much Temporary Child Support is Enough?*, 1 FAM. ADVOC. 37 (1978-79).

73. 57 N.C. App. at 183-84, 290 S.E.2d at 781.

74. 260 N.C. 635, 641, 133 S.E.2d 487, 492 (1963).

75. In *Fuchs*, the lower court set the level of child support simply by determining plaintiff's net income and then dividing by the number of people dependent on that income for support. *Id.* at 640, 133 S.E.2d at 492.

76. No. 8115DC1386 (N.C. App. Dec. 21, 1982) (unpublished opinion).

77. The court adopted the holdings of *Hayn v. Hayn*, 162 Kan. 189, 175 P.2d 127 (1946) (court may order father to maintain life insurance policy with children as beneficiaries when father has consented to such an order), and *Riley v. Riley*, 131 So. 2d 491 (Fla. 1961) (father may be required to maintain life insurance policy with children as beneficiaries pursuant to statute permitting court to make orders providing for security necessary to ensure payment of child support). No. 8115DC1386, slip op. at 7.

78. *Id.*

79. See *Lincoln Nat'l Life Ins. Co. v. Watson*, 71 Ill. App. 3d 900, 390 N.E.2d 506 (1979); *Allison v. Allison*, 188 Kan. 593, 363 P.2d 795 (1961); *Morris v. Morris*, 13 Wis. 2d 92, 108 N.W.2d 124 (1961). But see *Calvin v. Calvin*, 238 Ga. 421, 233 S.E.2d 151 (1977); *Woody v. Woody*, 258 Md. 224, 265 A.2d 467 (1970); *Ehrler v. Ehrler*, 69 Misc. 2d 234, 328 N.Y.S.2d 728 (1972).

the children against his wishes.⁸⁰ Nevertheless, by focusing upon the impending death of the father, the court made a significant step toward holding a parent responsible after his death for his children's support during their minority.⁸¹

In *Dishmon v. Dishmon*⁸² the court of appeals refused to accept plaintiff's argument that a consent judgment fixing child support was not a "court order" necessitating a showing of changed circumstances under G.S. 50-13.7(a) before its modification could be allowed.⁸³ Relying upon *Henderson v. Henderson*,⁸⁴ the court held that the adoption of the separation agreement made it an order of the court requiring judicial compliance with the provisions of G.S. 50-13.7(a).⁸⁵ In reaching this holding, the court made no distinction between merged and approved separation agreements. Rather, it seemed to articulate a broad rule that consent judgments are always orders of the court in the context of custody and child support agreements.⁸⁶

In *In re Custody of Peal*⁸⁷ the North Carolina Supreme Court reaffirmed the broad discretion granted to trial judges in determining who shall be awarded custody of a child. The court reversed an appeals court decision that there had not been sufficient evidence of changed circumstances to support an order transferring custody from the mother to the father. While expressly finding that both parents were fit,⁸⁸ the court focused upon the desire of the two children to be together and the increased age of the younger child in deciding to allow custody of the child to be transferred.⁸⁹

By contrast, in *Barnes v. Barnes*⁹⁰ the appeals court upheld the dismissal of a motion for change of custody when the plaintiff mother introduced evidence of her increased ability to care for the child, but no evidence of her father's unfitness or inability to care for the child.⁹¹ The court also held that the terms of a consent judgment regarding child custody cannot be altered without a showing of changed circumstances as required by G.S. 50-13.7(a).⁹²

Finally, in *Story v. Story*⁹³ the court of appeals differentiated between the

80. See *Hayn v. Hayn*, 162 Kan. 189, 175 P.2d 127.

81. See generally 59 A.L.R.3d 9 (1974).

82. 57 N.C. App. 657, 292 S.E.2d 293 (1982).

83. N.C. GEN. STAT. § 50-13.7(a) (Cum. Supp. 1981) provides in pertinent part: (a) An order of a court of this state for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.

84. 55 N.C. App. 506, 286 S.E.2d 657 (1982) *aff'd*, 307 N.C. 401, 298 S.E.2d 345 (1983).

85. The court also held that defendant's assumption of the responsibility of supporting an emancipated child is not, in itself, a sufficient showing of changed circumstances to uphold modification of child support payments. 57 N.C. App. at 658-59, 292 S.E.2d at 294.

86. *Id.* at 661, 292 S.E.2d at 295. See *Barnes v. Barnes*, 55 N.C. App. 670, 286 S.E.2d 586 (1982) (The terms of a consent judgment regarding child support cannot be altered without a showing of changed circumstances).

87. 305 N.C. 640, 290 S.E.2d 664 (1982).

88. *Id.* at 646, 290 S.E.2d at 668.

89. *Id.* at 646-47, 290 S.E.2d at 668.

90. 55 N.C. App. 670, 286 S.E.2d 586 (1982).

91. *Id.* at 672, 226 S.E.2d at 587.

92. *Id.* See *supra* note 17 and accompanying text.

93. 57 N.C. App. 509, 291 S.E.2d 923 (1982).

modicum of evidence necessary to sustain a temporary custody order and that required to sustain a permanent custody order. The court upheld a temporary custody order when the trial court's finding of facts was based upon a verified complaint, an unverified answer and counterclaim, a verified answer to the counterclaim, and a bare factual finding by the court that placing the child in the custody of his mother would be in his best interest.⁹⁴ By contrast, the court refused to uphold a permanent custody order based upon the same information. The court noted both the need for specific findings of fact in awarding a permanent custody order and the greater reliability of sworn testimony.⁹⁵

D. Alimony

In *Rowe v. Rowe*⁹⁶ the North Carolina Supreme Court found as a matter of law that plaintiff had offered proof of changed circumstances sufficient to support a reduction in alimony payments, despite the inclusion of a nonmodification provision in his separation agreement.⁹⁷ Two years after the divorce was granted, defendant wife sold her stock in a closely-held corporation and invested in income-producing securities, which increased her monthly income and decreased her net worth.⁹⁸ Plaintiff then filed for a reduction in alimony payments based on a change in circumstances.

Although the trial court found an insufficient change in circumstances to warrant a modification of alimony payments, the court of appeals reversed, holding that as a matter of law there was a sufficient change of circumstances to require modification.⁹⁹ The supreme court affirmed, holding that the support order was modifiable unless defendant could prove that the support and property settlement provisions were inseparable.¹⁰⁰ In a vigorous dissent, Justice Copeland noted that the consent judgment was contractual in nature and that the consequence of the decision was to allow a party who had agreed to a provision to rescind his agreement subsequently.¹⁰¹ He would have allowed the court to void a "no modification" clause only if unconscionability could be shown.¹⁰²

The majority opinion conforms with the practice in North Carolina of looking to the form of the consent judgment rather than the intent of the par-

94. *Id.* at 514, 291 S.E.2d at 926.

95. *Id.* at 515, 291 S.E.2d at 927.

96. 305 N.C. 177, 287 S.E.2d 840 (1982).

97. *Id.* at 188, 287 S.E.2d at 846-47.

98. *Id.* at 181, 287 S.E.2d at 843.

99. *Id.* at 182, 287 S.E.2d at 843-44.

100. *Id.* at 186, 287 S.E.2d at 846.

101. [I]t must be remembered that a consent judgment, regardless of its legal setting, is contractual in nature; consequently, its terms should be interpreted according to: (1) the parties' expressed intent in light of the surrounding circumstances existing at the time of entry and (2) the obvious purposes intended to be accomplished by its entry. Any consent judgment should be construed as it is written, and our courts should refrain from actions which effectively ignore or nullify the language or provisions included therein.

Id. at 190-91, 287 S.E.2d at 848 (emphasis in original) (citations omitted).

102. *Id.* at 849, 287 S.E.2d at 849 (Copeland, J., dissenting).

ties.¹⁰³ Since the court "ordered" alimony, the support provisions were held to be modifiable in spite of the expressed intent of the parties—judicially noted—that the provisions be nonmodifiable. *Rowe* presents a clear case for making such a determination based upon intent, rather than form. Both parties to the agreement were wealthy and represented by attorneys throughout negotiations and no evidence of duress or overreaching was presented.¹⁰⁴ Nevertheless, the court chose to impose formal rules of construction in determining the nature of the support provisions and virtually ignored the intent of the parties. Thus, in balancing the competing policies of the State's inherent interest in regulating the incidents of marriage and the freedom of parties to negotiate and contract, the court's results lean heavily in favor of the right of the State to regulate marriage.

The case also illustrates the pitfalls for attorneys in negotiating support payments. By failing to note the court's distinction between approval of agreements and their adoption, and by permitting the payments to be denominated as alimony and ordered by the court, the attorneys may dictate the outcome of later litigation on the nature of support payments, regardless of what the parties intended.

In *Quick v. Quick*¹⁰⁵ the supreme court refused to entangle itself in the difficult problem of enforcing alimony payments during the pendency of an appeal. The court noted that contempt proceedings at the trial court level are stayed during an appeal, and that an appeals court cannot hear the matter because it involves factual findings. Consequently, the supporting spouse is ensured a lengthy period during which he will not have to pay alimony.¹⁰⁶ While the court recognized the existence of a problem in this situation, it nevertheless deferred to the legislature to rectify it.¹⁰⁷

E. Arbitration

In *Crutchley v. Crutchley*¹⁰⁸ the North Carolina Supreme Court joined the growing number of courts that recognize arbitration as a valid method of settling domestic disputes.¹⁰⁹ While the court was obligated to invalidate the arbitration award because of the peculiar interaction between North Carolina law and the facts of the case, it expressly endorsed arbitration as an alternative means of settling marital disputes.¹¹⁰

The Crutchleys first brought their divorce action into court in 1977.

103. Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C.L. Rev. 819, 848-58 (1981).

104. 305 N.C. at 192, 287 S.E.2d at 849 (Copeland, J., dissenting).

105. 305 N.C. 446, 290 S.E.2d 653 (1982).

106. *Id.* at 461, 290 S.E.2d at 663.

107. *Id.* at 462, 290 S.E.2d at 663-64.

108. 306 N.C. 518, 293 S.E.2d 793 (1982).

109. See, e.g., *In re Mesmer's Estate*, 94 Cal. App. 97, 270 P. 732 (1928); *Masterson v. Masterson*, 22 Ky. Op. 1193, 60 S.W. 301 (1901); *Stratton v. Stratton*, 77 Me. 373, 52 A. 779 (1885); *Carter v. Carter*, 109 Mass. 306 (1872); *McAllister v. McAllister*, 57 Tenn. (10 Heisk.) 345 (1872).

110. 306 N.C. at 519, 293 S.E.2d at 794.

Before their case was heard, they agreed to arbitrate their differences, and the trial judge filed a consent order of their agreement to arbitrate and appointed an arbitrator.¹¹¹ The Crutchleys divorce was finalized in December 1977, the same time their arbitration award was confirmed by the court.¹¹² One year later, Mrs. Crutchley filed a motion for modification of the arbitration award. Both the trial court and the North Carolina Court of Appeals dismissed Mrs. Crutchley's motions for her failure to meet the ninety-day statute of limitations provided in the North Carolina Arbitration Act.¹¹³

The North Carolina Supreme Court reversed. Although the supreme court agreed with the court of appeals that there was "no legislative expression [in North Carolina's Arbitration Act] . . . that arbitration of [domestic] disputes is against public policy,"¹¹⁴ the court held that once domestic disputes are before a judge, the judge may not delegate his duty to resolve the disputes to a third party.¹¹⁵

The court-ordered arbitration in *Crutchley* was considered a voluntary reference under rule 53,¹¹⁶ which does not allow the delegation of suits such as that of the Crutchleys.¹¹⁷ Arbitration would have been proper had the couple either dismissed their court suit prior to the time their arbitration agreement was ordered by the court, or simply arbitrated without the court's order to do so.¹¹⁸

The court did, however, note a number of advantages to the arbitration of marital disputes: "reduced court congestion, the opportunity for resolution of sensitive matters in a private and informal forum by self-chosen judges, speed, economy and finality."¹¹⁹ While the supreme court recognized certain negative attributes of arbitration, such as the loss of full appellate review and the protections of state substantive law and rules of evidence,¹²⁰ it ruled that the scale tipped in favor of allowing arbitration of these matters.

It is important to note that the court in *Crutchley* stated that only *spousal support* may be subjected to binding arbitration;¹²¹ the provisions in an arbitration award for custody or child support remain reviewable and modifiable

111. *Id.* at 520, 293 S.E.2d at 795.

112. 53 N.C. App. 732, 738, 281 S.E.2d 744, 747 (1981).

113. N.C. GEN. STAT. § 1-567.13 (Cum. Supp. 1981).

114. 306 N.C. at 523, 293 S.E.2d at 796.

115. *Id.* at 522, 293 S.E.2d at 796.

116. N.C. GEN. STAT. § 1A-1, Rule 53(a)(1) (1969).

117. "Voluntary references" are to be distinguished from "compulsory references." In the former, the judge has the discretion to appoint a referee or decide the matter himself, N.C. GEN. STAT. § 1A-1, Rule 53(a)(1) (1969); in the latter, the judge must appoint a referee for certain complex litigation issues, N.C. GEN. STAT. § 1A-1, Rule 53(a)(2) (1969). The court specifically left unanswered the question whether a compulsory reference would have been a valid method for the Crutchleys to settle their disputes. 306 N.C. at 525, 293 S.E.2d at 798.

118. 306 N.C. at 523, 293 S.E.2d at 796.

119. *Id.* An arbitrator is bound by neither.

120. *Id.* at 524, 293 S.E.2d at 797.

121. *Id.*

by North Carolina courts.¹²² The court reasoned that since parties are permitted to settle spousal support by agreement, there was no bar to their effecting the identical settlement through arbitration. Despite the strong North Carolina policy of *parens patriae*, the court in *Crutchley* held that the amount of child support awarded is presumed to be just and reasonable, absent evidence to the contrary.¹²³

Crutchley opens a virtual Pandora's box of unanswered problems for those hoping to use arbitration to settle domestic disputes. It is unclear whether domestic arbitration awards will be treated as deferentially as commercial arbitration awards are,¹²⁴ or whether courts will subject them to closer scrutiny for the fairness and full disclosure ostensibly required in the formation of a separation agreement.¹²⁵ Indeed, the court left open the vital question of exactly how closely the analogy between separation agreements and arbitrations awards may be drawn. Similar judicial treatment of separation agreements and arbitration awards would provide the most consistent public policy for the state.

F. Husband-Wife Property

In 1982 the legislature passed a bill¹²⁶ providing that for conveyances on or after January 1, 1983, both husband and wife will have equal right to "the control, use, possession, rents, income, and profits" of land held by the parties in tenancy by the entirety.¹²⁷ The bill reverses the judicial doctrine, firmly entrenched in North Carolina, providing that the husband has the absolute right for the duration of the marriage to control, use, possess, and receive rents and income from land held by the entireties.¹²⁸ Thus, North Carolina joins

122. *Id.* This is the same treatment afforded child support awards in separation agreements. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 987 (1963).

123. The scope of judicial review of arbitration awards is very narrow in North Carolina. N.C. GEN. STAT. § 1-567.13 (Cum. Supp. 1981). See *Calvine Cotton Mills v. Textile Workers Union*, 283 N.C. 719, 79 S.E.2d 181 (1953); *Thomasville Chair Co. v. United Furniture Workers*, 233 N.C. 46, 62 S.E.2d 535 (1950); *Pearson v. Barringer*, 109 N.C. 398, 13 S.E. 942 (1881); *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

124. See, e.g., *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971); *Van Every v. Van Every*, 265 N.C. 506, 144 S.E.2d 603 (1965); *Winborne v. Winborne*, 41 N.C. App. 756, 255 S.E.2d 640 (1979). No separation agreement has ever been declared void because of the inference of fraud or duress, however. Sharp, *supra* note 103, at 832.

125. Most problematic is the merger/approval dichotomy existing in the judicial treatment of separation agreements and the resulting disparate legal effects. For a full discussion of the problem, see Sharp, *supra* note 103. It would be most unfortunate for the relatively faster and less traumatic arbitration method to become burdened with such uncertainties, requiring couples who had wished to avoid litigation to go into court to battle over the meaning of an arbitration award.

126. Act of June 18, 1982, ch. 1245, 1982 N.C. Sess. Laws 136 (Reg. Sess.) (codified at N.C. GEN. STAT. § 39-13.6(a) (Interim Supp. 1982)).

127. *Id.* § 1 provides:

A husband and wife shall have an equal right to the control, use, possession, rents, income, and profits of real property held by them in tenancy by the entirety. Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse. This section shall not be construed to require the spouse's joinder where a different provision is made under G.S. 39-13, G.S. 39-13.3, G.S. 39-39.4, or G.S. 52-10.

128. See, e.g., *Koob v. Koob*, 283 N.C. 129, 195 S.E.2d 552 (1973); *West v. Aberdeen & R.R.*

the majority of states in expounding the "modern view" of the tenancy by the entirety.¹²⁹

Subsection (1)(b) of the bill provides that a conveyance of real property to a husband and wife vests title in them as tenants by the entirety unless the conveyance expressly indicates a contrary intent of the parties.¹³⁰ Essentially, the section codifies existing common law principles expounded by the courts of North Carolina concerning the manner in which real property vests in husband and wife.¹³¹

Subsection (1)(c) makes the bill applicable to all conveyances on or after January 1, 1983 but raises constitutional questions by further providing that "[f]or income tax purposes effective for taxable years beginning on or after January 1, 1983, the income from property held in tenancy by the entirety shall be reportable 1/2 (one half) by each spouse regardless of when the conveyance was made."¹³² By requiring spouses to report one-half the income generated by a tenancy by the entirety *regardless of when it was created*, it places women in the position of having to pay taxes on property they do not own and over which they do not have management power, since the bill grants equal rights to ownership and control only to conveyances after January 1, 1983.¹³³ It seems "unconstitutional for the state to tax the wife with respect to a half interest in rents and profits she [does] not own."¹³⁴ Yet if the intent of the bill is to give the wife half ownership regardless of when the conveyance was made, thus eliminating the taxation problem, a constitutional problem arises from the husband's perspective, since his property is being taken without due process of law.

G. NORMAN ACKER

CATHERINE DWIGHT HINKLE

Co., 140 N.C. 620, 53 S.E. 477 (1906); *Hinton v. Hinton*, 17 N.C. App. 715, 195 S.E.2d 319 (1973); *Hodge v. Hodge*, 12 N.C. App. 574, 183 S.E.2d 800 (1971). See also 2 R. LEE, *supra* note 60, § 115, at 50-58.

129. See C.J. MOYNIHAN, *INTRODUCTION TO REAL PROPERTY* 233 (1962).

130. Act of June 18, 1982, ch. 1254, § 1(b), 1982 Sess. Laws 136-37 (Reg. Sess.) (codified at N.C. GEN. STAT. § 39-13.6(b) (Interim Supp. 1982)) provides:

A conveyance of real property, or any interest therein, to a husband and wife vests title in them as tenants by the entirety when the conveyance is to:

- (1) a named man 'and wife,' or
- (2) a named woman 'and husband,' or
- (3) two named persons, whether or not identified in the conveyance as husband and wife, if at the time of conveyance they are legally married; unless a contrary intention is expressed in the conveyance.

131. See, e.g., *Bowling v. Bowling*, 252 N.C. 527, 145 S.E.2d 228 (1960); *Byrd v. Patterson*, 229 N.C. 156, 48 S.E.2d 45 (1948); *Moore v. Greenville Banking & Trust Co.*, 178 N.C. 118, 100 S.E. 269 (1919). See also 2 R. LEE, *supra* note 60, § 113, at 38-46.

132. Act of June 18, 1982, ch. 1245, § 1(c), N.C. Sess. Laws 136-37 (Reg. Sess.) (codified at N.C. GEN. STAT. § 36.13.6(c) (Interim Supp. 1982)).

133. For a discussion of the constitutional problems posed by the bill, see Reppy, *North Carolina's Tenancy by the Entirety Reform Legislation of 1982*, 5 CAMPBELL L. REV. 1, 16-30 (1982).

134. *Id.* at 17.

IX. PROPERTY

A. Leases

In *Texaco, Inc. v. Creel*¹ the North Carolina Court of Appeals faced for the first time the issue of the proper interpretation of a lease provision containing both an option to purchase at a fixed price and a first refusal option. There is a split of authority among jurisdictions that have addressed such dual purchase options;² North Carolina, at least for the moment,³ is among those courts that construe such clauses in favor of the lessee.⁴

The lease in *Creel* granted lessee (Texaco) an option to purchase property for the fixed price of \$50,000, which could not be exercised until the end of either the ten-year lease term or any of the four five-year renewal periods.⁵ The lease further provided for a right of first refusal. Near the end of the lessee's final extension period, the lessor notified Texaco that he had received two bona fide offers for the land—each in amount more than triple Texaco's fixed price option.⁶ Texaco declined to exercise its first refusal option; instead, it elected to purchase the property under the fixed price option. The lessor contended that the lessee's right to exercise the fixed price option expired upon the receipt of a bona fide offer and refused to convey the property. The trial court agreed and summarily dismissed the plaintiff lessee's claim for specific performance.⁷ The court of appeals rejected the lessor's interpretation of the dual option clause and granted summary judgment for the lessee⁸ after examining two cases from other jurisdictions.

In *Texaco, Inc. v. Rogow*⁹ the Connecticut Supreme Court held that the lessor's receipt of a bona fide offer extinguished the lessee's fixed price option. Under this construction, the lessee must match the first purchase offer or risk losing the right to purchase the property thereafter.¹⁰ The court of appeals rejected this reasoning because it renders the fixed price option "completely

1. 57 N.C. App. 611, 292 S.E.2d 130 (1982), *disc. rev. granted*, 306 N.C. 564, 294 S.E.2d 229 (1982).

2. Compare *M & M Oil Co. v. Finch*, 7 Kan. App. 2d 208, 640 P.2d 317 (1982) (when lessor is presented with bona fide offer at price higher than fixed option price, lessee must exercise right of first refusal if he wishes to purchase property) with *Crowley v. Texaco, Inc.*, 306 N.W.2d 871 (S.D. 1981) (lessee's refusal to exercise right of first refusal does not extinguish right to later exercise fixed price option).

3. Discretionary review has been granted in *Creel*. See *supra* note 1.

4. See, e.g., *Butler v. Richardson*, 74 R.I. 344, 60 A.2d 718 (1948); *Crowley v. Texaco, Inc.*, 306 N.W.2d 871 (S.D. 1981).

5. 57 N.C. App. at 612-14, 292 S.E.2d at 131-32. Clause 11 of the lease granted the following option to purchase:

Lessor hereby grants to lessee the exclusive right, at lessee's option, to purchase the demised premises. . . . (a) for the sum of Fifty Thousand Dollars, . . . (b) On the same terms and at the same price as any bona fide offer for said premises received by lessor and which offer lessor desires to accept (emphasis in original).

6. 57 N.C. App. at 614, 292 S.E.2d at 132.

7. *Id.* at 615, 292 S.E.2d at 132.

8. *Id.* at 619, 292 S.E.2d at 135.

9. 150 Conn. 401, 190 A.2d 48 (1963).

10. *Id.* at 409, 190 A.2d at 52. The court viewed a contrary interpretation as wholly subordinating the first refusal option and thus "render[ing] virtually inoperative the provision expressly

meaningless."¹¹ The court instead adopted the interpretation of the South Dakota Supreme Court in *Crowley v. Texaco, Inc.*¹² as the only construction that gave effect to the fixed price option.¹³ Relying heavily on a persuasive quotation from a Rhode Island case,¹⁴ *Crowley* held that the right of first refusal was supplemental to the fixed price option and became meaningful only if the lessor received an offer for less than the fixed option price.¹⁵ This construction defines the right of first refusal as a device employed by the lessor to "induce an acceleration of lessee's decision to purchase by affording [him] an opportunity to purchase at a price more advantageous to [him] than the price fixed in the option."¹⁶

While the court's holding finds support in other jurisdictions,¹⁷ its foundation is not entirely solid. Although the court's construction does not render the fixed option clause "totally meaningless," the interpretation does render the first refusal option "totally meaningless" in a practical sense by subordinating it to the fixed price option.¹⁸ Lessors will feel no pressure to solicit offers for less than a fixed option price simply to accelerate a lessee's decision to purchase. Moreover, the court's interpretation favors lessees who are clever enough to include a low option price in a long term lease, by guaranteeing that they will never pay more than the fixed option price.¹⁹ In *Creel* this interpretation enabled Texaco to purchase property with a market value of between \$155,000 and \$217,000 for just \$50,000.²⁰ A contrary interpretation of the dual option clause would not render the first refusal provision meaningless. Texaco would still have the first opportunity to acquire a valuable piece of property. Neither would Texaco be penalized by such an interpretation—it would simply be required to pay the fair market value for the lessor's property.

In *Wachovia Bank & Trust Co. v. Rubish*²¹ the supreme court clarified the requirements for proving waiver by estoppel. Plaintiff bank, as executor and trustee of lessor's estate, initiated a summary ejectment action to regain possession of the leased premises.²² The bank asserted that the defendant lessee's

according to the defendant the unrestricted opportunity to attempt to obtain the fair value of the property during the first nine years [of the lease term]." *Id.* at 407-08, 190 A.2d at 52.

11. 57 N.C. App. 611, 617, 292 S.E.2d 130, 133 (1982).

12. 306 N.W.2d 871 (S.D. 1981).

13. 57 N.C. App. at 617, 292 S.E.2d at 134.

14. *Butler v. Richardson*, 74 R.I. 344, 349-50, 60 A.2d 718, 722 (1948), *quoted in Crowley*, 306 N.W.2d at 874.

15. 306 N.W.2d at 874.

16. 57 N.C. App. at 617, 292 S.E.2d at 133-34.

17. *See supra* note 4.

18. *See Rogow*, 150 Conn. at 407-08, 190 A.2d at 51-52; *Crowley*, 306 N.W.2d at 875-76 (Henderson, J., dissenting). In the latter case, Justice Henderson argues that the construction adopted by the majority (later adopted by the North Carolina Court of Appeals) renders the right of first refusal meaningless and inquires why the parties would include such a meaningless provision in their agreement.

19. *See* 306 N.W.2d at 874, in which Justice Henderson's dissenting opinion suggests that such an interpretation "is entirely for the benefit of Texaco."

20. 57 N.C. at 614, 292 S.E.2d at 132.

21. 306 N.C. 417, 293 S.E.2d 749 (1982).

22. *Id.* at 418, 293 S.E.2d at 751.

failure to give timely written notice of his intention to exercise his option to extend the lease constituted impermissible holding over. Lessee claimed that plaintiff waived the written notice requirement and was equitably estopped to demand such notice.²³ The jury found for the lessee.²⁴ The supreme court affirmed the conclusion of the court of appeals that the jury had sufficient grounds to find plaintiff estopped to require written notice, but reversed and remanded for a new trial because the jury had not been properly instructed and because the issues had not been correctly formulated.²⁵

The supreme court began its review with a careful explication of the doctrine of waiver.²⁶ In the context of the landlord-tenant relationship, the necessity of consideration to support a waiver of notice depends upon whether the waiver occurs before or after notice is due.²⁷ Waiver of a substantial right before performance becomes due must be supported by either consideration or estoppel. Because the right to renew a lease is a substantial right,²⁸ the lessee in *Rubish* has the affirmative burden of proving consideration or estoppel sufficient to support a waiver of that right. The court held in *Rubish* that promissory estoppel was sufficient to support such a waiver, thus relieving lessee of the burden of proving the elements of equitable estoppel.²⁹

23. *Id.* at 418-19, 293 S.E.2d at 751.

24. *Wachovia Bank & Trust Co. v. Rubish*, 50 N.C. App. 662, 664, 275 S.E.2d 494 (1981).

25. 306 N.C. 424, 434, 293 S.E.2d 754, 760.

26. *Id.* at 424-29, 293 S.E.2d at 754-57. Waiver is commonly defined as "the intentional relinquishment of a known right." *Discount Auto Mart, Inc. v. Bank of N.C.*, 45 N.C. App. 543, 544, 263 S.E.2d 41, 42 (1980).

27. In *Wheeler v. Wheeler*, 299 N.C. 633, 263 S.E.2d 763 (1980), the supreme court explicated the elements of "waiver by performance." Such a waiver does not require consideration or estoppel if:

- (1) The waiving party is the innocent, or nonbreaching party, and
- (2) The breach does not involve total repudiation of the contract so that the nonbreaching party continues to receive some of the bargained-for consideration. . . . and
- (3) The innocent party is aware of the breach, and
- (4) The innocent party intentionally waives his right to excuse or repudiate his own performance by continuing to perform or accept the partial performance of the breaching party.

Id. at 639, 263 S.E.2d at 766-67.

28. *Id.* at 426 n.6, 293 S.E.2d at 755 n.6.

29. *Id.* at 427, 293 S.E.2d at 756. In *Gladden v. Pargus, Inc.*, 575 F.2d 1091 (4th Cir. 1978), the Court of Appeals for the Fourth Circuit noted that North Carolina has outlined the elements of equitable estoppel as follows:

- (1) Misrepresentation or concealment of material facts;
- (2) Estopped parties' knowledge, either actual or implied, that the representations were untrue when made;
- (3) Lack of knowledge as to the untruth by the party raising the estoppel;
- (4) Estopped parties' intent or expectation that misrepresentations will be relied upon;
- (5) Reliance by party raising estoppel;
- (6) Prejudice to party raising estoppel.

Id. at 1094.

RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979) defines promissory estoppel as: "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Thus, the primary difference between the two types of estoppel is that in proving promissory

Rubish relaxes the requirements of waiver by estoppel: waiver may now be established upon proof of an express or implied promise, rather than proof of an actual misrepresentation. As Justice Exum noted, past cases have recognized the distinction between equitable and promissory estoppel,³⁰ but the use of estoppel as a ground for waiver has caused confusion "as to exactly what must be proven by the party asserting the estoppel."³¹ The supreme court's thoughtful opinion should help alleviate such confusion in the future.

In North Carolina a demand for payment of rent is a prerequisite to forfeiture when the lease does not contain a forfeiture clause for failure to pay rent. In *Snipes v. Snipes*³² the court of appeals clarified the requirements of G.S. 42-3 for such a demand.³³ In that case, when lessor attempted to convey the leased premises, he contended that the lease was terminated by lessee's failure to pay rent.³⁴ Lessee argued that the lease was still in force and that such a conveyance violated his first purchase option. The court rejected defendant's argument that informing the lessee of her desire to "get all this business settled" constituted a proper demand for payment.³⁵ Because demand under G.S. 42-3 requires a "clear, unequivocal statement, either oral or written, requiring the lessee to pay all past due rent,"³⁶ the court reasoned that any less authoritative demand would fail to put the lessee on notice that the lessor intended to exercise her statutory right to forfeiture.³⁷

B. Title

Considering the issue for the first time, the court of appeals in *Cothran v. Evans*³⁸ held that because North Carolina's registration statutes do not en-

estoppel the lessee need only establish the existence of an express or implied promise; an actual misrepresentation need not be shown.

30. *Rubish*, 306 N.C. at 428, 293 S.E.2d at 756. See also *Kearney v. Hare*, 265 N.C. 571, 575, 144 S.E.2d 636, 640 (1965) (lessor was estopped to deny any extension of a lease when he requested and accepted payment of rent for the extended term before expiration date of lessee's right to give notice of an extension).

31. 306 N.C. at 427, 293 S.E.2d at 755-56. The court observed that defendant had alleged that plaintiff was equitably estopped, and the trial court instructed on the elements of equitable estoppel.

32. 55 N.C. App. 498, 286 S.E.2d 591, *aff'd per curiam*, 306 N.C. 373, 293 S.E.2d 187 (1982).

33. N.C. GEN. STAT. § 42-3 provides:

In all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay rent within 10 days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reentry in the lease.

N.C. GEN. STAT. § 42-3 (1976).

34. 55 N.C. App. at 500, 286 S.E.2d at 592.

35. *Id.* at 504, 286 S.E.2d at 595.

36. *Id.*

37. *Id.*

38. 56 N.C. App. 431, 289 S.E.2d 398 (1982). When, as in this case, state and federal regulations profess to govern the same subject matter, the federal regulations control. See *Currin v. Wallace*, 306 U.S. 1, 11 (1939) ("otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field"). A federal district court has determined that tobacco allotments are not within the purview of this

compass tobacco allotments, federal guidelines will govern the validity of leased allotments, as well as the priority of any liens on land subject to the allotments. In 1975 plaintiffs conveyed two farms to Whispering Pines, Inc., and received in consideration a purchase money note and a deed of trust that was duly recorded.³⁹ In 1977 defendant and Whispering Pines entered into a five-year lease of the tobacco allotment on the two farms; the lease option included an option to purchase.⁴⁰ Defendant then recorded the lease. In 1978 Whispering Pines fell behind on its note payments and persuaded plaintiffs, as mortgagees, to agree to a lease of the farm's allotment to defendant.⁴¹ Pursuant to federal guidelines, plaintiffs then signed a Record of Transfer of Allotment, in which they agreed to a five-year lease between Whispering Pines and defendant.⁴² After the deed of trust was foreclosed in 1979, plaintiffs became record owners of the farms and asked defendant to vacate the lands. When defendant refused, plaintiffs argued that the foreclosure sale had extinguished the lease, and brought an action to recover for the value of the allotment for 1980 and to obtain an injunction ordering defendants to transfer the allotment to them.⁴³

The court determined that the 1977 lease between Whispering Pines and defendant was invalid, since the parties had not complied with federal requirements.⁴⁴ It concluded, however, that the 1978 lease was valid, and that in signing the Record of Transfer as mortgagee, plaintiffs had agreed to subordinate their lien on the farms to defendant's lease.⁴⁵ As a result, the foreclosure one year later did not extinguish defendant's lease, and plaintiffs could not use the farm's tobacco allotment until the lease expired in 1982.⁴⁶

The result is well reasoned. Plaintiffs had argued that since the lease was recorded after they had recorded the mortgage and deed of trust, the lease was

state's registration statutes concerning prior encumbrances. See *Hart v. Hassell*, 250 F. Supp. 893, 897 (E.D.N.C. 1966).

39. 56 N.C. App. at 431, 289 S.E.2d at 399.

40. *Id.* The terms of this lease provided that:

[I]f for any reason Lessor [Whispering Pines, Inc.] should lose the title to the property where the tobacco allotment is located or for any reason be unable to legally lease the tobacco allotment for any period during the term of this lease, Lessor shall promptly repay Lessee [Tildon Evans] on a pro rata basis for any unexpired term of said lease.

41. *Id.* at 431-32, 289 S.E.2d at 399.

42. *Id.* at 432, 289 S.E.2d at 399.

43. *Id.* Plaintiffs sought to recover the value of the tobacco for 1980 because defendant had continued to farm the land during that year.

44. *Id.* at 434, 289 S.E.2d at 400. The Agricultural Adjustment Act of 1938 provides for the transfer of farm marketing quotas "only in such manner and subject to such conditions as the Secretary [of Agriculture] may prescribe by regulations." 7 U.S.C. § 1313(d) (1976). The Secretary has required persons seeking to lease their tobacco quotas to execute the lease on a federal form that is subject to the approval of the county committee. See 7 C.F.R. § 725-72(c)(2) (1982). The 1977 lease was thus improperly executed.

45. 56 N.C. App. at 434, 289 S.E.2d at 400. Since the parties had agreed to a five-year lease, federal regulations required the written consent of the plaintiffs. "No transfer of allotment other than by annual lease shall be made from a farm subject to a mortgage or other lien unless the transfer is agreed to in writing by the lienholder." 7 C.F.R. § 725.72(0) (1982).

46. 56 N.C. App. at 434, 289 S.E.2d at 401.

a junior lien and the foreclosure sale thus extinguished it.⁴⁷ This argument ignores the federal government's interest in controlling the transfer of tobacco allotments. To conclude that the foreclosure sale did extinguish the lease would be tantamount to granting to the state the power to regulate such transfers. In keeping leases of tobacco allotments outside the scope of North Carolina laws concerning prior encumbrances, the court has maintained federal control of such leases. The requirement of obtaining a lien-holder's consent to a lease of longer than one year reduces any unfairness that may result to the lien-holder who later takes record title of the land.

In *Simmons v. Quick-Stop Food Mart*⁴⁸ the supreme court applied principles of agency law and the Uniform Partnership Act in concluding that the wife of a partner had acquired each partner's one-half interest in a tract of partnership property, giving her fee simple title. In 1976, Wood and Simmons Investments, a two-man partnership, owned a tract of land held in the names of each partner.⁴⁹ Anticipating immediate dissolution, Wood agreed to convey his one-half interest in the tract to Simmons and Simmons' wife. Ordinarily, when one partner conveys partnership property held in the name of each partner, he passes only the equitable interest.⁵⁰ Since, however, Wood conveyed the property to a fellow partner in anticipation of dissolution, Wood was not "carrying on the business of the partnership in the usual way."⁵¹ Under such circumstances, a partner's conveyance of partnership property binds the partnership if other partners so authorize.⁵² As Simmons impliedly authorized the conveyance by accepting it as grantee, the partnership validly conveyed Wood's one-half interest to Simmons and Simmons' wife.⁵³

After dissolution of the partnership, the other one-half interest remained partnership property, and Simmons could still act as agent for the partnership to convey this one-half interest.⁵⁴ Thus, when he and his wife executed a sepa-

47. Ordinarily, one who purchases a deed of trust at a foreclosure sale acquires title free from encumbrances and liens that arose after execution of the mortgage. See *Dixieland Realty Co. v. Wysor*, 272 N.C. 172, 175, 158 S.E.2d 7, 10 (1967). Whether the lease of a tobacco allotment constitutes an encumbrance or lien is a question the *Cothran* court did not address.

48. 307 N.C. 33, 296 S.E.2d 275 (1982). This action arose from a dispute between the ex-wife of a partner in an investment partnership and a convenience shop. The ex-wife, having recorded the deed on November 5, 1979, claimed fee simple title of the disputed property. The shop recorded a lease on the property after this date, but maintained that the conveyance to the ex-wife had been invalid.

49. *Id.* at 36, 296 S.E.2d at 278 (1982). The property had been conveyed to "Johnny L. Wood and Oscar Harold Simmons d/b/a Wood and Simmons Investments, a Partnership." In determining that this conveyance created partnership property in the names of each partner, the court noted that other property was held in the partnership name with no mention of the partners individually. *Id.*

50. See N.C. GEN. STAT. § 59-40(d) (1982).

51. 307 N.C. at 40, 296 S.E.2d at 280. N.C. GEN. STAT. § 59-39(a) (1982) governs acts of a partner that carry on the partnership's business in the usual way. Section 59-39(b) governs those acts which appear not to carry on the business in the usual way.

52. See N.C. GEN. STAT. § 59-39(b) (1982).

53. 307 N.C. at 40, 296 S.E.2d at 280.

54. *Id.* at 41-42, 296 S.E.2d at 280-81. N.C. GEN. STAT. § 59-65(a)(1) (1982) provides that after dissolution a partner can bind the partnership "[b]y any act appropriate for winding up partnership affairs."

ration agreement conveying the property to his wife, Simmons effectively conveyed the remaining one-half interest that the partnership had held, as well as his share of the one-half interest that he and his wife had held jointly.⁵⁵ Since she had acquired all the interests, she then held fee simple title.

C. Mortgages

In *In re Bonder*⁵⁶ the North Carolina Supreme Court expanded the scope of its earlier approval of due-on-sale provisions in real estate loans secured by a deed of trust. The court held that due-on-sale clauses in residential loan instruments, as well as in commercial instruments, are valid and enforceable.⁵⁷ The court also held that the separate components of a due-on-sale provision need not all appear in the same paragraph of a loan instrument.⁵⁸

The deed of trust in *Bonder* contained an agreement that the borrower would not convey the premises without written consent of the lender. A separate clause contained a provision that the entire loan would become due immediately upon the mortgagor's breach of any "agreement or condition" of the loan instrument.⁵⁹ The mortgagor (*Bonder*) sought the mortgagee's written consent to convey the premises to a third party. The mortgagee acceded to this conveyance on the condition that the interest rate be raised from 7 $\frac{3}{4}$ % to 12%.⁶⁰ Although the third party refused the mortgagee's terms, the mortgagor conveyed the property upon the original loan terms. The mortgagee then demanded full payment of the loan.⁶¹ When the mortgagor failed to honor this demand, foreclosure proceedings were initiated.⁶² The court of appeals relied upon *Crockett v. First Federal Savings & Loan Association*⁶³ to affirm the superior court's authorization of the foreclosure proceedings.

In affirming the court of appeal's decision, the supreme court agreed that *Crockett* was "both instructive and controlling."⁶⁴ In *Crockett* a due-on-sale clause in a commercial loan agreement was held not to constitute an invalid restraint on alienation.⁶⁵ The borrower could avoid the hardship of foreclosure "merely by paying off the loan."⁶⁶ The borrower also had the option of not selling if his loan became more favorable to him due to changed interest rates.⁶⁷ The court, noting that both parties stood on equal footing, declined to restrict the lender's exercise of a due-on-sale clause to those situations in

55. 307 N.C. at —, 296 S.E.2d at 281.

56. 306 N.C. 451, 293 S.E.2d 798 (1982).

57. *Id.* at 457, 293 S.E.2d at 802. In *Crockett v. First Fed. Sav. & Loan Ass'n*, 289 N.C. 620, 224 S.E.2d 580 (1976), the supreme court upheld a due-on-sale clause in a commercial lease.

58. 306 N.C. at 458, 293 S.E.2d at 803.

59. *Id.* at 452, 293 S.E.2d at 799.

60. *Id.* at 453, 293 S.E.2d at 799.

61. *Id.* at 453, 293 S.E.2d at 800.

62. *Id.*

63. 289 N.C. 620, 224 S.E.2d 580 (1976).

64. 306 N.C. at 455, 293 S.E.2d at 800.

65. 289 N.C. at 630-31, 224 S.E.2d at 587.

66. *Id.* at 625, 224 S.E.2d at 584.

67. *Id.*

which its security is threatened.⁶⁸ Thus, absent a prepayment penalty, the lender could withhold consent to a property conveyance for the sole purpose of seeking an increased interest rate.⁶⁹

After reaffirming *Crockett*,⁷⁰ the court disposed of respondent mortgagor's two principle contentions. First, the court rejected the claim that *Crockett* applied only to commercial loan instruments. Refusing to assume that a residential borrower is less capable than a commercial borrower of understanding a loan agreement, the court approved due-on-sale clauses in residential loans.⁷¹ Second, the court dismissed respondent's contention that the language in its loan instrument did not constitute a due-on-sale clause.⁷² The provision in respondent's loan requiring the lender's consent to convey the secured property did not appear, as it did in *Crockett*, in the same paragraph as the provision regarding the borrower's breach and the resulting acceleration of loan maturity.⁷³ The court held that requiring the two provisions of a due-on-sale clause to appear within the same paragraph would ignore the substance of the terms of the deed when read as a whole.⁷⁴

In his dissent, Justice Meyer compared the pertinent language in the *Crockett* and *Bonder* loan instruments.⁷⁵ The *Bonder* instrument, he concluded, required a "patching together of separate parts in order to construct a due-on-sale interpretation."⁷⁶ Therefore, he argued that such a construction would not correspond to the expectations of the parties when the instrument was signed.⁷⁷

Bonder deals North Carolina residential mortgagors a stiff blow.⁷⁸ The court's rationale for upholding a due-on-sale clause in *Crockett* is undercut in the context of a typical residential loan agreement.⁷⁹ The holding in *Crockett* was based upon a number of assumptions, none of which characterize the situation of most home borrowers.⁸⁰ A residential borrower, unversed in the intricacies of real estate finance, does not stand on equal footing with a savings and loan institution.⁸¹ The court's assumption that the average borrower will be

68. *Id.* at 630, 224 S.E.2d at 587.

69. *Id.* at 631, 224 S.E.2d at 587.

70. 306 N.C. at 457, 293 S.E.2d at 802.

71. *Id.*

72. *Id.* at 458, 293 S.E.2d at 802-03.

73. *Id.* at 452-53, 293 S.E.2d at 799.

74. *Id.* at 458, 293 S.E.2d at 803.

75. *Id.* at 463-64, 293 S.E.2d at 805 (Meyer, J., dissenting).

76. *Id.* at 464, 293 S.E.2d at 806 (Meyer, J., dissenting).

77. *Id.*

78. Compare Note, *Real Property Security—North Carolina Deals Mortgagors a Bad Hand*, 13 WAKE FOREST REV. 490 (1977) (criticizing *Crockett* as contrary to basic principles of property and contract law, and various statutory and equitable considerations) with Note, *Mortgages—Use of Due on Sale Clause by a Lender Is Not a Restraint on Alienation in North Carolina*, 55 N.C.L. REV. 310 (1977) (court commended for "recognizing significant economic policies" in arriving at correct result in *Crockett*).

79. 306 N.C. at 466, 293 S.E.2d at 806 (Meyer, J., dissenting).

80. See Note, *Real Property Security*, *supra* note 78, at 496.

81. See *Crockett v. First Fed. Sav. & Loan Ass'n*, 289 N.C. 620, 632-44, 224 S.E.2d 580, 588-95 (1976) (Lake, J., dissenting).

able to choose not to alienate his property if he enjoys a favorable mortgage interest rate ignores reality; such a choice is frequently illusory, as when the homeowner changes job locations.⁸² Similarly, it is unrealistic to assume that most homeowners can pay their mortgages in full at will and thus avoid the hardships of foreclosure.⁸³ Finally, as Justice Meyer noted in his dissent, the majority's treatment of the due-on-sale clause itself is troublesome.⁸⁴ The court's willingness to pull together various portions of a loan agreement to create a due-on-sale interpretation invites the type of abuse by unscrupulous lenders that Justice Lake envisioned in his dissent in *Crockett*:

In the present instance, the accelerating event, as now construed by the money lender, is a 'sleeping' provision, tucked away in the printed portion of the deed of trust so that its meaning, as now asserted by the money lender, would not readily catch the attention of a mortgagor, or a subsequent purchaser of the property, reading the deed of trust.⁸⁵

In *Tech Land Development, Inc. v. South Carolina Insurance, Co.*⁸⁶ the North Carolina Court of Appeals addressed the issue whether a purchasing mortgagee at a foreclosure sale was entitled to retain the proceeds of an insurance settlement on mortgaged property that had been damaged by fire. In a case of first impression, the court adopted the distinction made in most jurisdictions⁸⁷ between foreclosure-after-loss and foreclosure-before-loss.⁸⁸

To secure a note owed to Northwestern Bank, plaintiff had executed a deed of trust on a building it owned.⁸⁹ In compliance with the deed of trust, plaintiff purchased a fire insurance policy from South Carolina Insurance Company. When plaintiff defaulted on its mortgage, Northwestern initiated foreclosure proceedings.⁹⁰ After Northwestern purchased the property at the foreclosure sale, a fire damaged the building on the last day of the upset period. Northwestern settled with South Carolina Insurance Company for \$67,449.30, and plaintiff sued to determine what portion of the recovery Northwestern was entitled to retain.⁹¹

The court of appeals affirmed the lower court's decision that Northwestern was entitled to the entire settlement. The court noted that if the insured property had been damaged prior to foreclosure, Northwestern's bid would have represented the value of the damaged property,⁹² and its retention of the

82. See Note, *Real Property Security*, *supra* note 78, at 496.

83. *Id.*

84. 306 N.C. at 463, 293 S.E.2d at 805.

85. 289 N.C. at 623, 224 S.E.2d at 589 (Lake, J., dissenting).

86. 57 N.C. App. 566, 291 S.E.2d 821, *disc. rev. denied*, 306 N.C. 563, 294 S.E.2d 228 (1982).

87. See G. OSBORNE, G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* § 4.16 (1979); Note, *Foreclosure, Loss, and the Proper Distribution of Insurance Proceeds Under Open and Standard Mortgage Clauses: Some Observations*, 7 VAL. U.L. REV. 485 (1973).

88. 57 N.C. App. at 569, 291 S.E.2d at 823-24.

89. *Id.* at 566, 291 S.E.2d at 822.

90. *Id.* at 566-67, 291 S.E.2d at 822.

91. *Id.* at 567, 291 S.E.2d at 822.

92. *Id.* at 569, 291 S.E.2d at 822.

insurance proceeds in excess of the deficiency after foreclosure would amount to unjust enrichment.⁹³ Since the property was damaged after the foreclosure sale and before the expiration of the upset period, Northwestern's bid represented the value of the undamaged property and the bank was entitled to the entire insurance settlement.⁹⁴ This settlement, the court reasoned, represented the difference in value between the property Northwestern had bid and the property it had received.⁹⁵

D. Joint Ownership⁹⁶

In *Bridgers v. Bridgers*⁹⁷ the court of appeals construed G.S. 46-25, which provides for the partition of standing timber on land owned by tenants in common.⁹⁸ Plaintiffs, cotenants in remainder of a one-half interest in a tract of land, petitioned the superior court for sale of the land's standing timber pursuant to section 46-25.⁹⁹ Defendant, owner of the other half interest in the same land, counterclaimed for its equitable partition into two shares of equal value.¹⁰⁰ The superior court found G.S. 46-25 inapplicable and granted defendant's counterclaim.

The court of appeals held that the superior court had misconstrued G.S. 46-25 in two respects. First, G.S. 46-25 does not require all cotenants to have the same type of interest in land.¹⁰¹ Consequently, a cotenant in remainder could petition for a sale of standing timber in which the other cotenant has a present possessory interest.¹⁰² Second, a finding that an equitable partition is

93. *Id.* at 569, 291 S.E.2d at 823-24.

94. *Id.* at 569-70, 291 S.E.2d 824.

95. *Id.* at 570, 291 S.E.2d at 824.

96. The court of appeals in *Threatte v. Threatte*, 59 N.C. App. 292, 296 S.E.2d 521 (1982), *disc. rev. granted*, 307 N.C. 582, 299 S.E.2d 650 (1983), clarified the type of writing required by N.C. GEN. STAT. § 41-2.1 to create a joint bank account with a right of survivorship. Section 41-2.1 permits a joint account with right of survivorship to be established when "both or all parties have signed a written agreement, . . . expressly providing for the right of survivorship." The court of appeals concluded N.C. GEN. STAT. § 41-2.1 (1981 & Cum. Supp. 1981) would be satisfied by either a properly executed signature card or a certificate, signed by both parties, that expressly provided for a right of survivorship. The signature card in question was signed by both plaintiff and the intestate, and contained language sufficient to create an incident of survivorship. Thus, the court had little difficulty affirming the lower court's summary judgment in favor of plaintiff's claim to the proceeds of the account.

97. 56 N.C. App. 617, 289 S.E.2d 921 (1982).

98. N.C. GEN. STAT. § 46-25 provides:

When two or more persons own, as tenants in common, . . . a tract of land, . . . then in any such case in which there is standing timber upon any such land, a sale of said timber trees, separate from the land, may be had upon the petition of one or more of said owners, or the life tenant, . . . upon such terms as the court may order, Provided further, that prior to a judgment allowing a life tenant to sell the timber there must be a finding that the cutting is in keeping with good husbandry and that no substantial injury will be done to the remainder interest.

N.C. GEN. STAT. § 46-25 (1976).

99. 56 N.C. App. at 618, 289 S.E.2d at 922.

100. *Id.*

101. *Id.* at 620, 289 S.E.2d at 923.

102. *Id.*

impossible is not a prerequisite for granting a partition under G.S. 46-25.¹⁰³ The court observed that G.S. 46-25, unlike G.S. 46-22¹⁰⁴ and G.S. 46-26,¹⁰⁵ "makes no mention of a partition of the real estate."¹⁰⁶ The court concluded that while G.S. 46-25 was a permissive statute,¹⁰⁷ the superior court's misconstruction of the statute required that the case be remanded.

E. Eminent Domain

In *Long v. City of Charlotte*¹⁰⁸ the supreme court further clarified the still developing law governing airport noise cases. Long, who owned property one mile from the end of a recently built runway, sought to recover for damage to his home, possessions, and physical and mental health,¹⁰⁹ which allegedly resulted from the noise, vibration, and pollution caused by low-flying aircraft passing over and near his property.¹¹⁰ He brought action for inverse condemnation, trespass, and nuisance, and further sought punitive damages from defendant city, which had allegedly known of plaintiff's claim prior to construction of the runway.¹¹¹ The trial court dismissed the claims for trespass and nuisance, and struck the allegation of punitive damages.¹¹²

The supreme court affirmed the trial court in all respects. According to the court, trespass and nuisance theories do not protect the landowner's inter-

103. *Id.* at 621, 289 S.E.2d at 923.

104. N.C. GEN. STAT. § 46-22 provides:

Whenever it appears by satisfactory proof that *an actual partition of the lands cannot be made* without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof.

N.C. GEN. STAT. § 46-22 (1976) (emphasis added).

105. N.C. GEN. STAT. § 46-26 provides:

In case of the partition of mineral interests in all instances where it is made to appear to the court that it would be for the best interests of the tenants in common, or joint tenants, of such interests to have the same sold, or *if actual partition of the same cannot be had* without injury to some or all of such tenants [in common], then it is lawful for and the duty of the court to order a sale of such mineral interests and a division of the proceeds as the interests of the parties may appear.

N.C. GEN. STAT. § 46-26 (1976) (emphasis added).

106. 56 N.C. App. at 621, 289 S.E.2d at 923.

107. *Id.* The court noted that under section 46-25, a judge's discretionary order is ordinarily not subject to review unless an abuse of discretion is evident. While there was no such abuse in this case, the judge had ruled upon section 46-25 under a "misapprehension of the law." *Id.*

108. 306 N.C. 187, 293 S.E.2d 101 (1982). The North Carolina courts last considered the issue of "a taking by aircraft noise" in *Cochran v. City of Charlotte*, 53 N.C. App. 390, 281 S.E.2d 179 (1981), *cert. denied*, 304 N.C. 725, 288 S.E.2d 380 (1982). The supreme court had not considered the issue since *Hoyle v. City of Charlotte*, 276 N.C. 292, 172 S.E.2d 1 (1970). *Long* was consolidated for oral argument with *Robinson v. City of Charlotte*, 306 N.C. 213, 293 S.E.2d 117 (1982), and the court's holding in *Long* determined *Robinson*.

109. Plaintiff alleged that the aircraft had caused him and his wife "stress, anxiety, fear, annoyance and loss of sleep, all resulting in injury to their physical and mental health." 306 N.C. at 192, 293 S.E.2d at 105.

110. 306 N.C. at 191-92, 293 S.E.2d at 105.

111. *Id.* at 191-92, 293 S.E.2d at 104-05.

112. *Id.* at 188, 293 S.E.2d at 103. The court allowed plaintiff's petition for discretionary review before the date on which the court of appeals had been scheduled to hear the case, because the decision in *Long* would govern approximately 200 similar cases already pending. *Id.* at 189, 293 S.E.2d at 104.

est in airport noise cases.¹¹³ To recover under the trespass theory, a plaintiff must show that the planes flew directly over his property, and he must identify and sue a particular pilot.¹¹⁴ The nuisance theory is inadequate "particularly when there are only infrequent interferences."¹¹⁵ Accordingly, the court held that inverse condemnation is a landowner's sole remedy for injuries resulting from aircraft overflight.¹¹⁶ The court also adopted the general rule that absent express statutory authority, a plaintiff may not recover punitive damages against a municipality.¹¹⁷

In considering the issue for the first time, the court discussed the historical concerns of retribution and deterrence as justifications for imposition of punitive damages. It concluded, however, that imposition of punitive damages upon a municipality satisfies neither of these concerns. First, the guilty officer does not suffer; rather the governmental entity must pay the award and suffer any retribution. Secondly, since the individual officer does not pay, the deterrent effect is limited. Consequently, punitive damages present a windfall to a plaintiff, while burdening innocent taxpayers who must pay the damages imposed upon the municipality. Given these considerations, the court properly chose to follow "overwhelming weight of modern authority" in refusing to permit imposition of punitive damages upon a municipality.¹¹⁸

The remainder of the court's decision is somewhat more questionable. In restricting plaintiff to an inverse condemnation action,¹¹⁹ the court denied recovery for harm to plaintiff's physical and mental health.¹²⁰ Under this ruling, courts may consider harm only to the extent that it has diminished the value of

113. *Id.* at 197, 293 S.E.2d at 108.

- 114. *Id.* (quoting Kettelson, *Inverse Condemnation of Air Easements*, 3 REAL PROPERTY, PROBATE & TRUST J. 97, 97 (1968)). See also Note, *Inverse Condemnation and Nuisance: Alternative Remedies for Airport Noise Damage*, 24 SYRACUSE L. REV. 793 (1973).

115. *Long*, 306 N.C. at 197, 293 S.E.2d at 108. In order to recover under a nuisance theory in North Carolina, a party must show a *substantial* nontrespassory invasion of his interest in the private use and enjoyment of land. The invasion subjecting a tortfeasor to liability may be either intentional or unintentional. Liability for an unintentional invasion arises when the conduct is negligent, reckless, or ultrahazardous. *Morgan v. High Penn Oil*, 238 N.C. 185, 77 S.E.2d 682 (1953).

116. *Long*, 306 N.C. at 197, 293 S.E.2d at 108. The term "inverse condemnation" designates "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *City of Charlotte v. Spratt*, 263 N.C. 656, 662-63, 140 S.E.2d 341, 346 (1965) (quoting *City of Jacksonville v. Schumann*, 167 So.2d 598 (Fla. App. 1964)).

117. *Long*, 306 N.C. at 206-08, 293 S.E.2d at 113-15. The term "municipal corporation" will probably be construed to include not only cities, towns, villages, and counties, but also other political subdivisions such as municipal transit authorities, municipal agencies, and school districts. See *Carolina-Virginia Coastal Highway v. Coastal Turnpike Auth.*, 237 N.C. 52, 74 S.E.2d 310 (1953); Annot., 1 A.L.R.4th 448, 451 n.3 (1980).

118. *Long*, 306 N.C. at 206-08, 293 S.E.2d at 114 (citing Annot., 1 A.L.R.4th 448 (1980)).

119. A condemnation action proceeds on the theory that private property has been taken for public use without compensating the owner. It is interesting to note that North Carolina is the only state whose constitution does not contain a provision prohibiting the taking of private property without just compensation. The supreme court allows recovery for a taking on federal constitutional and common law grounds. See Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207 (1967).

120. *Long*, 306 N.C. at 204-06, 293 S.E.2d at 112-13.

a plaintiff's property.¹²¹ Acknowledgment of an action for nuisance would have allowed landowners to recover both for diminution in property value and for proximately caused special damages, such as physical distress and mental anguish. In cases involving a violation of airspace not amounting to a taking, a landowner still could recover for physical and mental harm. Other courts, realizing the inadequacy of the inverse condemnation action in such cases, have permitted nuisance actions as well as inverse condemnation suits.¹²²

Though *Long* might appear to preclude recovery of special damages for physical and mental harm, the supreme court noted that it might permit a nuisance action when low flying aircraft cause a specific bodily injury, "such as injury to the eardrum affecting hearing."¹²³ The court specifically mentioned in a footnote that it was not deciding this issue.¹²⁴ Perhaps a resolution of this question will become the next development of North Carolina law in airport cases, "a continually developing area of the law . . . [that], as of this date, has not fully evolved."¹²⁵

In *Greensboro-High Point Airport Authority v. Irvin*¹²⁶ the supreme court applied the traditional measure of damages in eminent domain cases to reach an arguably unjust result.¹²⁷ *Irvin* involved a condemnation action brought by the Airport Authority in 1975.¹²⁸ Following discovery and a hearing overruling defendant's defenses, commissioners appraised the value of the property as of July 1, 1975, the date the Authority had filed its petition to condemn.¹²⁹ After several appeals, in November 1980 a jury determined the amount of compensation using the July 1, 1975 date of valuation.¹³⁰ *Irvin* argued that the court should have assessed the property value as of the date of the trial. The court of appeals agreed, considering it "patently unfair" to pay the landowner in 1980 dollars for damages that were measured in 1975 dollars of much greater value.¹³¹ The court also noted that the purpose of the rule establishing the date of petition as the valuation date is to prevent a windfall

121. *Id.*

122. See, e.g., *Greater Westchester Homowners Ass'n v. City of Los Angeles*, 26 Cal. 3d 86, 1303 P.2d 1329, 160 Cal. Rptr. 733 (1979), cert. denied, 449 U.S. 820 (1980); *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972); *Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100 (1962) (cited in *Long*, 306 N.C. at 197 n.8, 293 S.E.2d at 108 n.8.). Plaintiffs in *Long* had sued the Federal Aviation Agency's administration in federal court. The federal court found that there was no remedy under the Federal Aviation Act, but assumed that plaintiffs could recover for all injuries under North Carolina law. The court suggested that limiting recovery to the loss in fair market value would be a "harsh and unjust result." 306 N.C. at 202 n.9, 293 S.E.2d at 111 n.9.

123. 306 N.C. at 190 n.4, 293 S.E.2d at 104 n.2.

124. *Id.*

125. *Id.* at 194, 293 S.E.2d at 106.

126. 306 N.C. 263, 293 S.E.2d 149 (1982).

127. *Id.* at 274, 293 S.E.2d at 157.

128. *Id.* at 274, 293 S.E.2d at 151. The development of aviation has forced courts and legislatures to modify the ancient maxim, "he who owns the soil owns it to the heavens." *Hoyle v. City of Charlotte*, 276 N.C. 292, 299, 172 S.E.2d 1, 6 (1970).

129. 306 N.C. at 264, 293 S.E.2d at 151.

130. *Id.* at 266, 293 S.E.2d at 152.

131. *Greensboro-High Point Airport Auth. v. Irvin*, 54 N.C. App. 355, 357, 283 S.E.2d 171, 172 (1981).

to the landowner whose property value increases because of the condemnation; in *Irvin* the increase in property value resulted from general increases in property values during the five years between petition and trial.¹³² Finally, the court noted the Airport Authority's failure to pay the money into court pursuant to a statute which permits the condemnor to take possession of the land upon paying the amount of the award.¹³³ Had the Authority paid, it would have been "in possession for the purpose of establishing the valuation date."¹³⁴

The supreme court reversed, strictly applying the rule that the measurement of compensation is the difference in property value immediately before and immediately after the date of petition.¹³⁵ The court found that the statute permitting the condemnor to possess the property upon payment of the award into court merely offers the condemnor an option, and does not change the date of valuation.¹³⁶ Examining the rationale behind assessing the property value as of the date the petition is filed, the court determined that the rule is intended to prevent recovery of *any* appreciation of value after the filing date, regardless of the cause of such appreciation.¹³⁷

G.S. 40A-63 suggests that the legislature may have envisioned a narrower rationale behind this rule.¹³⁸ Although the statute does establish the date of petition as the valuation date, it also mentions that "except as provided in the following sections [the valuation] shall not reflect an increase or decrease *due to the condemnation*."¹³⁹ This language suggests a concern that a landowner should not benefit from the condemnation—it does not necessarily follow that delays between the filing date and payment of the award should penalize the landowner. While the court's provision for payment of interest over the years of delay mitigates this penalty somewhat,¹⁴⁰ the legal rate of interest cannot compensate for the diminution in the value of the dollar over the same period.

Nevertheless, North Carolina courts seem determined not to consider

132. *Id.*

133. *Id.*

134. *Id.*

135. *Irvin*, 306 N.C. at 268, 293 S.E.2d at 153.

136. *Id.* at 267-68, 293 S.E.2d at 152-53. N.C. GEN. STAT. § 40-19 (1976), *repealed by* N.C. Gen. Stat. § 40A-1 (Cum. Supp. 1981), provides for this "quick take" procedure. In 1981 the legislature replaced the Chapter 40 statutes governing eminent domain with Chapter 40A, effective January 1, 1982. N.C. GEN. STAT. § 40A-1 (Cum. Supp. 1981). The new quick take procedure states that the condemnor "may" deposit money into court. N.C. Gen. Stat. § 40A-28 (Cum. Supp. 1981).

137. 306 N.C. at 270-71, 293 S.E.2d at 154-55 (declaring that the court of appeals mistakenly found room for exceptions in some courts' use of the word "ordinarily" as a preface to the general rule that petition date is the date of valuation).

138. *See* N.C. GEN. STAT. § 40A-63 (Cum. Supp. 1981). The court could not apply this statute to this case, however, since this eminent domain proceeding commenced before the statute took effect. *See supra* note 136.

139. N.C. GEN. STAT. § 40A-63 (Cum. Supp. 1981) (emphasis added).

140. *See* 306 N.C. at 272-73, 293 S.E.2d at 155-56. North Carolina courts generally provide for payment of interest as compensation for delays in paying the award. Interest is paid from the date the condemnor acquires the right to possession. *See City of Kings Mountain v. Goforth*, 283 N.C. 316, 196 S.E.2d 231 (1973). In *Irvin* the condemnor acquired the right to possession on the date the commissioners assessed the property, a year after it filed the petition to condemn.

changes in property value that arise after the date of petition. In *Department of Transportation v. Bragg*¹⁴¹ the Department brought a condemnation action for a right of way across Bragg's land. After filing the petition, but before damages had been determined, the Department excavated a spring that formerly had drained through a pipeline across Bragg's property. The pipeline broke, causing water damage to Bragg's motel.¹⁴² At trial, the Department filed a motion *in limine* requesting the court not to consider the water damages in determining compensation.¹⁴³ The trial court granted the motion and the court of appeals affirmed.¹⁴⁴ According to the court, compensation must be determined as of the time of taking, which occurred upon filing of the petition.¹⁴⁵ Thus, to recover for water damages to his motel, Bragg was required to bring a separate action.¹⁴⁶

Although the cause of action for inverse condemnation ordinarily accrues at the time of the alleged taking, North Carolina courts have recognized an exception to this rule when the state has taken an easement for flooding.¹⁴⁷

In *Lea Co. v. North Carolina Board of Transportation*¹⁴⁸ the court of appeals reiterated that the right of action for such a taking does not arise until damage has occurred. In *Lea Co.* the state had built highway structures on the edge of plaintiff's property. Plaintiff alleged that these structures had foreseeably increased the level of flooding on its property and thereby caused substantial damage to its apartments.¹⁴⁹ Arguing that in building these structures the state had taken an easement for flooding, plaintiff brought an action for inverse condemnation.

To recover for such a taking, a landowner must show that the flooding was (1) "reasonably to have been anticipated by the government," (2) "the direct result of the structure established and maintained by the government," and (3) "an actual permanent invasion of the land, or a right appurtenant thereto, amounting to an appropriation of and not merely an injury to the property."¹⁵⁰ The court determined that plaintiff had proved these elements, citing evidence that (1) the flooding was at approximately one hundred year flood levels, which would have been statistically foreseeable by those familiar with the science of hydrology;¹⁵¹ (2) the structures "substantially increased"

141. 59 N.C. App. 344, 296 S.E.2d 657 (1982).

142. *Id.* at 344-45, 296 S.E.2d at 657.

143. *Id.* at 345, 296 S.E.2d at 657.

144. *Id.*

145. *Id.* "Upon the filing of the complaint and the declaration of taking and deposit in court, . . . title to said land . . . together with the right to immediate possession . . . shall vest [as of] the time of the filing of the complaint. . . ." N.C. GEN. STAT. § 136-104 (1981).

146. 59 N.C. App. at 346, 296 S.E.2d at 658.

147. *See* *Midgett v. North Carolina State Highway Comm'n*, 260 N.C. 241, 132 S.E.2d 599 (1963).

148. 57 N.C. App. 392, 291 S.E.2d 844, *disc. rev. allowed*, 306 N.C. 557, 294 S.E.2d 371 (1982).

149. *Id.* at 394, 291 S.E.2d at 846.

150. *Id.* at 396-97, 291 S.E.2d at 847-48 (quoting *Midgett v. North Carolina State Highway Comm'n*, 260 N.C. 246, 248, 132 S.E.2d 599, 607 (1963)). Prior to *Lee Co.*, North Carolina courts had not considered this issue since *Midgett*.

151. *Id.* at 397, 291 S.E.2d at 848.

the level of flooding that would have occurred had they not been built;¹⁵² and (3) the permanency of the foreseeable harm from the structures constituted a permanent invasion of plaintiff's land.¹⁵³ The court then observed that although the state had taken an easement for flooding, an inverse condemnation action for such a taking is grounded in nuisance.¹⁵⁴ Thus, while the state had taken a right to flood when it first built the structures, defendant could not recover until actual damage had occurred.¹⁵⁵ Given the problem that flood easement takings present in proving the diminution of property value before actual damage occurs, this rule seems reasonable.

In *Department of Transportation v. Harkey*¹⁵⁶ the court of appeals, relying upon questionable grounds, denied compensation to a church for impairment of access. In *Harkey*, the Department of Transportation had condemned a strip of church property to construct a highway right-of-way. Access to the church remained, but the right-of-way required church-goers to travel one mile further than before, partially through residential streets. The church sought compensation for this added inconvenience, but the trial court and the court of appeals held that "reasonable and adequate" access remained after the condemnation.¹⁵⁷

The court stated that "the main question in cases such as this one concerns the reasonableness of the substitute access provided."¹⁵⁸ In the 1971 case of *Smith Co. v. Highway Commission*,¹⁵⁹ the supreme court awarded compensation for impairment of access when a condemnation resulted in increased travel of less than one mile over residential streets to reach the affected owner's warehouse. Although the "reasonableness of the substitute access provided" seems substantially the same, the *Harkey* court distinguished *Smith* on two grounds: (1) in *Harkey* the Department of Transportation had worked harder to provide adequate alternative access routes for the church, and (2) *Harkey* involved a church, rather than commercial property.¹⁶⁰ Even with the Department of Transportation's improvements, however, the inconvenience to the church was no less than that for which the court awarded compensation in *Smith*. Thus, the only real distinction between the two cases is that one involved church property, and the other commercial. That such a distinction should determine whether a compensable taking has occurred is questionable. Indeed, Justice Webb dissented for that very reason.¹⁶¹

152. *Id.* at 398, 291 S.E.2d at 848.

153. *Id.* at 398-99, 291 S.E.2d at 848-49.

154. *Id.* at 402, 291 S.E.2d 850-51.

155. *Id.* North Carolina courts have long followed this rule in flood easement takings, though apparently this situation rarely arises. See *Midgett v. North Carolina State Highway Comm'n*, 260 N.C. 241, 132 S.E.2d 599 (1963); *Beach v. Wilmington & W. R.R.*, 120 N.C. 498, 26 S.E. 703 (1897) (railroad discharging drainage ditches).

156. 57 N.C. App. 172, 290 S.E.2d 773 (1982).

157. *Id.* at 172-73, 290 S.E.2d at 773-74.

158. *Id.* at 174, 290 S.E.2d at 774 (quoting *North Carolina State Highway Comm'n v. Rankin*, 2 N.C. App. 452, 163 S.E.2d 302 (1968)).

159. 279 N.C. 328, 182 S.E.2d 383 (1971).

160. 57 N.C. App. at 174, 290 S.E.2d at 774.

161. *Id.* at 175, 290 S.E.2d at 775 (Webb, J., dissenting).

F. Easements

In *Green v. Duke Power Co.*¹⁶² the supreme court considered the question whether a landowner may be held liable for injuries caused by structures placed by another on his land pursuant to an easement. In *Green* the plaintiffs sued Duke Power Co. for injuries received when a five-year old touched an exposed transformer owned and operated by Duke.¹⁶³ The transformer was located on land owned by the Charlotte Housing Authority, which was leasing the land when the accident occurred.¹⁶⁴ Plaintiffs alleged that Duke Power had negligently failed to keep the transformer locked.¹⁶⁵ Duke Power filed a third party complaint against the Housing Authority and its lessee, Eanes, and sought contribution on ground that the third party defendants knew or should have known of the dangerous condition, yet did nothing to correct it.¹⁶⁶

In ruling that Duke Power was not entitled to contribution, the supreme court affirmed the trial court's decision to grant summary judgment for the Housing Authority and Eanes.¹⁶⁷ The court held that in order to find the third party defendants liable, Duke Power, as owner of the easement, had to show not only that the third-party defendants knew of the dangerous condition, but also that they had "a reasonable opportunity to prevent or control such [a condition]."¹⁶⁸

Eanes knew of the condition, but the court found that the express terms of the easement had left Eanes and the Housing Authority without control over the transformer.¹⁶⁹ The easement granted to Duke "the right . . . to construct, maintain and operate [thereon] . . . transformers . . . together with the right at all times to enter said premises . . ."¹⁷⁰ From these terms the courts reasoned that interference or tampering with the transformer would constitute an encroachment upon the rights of Duke Power, and that locking or fencing the transformer would impair its accessibility, contravening the terms of the

162. 305 N.C. 603, 290 S.E.2d 593 (1982).

163. *Id.* at 604, 290 S.E.2d at 594.

164. *Id.*

165. *Id.* The general rule in North Carolina is that the owner of the servient tenement is not responsible for the maintenance of the easement. See *Dodds v. St. Louis Trust Co.*, 205 N.C. 153, 170 S.E. 652 (1933).

166. During discovery, Eanes, the lessee, testified that he had known for some time that the transformer was unlocked and that he had so informed both Duke Power and the Housing Authority. Duke Power denied having received such information. 305 N.C. at 604-05, 290 S.E.2d at 594.

167. 305 N.C. at 613, 290 S.E.2d at 599. The court of appeals had dismissed Duke Power's appeal. *Green v. Duke Power Co.*, 50 N.C. App. 646, 274 S.E.2d 889 (1981).

168. 305 N.C. at 611-12, 290 S.E.2d at 598 (quoting 2 HARPER & JAMES, *THE LAW OF TORTS* § 27.19, at 1526 (1956)). In setting out this "control test," the court said it was following "the well-reasoned holding of the Hawaii Supreme Court that in such cases it is the control and not the ownership which determines the liability." *Id.* at 612, 290 S.E.2d at 598 (quoting *Levy v. Kimball*, 50 Hawaii 497, 499, 443 P.2d 142, 144 (1968)). Actually, the Hawaii rule originated as an explanation for the traditional rule that the owner of an easement is liable for injuries caused by his use of the land, even though he does not own the land. Because of his control over his use of the easement, liability attaches to him. See *Levy*, 50 Hawaii at 498-99, 443 P.2d at 144; *Re Taxes Victoria Ward*, 33 Hawaii 235, 236-37 (1934).

169. 305 N.C. at 611, 290 S.E.2d at 598.

170. *Id.*

easement. Thus bound by the easement provision, the third-party defendants had no control over the dangerous condition and could not be held liable.

Green suggests that the court will continue to impose liability solely upon the owner of the easement, unless the owner of the servient tenement has the opportunity and right to control the dangerous condition or conduct. The case in which the supreme court first mentioned the "control test" involved the alleged liability of a property owner for damages resulting from a fire set on his property by a third party.¹⁷¹ Even if the owner had known of the fire, it is doubtful he could have controlled it, because winds had blown it to adjoining property.¹⁷² In *Green* the third party defendants were capable of physically controlling the condition, but the court excused their inaction by explaining that they had no right of control under the terms of the easement. The precise terms, however, only required that Duke Power have the right to maintain the transformer and to enter the premises. Locking the transformer would have caused Duke Power little inconvenience; erecting a warning sign or informing Duke Power of the condition would not have interfered with the company's rights in any way. It seems that as a matter of public policy, courts should require the owner of a servient tenement to take comparable steps to prevent injury to others when he knows of a dangerous condition on his property and can reasonably reduce the risk it presents.¹⁷³ Considering that the landowner usually receives compensation for the easements he grants, and consents to the use that creates the risk, such a limited duty does not seem unduly burdensome.

In *City of Statesville v. Credit & Loan Co.*¹⁷⁴ the court of appeals held that a municipality had not established an aviation easement by prescription, because it had not shown that planes passing over defendant's property had interfered with the use of the property or endangered the people on it. Plaintiff had claimed an easement over land it needed for enlargement of its airport. Because plaintiff did not claim it had taken an easement by eminent domain, the courts did not apply a *Causby* analysis of the constitutional dimensions of airspace;¹⁷⁵ instead, the court applied the North Carolina common and statutory law of easements. In North Carolina, one of the elements of a prescrip-

171. See *Benton v. Montague*, 253 N.C. 695, 117 S.E.2d 771 (1961) (property owner not liable for acts of licensee on his property, because he neither knew of nor could control these acts).

172. *Id.* at 701, 117 S.E.2d at 775-76.

173. In this case, Eanes may have met this suggested duty of care, since he had warned plaintiff not to play near the transformer, and alleged that he had informed Duke Power of the condition. 305 N.C. at 604, 290 S.E.2d at 594. The court seemed reluctant to impose any duty of care under the circumstances of this case, and merely stated that *if* sound policy did require imposition of a duty, Eanes discharged his duty by warning plaintiff not to play near the transformer. *Id.* at 613, 290 S.E.2d at 599. It might be argued that sound public policy in this situation imposes a greater duty than merely requiring the property owner to warn one child.

174. 58 N.C. App. 727, 294 S.E.2d 405 (1982).

175. *Id.* at 729, 294 S.E.2d at 406. For examples of the analysis under eminent domain actions, see *United States v. Causby*, 328 U.S. 256 (1946); *Cochran v. City of Charlotte*, 53 N.C. App. 390, 291 S.E.2d 179 (1981). Had the court applied the *Causby* analysis, plaintiff would have been required to show that "overflights constitute a *material* interference with the use and enjoyment of [defendant's] property, such that there [was] substantial diminution in fair market value." *Cochran*, 53 N.C. App. at 397, 291 S.E.2d at 186.

tive easement is use of another's property that is adverse, hostile, or under claim of right.¹⁷⁶ To determine whether the municipality had used defendant's property in such a manner, the court turned to the statutory law governing the altitudes at which planes may legally fly.¹⁷⁷ Thus, if planes had been flying at an altitude that did not interfere with defendant's use of the land, threaten the safety of individuals below, or injure their health and happiness, then the planes had not entered airspace that the defendant had a right to control, and plaintiff's use of the land was not adverse.¹⁷⁸ Upon plaintiff's failure to respond to affidavits stating that the manner of flights did not indicate a right of ownership, and that the land had been used continuously for farming over the previous twenty years, the court concluded that there was no genuine issue over the adverse nature of the flights.¹⁷⁹ Accordingly, the court affirmed the trial court's summary judgment for defendant.¹⁸⁰

Thus, in claims for a prescriptive easement over another's land, the statutory law governing lawful altitudes of flight will determine whether a use is adverse; in eminent domain actions, the constitutional measure of a landowner's right to airspace will determine whether there has been a taking. As a result, a court could rule that a given use of airspace injured the happiness of people below, and was thus adverse for the purpose of establishing a prescriptive easement, yet conclude that the same use did not materially interfere with the landowner's use so as to constitute a taking of his airspace. Curiously, then, the scope of a landowner's interest in airspace depends upon the type of action brought against him.

G. Zoning

In *State v. Jones*¹⁸¹ the North Carolina Supreme Court for the first time

176. *Statesville*, 58 N.C. App. at 729, 294 S.E.2d at 406. In order to acquire an easement by prescription, plaintiff must show: (1) that the use was adverse, hostile, or under claim of right; (2) that the use has been open and notorious; (3) that the use has been continuous and uninterrupted for at least twenty years; and (4) that there is substantial identity of easement claimed throughout the twenty-year period. *Potts v. Burnette*, 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981).

The court of appeals applied these principles in considering the validity of alleged prescriptive easements in two other cases in 1982. See *Newsome v. Smith*, 56 N.C. App. 419, 289 S.E.2d 149 (1982) (reversing trial court's directed verdict for defendant, citing evidence which tended to show that the disputed driveway was plaintiff's only means of access to their home and that plaintiffs and their predecessors had used it continuously for sixty years); *Rathburn v. Hawkins*, 56 N.C. App. 82, 286 S.E.2d 827 (1982) (reversing trial court's summary judgment for defendant on grounds that the dispute over whether plaintiff had sought permission to use a roadway over defendant's land constituted material issue of fact).

177. See N.C. GEN. STAT. § 63-13 (1981), which provides:

Flight in aircraft over the lands and waters of this state is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be injurious to the health and happiness, or imminently dangerous to persons or property lawfully on the land or water beneath.

178. See *Statesville*, 58 N.C. App. at 729-30, 294 S.E.2d at 406.

179. *Id.* at 730, 294 S.E.2d at 407.

180. *Id.*

181. 305 N.C. 520, 290 S.E.2d 675 (1982).

authorized zoning based solely upon aesthetic considerations.¹⁸² The case arose from the arrest of defendant Jones for violation of a Buncombe County ordinance requiring opaque fences around junkyards within specified areas of the county.¹⁸³ Jones argued that in seeking to hide junkyards from public view, the county pursued a purely aesthetic goal.¹⁸⁴ Traditionally, courts have limited exercise of the zoning power to enforcement of ordinances reasonably designed to promote the public health, safety, morals, or general welfare.¹⁸⁵ Because North Carolina courts had never considered aesthetic objectives to be within those public goals, Jones filed a motion to quash on grounds that the courts lacked authority to zone in this manner.¹⁸⁶ Thus, Jones argued, to deny him the desired use of his land constituted a taking without just compensation in violation of the law of the land clause of the North Carolina Constitution and the due process clause of the fourteenth amendment.¹⁸⁷

The superior court ruled the ordinance unconstitutional and granted the motion to quash.¹⁸⁸ The court of appeals reversed, citing dicta in several supreme court cases as evidencing a growing tolerance for aesthetic zoning.¹⁸⁹ The supreme court affirmed the court of appeals, and thereby joined a growing majority of courts that permit zoning solely for aesthetic considerations.¹⁹⁰

In choosing to allow aesthetic zoning, the court applied a balancing test first announced in a 1979 historic district zoning case, *A-S-P Associates v. City of Raleigh*.¹⁹¹ This test now limits aesthetic zoning to situations in which the

182. The court first expressly prohibited aesthetic zoning in *State v. Brown*, 250 N.C. 54, 59-60, 108 S.E.2d 74, 78 (1959). As recently as 1979 the court had declined "to endorse such a broad concept of the police power." *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 216, 258 S.E.2d 444, 450 (1979). The court of appeals, however, has departed from a blanket prohibition by upholding a county ordinance restricting the location of billboards. See *Cumberland County v. Eastern Fed. Corp.*, 48 N.C. App. 518, 524, 269 S.E.2d 672, 676, *disc. rev. denied*, 301 N.C. 527, 273 S.E.2d 453 (1980).

183. 305 N.C. at 521-22, 290 S.E.2d at 676.

184. *Id.* at 523, 290 S.E.2d at 677.

185. See *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 395 (1926).

186. 305 N.C. at 521, 290 S.E.2d at 676.

187. *Id.* at 523, 290 S.E.2d at 677. The term "law of the land" is synonymous with "due process of law" as used in the fourteenth amendment to the United States Constitution. In *re Moore*, 289 N.C. 95, 98, 221 S.E.2d 307, 308 (1976) (citing *Surplus Store, Inc v. Hunter*, 297 N.C. 206, 129 S.E.2d 764 (1964)).

188. 305 N.C. at 521, 290 S.E.2d at 676.

189. *Shugar v. Gill*, 53 N.C. App. 466, 277 S.E.2d 126 (1981).

190. Nineteen jurisdictions, including North Carolina, now permit regulation based solely upon aesthetic concerns; seven prohibit it; sixteen have not answered the question definitively; and nine have reported no cases. See Note, *Property Law—State v. Jones: Aesthetic Regulation—From Junkyards to Residences?*, 61 N.C.L. REV. 401, 403 n.23 (1983).

191. 298 N.C. 207, 258 S.E.2d 444 (1979) (upholding constitutionality of historic district preservation ordinance adopted pursuant to N.C. GEN. STAT. §§ 160A-395 to -399 (1982)). In a victory for preservationists during 1982, the legislature amended the Historic District Zoning Act to include property owned by the state. See N.C. GEN. STAT. § 160A-398.1 (1982). Prior to this amendment, municipalities could not regulate a publicly owned building unless it had been designated *individually* as historic property. See N.C. GEN. STAT. § 160A-399.11 (1982). Publicly owned buildings located within historic *districts* were not subject to historic zoning restrictions. Thus, a municipality could designate an area as a historic district, and seek to renovate or preserve structures within the district, but the state was free to use its buildings as it pleased, potentially frustrating the municipality's efforts. This amendment permits municipalities to regulate all buildings within designated historic districts, including those owned by the state (but excluding

resulting gain to the public outweighs the diminution in value of the individual's property.¹⁹² The court of appeals applied this test in *R. O. Givens, Inc. v. Town of Nags Head*,¹⁹³ upholding an ordinance that banned off-premises commercial signs.¹⁹⁴

These decisions allow municipalities greater control in creating and preserving an aesthetically pleasing environment. With elimination of the requirement that aesthetic regulation promote the public health, safety, morals, or general welfare, the control of junkyards, billboards, and other eyesores has become much more feasible. It is hoped, however, that aesthetic zoning will not become a vehicle for imposing the tastes of some individuals over those of others in controlling matters of more subjective aesthetic quality.¹⁹⁵

H. Wills, Trusts, and Estates

1. Construction

The case of *Adcock v. Perry*¹⁹⁶ presented the North Carolina Supreme Court with the problem of determining how to apply properly a statutory presumption embodied in G.S. 31-38,¹⁹⁷ which favors fee simple devises over lesser estates when construing ambiguous language in a will. The issue in *Adcock* was whether the following provisions of decedent's will operated to give his widow a fee simple interest or merely a life estate in his property:

Item 2

All . . . my property, real and personal . . . , I give, bequeath and devise unto my beloved wife, Annie Perry, and I do hereby give . . . to the said Annie Perry the right to sell or mortgage any part of the real and personal property hereby devised and bequeathed to her in order to provide funds with which to defray her own necessary personal expenses, but she is not given the power to sell, dispose of or mortgage any part of said property for the purpose of aiding or assisting any of her children or any of the members of her family.¹⁹⁸

Item 3

After the death of my said wife, I give, bequeath and devise all of my property remaining to my four children share and share alike

those "of the University of North Carolina, or any of its constituent institutions or agencies"). N.C. GEN. STAT. § 160.A-398.1 (1982).

192. 305 N.C. at 530-31, 290 S.E.2d at 681.

193. 58 N.C. App. 697, 294 S.E.2d 388 (1982).

194. Regulation of billboards has been a common objective of local governments; an objective that surely will continue with the recent decisions permitting aesthetic zoning. A 1982 amendment to the Outdoor Advertising Control Act, however, limited such regulation. See N.C. GEN. STAT. § 136-131.1 (1981), which requires payment of just compensation when a local government body orders the removal of a billboard, for which there is a valid permit, from property adjacent to a highway on the National System of Interstate and Defense Highways or the Federal-Aid Primary Highway System.

195. For a more thorough discussion of *State v. Jones* and its possible ramifications, see Note, *supra* note 9.

196. 305 N.C. 625, 290 S.E.2d 608 (1982).

197. See *infra* note 200 and accompanying text.

198. 305 N.C. at 626, 290 S.E.2d at 610.

. . . 199

In construing the provisions of the will, the court was bound to apply the rule of G.S. 31-38, which provides:

When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity.²⁰⁰

Plaintiffs argued that because of the statute the will operated to vest a fee simple interest in the testator's widow, which she in turn devised to them. Defendants (children of the testator) contended that Item 2 of the will gave the widow a life estate only, and that Item 3 gave them the fee simple interest in remainder. The majority of the supreme court agreed with defendants and held that, in this case, the presumption raised by G.S. 31-38 had been fully rebutted.²⁰¹ Justice Mitchell, dissenting, submitted his opinion²⁰² that the presumption could only be rebutted by "plain and express words, show[ing], . . . that the testator intended to convey an estate of less dignity."²⁰³ Since no plain and express words limiting the widow's interest to a life estate could be found in Item 2 of the will, Justice Mitchell believed the statutory presumption was not rebutted.²⁰⁴

The dissenting opinion correctly examined the actual language of the statute to determine whether the presumption has been rebutted, but incorrectly focused on only that portion of G.S. 31-38 which permits "plain and express words" to rebut the presumption.²⁰⁵ The statute provides a second method for rebutting the presumption: when no "plain and express words" limiting the devise to a life estate can be found in the sentence containing the disputed devise, if a reading of the *whole* instrument shows that the testator "plainly intended by the will or some part thereof to convey an estate of less dignity [than a fee simple],"²⁰⁶ the devise should not be presumed to be in fee. The majority opinion correctly noted that an examination of decedent's entire will compelled the conclusion that his "clear intent" was to devise to his wife a life estate only. If it were otherwise, a majority of the will's provisions would be rendered void as repugnant to the presumed absolute devise.²⁰⁷ Since the life estate construction corresponded to the "clear intent" of the will, the statutory presumption was properly held to have been rebutted.²⁰⁸

The majority opinion in *Adcock* seems to reach the correct result: the

199. *Id.*

200. N.C. GEN. STAT. § 31-38 (1976).

201. 305 N.C. at 631, 290 S.E.2d at 611.

202. *Id.* at 632, 290 S.E.2d 613 (Mitchell, J., dissenting).

203. See *supra* note 200 and accompanying text.

204. 305 N.C. at 632, 290 S.E.2d at 613.

205. See *id.*

206. See *supra* note 200 and accompanying text.

207. 305 N.C. at 630, 290 S.E.2d at 612.

208. *Id.* at 631, 290 S.E.2d at 611.

statutory presumption embodied in G.S. 31-38 should not be permitted to defeat the testator's intent. Justice Mitchell's contrary reading of G.S. 31-38 may be viewed as evidence that the statute, more than the will, was in need of judicial construction in this case.

In *Wachovia Bank & Trust Co. v. Livengood*,²⁰⁹ the issue was not whether the testator intended a devise in fee simple, but whether he intended his devisees to take per capita or per stirpes. The will in question created a testamentary trust for the benefit of the testator's sisters and sister-in-law,²¹⁰ then provided for distribution of the trust corpus in the following manner: "(2) Upon the death of the last survivors of my sisters . . . and my sister-in-law . . . this trust shall terminate and be paid over in equal shares to my nieces and Nephews per Stripes [sic]."²¹¹ Both the trial court and court of appeals were of the opinion that the testator's use of the words "per Stripes" (sic) meant that he intended the distribution to be made to the devisees per stirpes rather than per capita.²¹² If distribution were made per capita, each devisee would receive a 1/6 share;²¹³ but if the distribution were made per stirpes, one of the devisees would receive a 1/3 share, three devisees would each receive a 1/9 share, and the two remaining devisees would each receive a 1/6 share.²¹⁴

Two common law rules of construction were consulted by the courts to determine which method of distribution should control. First, the general rule provides that when a devise or bequest is to a class (such as nephews and nieces), the devisees take per capita unless it clearly appears that the testator intended a different division.²¹⁵ The other rule provides that when a testator uses technical words or phrases (such as "per stirpes") in disposing of property, it is presumed that he used them in their well-known legal or technical sense unless in some appropriate way in the instrument he indicates otherwise.²¹⁶ Ultimately, the supreme court held that the testator's use of the words "in equal shares" (which indicate a per capita distribution) was an appropriate way for the testator to indicate that the words "per Stripes" (sic) were not intended to require a true per stirpes distribution.²¹⁷

The court's solution ordering the trust corpus to be distributed on a per capita basis, appears fair in this particular case, but it leaves some questions unanswered. If one of the nieces in *Livengood* had died before the trust terminated, and had left issue surviving her, would her issue be entitled to share in the distribution by representation (per stirpes), or would they be excluded from the distribution entirely? A strict per capita distribution would require

209. 306 N.C. 550, 294 S.E.2d 319 (1982).

210. *Id.*

211. *Id.* at 550, 294 S.E.2d at 320 (emphasis added).

212. *Id.* at 552, 294 S.E.2d at 320. See *Survey of Developments in North Carolina Law, 1981—Property*, 60 N.C.L. REV. 1450-51 (1982).

213. *Livengood*, 306 N.C. at 551, 294 S.E.2d at 320.

214. *Id.*

215. *Id.* at 552, 294 S.E.2d at 320.

216. *Id.*

217. *Id.* at 553, 294 S.E.2d at 321.

exclusion of the grandnieces and grandnephews, but the better approach, not mentioned by the *Livengood* court, would permit the grandnieces and grandnephews to divide the share their parent would have received if she were still alive.²¹⁸ It is at least arguable that the latter approach describes precisely what the testator in *Livengood* intended when he directed that the trust fund be paid over "in equal shares to my nieces and Nephews per Stripes [sic]."²¹⁹ Perhaps he was trying to say "in equal shares to my nieces and nephews but if any niece or nephew dies leaving issue surviving on the date of distribution, the issue shall take their ancestor's share per stirpes." Unfortunately, the actual will contained no language that could be used to harmonize the conflicting terms.

The result reached by the supreme court in *Livengood* reflects an honest attempt to determine the testator's intent, but it is by no means clear that the testator's true intent could be determined from an examination of the language employed in the will. Since the words "in equal shares" and "per stirpes" are directly contradictory, any interpretation of the testator's intent amounts to little more than a judicial guess as to which phrase the testator intended to control the distribution of the trust assets.

2. Equitable Remedies

(a) Resulting Trusts and Presumptive Gifts

The opinion of the North Carolina Supreme Court in *Mims v. Mims*²²⁰ may well contain the year's most significant development in North Carolina property law.²²¹ In *Mims* the court prospectively changed a sexually discriminatory rule of law relating to presumptive gifts and purchase money resulting trusts in interspousal property disputes,²²² and held that, henceforth, in all cases not governed by the Equitable Distribution of Marital Property Act,²²³ the same presumption of gift that has for decades arisen in favor of wives who acquire title to real estate with funds provided by their husbands²²⁴ shall also

218. *E.g.*, *Dew v. Shockley*, 36 N.C. App. 87, 243 S.E.2d 177, *cert. denied*, 295 N.C. 465, 246 S.E.2d 9 (1978); *Roberts v. Northwestern Bank*, 271 N.C. 292, 156 S.E.2d 229 (1967); *Wachovia Bank & Trust Co. v. Bryant*, 258 N.C. 482, 128 S.E.2d 758 (1963); *see also Survey of Developments in North Carolina Law, 1981—Property*, 60 N.C.L. REV. 1451 n.231-32 (1982).

219. *See supra* note 211.

220. 305 N.C. 41, 286 S.E.2d 779 (1982).

221. *See Note, Property Law—Mims v. Mims: North Carolina Eliminates Presumption of Purchase Money Resulting Trust For Wives*, 61 N.C.L. REV. (1983).

222. *See* G. BOGERT & G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* §460 (rev. 2d ed. 1977); 2 R. LEE, *NORTH CAROLINA FAMILY LAW* §113, at 45 (4th ed. 1980); 1 H. TIFFANY, *THE LAW OF REAL PROPERTY* §272 (3d ed. 1939); Comment, *Husband's Acquisition of Title with Funds Furnished by Wife: Resulting Trust or Presumption of Gift*, 74 DICK. L. REV. 455, 463-65 (1970); Comment, *Resulting Trusts in Entireties Property When Wife Furnishes Purchase Money*, 17 WAKE FOREST L. REV. 415, 422 (1981). All authorities cited here advocate uniform application of the presumptive gift doctrine whenever one spouse acquires title to property paid for by the other spouse, regardless of the gender of the spouse furnishing the purchase price.

223. N.C. GEN. STAT. §§ 50-20, -21 (Cum. Supp. 1981). The holding of *Mims* is limited to cases not governed by this Act. 305 N.C. at 53, 286 S.E.2d at 787.

224. *See, e.g.*, *Honeycutt v. Citizens Nat'l Bank*, 242 N.C. 734, 89 S.E.2d 598 (1955); *Shue v. Shue*, 241 N.C. 65, 84 S.E.2d 302 (1954); *Carlisle v. Carlisle*, 225 N.C. 462, 35 S.E.2d 418 (1945).

operate in favor of husbands who are named as grantees in deeds for which their wives furnished the consideration.²²⁵ The effect of the *Mims* decision is to remove the common law presumption that a wife who purchases property with her own funds and places the title in her husband's name is entitled to a resulting trust in the property,²²⁶ and to replace that presumption with a rule providing that if either spouse furnishes consideration for a conveyance vesting title in the other spouse, there is a presumption that the conveyance of title was intended as a gift.²²⁷ The presumption of gift may be rebutted by clear, cogent, and convincing evidence,²²⁸ and if rebutted successfully will entitle the party who provided the consideration for the conveyance to a jury trial on the issue of the purchaser's intention.²²⁹ If the jury determines that no gift was intended, the purchaser is entitled to the benefit of a resulting trust in the property.²³⁰

The circumstances giving rise to the original lawsuit in *Mims* were as follows: Mr. Mims furnished the entire purchase price for a house and lot titled in the names of both spouses as tenants by the entireties and used by the parties as a marital home.²³¹ After the couple separated, he instituted an action seeking reformation of the deed and a declaration that he was the sole beneficial owner of the real estate.²³² Mr. Mims theorized that, since he had allowed the deed to be drawn in both names only because of a mistaken notion that North Carolina law required it,²³³ he lacked the donative intent necessary to

See generally R. LEE, *supra* note 222, at 44; WEBSTER, *REAL ESTATE LAW IN NORTH CAROLINA* §111 at 112 (rev. ed. 1981); Comment, *Husband's Acquisition of Title with Funds Furnished by Wife: Resulting Trust or Presumption of Gift*, 74 DICK. L. REV. 455, 456-57 (1970); Comment, *Resulting Trusts in Entireties Property When Wife Furnishes Purchase Money*, 17 WAKE FOREST L. REV. 415, 417 (1981).

225. *Mims*, 305 N.C. at 53, 286 S.E.2d at 787.

226. See *infra* notes 248-50 and accompanying text. A resulting trust is an intent effectuating device and should be distinguished from a constructive trust, see *supra* notes 312-28 and accompanying text, which may operate regardless of the parties' intentions. The constructive trust enjoys a broader range of application because it may be invoked whenever it is inequitable for a title holder to retain ownership of a piece of property. The resulting trust, however, is generally confined to instances in which the form of the original conveyance did not conform to the purchaser's intention. The trust is raised in order to effectuate that which the law presumes to have been the intention of the party supplying the consideration for the conveyance.

The classic example of a resulting trust is the purchase-money resulting trust. In such a situation, when one person furnishes the consideration to pay for land, title to which is taken in the name of another, a resulting trust commensurate with his interest arises in favor of the one furnishing the consideration. The general rule is that the trust is created, if at all, in the same transaction in which the legal title passes, and by virtue of the consideration advanced before or at the time the legal title passes. *Cline v. Cline*, 297 N.C. 336, 344, 255 S.E.2d 399, 404-05 (1979).

Mims, 305 N.C. at 46-47, 286 S.E.2d at 784. See also *Wilkie v. Wilkie*, 58 N.C. App. 624, 629, 294 S.E.2d 230, 232 (1982).

227. 305 N.C. at 53, 286 S.E.2d at 787.

228. *Id.*

229. *Id.* at 56-61, 286 S.E.2d at 789-91.

230. *E.g.*, *Wilkie v. Wilkie*, 58 N.C. App. 624, 628, 294 S.E.2d 230, 232 (1982).

231. 305 N.C. at 43-45, 286 S.E.2d at 782-83.

232. *Id.* at 43, 286 S.E.2d at 782.

233. *Id.* at 59, 286 S.E.2d at 791.

give his wife a vested interest in the property.²³⁴ Mrs. Mims, contending that she was lawfully seized of an entireties interest in the home by way of gift,²³⁵ moved for summary judgment, which was granted by the trial court and affirmed by the North Carolina Court of Appeals.²³⁶ The North Carolina Supreme Court granted discretionary review and reversed.²³⁷ Explaining that the common-law doctrine of presumptive gift (upon which Mrs. Mims strongly relied) is rebuttable by "clear, cogent and convincing evidence,"²³⁸ the court held that Mr. Mims had met the burden of rebutting the presumption,²³⁹ thereby raising a genuine issue of material fact for the jury and rendering summary judgment improper.²⁴⁰

Had the court's opinion stopped there, it would have clarified existing law without changing it. But the significance of *Mims* is that the court saw fit to change prospectively the law relating to presumptions in interspousal property disputes. Having disposed of the very narrow issue before it,²⁴¹ the court went on to declare that, thenceforth, in all cases not controlled by the Equitable Distribution Act,²⁴² the presumption of gift rule would not run solely in favor of wives, but would also inure to the benefit of husbands holding title to property purchased by their wives.²⁴³ By declaring that the presumptive gift rule must be applied uniformly between marital partners without regard to the gender of the spouse providing purchase money funds, the court in *Mims* removed a substantial advantage formerly enjoyed by any wife who sought to establish sole beneficial ownership of realty titled in her husband's name (or in their joint names) when she had provided the purchase price for the property.²⁴⁴ Prior to *Mims* the common law in North Carolina clearly weighed in favor of the wife when title to realty purchased by either spouse was in dispute. If a husband purchased realty during coverture and the wife was named as a grantee in the deed, the law presumed that the husband intended to make a gift of the property to his wife²⁴⁵ to the extent evidenced by the deed itself²⁴⁶ (in this case an entireties interest). However, if the roles were reversed and the

234. 305 N.C. at 45, 286 S.E.2d at 783.

235. *Id.* at 43-44, 286 S.E.2d at 782.

236. *Id.* at 43, 286 S.E.2d at 781-82.

237. *Id.* at 43, 286 S.E.2d at 782.

238. *Id.* at 53, 286 S.E.2d at 787.

239. *Id.* at 59, 286 S.E.2d at 791.

240. *Id.* at 46, 286 S.E.2d at 783.

241. The narrow question before the court was whether the parties' evidentiary showing entitled the wife to summary judgment. *Id.* at 43, 286 S.E.2d at 781-82.

242. N.C. GEN. STAT. §52-20, -21 (Cum. Supp. 1981). The Equitable Distribution of Marital Property Act does not govern disposition of property in divorce actions filed prior to October 1, 1981, nor does it apply to property disputes arising among the heirs or devisees of a titleholding decedent. See *infra* notes 262-75 and accompanying text. See generally Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. REV. 247 (1983).

243. *Mims*, 305 N.C. at 53, 286 S.E.2d at 787.

244. See *infra* notes 245-50 and accompanying text.

245. *Tarkington v. Tarkington*, 301 N.C. 502, 505, 272 S.E.2d 99, 101 (1980), overruled by *Mims*, 305 N.C. at 53, 286 S.E.2d at 787. See *supra* note 224 and accompanying text.

246. R. LEE, *supra* note 222, at 44; Comment, *Resulting Trusts in Entireties Property When Wife Furnishes Purchase Money*, 17 WAKE FOREST L. REV. 415, 417 (1981).

wife supplied the consideration, no presumption of gift operated in favor of the husband.²⁴⁷ Instead, if a wife could prove that she supplied the consideration for the deed, the law would presume that she did not freely intend to make a gift to her husband, but participated in the transaction as a result of his influence and coercion.²⁴⁸ In court, the effect of the presumption of coercion was to prevent the husband from acquiring any beneficial estate in the property as a matter of law, unless he could prove by clear, strong, and convincing evidence that, at the time of the transaction, his wife freely intended for him to take a beneficial estate by way of gift.²⁴⁹ If the husband failed to rebut the presumption of coercion, he merely held title to the property in a resulting trust for the wife, who alone was seized of the beneficial estate.²⁵⁰

The *Mims* decision abolished the presumption of coercion and established the presumptive gift rule for uniform application between spouses, regardless of the gender of the spouse furnishing consideration.²⁵¹ In the course of explaining the reasons for the new rule, the court stated:

The primary focus of our common law rules is to determine beneficial ownership of property acquired during marriage by giving effect to what was intended at the time the property was acquired. *What the payor intended at the time of acquisition is controlling*, no matter the context in which the dispute arises . . . [W]e believe the presumptive gift rule, being more in accord with the probabilities of the marital state, is a better procedural device that the presumptive trust rule for ascertaining the truth.²⁵²

By declaring that the presumption of gift rule must be applied uniformly between marital partners without regard to the gender of the spouse providing purchase money funds, the *Mims* court adopted a simple, sensible, nondiscriminatory rule that comports with our society's current philosophical values.²⁵³ But because of the 1981 enactment of North Carolina's Equitable Distribution of Marital Property upon Divorce Act,²⁵⁴ the *Mims* decision will have only limited influence in property disputes arising in the context of

247. 305 N.C. at 47, 286 S.E.2d at 784; R. LEE, *supra* note 222, at 43; J. WEBSTER, *supra* note 224, at §507 n.92; Comment, *Resulting Trusts in Entireties Property When Wife Furnishes Purchase Money*, 17 WAKE FOREST L. REV. 415, 417 (1981).

248. 305 N.C. at 48-49, 286 S.E.2d at 785; Sprinkle v. Spainhour, 149 N.C. 223, 226, 62 S.E. 910, 911 (1908); Comment, *Resulting Trusts in Entireties Property When Wife Furnishes Purchase Money*, 17 WAKE FOREST L. REV. 415, 421 (1981).

249. Tarkington v. Tarkington, 301 N.C. 504, 507, 272 S.E.2d 102, 199 (1981), *overruled by Mims*, 305 N.C. at 53, 286 S.E.2d at 787 (1982). See Comment, *Resulting Trusts in Entireties Property When Wife Furnishes Purchase Money*, 17 WAKE FOREST L. REV. 415, 422 (1981). Cf. Wright v. Wright, 305 N.C. 345, 353, 289 S.E.2d 347, 352 (1982) ("where one party furnishes the purchase price but has title placed in the name of another, these facts, standing alone, create a rebuttable presumption that a resulting trust was intended. The presumption may be rebutted by showing that, in fact, no trust was intended").

250. Tarkington v. Tarkington, 301 N.C. 504, 507, 272 S.E.2d 102, 199 (1981).

251. See *supra* notes 223-26 and accompanying text.

252. *Mims*, 305 N.C. at 54, 286 S.E.2d at 788 (emphasis added).

253. See *id.* at 49-51, 286 S.E.2d at 785-86.

254. See *supra* note 242.

divorce,²⁵⁵ and will soon be applicable only in familial property disputes arising upon the death of one of the marriage partners.²⁵⁶ The Equitable Distribution Act governs disposition of all property disputes arising out of divorce actions filed on or after October 1, 1981.²⁵⁷ The Act prescribes a method for distinguishing between "separate" and "marital" property, and permits the court to make an equitable division of the "marital" property after a final divorce decree is entered.²⁵⁸ "Separate" property is not subject to the court's distribution power.²⁵⁹ Separate property is defined as follows:

(2) "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, *property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall be considered separate property regardless of whether the title is in the name of the husband or wife or both.*²⁶⁰

Since Mr. Mims furnished the entire purchase price for the property titled to himself and his wife, their marital home would have been his separate property if the Act had been in effect when the Mims' divorce action was filed. Mr. Mims would not have been required to rebut the presumption of gift or prove his intent to a jury's satisfaction in order to regain full beneficial ownership of the property. Instead, he would only have been required to prove that he provided the purchase money out of his separate property and that the instrument of conveyance lacked any statement that he intended for his wife to hold her title as "separate" property.²⁶¹

The facts of another 1982 case, *Wilkie v. Wilkie*,²⁶² exemplify the application of the *Mims* rule in circumstances in which the Equitable Distribution Act is inapplicable because the property dispute does not arise in the context of divorce.²⁶³ In *Wilkie*, the titleholding husband died and was survived by a wife who actually paid for the acquisition of the property and the construction of improvements thereon.²⁶⁴ The wife's evidence tended to prove that when she purchased the property she intended to take title jointly with her husband

255. The Equitable Distribution Act applies to all divorce actions filed on or after October 1, 1981. Act of July 3, 1981, ch. 815, §7, 1981 N.C. Sess. Laws, 1st Sess. 1184, 1186. Thus, all divorce actions filed on or after October 1, 1981, may not be subject to *Mims*' presumptive gift rule. *But see* Sharp, *supra* note 242, at 268.

256. *See infra* notes 262-69 and accompanying text.

257. *See supra* note 255.

258. *See Mims*, 305 N.C. at 54, 286 S.E.2d at 788; N.C. GEN. STAT. § 50-20(b)(2) (Cum. Supp. 1981).

259. 305 N.C. at 54, 286 S.E.2d at 788.

260. N.C. GEN. STAT. §50-20(b)(2) (Cum. Supp. 1981) (emphasis added).

261. *Id.*

262. 58 N.C. App. 624, 294 S.E.2d 230, *disc. rev. denied*, 306 N.C. 752, 272 S.E.2d 764 (1982).

263. The *Wilkie* opinion never expressly refers to *Mims*, filed seven months earlier, but *Wilkie* does seem to apply the *Mims* rule properly. *See supra* notes 227-29 and accompanying text.

264. *Wilkie*, 58 N.C. App. at 625, 294 S.E.2d at 230.

as tenants by the entireties.²⁶⁵ When her husband died intestate, she discovered that the deed to the property was drawn solely in the decedent's name.²⁶⁶ His children by a prior marriage claimed to have inherited the fee simple title, and the widow sued for imposition of a resulting trust in her favor.²⁶⁷ Mrs. Wilkie was ultimately successful in her suit,²⁶⁸ but because the marriage ended without divorce, she was required to rebut the presumption of gift and to prove to the jury's satisfaction that a tenancy by the entireties was intended.²⁶⁹ If the marriage had ended in divorce instead of death, and the divorce action had been filed after the effective date of the Equitable Distribution Act, Mrs. Wilkie could have accomplished the same result merely by proving that she furnished the purchase price for the property from her own separate funds and that the deed bore no statement of an intention to permit Mr. Wilkie to hold the property as his separate property.²⁷⁰

In the final analysis, the ownership of real estate in North Carolina depends largely upon how the marriage ends—by death or divorce. If it ends in a divorce action filed after the effective date of the Equitable Distribution Act,²⁷¹ title acquired by one spouse with funds furnished from the separate property of the other spouse will vest no estate at all in the nonpaying spouse, in the absence of a statement of intent to make a gift of separate property in the instrument of conveyance.²⁷² If the marriage terminates by the death of either spouse, however, the nonpaying spouse will be presumed to hold an absolute estate by way of gift, regardless of the absence of any statement of intent in the deed.²⁷³ The presumption of gift is strong and is rebuttable only by clear, cogent, and convincing evidence,²⁷⁴ which may be much more difficult to marshal in the context of death than in the context of divorce.²⁷⁵ When read together, the Equitable Distribution Act and *Mims* form a new rule that is intrinsically illogical: any spouse may make a valid gift to the other spouse by purchasing property and naming the nonpaying spouse as

265. *Id.* at 628, 294 S.E.2d at 232.

266. *Id.*

267. *Id.* at 625, 294 S.E.2d at 230.

268. *Id.* at 630-31, 294 S.E.2d at 233.

269. *Id.* at 628-30, 294 S.E.2d at 232-33.

270. *See supra* notes 257-60 and accompanying text.

271. *See supra* note 255.

272. *See supra* notes 257-60 and accompanying text.

273. *See supra* notes 243 & 269 and accompanying text.

274. *Mims*, 305 N.C. at 53, 286 S.E.2d at 787.

275. *See, e.g., Wilkie*, 58 N.C. App. at 626-27, 294 S.E.2d at 230-31. In *Wilkie*, defendants argued that the surviving spouse should not be permitted to introduce evidence of statements made by the decedent to support her claim to a resulting trust. Although the "dead man's statute," N.C. GEN. STAT. § 8-51, does preclude an interested witness from testifying at trial about personal transactions or communications between the witness and decedent when either the witness or the person he is testifying against derives his interest or title from, through or under the decedent, 58 N.C. App. at 626, 294 S.E.2d at 230-31, the court admitted the testimony into evidence on the grounds that defendants had waived the protection of the dead man's statute by eliciting the incompetent evidence through the use of pretrial interrogatories. *Id.* at 626-27, 294 S.E.2d at 231. It appears from the *Wilkie* opinion that if defendants had not sought discovery of the incompetent evidence, plaintiff could not have introduced it at trial, and likely would not have succeeded in her claim. *Id.*

grantee without including in the deed any statement reflecting a donative intent, but if the marriage ends in divorce, the gift will be a nullity. In view of the current state of North Carolina property law, perhaps the best advice an attorney can give his married clients is to examine their existing instruments of ownership, evaluate the effect of divorce or the death of one spouse on the ownership of their property, and consider executing either a new deed reciting their intention to hold their interests as "separate" property,²⁷⁶ or a contract²⁷⁷ that would govern disposition of the property in the event of dissolution of the marriage by death or divorce.

(b) Unjust Enrichment and Equitable Liens

If a coin were minted with the facts of *Mims v. Mims*²⁷⁸ appearing on one side, the facts of *Wright v. Wright*²⁷⁹ would appear on the other. In *Mims* a husband, who never intended to give his wife an estate in the property he purchased, permitted a deed to be drawn in favor of himself and his wife as tenants by the entireties, but in *Wright*²⁸⁰ the husband complained that his wife had promised to convey to him an estate in her property, then failed to execute a deed carrying out the promise. Mr. Wright claimed that his wife had induced him to expend his separate savings and to perform labor in remodeling her house by orally promising to convey the property into their joint names.²⁸¹ The promise, he claimed, was made prior to their wedding, and the improvements were finished after the marriage ceremony.²⁸² About a year after the improvements were completed, and largely as a result of the couple's arguments over how the home should be titled, the parties separated,²⁸³ and thereafter plaintiff-husband instituted this action.

Because the wife's alleged promise was oral, it was unenforceable under North Carolina law.²⁸⁴ Since plaintiff could not sue to compel the conveyance,²⁸⁵ he opted to sue for damages to be secured by an equitable lien.²⁸⁶

276. See *supra* notes 257-60 and accompanying text.

277. N.C. GEN. STAT. § 50-20 (Cum. Supp. 1981) provides:

(d) Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

278. 305 N.C. 41, 286 S.E.2d 779 (1982); see also *supra* text accompanying notes 231-40.

279. 305 N.C. 345, 289 S.E.2d 347 (1982).

280. *Id.* at 346, 289 S.E.2d 348.

281. *Id.* at 345, 351, 289 S.E.2d 347, 351.

282. *Id.* at 347, 289 S.E.2d at 349.

283. *Id.*

284. N.C. GEN. STAT. § 22-2 (1965) provides, "All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith . . ." N.C. GEN. STAT. § 52-10(a) (Cum. Supp. 1981) provides in pertinent part, "No contract or release between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of either spouse . . . unless it is in writing and is acknowledged by both parties before a certifying officer."

285. 305 N.C. at 350, 289 S.E.2d at 350.

Plaintiff relied upon the equitable doctrine of unjust enrichment and argued that because he was induced to make the improvements by defendant's promise, it would be unjust to permit her to retain their benefit without paying for them.²⁸⁷ He sought an equitable lien, enforceable by foreclosure,²⁸⁸ if defendant refused or could not pay for the improvements.

The equitable lien theory is a sound and well established remedy,²⁸⁹ but courts have had difficulty deciding what facts plaintiff must prove in order to obtain it. Is it enough for plaintiff to prove that he did not intend to make a gift to his spouse,²⁹⁰ or will a "good faith belief" that an estate in the property was promised him suffice?²⁹¹ Or must plaintiff prove that the promise was actually made?²⁹² In *Wright* plaintiff was unable to prove the promise²⁹³ but did present evidence of his own "good faith belief" in the promise.²⁹⁴ The North Carolina Supreme Court held that plaintiff must actually prove the promise, and must do so with clear, cogent, and convincing evidence, if he is to prevail.²⁹⁵ In so holding, the supreme court overruled a line of court of appeals' decisions that had required only a good faith belief in the existence of the promise,²⁹⁶ and extended the presumptive gift rule announced in *Mims v. Mims*²⁹⁷ to apply to interspousal unjust enrichment cases such as *Wright*.²⁹⁸

286. *Id.* at 354-55, 289 S.E.2d at 353.

287. *Id.* at 350, 289 S.E.2d at 350.

288. *See id.* at 354-55, 289 S.E.2d at 353. *See generally* 4 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §1233 (5th ed. 1941); 5 A. SCOTT, THE LAW OF TRUSTS § 454.7 n.1 (3d ed. 1967); Annot., 89 A.L.R. 1455 (1934).

289. The general rule is that if one is induced to improve land under a promise to convey the same to him, which promise is void or voidable, and after the improvements are made he [the promisor] refuses to convey, the party thus disappointed shall have the benefit of the improvements to the extent that they increased the value of the land.

Wright, 305 N.C. at 351-52, 289 S.E.2d at 351 (quoting *Jones v. Sandlin*, 160 N.C. 150, 154, 75 S.E. 1075, 1077 (1912)).

290. *See* 305 N.C. at 349, 289 S.E.2d at 350.

291. *Id.* at 353, 289 S.E.2d at 352-53.

292. *Id.* at 353-54, 289 S.E.2d at 352-53.

293. *Id.* at 348, 289 S.E.2d at 349 (jury's verdict).

294. *See id.* at 347, 289 S.E.2d at 349 (plaintiff's testimony).

295. *Id.* at 354-55, 289 S.E.2d at 352-53. The requirement that plaintiff must prove the express promise is partly due to the special husband-wife relationship existing between the parties. An implied promise to pay is not sufficient to support an unjust enrichment action between parties with a special relationship, but it may be sufficient to support such claim between parties without such a relationship. *Id.* at 354, 289 S.E.2d at 353. *See e.g.*, *Beacon Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E.2d 434 (1966); *Rhyne v. Sheppard*, 224 N.C. 734, 32 S.E.2d 316 (1944).

296. 305 N.C. at 353, 289 S.E.2d at 352, *overruling* *Parslow v. Parslow*, 47 N.C. App. 84, 89, 266 S.E.2d 746, 749 (1980) and *Clontz v. Clontz*, 44 N.C. App. 573, 261 S.E.2d 695, *cert. denied*, 300 N.C. 195, 269 S.E.2d 622 (1980). In *Parslow*, as in *Wright*, the adversaries were marital partners, while in *Clontz* the disputing parties were brothers. It is arguable that the "good faith belief" standard of proof might be appropriate if the parties were unrelated by blood or marriage. Less intimate acquaintances are less likely to make improvements on one another's lands without an actual arm's length transaction and exchange of promises. Consequently, a mere acquaintance's good faith belief in a promise of conveyance, corroborated by his expenditure of money to improve another's property, may be strong evidence that a promise was actually made and relied upon. *See supra* note 295.

297. "In all cases . . . to which the statute [An Act for Equitable Distribution of Marital Property Act] is not applicable the rule shall be that where a spouse furnishing the consideration causes property to be conveyed to the other spouse, a presumption of gift arises, which is rebuttable by clear, cogent and convincing evidence." *Mims v. Mims*, 305 N.C. 41, 53, 286 S.E.2d 779,

Consequently, the current state of North Carolina law in interspousal unjust enrichment cases is that any spouse who improves property belonging to the other spouse is presumed to have intended to make a gift to the titleholder.²⁹⁹ This presumption of gift must be rebutted by clear, strong, and convincing evidence.³⁰⁰ If the claimant's grounds for rebutting the presumption of gift is that the titleholder promised to convey him an estate in exchange for the improvements, the claimant must prove that the promise was actually made.³⁰¹ Apparently, proof of only a good faith belief in the promise is insufficient to rebut the presumption because it does not meet the "clear, cogent, and convincing" standard. As justification for requiring such a strict standard of proof in interspousal affairs, the court noted:

Not every enrichment of one by the voluntary act of another is unjust. "Where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched. The recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for their value." *Rhyne v. Sheppard*, 224 N.C. 734, 737, 32 S.E.2d 316, 318 (1944). This rule is particularly applicable where a husband makes improvements to his wife's land because of the presumption that the improvements constitute a gift.³⁰²

Although the court's opinion in *Wright* never mentions the recently enacted Equitable Distribution of Marital Property Act,³⁰³ *Wright* should be read with the Act in mind. If the Wrights' divorce action had been filed after October 1, 1981, the provisions of the Act would have been consulted in resolution of their property dispute.³⁰⁴ The Act, however, does not expressly mention the use of one spouse's separate property (Mr. Wright's premarital life savings) to increase the value of the other spouse's separate property (Mrs. Wright's real estate). The only portions of the Act that appear to be pertinent are:

(b)(2) The increase in value of separate property . . . shall be considered separate property.

787 (1982). See Note, *Property Law—Mims v. Mims: North Carolina Eliminates Presumption of Purchase Money Resulting Trust for Wives*, 61 N.C.L. REV. 566 (1983); see also *infra* notes 220-61.

298. "[W]e conclude . . . because of all the reasons we gave in *Mims*, that the same presumption of gift should apply whichever spouse furnishes improvements on the other spouse's land." *Wright*, 305 N.C. at 355, 289 S.E.2d at 354.

299. *Id.*

300. See *supra* note 297.

301. See *supra* note 19 and accompanying text.

302. 305 N.C. at 350, 289 S.E.2d at 351 (final citations omitted).

303. N.C. GEN. STAT. §§ 52-20, 21 (Cum. Supp. 1981).

304. The provisions of the Act were inapplicable to the facts of *Wright* because the parties' divorce action was filed prior to the effective date of the Act. Act of July 3, 1981, ch. 815, §7, 1981 N.C. Sess. Laws, 1st Sess. 1184, 1186, provides, "This act shall become effective October 1, 1981, and shall apply only when the action for an absolute divorce is filed on or after that date."

The actual date on which the Wrights' divorce action was filed is unknown, but their divorce decree was rendered on February 6, 1978. See Record on Appeal at 15, *Wright v. Wright*, 305 N.C. 345, 289 S.E.2d 347 (1982). Mr. Wright's suit seeking imposition of an equitable lien was filed on October 14, 1977 (prior to the divorce decree), but the case was not adjudicated until August 15, 1979 (one and one half years after the divorce decree). See *id.* at 2 & 22.

. . . .

(c) There shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably. Factors the court shall consider under this subsection are as follows:

. . . .

(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage.³⁰⁵

The question that remains unresolved by *Wright* is: will the provisions of the Act be applied to the exclusion of existing equitable remedies? Arguably, the answer should be "no." By its own terms the Act authorizes distribution of only *marital* property.³⁰⁶ *Separate* property, even though its value may have been increased by a spouse who did not own it, is not subject to distribution by the court.³⁰⁷ Consequently, if the value of the distributable *marital* property³⁰⁸ is insufficient to reimburse one spouse for his improvements to the other spouse's separate property, an exclusive application of the Equitable Distribution of Marital Property Act will not satisfy his claim. If such a spouse could meet the evidentiary requirements set forth in *Wright*,³⁰⁹ he should not be denied an equitable lien on his wife's separate property merely because that property is unavailable for direct distribution under the Act.

(c) *Constructive Trusts*

Resulting trusts and equitable liens³¹⁰ are but two equitable devices available as remedies for fraudulently induced transactions. A third device, the constructive trust, was examined by the North Carolina Court of Appeals in its review of *Ferguson v. Ferguson*.³¹¹ A constructive trust is an equitable device to prevent unjust enrichment and to remedy the acquisition of property through fraud³¹² or through the violation of some duty.³¹³ It may also be imposed upon one whose retention of property is inequitable, though the

305. N.C. GEN. STAT. § 50-20 (Cum. Supp. 1981).

306. See N.C. GEN. STAT. §§ 50-20(a), (c) (Cum. Supp. 1981); see also Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. REV. 247, 249 nn. 11-12 (1983); *Survey of Developments in North Carolina Law, 1981*, 60 N.C.L. REV. 1379, 1396 (1982).

307. Support for this statement is implicit within the scheme of the Act. See N.C. GEN. STAT. § 50-20(b)(2) (Cum. Supp. 1981) (defining separate property); see also *supra* note 307.

308. See N.C. GEN. STAT. § 50-20(b)(1) (Cum. Supp. 1981) (defining marital property).

309. See *supra* notes 295, 298-302, and accompanying text.

310. See *supra* notes 278-305 and accompanying text.

311. 55 N.C. App. 341, 285 S.E.2d 288, *disc. rev. denied*, 306 N.C. 383, — S.E.2d — (1982).

312. *Whitman v. Forbes*, 55 N.C. App. 706, 712, 286 S.E.2d 889, 893 (1982). See *Bowen v. Darden*, 241 N.C. 11, 14, 84 S.E.2d 289, 292 (1954); *Teachey v. Gurley*, 214 N.C. 288, 292, 199 S.E. 83, 87 (1938).

313. *E.g., Whitman*, 55 N.C. App. at 713, 286 S.E.2d at 894 (since real estate broker stands in fiduciary relationship with the seller, proof that broker, by purchasing the property in a business capacity, violated his fiduciary duty would be sufficient to entitle seller to constructive trust). See *N.C. Real Estate Licensing Bd. v. Gallman*, 52 N.C. App. 118, 277 S.E.2d 853 (1981).

property was originally acquired without fraud.³¹⁴ Essentially, a constructive trust arises whenever one is obliged by equitable principles to convey property to another.³¹⁵ The person so obliged is deemed to be a trustee, and his only duty as trustee is to convey the property to the beneficiary.³¹⁶

In *Ferguson*³¹⁷ the North Carolina Court of Appeals upheld the trial court's imposition of a constructive trust upon a son's title to property conveyed to him by his mother. Mrs. Ferguson (plaintiff) feared that her ownership of a tract of land would prevent her from qualifying for governmental financial assistance if she should become ill and incur substantial medical bills.³¹⁸ In order to preserve her property for the benefit of her children and still qualify for government aid during a serious illness, plaintiff conveyed the property to her son upon her son's promise to hold the title for the benefit of plaintiff and all her children.³¹⁹ The son and his wife later breached the promise by mortgaging the land and appropriating the funds to their own use.³²⁰ The jury found that defendants had promised to hold the land for the benefit of plaintiff or her children, but had not intended to comply with the promise when they made it. The jury also found that plaintiff reasonably relied on defendant's promise, and the trial court imposed a constructive trust upon the transaction.³²¹

Defendant argued, among other things, that plaintiff had conveyed the property for the purpose of defrauding future creditors or secreting funds from government agencies, and therefore lacked the "clean hands" necessary to qualify for an equitable remedy.³²² Significantly, the court refused to permit the doctrine of clean hands to prevent plaintiff's remedy.

The doctrine of clean hands is not one of absolutes that applies to every unconscionable act of a party. Whether plaintiff committed an unconscionable act and whether her actions were more egregious than those of defendants, are questions of material fact to be decided by a jury and not by the court.³²³

[If] the [plaintiff] did anything inequitable — and this is a material issue of fact for trial — it was not against defendants but against [a party] not involved in the property dispute in any way. A person is not barred from his day in court in a particular case because he

314. *Whitman*, 55 N.C. App. at 712, 286 S.E.2d at 893. See *Teachey*, 214 N.C. at 288, 292, 199 S.E. at 83, 87 (1938).

315. "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." 4 A. SCOTT, *THE LAW OF TRUSTS* § 462 at 3413 (3d ed. 1967) (quoting Judge Cardozo); see also *infra* note 316.

316. See R. LEE, *NORTH CAROLINA LAW OF TRUSTS* §§ 10b, 13a (1958); 4 A. SCOTT, *supra* note 315, at 3413.

317. 55 N.C. App. 341, 285 S.E.2d 288 (1982).

318. *Id.* at 342, 285 S.E.2d at 290.

319. *Id.* at 342-43, 285 S.E.2d at 290.

320. *Id.* at 343, 285 S.E.2d 290.

321. *Id.*

322. *Id.* at 346-47, 285 S.E.2d at 292.

323. *Id.* (citations omitted).

acted wrongfully in another unrelated matter or because he is generally immoral.³²⁴

The foregoing quotations are likely to draw criticism from commentators since they seem to imply that even if the mother conveyed the property upon a secret trust in order to defraud future creditors, her hands might still be clean enough to invoke the equity powers of a court. The court's view that equity will tolerate a minor fraud if it is unrelated to the subject matter of the dispute may be good law, but it is disturbing to note that the court of appeals apparently believed that Mrs. Ferguson's scheme to qualify for government aid while retaining the benefits and enjoyment of property ownership was sufficiently "unrelated" to the son's fraud to entitle her to a constructive trust.

The practical result of imposition of a constructive trust in this particular case accomplishes a proper objective: as constructive trustees defendants are required to reconvey the property to plaintiff,³²⁵ thus restoring the record title to plaintiff, and at least temporarily preventing her from sidestepping governmental eligibility requirements for aid. When plaintiff recovers the property, however, there is nothing to prevent her from using the same trick again with a different grantee who may be more likely to abide by their secret pact. The court's opinion does nothing to discourage a grantor from conveying property on a secret trust to avoid complying with regulations for obtaining government aid. In fact, the opinion encourages such secret trusts by providing a remedy if the secret trustee fails to abide by his secret promise.

Perhaps the better solution would be to deny imposition of a constructive trust in such circumstances and force the plaintiff to sue on a theory of express parol trust. Since parol trusts are enforceable in North Carolina,³²⁶ the court could specifically enforce the trustee's promise to hold the land for the benefit of the plaintiff (thereby remedying the grantee's fraud), and could file its official judgment, reciting the terms of the trust in the county's public records among the deeds and deeds of trust (thereby exposing the secret trust and remedying plaintiff's fraud). The trust would not be then extinguished by the adjudication, and plaintiff could not reconvey the property to a new grantee in a second attempt to avoid governmental eligibility requirements.

3. Statute of Limitations

In *Tyson v. North Carolina National Bank*³²⁷ the North Carolina Supreme Court had occasion to consider a question of first impression: in an action against an executor serving without bond for breach of his fiduciary duty, which statute of limitations should apply? Faced with three alternatives,³²⁸ none of which clearly applied to the facts of the case, Justice Carlton, writing

324. *Id.* (quoting *High v. Parks*, 42 N.C. App. 707, 257 S.E.2d 661), *disc. rev. denied*, 298 N.C. 806, 262 S.E.2d 1 (1979).

325. *See supra* note 315 and accompanying text.

326. *Ferguson*, 55 N.C. App. at 341, 344, 285 S.E.2d at 288, 291.

327. 305 N.C. 136, 286 S.E.2d 561 (1982).

328. The first alternative, N.C. GEN.STAT. § 1-52(1) (Cum. Supp. 1981), provides, "Within

for a unanimous court,³²⁹ chose to apply G.S. 1-52(1),³³⁰ which provides a three-year period within which an action may be brought "upon a contract, obligation or liability arising out of a contract, express or implied."³³¹ The difficulty with the court's holding is the simple fact that *Tyson* involved no contract whatsoever.³³² While recognizing that "there exists no contract, either express or implied, between the parties to this action," the Court stated that the lack of a contract was not determinative of the statute's applicability.³³³ The determinative factors, it concluded, lay in the nature of the overall transaction, the attendant rights and duties,³³⁴ and the remedy³³⁵ sought by the plaintiff. The remedy sought by the plaintiff in *Tyson* was money damages for failure to exercise reasonable care in marshalling the assets of an estate.³³⁶

Plaintiff was the widow of a man who died leaving a will that named defendant's predecessor³³⁷ as executor (of decedent's estate) and trustee of two testamentary trusts.³³⁸ At his death, plaintiff's decedent owed debts totalling over \$80,000, a substantial portion of which were owed to the same bank that was named as executor of his will.³³⁹ The bank qualified as executor and marshalled the assets of the estate, but initially failed to discover that the decedent's house was titled solely in his name.³⁴⁰ The will had not made an express disposition of the house,³⁴¹ and the executor simply assumed that the house was owned by the entireties.³⁴² Consequently, the executor neither included the property in its initial accounting³⁴³ nor applied it toward the pay-

three years an action—(1) Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections or in G.S. 1-53(1)."

The second alternative, N.C. GEN. STAT. § 1-50(2) (Cum. Supp. 1981), provides, "Within six years an action—(2) Against an executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final account by the proper officer, and the filing of the audited account as required by law."

The third alternative is a ten year "catch-all" statute, N.C. GEN. STAT. § 1-56 (1969), which provides, "An action for relief not otherwise limited by this subchapter may not be commenced more than ten years after the cause of action has accrued."

329. Justice Copeland did not participate in the consideration or decision of the case. 305 N.C. at 143, 286 S.E.2d at 565.

330. See *supra* note 328.

331. N.C. GEN. STAT. § 1-52(1) (Cum. Supp. 1981).

332. 305 N.C. at 142, 286 S.E.2d at 565.

333. *Id.*

334. "The overall transaction, and the attendant rights and duties, is [sic] clearly contractual in nature. . . . [A]ny failure to perform in compliance with the duties as a fiduciary is tantamount to a breach of contract." *Id.*

335. "The remedy sought by this action is . . . to recover damages for breach of fiduciary duty." *Id.* at 141, 286 S.E.2d at 564 (emphasis in original).

336. *Id.*

337. The testator named State Bank & Trust Company as the executor of his will. State Bank & Trust Company merged with North Carolina National Bank in 1969. *Id.* at 137 n.1, 286 S.E.2d at 562 n.1.

338. *Id.* at 137, 286 S.E.2d at 562. The two trusts were created primarily for plaintiff's benefit. *Id.*

339. *Id.*

340. *Id.* at 137-38, 286 S.E.2d at 562.

341. *Id.* at 137, 286 S.E.2d at 562.

342. Defendant Appellee's New Brief at 3, *Tyson*, 305 N.L. 136, 286 S.E.2d 561.

343. 305 N.C. at 137-38, 286 S.E.2d at 562.

ment of decedent's debts. Instead, the bank sold two other parcels of decedent's real estate and used the proceeds to satisfy his debts.³⁴⁴ One of these parcels was the only significant income producing asset in the estate, and would have provided income for the widow and children if it had been retained as a trust asset.³⁴⁵ Approximately one year after the sale of these lands, the widow attempted to sell the house, only to discover that it was not owned by the entireties. The executor then sold the house for \$60,000.³⁴⁶ Plaintiff brought her action against the executor approximately ten and one-half years after the executor's qualification, nine and one-half years after discovering the omission, and six years and nine months after the final accounting was filed.³⁴⁷

Plaintiff contended that the executor should have discovered that the house was an estate asset and should have sold the house, rather than the income producing property, to pay decedent's debts.³⁴⁸ By not doing so, plaintiff argued, the executor failed to exercise reasonable care in marshalling and preserving the assets of the estate, thereby breaching its fiduciary duty.³⁴⁹ Defendant set forth the statute of limitations as an affirmative defense.³⁵⁰ Thus, the only significant issue addressed in the court's opinion was which statute of limitations applied.

Of the three statutes of limitation available for the court's inspection,³⁵¹ G.S. 1-50(2) received the least scrutiny. That statute provides a six year limitation period, running from the date of filing a final accounting, for actions "against an executor, administrator, collector, or guardian on his official bond."³⁵² Although the court noted this statute,³⁵³ it refused to explain its inapplicability. Its reasoning was presumably that G.S. 1-50(2) speaks of an action on an official bond, and the executor in *Tyson* served without posting a bond.³⁵⁴

344. *Id.* at 138, 286 S.E.2d at 562.

345. *Id.* at 138, 286 S.E.2d at 563.

346. *Id.*

347. See Plaintiff Appellant's Brief at 23-24, *Tyson*, 305 N.C. 136, 286 S.E.2d 561.

348. 305 N.C. at 138, 286 S.E.2d at 563. It is worth noting, however, that even if the executor had sold the house rather than the farm, the debts could not have been satisfied. The executor would have had to sell or mortgage additional property to extinguish the total indebtedness. See *supra* text accompanying notes 338 & 345.

349. 305 N.C. at 141, 286 S.E.2d at 564.

350. *Id.* at 140, 286 S.E.2d at 564. Defendant could find no statute of limitations expressly governing this type of action, but argued that the three-year contract statute, G.S. 1-52(1), was intended to control. In the alternative defendant argued in favor of applying G.S. 1-50(2), the six-year limitation period for actions on an executor's official bond. Under either statute plaintiff's claim would be barred. Plaintiff contended that G.S. 1-56, the ten year "catch all" statute of limitations, should apply. See *supra* note 327.

351. See *supra* note 327.

352. See *supra* note 327.

353. 305 N.C. at 140-41, 286 S.E.2d at 564.

354. Plaintiff-Appellant's Brief at 21, *Tyson*. Although the existence of a six-year limitation period for actions on an executor's official bond might lead one to expect that a shorter limitation period was intended to apply if the executor served without bond, see N.C. GEN. STAT. § 28A-19-3(i) (Cum. Supp. 1981) (six-month limitation period provided by N.C. GEN. STAT. 28A-19-3(a) (1976 & Cum. Supp. 1981) for presentation of claims to the personal representative of a decedent's estate does not bar plaintiff's claim to the extent that decedent or personal representative is pro-

Plaintiff argued that G.S. 1-56,³⁵⁵ which provides a ten-year period for filing actions, was the proper statute to apply in an action for breach of fiduciary duty when no bond is involved.³⁵⁶ This statute is a "catch-all" limitation, establishing a deadline for filing claims in all cases not otherwise provided for by statute.³⁵⁷ Since the two other statutes examined in the opinion do not expressly apply to executors or breaches of fiduciary duties, this argument seems reasonable.³⁵⁸ The six-year statute speaks only of actions involving an official's bond,³⁵⁹ and the three-year statute appears to apply solely to actions concerning a contract.³⁶⁰

The supreme court, however, rejected plaintiff's argument and held that G.S. 1-52(1), the contract statute, is the proper statute to follow in cases involving any money damage claim based upon an executor's breach of fiduciary duty.³⁶¹ Reasoning that the nature of the remedy sought (money damages) together with the "attendant rights and duties" of the parties, gave the "overall transaction" a contractual flavor, the court held that the three-year statute of limitation on contract actions applied even though no contract, express or implied, existed in fact.³⁶² To support its conclusion, the court drew an analogy between the executor appointed by will in the instant suit and a trustee serving under an express trust.³⁶³ Since earlier cases had already held that the three-year contract statute of limitations governs claims arising out of breach of an express trust,³⁶⁴ and since one statute was found to imply a legislative intent to give identical treatment, at least in certain respects, to trustees of express trusts and personal representatives of estates,³⁶⁵ the court's application of the contract statute to the *Tyson* facts is defensible. It is not, however, immune to criticism.

The *Tyson* holding and rationale are subject to two fundamental criticisms. The first, which has already been mentioned,³⁶⁶ is that the court should

tected by insurance coverage with respect to claim), no other statute expressly governing actions brought against an executor for breach of his fiduciary duty has been found in the North Carolina General Statutes.

355. See *supra* note 327.

356. 305 N.C. at 141, 286 S.E.2d at 564.

357. *Lattimore v. Loews Theatres, Inc.*, 410 F. Supp. 1397, 1400 (M.D.N.C. 1975).

358. For this reason, the North Carolina Court of Appeals believed that plaintiff's claim was timely. *Tyson v. North Carolina Nat'l Bank*, 53 N.C. App. 189, 191, 280 S.E.2d 478, 479-80 (1981), *aff'd on other grounds*, 305 N.C. 136, 286 S.E.2d 561 (1982).

359. See *supra* notes 35-53 and accompanying text.

360. See *supra* notes 327-29 and accompanying text.

361. 305 N.C. at 142, 286 S.E.2d at 565.

362. *Id.*

363. *Id.* at 141-42, 286 S.E.2d at 565.

364. *E.g.*, *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 101 S.E.2d 8 (1957); *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938). But see *New Amsterdam Casualty Co. v. Waller*, 301 F.2d 839 (4th Cir. 1962) (examining *Teachey* and other North Carolina opinions, which seem to indicate that the remedy of resulting trust or constructive trust causes ten-year statute to apply).

365. N.C. GEN. STAT. §28A-13-10(c) (1976) provides in pertinent part, "If the exercise of power concerning the estate is improper, the *personal representative* is liable for breach of fiduciary duty to interested persons for resulting damage or loss to the same extent as a trustee of an express trust." (emphasis added). See also *Tyson*, 305 N.C. at 142, 286 S.E.2d at 565.

366. See *supra* notes 328-30 and accompanying text.

not apply a contract statute of limitations to a cause of action in which no contract existed. Nothing in the language of G.S. 1-53³⁶⁷ would put a potential noncontract litigant on notice that her cause of action must be brought within three years or be forever barred. By interpreting the contract statute as encompassing this noncontract action, the court violated one of its own rules of statutory construction: "The statute of limitations . . . is not such a meritorious defense that either the law or the facts should be strained in aid of it."³⁶⁸

Second, and perhaps more importantly, the court's description of the nature of the remedy³⁶⁹ should have no bearing upon the issue of which statute of limitations applies.³⁷⁰ It has been observed that one wrong may give rise to a choice of remedies.³⁷¹ Thus, a breach of contract may permit a plaintiff to sue for expectancy damages, specific performance, or restitution.³⁷² Yet regardless of the remedy sought, the three-year contract statute of limitations³⁷³ would seem to apply. Similarly, a fraudulent transaction may be remedied by reformation, money damages, equitable lien, or constructive trust.³⁷⁴ In either event, the statute of limitations applicable to actions founded upon fraud should govern.³⁷⁵ If this were not the rule, the purpose of the statutes³⁷⁶ could be avoided merely by framing one's prayer for relief to invoke the longer limitation period.³⁷⁷ Finally, the language of the statutes themselves seems to de-

367. See *supra* note 327.

368. *Hardbarger v. Deal*, 258 N.C. 31, 35, 127 S.E.2d 771, 774 (1962) (quoting *Rochester v. Tup*, 54 Wash. 2d 71, 74, 337 P.2d 1062, 1065 (1959)).

369. See *New Amsterdam Casualty Co. v. Waller*, 301 F.2d 839 (4th Cir. 1962). *New Amsterdam* sifts through several North Carolina Supreme Court cases to determine whether it is the cause of action or the remedy that determines the applicability of a statute of limitations. The United States Court of Appeals for the Fourth Circuit examined both of the cases principally relied on in the *Tyson* opinion, *Jarrett v. Green*, 230 N.C. 104, 52 S.E.2d 223 (1949), and *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938), before reaching the following conclusion in *New Amsterdam*:

We find nothing in any North Carolina decision suggesting that the courts of that state, for purposes of limitations, classify a cause of action by reference to the courts' remedial power to grant redress. . . . For purposes of limitations, however the North Carolina Court has looked to the *nature of the right* of the litigant which calls for judicial aid, *not to the nature of the remedy* to rectify the wrong.

301 F.2d at 842 (emphasis added).

370. See *infra* notes 371-73 and accompanying text.

371. 12 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1454 n. 5 (3d ed 1970); 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§1338, 1418 (3d ed. 1968).

372. N.C. GEN. STAT. §1-52(1) (Cum. Supp. 1981).

373. See *supra* notes 220-327 and accompanying text; see also *New Amsterdam Casualty Co. v. Waller*, 301 F.2d 839 (action to impress constructive trust); *Stewart v. Salisbury Realty & Ins. Co.*, 159 N.C. 230, 74 S.E. 736 (1912) (money damages).

374. N.C. GEN. STAT. § 1-52(9) (1969 & Cum. Supp. 1981) provides, "Within three years an action—(a) For relief on the ground on fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." See *supra* note 329 and accompanying text. *New Amsterdam Casualty Co. v. Waller*, 301 F.2d 839 (4th Cir. 1962) focuses mainly on this statute.

375. *New Amsterdam Casualty Co. v. Waller*, 301 F.2d 839 (4th Cir. 1962).

376. The purpose of a statute of limitations is to afford security against stale claims and not to deprive anyone of his just rights by lapse of time. *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957); *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

377. Since a statute of limitations has been characterized as providing a right not to be sued beyond the time limited, *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 663, 194 S.E.2d 521, 535 (1973), the purpose of the statute is not fulfilled if, as a result of one wrong against one potential

mand the conclusion that it is the nature of the right, rather than the nature of the remedy, that determines which limitation period shall apply to a claim.³⁷⁸ The statutes are phrased in such terms as "contracts,"³⁷⁹ "trespass,"³⁸⁰ "fraud,"³⁸¹ and "personal injury,"³⁸² not "money damages" or "constructive trust."³⁸³ Since the classification system in the limitations statutes is based upon the substantive nature of the plaintiff's right, rather than his remedy, *Tyson* may be criticized for permitting plaintiff's prayer for a particular remedy to influence the court's determination of the applicable statute. Despite the foregoing criticisms, the holding in *Tyson* is now the law of North Carolina. Unless that holding is overruled by future North Carolina Supreme Court action or by legislative enactment, plaintiffs' attorneys should beware the holding in *Tyson*: G.S. 1-52(1)³⁸⁴ is construed to provide a three-year limitation on any action for money damages against an executor serving without bond for breach of his fiduciary duty in marshalling the assets of his decedent's estate and paying the decedent's debts.³⁸⁵

4. Illegitimate's Right To Inherit From Putative Father

The North Carolina Court of Appeals in *Herndon v. Robinson*³⁸⁶ held that an illegitimate child who seeks to share in his intestate father's estate by relying upon the putative father's acknowledgment of paternity, rather than a judicial decree establishing paternity, must strictly comply with the requirements of G.S. 29-19.³⁸⁷ In the absence of either a formal acknowledgment of paternity executed by the father for the purpose of establishing an heir and filed in the clerk of court's office during the father's lifetime, or judicial decree establishing paternity, no informal acknowledgment by the father will permit the child to inherit.³⁸⁸ The court in *Herndon* refused to accept "numerous written documents, signed by Mr. Herndon, which clearly acknowledge[d] pa-

plaintiff, the statute gave defendant repose from a suit for money damages on one date, but still permitted plaintiff to sue him for a different remedy for several years after the money damages limitation date had passed.

378. See *supra* note 369.

379. See N.C. GEN. STAT. § 1-52(1) (Cum. Supp. 1981), quoted *supra* note 327.

380. See N.C. GEN. STAT. § 1-52(3) (1969 & Cum. Supp. 1981).

381. See *supra* note 374.

382. See N.C. GEN. STAT. § 1-52(16) (Cum. Supp. 1981).

383. See *Tyson*, 305 N.C. at 141-42, 286 S.E.2d at 564-65.

384. See *supra* note 327.

385. 305 N.C. 136, 286 S.E.2d 561.

386. 57 N.C. App. 318, 291 S.E.2d 305 (1982).

387. N.C. GEN. STAT. § 29-19 (1976 & Cum. Supp. 1981) provides that an illegitimate child may inherit from his putative father if proof of paternity has been established by any one of the following methods: (1) a judicial decree entered during the life of the putative father; (2) the father's written admission of paternity "executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime" in the appropriate office of the clerk of superior court; (3) the father's acknowledgment of paternity in his duly probated will. At common law an illegitimate child had no right to inherit from his putative father at common law. See *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965).

388. 57 N.C. App. at 321, 291 S.E.2d at 307. *Mitchell v. Freuler*, 297 N.C. 206, 254 S.E.2d 762 (1979), is the leading case in North Carolina on this topic.

ternity"³⁸⁹ as satisfying the statute for purposes of intestate succession. The court rejected plaintiff's theory of "constructive compliance"³⁹⁰ with the statute, holding that "just as a father must act to *exclude* a legitimate child from sharing in his estate, he must also act to *include* an illegitimate child."³⁹¹ The court's observation is not entirely accurate, however: a father whose paternity is established by judicial decree certainly does not have to do any act in order to permit his illegitimate child to take a share of his estate.³⁹² In fact, such a father would have to act to *exclude* his illegitimate child just as he would have to act to exclude his legitimate child.

The court's imprecise statement of the law may be a fortunate error, for it calls attention to the need for thoughtful judicial inquiry into the legislature's purposes in enacting G.S. 29-19. The opinion in *Herndon* rests on the court's belief that the statutory provision requiring an acknowledgment filed in the local clerk's office was enacted to ensure that the acknowledging father *intended* for his illegitimate child to inherit from him in the event of intestacy. In the court's view, the statute requires an acknowledgment made for the *purpose* of permitting the child to inherit.³⁹³ Since the documents offered by the illegitimate child in *Herndon* had been executed by the father when he had some other purpose in mind, they were rejected by the court.³⁹⁴

Nevertheless it is doubtful that the legislature meant to require a father to have such a purpose in mind at the moment of acknowledgment. More likely the draftsmen's immediate concern was for the financial protection of illegitimate children whose deceased fathers, while living, had been unable or unwilling to make regular child support payments without official prodding. The judicial decree of paternity and the voluntary paternity acknowledgment described in G.S. 29-19 are devices widely utilized by child support enforcement officers to establish a father's obligation to support his illegitimate children during the father's lifetime. G.S. 29-19 essentially provides that documentation of paternity sufficient to justify the issuance of a child support order during the father's lifetime is also sufficient to permit the child to inherit from his father's estate. Nothing in the statute indicates a legislative intent to disqual-

389. 57 N.C. App. at 320, 291 S.E.2d at 307. The documents included an application for an insurance policy on plaintiff's life and an employment application. Other unsigned documents indicating that plaintiff was the decedent's natural son included plaintiff's school records and the 1950 federal census. In addition to these documents, plaintiff offered substantial proof that the decedent, who had no legitimate children, openly acknowledged the illegitimate plaintiff as his son, permitted plaintiff to live in his home, provided financial support for plaintiff and plaintiff's mother, and requested that plaintiff adopt his father's last name. Although the decedent never filed a formal acknowledgment of his paternity, it seems likely that plaintiff was an object of the decedent's bounty. No judicial decree or voluntary acknowledgement of paternity was ever sought, probably because the decedent did not deny that he was plaintiff's father.

390. *Id.* See Note, *Judicial Impairment of the Illegitimate's Paternal Inheritance Rights in North Carolina*—Mitchell v. Freuler, 16 WAKE FOREST L. REV. 205, 216 (1980) (theory of constructive compliance with G.S. 29-19(b)(2) should be adopted to prevent inequity and to promote the remedial purposes of the statute).

391. 57 N.C. App. at 321, 291 S.E.2d at 307 (emphasis in original).

392. See N.C. GEN. STAT. § 29-19(b)(1) (1976 & Cum. Supp. 1981).

393. 57 N.C. App. at 320-21, 291 S.E.2d at 307.

394. *Id.*

ify a paternity acknowledgment procured by a child support enforcement officer and executed for purposes of acknowledging parental responsibility rather than for the purpose of establishing an heir for the future. The issue whether the father's acknowledgment is made for the purpose of signifying the father's recognition of his duty to provide support, or for the purpose of ensuring the child's inheritance right, should be deemed irrelevant under the terms of G.S. 29-19.

The ultimate aim of the statute seems to be to place legitimate and illegitimate children on equal footing for purposes of intestate succession whenever reliable proof of paternity is available, regardless of the putative father's intent to permit or deny inheritance rights to the illegitimate child. If this is the aim of the statute, its weakness is that it fails to provide inheritance rights for the illegitimate child whose father has openly acknowledged his paternity and has responsibly provided voluntary support for the child without judicial intervention.³⁹⁵ Although it seems improbable to assume that the legislature meant to grant inheritance rights to a child whose lineage was established in an adverse judicial proceeding against an uncooperative father, but to deny them to an openly, albeit informally, acknowledged child of a responsible, affectionate father, the decision in *Herndon* reaches exactly that result.

The court of appeals' strict construction of G.S. 29-19 appears to be a harsh and unwarranted application of the common-law rule that statutes in derogation of the common law should be strictly construed.³⁹⁶ Where, as in *Herndon*, there can be no serious doubt that the claimant is the decedent's child,³⁹⁷ there should be no obstacle to the child's right to inherit from his father. Should the North Carolina Supreme Court have the opportunity to review the court of appeal's decision, it is hoped that the supreme court will adopt the plaintiff's theory of "constructive compliance" with the statute and reverse the lower court's holding in this case.

I. Real Estate Brokers³⁹⁸

Two cases decided by the North Carolina Court of Appeals in 1982,

395. *E.g.*, *Mitchell v. Freuler*, 297 N.C. 206, 254 S.E.2d 762 (1979); *Herndon*, 57 N.C. App. 318, 291 S.E.2d 305 (1982).

396. *See* Note, *supra* note 390, at 212-13 nn.63-66 (1980).

397. The court of appeals admitted that "there is little doubt that plaintiff is, in fact, the natural son of Gartha Herndon." 57 N.C. App. at 321, 291 S.E.2d at 307.

398. In *Reidy v. Macauley*, 57 N.C. App. 184, 290 S.E.2d 746 (1982), the North Carolina Court of Appeals held that a real estate broker is but an "incidental" beneficiary of a contract of sale executed between the purchaser and seller, and therefore may not maintain an action against the purchaser for recovery of her sales commission if the purchaser breaches the sales contract by failing to consummate the sale. Relying upon the holding in *Vogel v. Reed Supply Co.*, 277 N.C. 119, 177 S.E.2d 273 (1970), the court of appeals drew a distinction between an "intended" beneficiary (one for whose direct benefit the contract was made) and an "incidental" beneficiary (any beneficiary other than an intended beneficiary), and held that unless a broker can show that the parties to the sales contract executed it for the purpose of benefiting the broker, the purchaser's breach does not entitle the broker to recover his lost commission. *Reidy*, 57 N.C. App. at 186-87, 290 S.E.2d at 747-48.

In *The Property Shop v. Mountain City Inv. Co.*, 56 N.C. App. 644, 290 S.E.2d 222 (1982), a North Carolina real estate broker was permitted to recover the amount of her commission plus

Gower v. Strout Realty, Inc.,³⁹⁹ and *Shortt v. Knob City Investment Company, Inc.*,⁴⁰⁰ answered questions of first impression on the subject of real estate broker's commissions. In *Gower*⁴⁰¹ the court construed a North Carolina statute⁴⁰² prohibiting an unlicensed agent from engaging in the occupation of real estate broker or salesman to mean that it is unlawful for an out-of-state broker who is unlicensed in North Carolina to enter into a "finder's fee"⁴⁰³ agreement with a licensed listing agent in North Carolina.⁴⁰⁴ It is not unlawful for that same out-of-state broker to purchase the listed property on his own account, take a share of the North Carolina broker's commission by prior agreement, and then resell the property to his own prospects in the state where he is licensed.⁴⁰⁵

The suit was instituted by two California real estate brokers who operated a brokerage business in partnership form in California.⁴⁰⁶ They sued a North Carolina licensed broker for recovery of money damages on two theories. First, plaintiffs alleged that they had entered into a co-brokerage agreement with defendant whereby defendant agreed to pay plaintiffs an amount equal to one-half his real estate commission if plaintiffs procured a ready, willing, and able buyer for the North Carolina property. Plaintiffs claimed that they were entitled to recover the "finder's fee" because they had produced such a buyer, but the owner refused to sell the property.⁴⁰⁷ Plaintiff's second theory of recov-

accrued interest from a seller who had entered into an oral brokerage contract with plaintiff whereby plaintiff was to receive a six percent commission if she procured a purchaser ready, willing, and able to buy a certain North Carolina motel. After entering into the oral brokerage agreement, plaintiff contacted a broker in the state of Georgia, and through him procured a purchaser for the motel. The Georgia broker accompanied the purchaser on a trip to North Carolina to inspect the property and to meet with the sellers. The purchaser bought the property, but the sellers refused to pay plaintiff's commission. After a jury trial resulted in a verdict for the plaintiff, the sellers appealed. The central issues on appeal were: (1) if a seller and purchaser negotiate a sale without a broker present, but the seller knows or ought to know that his broker procured the purchaser, is the broker entitled to his commission? and (2) if the broker is entitled to a commission, but the purchase price in the sales contract is lower than the price at which the broker listed the property, what is the measure of the broker's recovery? The court of appeals answered the first question in the affirmative, and adopted as the proper measure of the broker's commission the rate specified in the original listing agreement. "[A]s a general rule when a sale is made by the owner at a price less than the broker is authorized to offer, the commission allowed is the contract rate on the actual sale price." *Id.* at 652, 290 S.E.2d at 227. If no particular rate of commission is specified in the listing agreement between seller and broker, the broker is entitled to recover in *quantum meruit* for the reasonable value of his services. *Id.*

399. 56 N.C. App. 603, 289 S.E.2d 880 (1982).

400. 58 N.C. App. 123, 292 S.E.2d 737 (1982).

401. 56 N.C. App. 603, 289 S.E.2d 880.

402. N.C. GEN. STAT. § 93A-1 (1981) provides:

[I]t shall be unlawful for any person, partnership, association or corporation in this State to act as a real estate broker or real estate salesman, or directly or indirectly to engage or assume to engage in the business of real estate broker or real estate salesman . . . without first obtaining a license issued by the North Carolina Real Estate Licensing Board

403. "[A] finder's fee contract is an arrangement by which an intermediary finds, introduces, and brings together parties to a real estate transaction, leaving the ultimate transaction and consummation of the transaction to the broker." *Gower*, 56 N.C. App. at 605, 289 S.E.2d at 882.

404. *Id.* at 605, 289 S.E.2d at 882.

405. *Id.* at 606, 289 S.E.2d at 882.

406. *Id.* at 603, 289 S.E.2d at 881.

407. *Id.*

ery alleged that their ready, willing, and able buyer was one of the plaintiff brokers, and that the purchasing partner had tendered the purchase price for the property, but the owner had cancelled the listing agreement.⁴⁰⁸

Plaintiff's first theory of recovery presented a question of first impression in the North Carolina appellate courts. Consequently, the court of appeals consulted the law of various other jurisdictions before concluding that:

There is a split of authority on the question of whether a "finder's fee" contract is invalid because it violates licensing law. *See* Annot., 24 A.L.R.3d 1160, 1172, *et seq.* We find the better view to be that, though the finder or originator does not assist in the ultimate negotiations of sale, the real estate licensing statutes would become meaningless if unlicensed parties were able to carry on traditional brokerage activities under a finder's fee contract.⁴⁰⁹

The court then went on to hold that a finder's fee contract between an unlicensed person and a licensed broker violates G.S. 93A-1 and is invalid.⁴¹⁰

Having held the finder's agreement invalid, the court examined the question raised by plaintiff's second theory: whether an out-of-state broker may contract to purchase in-state property through a North Carolina licensed broker and split the North Carolina broker's sales commission.⁴¹¹ The court of appeals stated that the answer to this issue was provided by the North Carolina Supreme Court in *McArver v. Gerukos*.⁴¹² Quoting *McArver* the court of appeals held that the type of agreement alleged by plaintiff's second claim for relief does not violate the licensing statutes, G.S. 93A-1,-2:

Thus it is clear that the Legislature did not intend for this act to apply to a person, partnership or association who purchases land for his or its own account, *even though such purchase is for resale*. Therefore, a contract by one who is not a licensed real estate broker or salesman with another person to buy land, or an option thereon, for their own account and, thereafter, to resell such land, or option, and divide the profits would not be a contract to do an act prohibited by this statute.⁴¹³

This passage from *McArver* convinced the court of appeals that plaintiff's second theory of recovery was not unlawful under the North Carolina licensing statute.⁴¹⁴

The court could have distinguished *McArver* from the instant case on the grounds that *McArver* validated a contract to split the purchaser's future profits if he were successful in reselling the property,⁴¹⁵ while the *Gower* contract contemplated splitting the in-state broker's commission earned on the first

408. *Id.* at 603-04, 289 S.E.2d at 881.

409. *Id.* at 605, 289 S.E.2d at 882.

410. *Id.*

411. *Id.* at 603-04, 289 S.E.2d at 881.

412. 265 N.C. 413, 144 S.E.2d 277 (1965).

413. 56 N.C. App. at 606, 289 S.E.2d at 882 (quoting *McArver v. Gerukos*, 265 N.C. 413, 418, 144 S.E.2d 277, 281 (1965)) (emphasis added).

414. 56 N.C. App. at 606, 289 S.E.2d at 882.

415. *Id.*

sale.⁴¹⁶ Such a distinction, however, would not be helpful in resolving the issue before the court. The real issue at the heart of *Gower* is how a North Carolina licensed broker may deal with an out-of-state broker unlicensed to do business in this state? The answer given in *Gower* seems to be that a licensed broker may deal with an unlicensed one only in the same manner in which he may deal with any other prospective purchaser. He may offer to sell the property to him for the price authorized by the seller, and he may encourage the prospect's acceptance by agreeing to split his commission with the buyer.⁴¹⁷ However he may not make an enforceable "finder's fee" agreement with one who is not purchasing the property on his own account.⁴¹⁸

One difficulty with the *Gower* rule is that an out-of-state broker, licensed in his own state but unaware of the law in North Carolina, may readily agree to enter into such a "finder's fee" contract and may fully perform his part of the bargain by procuring a ready, willing, and able purchaser who consummates the sale. If the North Carolina broker makes and honors such an agreement, he violates North Carolina law. If the North Carolina broker refuses to honor the agreement, he will be unjustly enriched by the value of the finder's services, but, under the rule of *Gower*, he cannot be successfully sued in North Carolina by the out-of-state broker who actually procured the purchaser. Such a result is inequitable when considering the fact that the party most likely to be aware of the unlawfulness of the finder's fee agreement (the North Carolina broker) stands to benefit first by ignoring the law when he needs help in locating a purchaser, then by invoking the law's protection once that purchaser is found.

In *Shortt v. Knob City Investment Co.*⁴¹⁹ the court of appeals faced the question whether a sale of one hundred percent of the outstanding shares of the seller corporation to a person procured by the seller's real estate broker constituted a sale of the corporation's property entitling the agent to his contractual commission.⁴²⁰ Knob City Investment Co. (defendant) entered into a sales agency contract with plaintiff, whereby plaintiff was authorized to offer all defendant corporation's real estate and improvements, fixtures, and supplies located thereon (which was all the tangible property belonging to the corporation)⁴²¹. Under the terms of the contract, if the property did not sell before the expiration date of plaintiff's listing, but was sold within the following six months to a purchaser to whom plaintiff had submitted the offer during the term of the listing, plaintiff would be entitled to a commission of ten percent of the sales price.⁴²² Within six months after the listing expired, a person to whom plaintiff had submitted the offer of sale bought one hundred percent of the outstanding stock of the defendant corporation. The sale of the stock

416. See *supra* text accompanying notes 406-09.

417. See *supra* note 404 and accompanying text.

418. See *supra* notes 402 & 403 and accompanying text.

419. 58 N.C. App. 123, 292 S.E.2d 737 (1982).

420. *Id.* at 127, 292 S.E.2d at 739-40.

421. *Id.* at 125, 292 S.E.2d at 738.

422. *Id.* at 125, 292 S.E.2d at 738-39.

was accomplished in one transaction in which the corporation's four shareholders simultaneously transferred all their shares to the purchaser.⁴²³ Because the sale was accomplished by a transfer of stock, no deed of conveyance of real estate was executed. The court of appeals held that the sale of the stock was a sale of the property within the terms of the exclusive sales agency contract.⁴²⁴

In reaching its decision, the court of appeals found no precedent in North Carolina law. Relying heavily upon the reasoning in an opinion from the Georgia Court of Appeals, *Kingston Development Co. v. Kenerly*,⁴²⁵ the North Carolina Court of Appeals quoted with approval authorities cited therein:

The sale of all of the stock of the corporation was in legal effect a sale of all of its assets, and the mere fact that the parties found it more convenient to transfer all of the stock rather than to make a conveyance of its assets does not change the substance of the transaction . . . [A] broker who is employed to procure a purchaser of all the company's property earns his commission when he procures a purchaser for all of the stock of the corporation . . . [Furthermore,] where the corporation contracts with the broker . . . it is the corporation as contracting party—not its stockholders as individuals that would be responsible for commission.⁴²⁶

The holding of *Shortt* adopts a sound, practical approach to the problem of determining whether a sale of stock may constitute a sale of real estate under the terms of a broker's listing agreement. By focusing upon the *effect* of the stock transfer (the property is controlled by a different entity) rather than its *form* (the property remains titled to the same corporate name)⁴²⁷, the court of appeals permitted the seller and purchaser to use the mode of transfer they deem most convenient, while at the same time protecting the broker's interest in the transfer.

MARC DAVID BISHOP
JULIANNE G. DOUGLASS
HERBERT F. JANICK

423. *Id.* at 127, 292 S.E.2d at 739.

424. *Id.* at 128, 292 S.E.2d at 740.

425. 132 Ga. App. 346, 208 S.E.2d 118 (1974).

426. *Id.* at 351-52, 208 S.E.2d at 122.

427. 58 N.C. App. at 127-28, 292 S.E.2d at 740.

X. TAXATION

A. Property Tax

The controversy in *In re Southern Railway*¹ centered on the appraisal of railroad property for *ad valorem* tax purposes.² These appraisals, which focus on the property as a system or unity,³ are made by the *Ad Valorem* Tax Division of the Department of Revenue⁴ and are subject to review by the Property Tax Commission.⁵ The value of railroad property is generally determined on the basis of income-earning capacity.⁶ Although the income approach is relatively simple in design, the required calculations are extremely complicated. The appraiser must determine the normal income the railroad is capable of earning on the date of appraisal and then capitalize that income at an appropriate rate of return.⁷ The object is to establish the "true value" or "market value" of the property.⁸

The taxpayers in *Southern Railway* challenged various aspects of the appraisal methods employed by the Department of Revenue in making the necessary calculations of income and rate of return.⁹ The first challenge concerned the appropriateness of adding deferred income tax expenses to the capitalizable income. The railroads, in accordance with generally accepted accounting procedures, had established reserves for deferred income taxes arising from accelerated depreciation of capital assets.¹⁰ The reserves were deducted from current income as an operating expense.¹¹ The Department of Revenue, however, adjusted the railroads' income records by re-adding the amounts previously deducted.¹² On appeal from an adverse decision by the Property Tax Commission, the railroads argued that deferred income taxes have no value and would not be regarded as income by a potential buyer or seller.¹³ The court of appeals disagreed.¹⁴ Citing the notion that future income taxes represent a contingency, not an outstanding indebtedness,¹⁵ the

1. 59 N.C. App. 119, 296 S.E.2d 463 (1982).

2. Railroads are classified as "public service companies" under N.C. GEN. STAT. § 105-333(14) (1979).

3. N.C. GEN. STAT. § 105-335(a) (1979).

4. *Id.*

5. N.C. GEN. STAT. § 143B-222 (1978).

6. See 59 N.C. App. at 126, 296 S.E.2d at 469. Other appraisal methods focus upon the market value of the company's stock and debt, and the book value of the company's assets. See N.C. GEN. STAT. § 105-336(a) (1979).

7. See 59 N.C. App. at 126-27, 296 S.E.2d at 469.

8. *Id.* at 126, 296 S.E.2d at 469.

9. The case also raised a question concerning the proper role of the Property Tax Commission in hearing appeals of the *ad valorem* tax appraisals from the Department of Revenue. The administrative issues, however, are beyond the scope of this section.

10. 59 N.C. App. at 127, 296 S.E.2d at 469. Under the accelerated method, the taxpayer's taxable income theoretically will increase as depreciation deductions decrease in later years. See *id.*

11. *Id.*

12. *Id.*

13. *Id.* at 127-28, 296 S.E.2d at 469.

14. *Id.* at 128, 296 S.E.2d at 470.

15. *Id.* at 128, 296 S.E.2d at 469-70.

court stated that establishing a reserve for deferred taxes simply "anticipates a tax that may never become due."¹⁶ Consequently, deducting the reserve from current income results in an undervaluation of the railroads' property.¹⁷ Thus, the court agreed with the Department of Revenue that the reserve should be included in income for purposes of the *ad valorem* tax appraisal.¹⁸

Other questions raised on appeal focused upon the determination of base value, the interest rates on indebtedness, and the rate of return on equity. The court held that the Department of Revenue could use the preceding year's income, rather than an average of the past five years' income, to establish base value.¹⁹ In dictum, the court indicated that income averaging might be appropriate if the railroads' income has not increased yearly.²⁰ The court also held that the Department need not substitute current market interest rates for the embedded cost²¹ of the debt.²² The court feared that difficult questions of fact could arise in establishing the current interest rates a particular taxpayer could obtain.²³ Finally, the court held that the actual rate of return on equity capital, based only upon past income, was an appropriate means of determining the rate of return a potential investor would demand.²⁴ The railroads argued unsuccessfully that the rate of return should be based upon the average rate of return, at current market cost for capitalization, for all railroads.²⁵ The court, apparently unable to marshal arguments strictly in favor of using the actual rate of return, concluded simply that the question was largely a matter of judgment, not law, and should not be set aside absent bad faith, unreasonableness, or arbitrariness.²⁶

B. Local Charges

In *Town of Spring Hope v. Bissette*²⁷ the supreme court considered the question whether a municipal body can increase its sewer rate to reflect the expense of a new waste water treatment plant before the new system begins operation. The statutory authorization for establishing water and sewer rates provides that "[a] city may establish and revise from time to time schedules of

16. *Id.* at 128, 296 S.E.2d at 470.

17. *See id.*

18. *Id.*

19. *Id.*

20. *Id.* Thus, if there have been alternate years of profit and loss, income averaging would be an appropriate method of establishing a realistic base value. *See id.* The question remains, however, whether income averaging would be mandatory in such a situation.

21. The "embedded" cost is the interest rate expressed on the face of the debt instrument. *Id.* at 129, 296 S.E.2d at 470.

22. *Id.*

23. *Id.* The difficulty of the determination, however, probably should not be controlling. From beginning to end, the appraisal involves many complicated factual questions. The Ad Valorem Tax Division and the Property Tax Commission presumably possess the expertise necessary to resolve such questions.

24. *Id.* at 130, 296 S.E.2d at 470.

25. *Id.* at 129-30, 296 S.E.2d at 470-71.

26. *Id.* at 130, 296 S.E.2d at 471.

27. 305 N.C. 248, 287 S.E.2d 851 (1982).

rents, rates, fees, charges, and penalties for the use or the services furnished by any public enterprise."²⁸ Bissette argued that, under the language of the statute, a town may not charge for services to be rendered in the future.²⁹ The supreme court, in dictum, agreed with that proposition.³⁰ The court disagreed, however, that construction of the new water treatment plant resulted in the rendition of new services. Writing for the majority, Chief Justice Branch observed, "When the new plant went into operation, the customers received nothing they had not theretofore received; thus, the increase in the rate did not reflect any services yet to be furnished, but merely the same service which had been previously furnished, *i.e.*, the efficient removal of waste water."³¹ Characterizing the new plant as a necessary improvement to the existing sewer system,³² the court held that the municipality could reflect the expense of constructing the new plant in its current water and sewer rate consistent with G.S. 160A-314(a).³³

Justice Exum, dissenting, drew a distinction between charges to cover the expense of constructing the new plant and charges intended to pay for maintenance of the facility.³⁴ The latter costs, he argued, could not be charged to the taxpayers until the plant actually went into operation.³⁵ The apparent basis for the distinction is that maintenance costs, unlike construction costs, are not actually incurred until the plant begins operation.³⁶ The majority opinion did not address the point.

C. Use Tax

In *Deep River Farms, Ltd. v. Lynch*³⁷ the court of appeals held³⁸ that a hydroponic growing system did not constitute a machine or machinery for purposes of the partial exemption from use tax provided by G.S. 105-164.4(1)(g).³⁹ The taxpayer's system was similar to a greenhouse,⁴⁰ and contained various moving parts, such as furnaces, pumps, and fans.⁴¹ The statute provides that the term "machines and machinery" includes:

all nonvehicular implements and mechanical devices designed and sold for any use defined in this subdivision, which have moving parts, or which require the use of any motor or animal power, fuel, or

28. N.C. GEN. STAT. § 160A-314(a) (1982).

29. 305 N.C. at 251, 287 S.E.2d at 853.

30. *Id.*

31. *Id.* at 252, 287 S.E.2d at 853.

32. *Id.*

33. *Id.*

34. *Id.* at 255-56, 287 S.E.2d at 854-55 (Exum, J., dissenting).

35. *Id.* at 256, 287 S.E.2d at 855 (Exum, J., dissenting).

36. *Id.* Justice Exum did not explain why actual incurrence of the costs should control in determining whether the increase in rates exceeds the statutory authorization. The connection, while not entirely tenuous, is far from axiomatic.

37. 58 N.C. App. 165, 292 S.E.2d 752 (1982).

38. *Id.* at 168, 292 S.E.2d at 754.

39. N.C. GEN. STAT. § 105-164.4(1)(g) (Cum. Supp. 1981).

40. 58 N.C. App. at 168, 292 S.E.2d at 754.

41. *Id.*

electricity in their operation but shall not include nonvehicular implements which have no moving parts and are operated wholly by hand.⁴²

The system's basic similarity to a building did not preclude application of the lower tax rate, since structures such as kilns and freezers have been held to constitute machinery for purposes of federal tax exemptions.⁴³ The court, citing *Endres Floral Co. v. United States*,⁴⁴ held that the crucial factor in determining whether structures can be classified as machines is the amount of human activity involved in the operation of the system.⁴⁵ The court characterized the human activity required by the hydroponic growing system as "substantial" and refused to classify it as a machine.⁴⁶ The court noted that defining a greenhouse as a machine would "allow any building or structure within which there are moving parts, systems or devices powered by machines to be classified as a machine. Such an interpretation would lead to absurd results not intended by the Legislature."⁴⁷

D. Income Tax

G.S. 105-159⁴⁸ requires a taxpayer to file a new return with the Secretary of Revenue whenever the taxpayer's net income for any year is corrected or changed by the Commissioner of Internal Revenue or any other authorized federal officer.⁴⁹ The new return must be filed within two years after receipt of the federal agent's report.⁵⁰ Failure to do so constitutes an attempt to evade or defeat income taxes under G.S. 105-236(7).⁵¹

Although the tax evasion statute clearly provides a three-year limitations period,⁵² the running of the statute presents a special problem when the attempted evasion consists of a failure to file a new return under G.S. 105-159. Suppose, for example, that on April 29, 1977, the taxpayer receives notice from the Commissioner of Internal Revenue that the taxpayer's net income for the years 1971, 1972, and 1973 has been corrected. The taxpayer fails to file a new return with the Secretary of Revenue within the two-year period provided by G.S. 105-159. Does the statute of limitations begin to run in 1971, 1972, and 1973, respectively, or on April 29, 1979, when the two-year period for filing a

42. N.C. GEN. STAT. § 105-164.4(1)(g) (Cum. Supp. 1981).

43. See *Endres Floral Co. v. United States*, 450 F. Supp. 16, 24 (N.D. Ohio 1977).

44. *Id.*

45. 58 N.C. App. at 170, 292 S.E.2d at 755.

46. *Id.*

47. *Id.*

48. N.C. GEN. STAT. § 105-159 (1979).

49. The purpose of the statute, of course, is to allow the Secretary of Revenue to assess additional state income taxes on the basis of the corrected net income. See *State v. Patton*, 57 N.C. App. 702, 704, 292 S.E.2d 172, 174 (1982).

50. N.C. GEN. STAT. § 105-159 (1979).

51. *Id.*

52. N.C. GEN. STAT. § 105-236(7) (1979).

new return expired?⁵³ In *State v. Patton*⁵⁴ the court of appeals held on these facts that the statute began to run not when the taxes fell due, but when the taxpayer failed to file a new return within the prescribed period.⁵⁵ The court reasoned that the offense, the act of evasion, occurred at the later date.⁵⁶ As a practical matter, any other interpretation of G.S. 105-159 would lead to absurd results, because the filing of the initial return, the audit by the federal government, the notice of corrected net income, and the lapse of the two-year period for filing a new return with state authorities would rarely transpire within three years after the taxes originally fell due. Therefore, acceptance of the taxpayer's argument in *Patton* would have eviscerated G.S. 105-159 by making enforcement virtually impossible.

E. Unemployment Tax

Under the Employment Security Law, employers are not required to make contributions to the Unemployment Insurance Fund on wages arising out of services performed "by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order . . .".⁵⁷ In *Baptist Children's Homes v. Employment Security Commission*⁵⁸ the court of appeals announced the appropriate test for determining whether the services of a minister are performed "in the exercise of his ministry" and thus beyond the scope of the statute.⁵⁹ Baptist Children's Homes, a North Carolina corporation that provides shelter and services for homeless and dependent children and their families,⁶⁰ employed an ordained minister as a house parent.⁶¹ The home treated the minister as self-employed and did not report his wages for the purposes of unemployment insurance coverage.⁶² The Employment Security Commission, focusing upon the nature of the work performed, argued that the mere fact that an individual is an ordained minister does not bring all services performed by the individual within the scope of the ministerial exemption.⁶³ Under the Commission's view, it is the job, not the employee, that must qualify for the exemption. Since the position itself involved no ministerial functions,⁶⁴ no person so employed, whether an ordained minister or not, could qualify.

53. Another way of phrasing the question is to ask whether the offense relates back to the year in which the taxes fell due.

54. 57 N.C. App. 702, 292 S.E.2d 172 (1982).

55. *Id.* at 704, 292 S.E.2d at 174.

56. *Id.*

57. N.C. GEN. STAT. § 96-8(6)k.15(ii) (Cum. Supp. 1981).

58. 56 N.C. App. 781, 290 S.E.2d 402 (1982).

59. The court made no decision on the merits, but remanded the case to the Employment Security Commission to make necessary findings of fact. See *infra* note 65.

60. 56 N.C. App. at 782, 290 S.E.2d at 403.

61. *Id.*

62. *Id.*

63. *Id.* at 783, 290 S.E.2d at 404.

64. *Id.* at 782, 290 S.E.2d at 403. In fact, most of the house parents were not ordained ministers. *Id.*

Adopting the language of regulations interpreting analogous federal statutes,⁶⁵ the court of appeals disagreed and decided that the appropriate test for determining whether services performed by a minister are "in the exercise of his ministry" is "whether the employer is itself a religious organization under the authority of a religious body constituting a church or church denomination or, if not, whether the employer is operated as an integral agency of such a religious organization."⁶⁶ Thus, the proper test focuses upon the character of the employer, rather than upon the nature of the position held. Unfortunately, however, the court provided no guidelines for determining whether a given employer is an "integral agency" of a religious organization;⁶⁷ consequently, application of the "integral agency" test will undoubtedly spawn further litigation.

F. Inheritance Tax

In *Holt v. Lynch*⁶⁸ the supreme court held that interest on funds borrowed to pay federal estate taxes and state inheritance taxes is deductible from the decedent's gross estate as a cost of administration.⁶⁹ More importantly, the court held that the cost-of-administration deduction embraces not only interest on money borrowed to pay the taxes, but also interest expenses incurred on the taxes themselves.⁷⁰ Resolution of the second issue involved a complicated construction of G.S. 105-241.1(i1),⁷¹ which provides the following definition of a "tax": " 'Tax' and 'additional tax,' for the purposes of this Subchapter and for the purposes of Subchapters V and VIII of this Chapter, include penalties and interest, as well as the principal amount of such tax or additional tax." The Revenue Commissioner argued on the basis of this definition that interest on a tax is itself a tax.⁷² Therefore, the interest payments in question, if regarded as a tax, cannot be deductible, since G.S. 105-9(5) allows a deduction only for "taxes paid to other states, and death duties paid to foreign countries."⁷³ The court of appeals found two major flaws in the Commissioner's reasoning. First, the court rejected the assumption that the statutory definition

65. *Id.* at 785-86, 290 S.E.2d at 404-05.

66. *Id.* The court did not have sufficient facts before it to determine the status of the employee under the newly enunciated test. Therefore, the case was remanded to the Commission for a determination whether Baptist Children's Homes is an "integral agency" of the Baptist State Convention. The court noted that there was uncontested evidence upon which the Commission could base a finding of "integral agency" status. *Id.* at 786, 290 S.E.2d at 405.

67. Presumably, courts will have no difficulty determining whether an employer is a "religious organization under the authority of a religious body constituting a church or church denomination." *Id.* at 785, 290 S.E.2d at 405.

68. 307 N.C. 234, 297 S.E.2d 594 (1982).

69. *Id.* at 237, 297 S.E.2d at 596.

70. *Id.* at 240-41, 297 S.E.2d at 598. Examples of interest on the tax itself include interest incurred as a result of federal estate tax deficiencies, deferred installments of federal estate tax, and state inheritance tax deficiencies. *Id.* at 234, 297 S.E.2d at 594-95. All of these costs represent interest, not on debt created to pay the tax, but rather on the tax itself. See *id.* at 239, 297 S.E.2d at 598.

71. N.C. GEN. STAT. § 105-241.1(i1) (1979).

72. 307 N.C. at 238-39, 297 S.E.2d at 597.

73. N.C. GEN. STAT. § 105-9(5) (1979).

of "tax" extends beyond purposes of administration to purposes of determining deductibility.⁷⁴ Second, assuming that for purposes of determining deductibility, interest on a tax is "something in addition to the tax,"⁷⁵ the court saw no reason to distinguish between interest on a debt created to pay the tax (which the court had already held deductible) and interest on the tax itself.⁷⁶

G. Statutory Developments

North Carolina corporations that have income subject to taxation in another state are required to apportion and allocate income in accordance with G.S. 105-130.4(b).⁷⁷ The General Assembly sought to clarify the situations in which apportionment is required by rewriting the test for determining when a corporation is deemed taxable in another state.⁷⁸ The new provision reads as follows:

For purposes of allocation and apportionment, a corporation is taxable in another state if (i) the corporation's business activity in that state subjects it to a net income tax or a tax measured by net income, or (ii) that state has jurisdiction based on the corporation's business activity in that state to subject the corporation to a tax measured by net income regardless whether that state exercises its jurisdiction. For purposes of this section, "business activity" includes any activity by a corporation that would establish a taxable nexus pursuant to 15 United States Code section 381.⁷⁹

In other legislative action, the General Assembly encouraged the use of alternative energy sources by creating corporate and personal income tax credits for the construction of peat facilities;⁸⁰ eliminated the requirement of certification by the Department of Natural Resources and Community Development from the property tax exclusion for real and personal property used solely for air cleaning or to abate, reduce, or prevent the pollution of air or water;⁸¹ created a tax refund of eleven cents per gallon for taxpayers who transport taxpaid motor fuel to another state for sale or use in that state;⁸² extended the foreign income exclusion to residents "living abroad," thereby bringing it in accordance with the federal exclusion;⁸³ raised the ceiling on the

74. 307 N.C. at 239, 297 S.E.2d at 597.

75. *Id.* at 240, 297 S.E.2d at 598.

76. *Id.*

77. N.C. GEN. STAT. § 105-130.4(b) (1979).

78. Law of June 18, 1982, ch. 1212, 1982 N.C. Sess. Laws, (Reg. Sess.) (codified at N.C. GEN. STAT. § 105-130.4(b) (Interim Supp. 1982)).

79. *Id.*

80. Law of June 18, 1982, ch. 1204, 1982 N.C. Sess. Laws, (Reg. Sess.) (codified at N.C. GEN. STAT. §§ 105-130.27A and 105-151.6A (Interim Supp. 1982)). "Peat facility" is defined as "a facility which uses peat as the feed stock for the production of a commercially manufactured energy source to replace petroleum, natural gas or other nonrenewable energy sources. . . ." *Id.*

81. Law of June 18, 1982, ch. 1244, 1982 N.C. Sess. Laws, (Reg. Sess.) (codified at N.C. GEN. STAT. § 105-275(27) to -275(28) (Interim Supp. 1982)).

82. Law of June 18, 1982, ch. 1219, 1982 N.C. Sess. Laws, (Reg. Sess.) (codified at N.C. GEN. STAT. § 105-446.6 (Interim Supp. 1982)). The new law applies to purchases of motor fuel made on or after July 1, 1982. *Id.*

83. Law of June 18, 1982, ch. 1205, 1982 N.C. Sess. Laws 105 (Reg. Sess.) (codified at N.C.

exemption of gain from the sale or exchange of a residence from eighteen months to two years;⁸⁴ provided that only funds actually received (rather than merely made available) from employee trusts must be reported as income;⁸⁵ created an inheritance tax exemption for survivor annuities receivable by a beneficiary under a federal employee retirement program to which the employee made contributions during his working years;⁸⁶ created a similar exemption for lump sum distributions that formerly did not qualify for tax-exempt treatment;⁸⁷ eliminated reporting requirements for estates under \$75,000;⁸⁸ and repealed the privilege tax on issuers and redeemers of trading stamps,⁸⁹ coal and coke dealers,⁹⁰ merchants buying or selling commodities on commission,⁹¹ junk dealers,⁹² and manufacturers and sellers of monuments and gravestones.⁹³

PAUL ABBOTT PARKER

GEN. STAT. § 105-141(b)(22) (Interim Supp. 1982)). The same bill repealed G.S. 105-147(1)f, which had allowed a deduction for expenses of state residents living abroad.

84. Law of June 18, 1982, ch. 1208, 1982 N.C. Sess. Laws 106 (Reg. Sess.) (codified at N.C. GEN. STAT. § 105-144.2(a) (Interim Supp. 1982)).

85. Law of June 18, 1982, ch. 1222, 1982 N.C. Sess. Laws, 112 (Reg. Sess.) (codified at N.C. GEN. STAT. § 105-142(d) (Interim Supp. 1982)).

86. Law of June 18, 1982, ch. 1218, 1982 N.C. Sess. Laws 111 (Reg. Sess.) (codified at N.C. GEN. STAT. § 105-3(8) (Interim Supp. 1982)).

87. Law of June 18, 1982, ch. 1220, 1982 N.C. Sess. Laws 112 (Reg. Sess.) (codified at N.C. GEN. STAT. § 105-3(5) (Interim Supp. 1982)).

88. Law of June 18, 1982, ch. 1221, 1982 N.C. Sess. Laws 112 (Reg. Sess.) (codified at N.C. GEN. STAT. §§ 105-22, 105-23, and 28A-21-2(a) (Interim Supp.)).

89. Law of June 18, 1982, ch. 1227, 1982 N.C. Sess. Laws 118 (Reg. Sess.) (repealing N.C. GEN. STAT. § 105-92 (1979)).

90. Law of June 18, 1982, ch. 1228, 1982 Sess. Laws 118 (Reg. Sess.) (repealing N.C. GEN. STAT. § 105-44 (1979)).

91. Law of June 18, 1982, ch. 1229, 1982 N.C. Sess. Laws 118 (Reg. Sess.) (repealing N.C. GEN. STAT. § 105-68 (1979)).

92. Law of June 18, 1982, ch. 1230, 1982 N.C. Sess. Laws, 119 (Reg. Sess.) (repealing N.C. GEN. STAT. § 105-102 (1979)).

93. Law of June 18, 1982, ch. 1231, 1982 N.C. Sess. Laws 119 (Reg. Sess.) (repealing N.C. GEN. STAT. § 105-96 (1979)).

XI. TORTS

A. Products Liability¹

In *Martin v. Smith*² the Federal District Court for the Western District of North Carolina addressed the concept of "crashworthiness" —an issue on which two federal appellate courts had recently reached conflicting conclusions regarding North Carolina law.³ *Martin* involved an action for wrongful death arising from an automobile accident in which plaintiffs' decedents were fatally burned. Plaintiffs sued the driver of the other car for negligence, and the manufacturer of their own car for wrongful design and construction. Citing *Wilson v. Ford Motor Co.*,⁴ defendant manufacturer moved for dismissal. *Wilson*, decided in 1981 by the United States Court of Appeals for the Fourth Circuit, held that North Carolina would not recognize the crashworthiness doctrine, which allows damages against a defendant whose negligent design aggravates injuries, but is not the cause of the original impact.⁵

The district court in *Martin* attacked the *Wilson* rationale as disharmonious with North Carolina law.⁶ North Carolina, the court said, recognizes that there may be more than one proximate cause for an injury,⁷ and the actor whose negligence is a proximate cause of any part of the injury is liable for that part.⁸ Stating that the manufacturer's negligence could be seen as a proximate cause of the injuries, and that the issue should go to the jury,⁹ the court noted that there is a split among the federal district courts: two having upheld such liability, and two having denied it. The court distinguished *Martin* from cases, such as *Wilson*, denying liability for aggravation of injuries because in *Martin* the fatal injuries resulted from burning. This factor, the court said, was a difference of kind, rather than simply of degree.¹⁰ The court thus denied defendant manufacturer's motions to dismiss and stated that the issue whether defendant manufacturer's negligence was a proximate cause of the injuries should be submitted to the jury.¹¹

1. In *McCollum v. Grove Mfg. Co.*, 58 N.C. App. 283, 293 S.E.2d 632 (1982), the court of appeals affirmed that North Carolina applies the "patent danger" rule. This rule, rejected in most jurisdictions, states that no warning of an obvious danger is required. The rule's rationale is that failure to warn is not the proximate cause of the injury. The court also said that although North Carolina recognizes strict liability in exceptional cases, the crane that caused plaintiff's injury in *McCollum* was not a dangerous instrumentality, and that therefore strict liability did not apply.

2. 534 F. Supp. 804 (W.D.N.C. 1982).

3. In *Seese v. Volkswagenwerk A.G.*, 648 F.2d 833 (3d Cir. 1981), the court predicted that North Carolina would adopt the crashworthiness doctrine, while *Wilson v. Ford Motor Co.*, 656 F.2d 960 (4th Cir. 1981), predicted that North Carolina would not. See *Survey of Developments in North Carolina Law, 1981—Torts*, 60 N.C.L. REV. 1159, 1468-71 (1982).

4. 656 F.2d 960 (4th Cir. 1981).

5. *Id.*

6. 534 F. Supp. at 806.

7. *Id.* (citing *Hester v. Miller*, 41 N.C. App. 509, 255 S.E.2d 318 (1979)).

8. *Id.*

9. 534 F. Supp. at 807.

10. *Id.* at 806.

11. *Id.* at 807. The court also stated that in this case plaintiffs alleged wanton and malicious concealment by the manufacturer of crash-test results. Regardless of the outcome of the

In *Bolick v. American Barmag Corp.*¹² the supreme court interpreted G.S. 1-50(6),¹³ the statute of limitations for product liability cases. In *Bolick* plaintiff was injured at work by a yarn-crimping machine purchased from defendant manufacturer. Plaintiff sued, alleging negligent design and manufacture, as well as breach of warranty. Defendant moved to dismiss on the ground that G.S. 1-50(6) barred recovery in suits filed more than six years after the original purchase.¹⁴ The trial court allowed the motion, but was reversed by the court of appeals, which held section 1-50(6) unconstitutional on its face.¹⁵

The supreme court, following the reasoning of *Smith v. American Radiator & Standard Sanitary Corp.*,¹⁶ determined that section 1-50(6) was not merely a procedural rule, but a substantive requirement for the bringing of the statutorily created cause of action.¹⁷ Therefore, in a suit to which section 1-50(6) applies, plaintiff must prove as a condition precedent that the action is brought within six years after the initial purchase.¹⁸ The statute, said the court, is more properly considered a "statute of repose" rather than a "statute of limitations."¹⁹ Because section 1-50(6) created substantive changes in the conditions precedent when it became effective in 1979, the court reasoned that the legislature did not intend that it be applied retroactively.²⁰ Since plaintiff's injuries

"crashworthiness" debate, the court felt that these allegations of intentional wrongdoing constituted sufficient grounds to warrant submission to the jury. *Id.*

12. 306 N.C. 364, 293 S.E.2d 415 (1982). See Dworkin, *Product Liability of the 1980s: "Repose is Not the Destiny of Manufacturers,"* 61 N.C.L. REV. 33, 62 (1982).

13. N.C. GEN. STAT. § 1-50(6) (Cum. Supp. 1981) provides, "No action for the recovery of damages, personal injury, death, or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption."

14. The machine was purchased on April 6, 1971, plaintiff was injured on June 3, 1977, and suit was filed after October 1, 1979 (the effective date of § 1-50(6)) but before three years had passed since the date of injury. 306 N.C. at 365, 293 S.E.2d at 417.

15. *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 284 S.E.2d 188 (1981). The court stated that by barring some actions before they accrued, the statute violated N.C. CONST. art 1, § 18, which guarantees a right to seek redress in the courts. See *Survey of Developments in North Carolina Law, 1981—Constitutional Law*, 60 N.C.L. REV. 1272, 1285-86 (1982).

16. 38 N.C. App. 457, 248 S.E.2d 462 (1978), *cert. denied*, 296 N.C. 586, 254 S.E.2d 33 (1979). The case involved N.C. GEN. STAT. § 1-50(5) (Cum. Supp. 1981), a statute similar to § 1-50(6), but related to injuries caused by unsafe conditions on real property.

17. A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of may be commenced, is not a statute of limitations. It is the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right.

306 N.C. at 369, 293 S.E.2d at 419 (quoting 34 AM. JUR., *Limitation of Actions* § 7 (1941)).

18. 306 N.C. at 370, 293 S.E.2d at 420.

19. *Id.* at 366, 293 S.E.2d at 417-18. The distinction is that a statute of limitations establishes a period of time within which a cause of action must be brought after its accrual—usually the time of the discovery of the injury. A statute of repose, however, adds the additional requirement that the action be brought within a certain length of time after some act by the defendant, such as the sale of the defective item or the rendering of the injurious service. It is this definite limit to the cause of action that gives potential defendants "repose" and attributes the substantive quality to such statutes.

20. *Id.* at 371, 293 S.E.2d at 420.

had occurred before the effective date of the statute, the court looked to the statute previously in effect,²¹ which provided that an action could be filed within three years of the injury. To do otherwise, the court said, would allow section 1-50(6) to destroy plaintiff's cause of action, which had vested before the statute became effective.²²

In a case decided the same day as *Bolick*, the supreme court considered related issues concerning section 1-50(6). In *Bernick v. Jordan*²³ a hockey player was injured when his mouthpiece broke. Alleging defective manufacture, the hockey player sued the manufacturer. Defendant argued that the claim was barred by G.S. 25-2-725,²⁴ which contains a four-year statute of limitations applicable to UCC transactions and states that the cause of action accrues when the breach of warranty occurs. Rejecting this contention, the court stated that G.S. 1-15(b),²⁵ a more specific statute of limitations pertaining to claims for personal injury or property damage, was in effect at the time of the injury.²⁶ Plaintiff asserted, however that G.S. 1-50(6) was the applicable statute, since section 1-15(b) was superseded in 1979 when section 1-50(6)²⁷ became effective. The court, applying the rule in *Bolick*, stated that since plaintiff's cause of action accrued before the effective date of section 1-50(6), the court would employ the statute in effect at the time of the injury.²⁸ Since section 1-15(b) provided that the cause of action accrued when the injury was discovered or reasonably discoverable, the cause of action in *Bernick* was allowed.²⁹

B. Wrongful Death

In *Carver v. Carver*,³⁰ the North Carolina Court of Appeals construed for the first time the North Carolina wrongful death statute in light of G.S. 1-539.21,³¹ which abolished parent-child immunity. G.S. 28A-18-2(a) authorizes actions for wrongful death only in cases in which the deceased would

21. N.C. GEN. STAT. §§ 1-52(1), (5) (Cum. Supp. 1981).

22. 306 N.C. at 371, 293 S.E.2d at 420-21.

23. 306 N.C. 435, 293 S.E.2d 405 (1982).

24. N.C. GEN. STAT. § 25-2-725 (1965 & Cum. Supp. 1981).

25. N.C. GEN. STAT. § 1-15(b) (repealed by Act of May 28, 1979, ch. 654, 1979 N.C. Sess. Laws 687, (1st Sess.))

26. 306 N.C. at 447, 293 S.E.2d at 411-12. N.C. GEN. STAT. § 1-15(b) (repealed 1979) provided in pertinent part:

[A] cause of action . . . having as an essential element bodily injury to the person . . . is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him . . . ; provided that . . . the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief.

27. See *supra* note 13.

28. *Bernick*, 306 N.C. at 447, 293 S.E.2d at 413.

29. *Id.*

30. 55 N.C. App. 716, 286 S.E.2d 789 (1982).

31. N.C. GEN. STAT. § 1-539.21 (Cum. Supp. 1981). That section provides, "The relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent."

have had a cognizable claim, had he lived.³² Because the rule of parent-child immunity was in effect prior to the enactment of G.S. 1-539.21, representatives of the estates of unemancipated minor children were barred from bringing wrongful death actions against such children's parents.³³ In 1976, however, the General Assembly abolished that immunity in cases involving injury arising out of the operation of a motor vehicle owned or operated by the parent.³⁴ In *Carver* the court interpreted the law to allow the estate representative of a minor child to sue the child's mother for negligently causing the child's death by automobile accident.³⁵

In *Burcl v. North Carolina Baptist Hospital, Inc.*³⁶ the supreme court considered the issue whether a foreign administrator could qualify as an ancillary personal representative after the running of the statute of limitations, and thereafter maintain a cause of action for wrongful death. Because a foreign administrator lacks the "capacity to sue" in a wrongful death action in North Carolina,³⁷ it had been the rule that if a wrongful death action was brought by a foreign personal representative who had failed to qualify locally before the limitations period ended, the complaint could not be amended: the action would be dismissed as untimely filed.³⁸ This result was considered proper because bringing suit in a different capacity was seen as tantamount to instituting a new cause of action.³⁹

In 1967, however, North Carolina adopted rules of civil procedure patterned after the federal rules.⁴⁰ North Carolina rule 15(a) now allows a party to amend his pleadings, rule 15(d) allows supplemental pleadings, and rule 15(c) states that the amendments relate back to the time of the original complaint unless there is prejudice to the defendant because of lack of notice. Rule 17 provides that an action shall not be dismissed on the ground that it is not brought in the name of the real party in interest, until reasonable time has been given to join or substitute the real party in interest. Because the North Carolina rules are patterned after the federal rules, the supreme court looked to federal precedent, and determined the controlling issue to be whether the original pleading gave notice of the events involved to the defending party,

32. N.C. GEN. STAT. § 1-539.21 (Cum. Supp. 1981) provides:

When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, . . . shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent

33. *Skinner v. Whitley*, 281 N.C. 476, 189 S.E.2d 230 (1972).

34. N.C. GEN. STAT. § 1-539.21 (Cum. Supp. 1981).

35. 55 N.C. App. at 724, 286 S.E.2d at 804. Because the mother could not receive a damages award, she could not testify as to loss of comfort and companionship. *Id.*

36. 306 N.C. 214, 293 S.E.2d 85 (1982).

37. *Monfils v. Hazlewood*, 218 N.C. 215, 216, 10 S.E.2d 673, 673 (1940).

38. *Hall v. Southern Ry.*, 149 N.C. 108, 62 S.E. 899 (1908).

39. 306 N.C. at 219-20, 293 S.E.2d at 89 (citing *Bennet v. North Carolina R.R.*, 159 N.C. 345, 74 S.E. 833 (1912)).

40. Act of June 27, 1967, ch. 954, 1967 N.C. Sess. Laws 1274 (codified at N.C. GEN. STAT. § 1A-1 (1969 & Cum. Supp. 1981)).

thereby avoiding prejudice.⁴¹

In *Burcl* the court determined that defendants had full notice of the events within the original period of limitations, and therefore reversed the trial court's denial of plaintiff's motion to file a supplemental pleading to show her qualification as ancillary administrator. This holding brings North Carolina in line with the majority view, and reflects a sound policy: the defendant is not prejudiced, and the plaintiff is not deprived of a legitimate claim because of a technicality.⁴²

In *Teachy v. Coble Dairies, Inc.*⁴³ decedent's administratrix sued the driver-owner of a commercial vehicle for the wrongful death of decedent. Defendant filed a third-party complaint against the North Carolina Department of Transportation, to which the State responded with motions to dismiss for failure to state a claim upon which relief could be granted and for lack of jurisdiction based upon sovereign immunity. The supreme court upheld the trial court's denial of the motions, and determined that the General Assembly, in its 1975 addition of subsection (c) to rule 14 of the North Carolina Rules of Civil Procedure,⁴⁴ intended that the State could be a proper third-party defendant, both for contribution and indemnification.⁴⁵

In a case of first impression, *Harris v. Hodges*⁴⁶ presented the court of appeals with the issue of self-defense in a civil suit for wrongful death. Citing Dean Prosser for the proposition that in this context "tort rules are apparently completely identical with those of the criminal law,"⁴⁷ the court stated that the use of deadly force in self-defense was proper when it appeared necessary to

41. 306 N.C. at 228, 293 S.E.2d at 93.

42. *Thorpe v. Wilson*, 58 N.C. App. 292, 293 S.E.2d 675 (1982) (citing with approval *Force v. Anderson*, 56 N.C. App. 423, 289 S.E.2d 56 (1982)) (failure to file claim (against the defendant administrator or executor's estate) within six-month statute of limitations contained in G.S. 28-19-3 did not bar recovery in wrongful death action when plaintiff sought to collect damages under an automobile liability insurance policy).

43. 306 N.C. 324, 293 S.E.2d 182 (1982).

44. N.C.R. Civ. P. 14(c) provides:

Notwithstanding the provisions of the Tort Claims Act, the State of North Carolina may be made a third-party plaintiff under subsection (a) or a third-party defendant under subsection (b) in any tort action. In such cases, the same rules governing liability and the limits of liability of the State and its agencies shall apply as is provided for in the Torts Claims Act.

The court construed this language as containing a clerical error, and stated that the term "third-party plaintiff" should read "third party" or "third-party defendant." This interpretation was made in order to harmonize the section with the 1981 Act "to make clear that the state may be either a third-party plaintiff or defendant in certain actions." 306 N.C. at 330, 293 S.E.2d at 186 (quoting Act of July 3, 1981, ch. 810, 1981 N.C. Sess. Laws 1182 (amending N.C.R. Civ. P. 14(c), codified as N.C. GEN. STAT. § 1A-1, Rule 14(c) (Cum. Supp. 1981)).

45. *Burcl*, 306 N.C. at 332, 293 S.E.2d at 187. The court also determined that state court is the proper forum for such actions, whereas direct suits against the State must be brought before the Industrial Commission. *Id.* Because of this conclusion, the pleadings need not conform to the Industrial Commission's requirements. *Id.* at 333, 293 S.E.2d at 187.

The court left undecided the issue whether sovereign immunity affected personal or subject matter jurisdiction, and used its supervisory jurisdiction under N.C. GEN. STAT. § 7A-31 (1981) to hear the issues decided.

46. 57 N.C. App. 360, 291 S.E.2d 346 (1982).

47. *Id.* at 361, 291 S.E.2d at 347 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 19, 108 n.12 (4th ed. 1971)).

protect against death or great bodily harm.⁴⁸ The trial court, therefore, had not erred in submitting a self-defense issue to the jury.⁴⁹

In *Scallon v. Hooper*⁵⁰ the court of appeals adopted the majority view that it is reversible error for the trial court to instruct the jury that damages awarded in a wrongful death action are tax-exempt.⁵¹ Similarly, the court ruled that since it was improper to mention insurance during the trial, it was also impermissible for the defendant's counsel in his argument to the jury to state that defendant "would be legally obligated to pay every single dollar of [the] verdict," as the jury could thereby infer that defendant was uninsured.⁵²

C. Medical Malpractice

*McPherson v. Ellis*⁵³ involved a girl who was permanently paralyzed after receiving an arteriogram. Plaintiff claimed that the physicians involved had not informed her of the risk and alleged that the doctors negligently failed to obtain her informed consent. The North Carolina Supreme Court cited a California case to define "informed consent": "a physician 'violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment.'"⁵⁴ The supreme court held that the plaintiff's uncontested expert testimony, if believed, established that the neuroradiologists' failure to disclose the risk of paralysis was not in keeping with the standard of practice in the same or similar community.⁵⁵

The court then considered whether an objective or subjective standard should be applied in determining whether the failure to disclose was the proximate cause of the injury. In the past, North Carolina courts have applied an objective standard and have excluded testimony of the plaintiff concerning whether, if properly informed, he would have undergone the operation.⁵⁶ In *McPherson*, however, the court said that because a subjective standard takes

48. The court relied on *State v. Clay*, 297 N.C. 555, 256 S.E.2d 176 (1979).

49. 57 N.C. App. at 362, 291 S.E.2d at 347.

50. 58 N.C. App. 551, 293 S.E.2d 843 (1982).

51. *Id.* at 556, 293 S.E.2d at 845.

52. *Id.* at 556-57, 293 S.E.2d at 845-46.

53. 305 N.C. 266, 287 S.E.2d 892 (1982).

54. *Id.* at 270, 287 S.E.2d at 895 (quoting *Salgo v. Leland Stanford, Jr. Univ. Bd. of Trustees*, 154 Cal. App. 2d 560, 578, 317 P.2d 170, 181 (1957)). Because the trial court heard testimony from a number of experts, the court expressed no opinion on the issue whether expert testimony was necessary to determine the scope of the duty of disclosure, and therefore let stand the court of appeals' implicit determination that it was unnecessary. *Id.*

In *Nelson v. Patrick*, 58 N.C. App. 546, 293 S.E.2d 829 (1982), the court of appeals observed that N.C. GEN. STAT. § 90-21.13 (1975), which requires that the action of the health care provider in obtaining consent accord with the professional standards among doctors of similar training and experience in the same or similar communities appeared to require that expert testimony be introduced by the party seeking to establish the standard. *Id.* at 550, 293 S.E.2d at 832. In *Nelson*, the court determined that an action for failure to disclose was grounded in negligence, not battery; therefore the three-year statute of limitations applied, rather than the one-year statute of limitations for battery.

55. 305 N.C. at 270-71, 287 S.E.2d at 895-96.

56. *Watson v. Clutts*, 262 N.C. 153, 136 S.E.2d 617 (1964).

into account the "quirks and idiosyncracies of the individual," it is more appropriate because it avoids the dilemma of forcing one's decisions to be judged by an objective standard set by others.⁵⁷ The court, therefore, reversed prior law and applied a subjective standard.⁵⁸

Because the General Assembly had passed G.S. 90-21.13,⁵⁹ effective July 1, 1976, requiring an objective standard of informed consent, the *McPherson* decision produces an anomalous result. Actions that arose before July 1, 1976 have been litigated under an objective standard, as were those causes of action arising after that date. But causes of action arising before the effective date of section 90-21.13, and coming to trial after *McPherson*, will be governed by a subjective standard. Particularly in light of the legislature's disavowal of this standard, this result seems most irregular.⁶⁰

D. Contractors

In *Sullivan v. Smith*⁶¹ the North Carolina Court of Appeals discussed the duty of care required of a general contractor in supervising the work and materials of a subcontractor. The court reversed the trial court's grant of judgment notwithstanding the verdict for defendant, the general contractor, and held that plaintiff had presented evidence that could justify a verdict in his favor.⁶² In the process the court clarified the evidentiary weight to be given a contractor's showing of adherence to customs in the trade.⁶³ The court held that such evidence does not constitute conclusive proof of lack of negligence, and also held that the duty of care owed by a general contractor to supervise the job's subcontractors is an independent duty, the breach of which could make the general contractor and the subcontractor joint tortfeasors.

57. 305 N.C. at 273, 297 S.E.2d at 897.

58. In *Simons v. Georgiade*, 55 N.C. App. 483, 286 S.E.2d 596 (1982), the court of appeals applied the objective standard, citing *Watson*, 262 N.C. 153, 136 S.E.2d 617 to exclude plaintiff's testimony. *Watson* was later expressly disapproved in *McPherson*, 305 N.C. at 273, 287 S.E.2d at 897.

59. N.C. GEN. STAT. § 90-21.13(a)(3) (1981) provides:

No recovery shall be allowed against any health care provider on the grounds that the health care treatment was rendered without the informed consent of the patient . . . where: A reasonable person, under all the surrounding circumstances, would have undergone such treatment of procedure had he been advised by the health care provider in accordance with the [other] provisions. . . of this subsection.

60. The court cited the statute and acknowledged that several of the principles set forth in the opinion are superseded by the statute. 305 N.C. at 269 n.1, 287 S.E.2d n.1.

61. 56 N.C. App. 525, 289 S.E.2d 870, *disc. rev. denied*, 306 N.C. 392, 294 S.E.2d 220 (1982).

62. *Id.* at 530, 289 S.E.2d at 873. As the court noted:

A directed verdict or a judgment n.o.v. for a defendant is improper when a plaintiff's evidence, taken as true and considered in the light most favorable to him, with all inferences made and contradictions resolved in his favor, is sufficient as a matter of law to justify a verdict for plaintiff.

Id. at 526, 289 S.E.2d at 871 (citations omitted).

63. An earlier ruling had established that a contractor was to be held to the standard of a reasonable and prudent contractor under the same or similar circumstances. The decisions did not indicate what weight was to be given evidence that defendant followed the custom of local builders. *See Lindstrom v. Chesnutt*, 15 N.C. App. 15, 189 S.E.2d 749, *cert. denied*, 281 N.C. 757, 191 S.E.2d 361 (1972).

Plaintiff alleged that faulty construction of a fireplace and chimney caused the partial destruction of his house.⁶⁴ Plaintiff initially sued both the general contractor and the subcontractor-mason who built the fireplace, but subsequently released the mason. Plaintiff's allegations of the general contractor's liability were based upon his failure to disclose and correct the faulty construction of the fireplace. The general contractor defended by claiming that his supervision was the same as that of other builders in his area. A jury returned a judgment against the general contractor in the amount of \$10,000, although the evidence showed damages of over \$100,000. The trial court granted the general contractor's motion for judgment notwithstanding the verdict, and conditionally granted plaintiff's motion for a new trial solely on the issue of damages should the court of appeals reverse the judgment notwithstanding the verdict.

On appeal, the court of appeals considered two issues. First, the court dealt with the standard of care required of a general contractor in supervising his subcontractors. The court refused to equate the standard of care followed by other builders in the area with the behavior of a reasonably careful and prudent contractor under the same or similar circumstances. Quoting from Dean Prosser,⁶⁵ the court held that evidence of custom was not conclusive of the issue of duty of care, and that in certain instances "what everyone else does may be found to be negligent"⁶⁶

Second, the court considered the effect of plaintiff's release of the subcontractor on the liability of the general contractor. Defendant general contractor claimed that the release deprived him of the right to indemnification, and thus warranted his dismissal from the case.⁶⁷ The court noted, however, that a right to indemnification arises when there exists either passive negligence by the employer and active negligence by the employee, or a single act of negligence by one whose negligence is imputed to another.⁶⁸ The court held that a general contractor has an independent duty of supervision that can be actively violated,⁶⁹ and that a general contractor is not vicariously liable for the torts of an independent subcontractor.⁷⁰ As a result, no right of indemnification existed between the defendants, and the release of one did not discharge the

64. A structural engineer who examined the fireplace and chimney testified that the interior fireplace bricks did not constitute "solid masonry construction" because of many gaps in the mortar. 56 N.C. App. at 526-27, 289 S.E.2d at 871.

65. 56 N.C. App. at 529, 289 S.E.2d at 873 (quoting W. PROSSER, *supra* note 47, § 33, at 167-68 (4th ed. 1971)).

66. W. PROSSER, *supra* note 47, § 33, at 168.

67. 56 N.C. App. at 530, 289 S.E.2d at 873. 73. See *Brown v. Town of Louisburg*, 126 N.C. 701, 36 S.E.2d 166 (1900) (plaintiff's release of defendant who was primarily liable destroyed a secondarily liable defendant's right of indemnity, and thus barred plaintiff's recovery of damages from the latter defendant).

68. 56 N.C. App. at 531, 289 S.E.2d at 874. See *Edwards v. Hamill*, 262 N.C. 528, 531, 138 S.E.2d 151, 153 (1964).

69. 56 N.C. App. at 531-32, 289 S.E.2d at 874. See *Lindstrom v. Chesnutt*, 15 N.C. App. 15, 189 S.E.2d 749, *cert. denied*, 281 N.C. 757, 191 S.E.2d 361 (1972).

70. 56 N.C. App. at 532, 289 S.E.2d at 874. See *Hendricks v. Leslie Fay, Inc.*, 273 N.C. 59, 62, 159 S.E.2d 362, 365 (1968).

other from liability.⁷¹

In *Cowan v. Laughridge Construction Co.*⁷² the court of appeals discussed the evidentiary weight accorded to OSHA violations in a court's determination of negligence per se. The court reversed the trial court's directed verdict for defendant and held that OSHA regulations are evidence of custom in the construction industry.⁷³ Defendant's violation of the regulations thus provided some evidence of negligence that should have precluded the directed verdict.

The court further noted that violation of the Rules of the North Carolina Commission of Labor,⁷⁴ which incorporate the OSHA regulations, could constitute negligence per se, but only if the noncompliance were criminal.⁷⁵ Noncompliance with the Rules is criminal only if the violation causes the death of an employee;⁷⁶ otherwise, the sanction is a lesser penalty assessed by the Commissioner.⁷⁷

E. Innkeepers and Guests

In *Urbano v. Days Inn of America*⁷⁸ the North Carolina Court of Appeals discussed the duty of care required of an innkeeper to protect his guests from the criminal acts of third persons on the premises. The court reversed the trial court's grant of summary judgment, holding that there was evidence that could allow a finding of defendant's breach of duty.

Plaintiff alleged in his negligence claim that defendant breached a duty of care to him by failing to provide adequate lighting in the parking lot, allowing unrestricted access to the motel, neglecting to warn plaintiff of previous acts of violence on the premises, and failing to provide adequate security for the guests in the motel.⁷⁹ Defendant denied the claims and asserted an affirmative defense of intervening wrongful acts of third persons as the proximate cause of the plaintiff's injuries.

On appeal, the court considered the question of the innkeeper's negli-

71. The release is instead governed by the Uniform Contribution Among Tort-Feasors Act, which states in pertinent part:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury . . .

(1) it does not discharge any of the other tort-feasors from liability for the injury . . . unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater

N.C. GEN. STAT. § 1B-4 (1969).

72. 57 N.C. App. 321, 291 S.E.2d 287 (1982).

73. 57 N.C. App. at 325, 291 S.E.2d at 290. See *National Marine Serv., Inc. v. Gulf Oil Co.*, 433 F. Supp. 913 (E.D. La. 1977), *aff'd*, 608 F.2d 522 (5th Cir. 1979).

74. N.C. GEN. STAT. § 95-131(a) (1981).

75. 57 N.C. App. at 325, 291 S.E.2d at 289. See *Swaney v. Peden Steel Co.*, 259 N.C. 531, 131 S.E.2d 601 (1963).

76. 57 N.C. App. at 325, 291 S.E.2d at 289-90; N.C. GEN. STAT. § 95-139 (1981).

77. N.C. GEN. STAT. § 95-139 (1981).

78. 58 N.C. App. 795, 295 S.E.2d 240 (1982).

79. *Id.* at 796, 295 S.E.2d at 241.

gence. The court cited *Foster v. Winston-Salem Joint Venture*⁸⁰ as recognizing a shopping center's duty to exercise reasonable care to protect its business invitees from the criminal acts of third persons on the premises. The court in *Foster* recognized that "foreseeability" was the crucial element in defining the extent of the duty.⁸¹ *Foster* also recognized that a parking lot provided by a business owner for the use of his invitees is part of the business premises.⁸² The court of appeals in *Urbano* extended the principle of the *Foster* decision to innkeepers. The court of appeals, following the *Foster* rationale of foreseeability, gave great weight to evidence showing forty-two incidents of criminal activity at the motel during the three years prior to plaintiff's injury.⁸³ The court noted that despite these occurrences, defendant had taken no extra precautions to ensure guests' safety, such as providing fencing, extra lighting in the parking lot, or a security guard. Instead, defendant unreasonably continued to rely solely upon routine visits by the police.⁸⁴ This evidence convinced the court that, under the general rules of *Foster*, a jury might reasonably find that defendant should have foreseen the potential for injury to its guests from criminal acts of third parties, and that failure to take any steps to prevent such injury would be a breach of duty to plaintiff.

In *Hockaday v. Morse*⁸⁵ the court of appeals discussed the legal status of a visitor of a registered guest in a motel. The court noted that North Carolina follows the traditional, majority view⁸⁶ that a visitor at the motel "who is there for a lawful purpose, at a proper time, by the guest's express or implied invitation, and who remains within the boundaries of the invitation, is an invitee, to whom the innkeeper owes the duty of exercising reasonable care, the same duty owed to registered guests."⁸⁷ As the court in *Hockaday* noted, such an extensive list of restrictive qualifications has spawned a body of case law illustrating the exceptions and obscuring the rule behind them.⁸⁸

In *Lamb v. Wedgewood South Corp.*,⁸⁹ a multiple party wrongful death suit, the North Carolina Court of Appeals reviewed the trial court's rulings on motions for summary judgment.⁹⁰ The court discussed the duty of care and

80. 303 N.C. 636, 281 S.E.2d 36 (1981). See Note, *Foster v. Winston-Salem Joint Venture: Duty of Mall Owners to Take Measures to Protect Invitees from Criminal Acts*, 60 N.C.L. REV. 1126(1982).

81. 303 N.C. at 640, 281 S.E.2d at 39.

82. *Id.* at 638, 281 S.E.2d at 38.

83. 58 N.C. App. at 798, 295 S.E.2d at 242.

84. *Id.*

85. 57 N.C. App. 109, 290 S.E.2d 763, *disc. rev. denied*, 306 N.C. 384, 294 S.E.2d 209 (1982).

86. 57 N.C. App. at 111, 290 S.E.2d at 765; see J. SHERRY, *THE LAW OF INNKEEPERS* § 9.2 (rev. ed. 1981); Annot., 58 A.L.R.2d 1202 (1958).

87. 57 N.C. App. at 111, 290 S.E.2d at 765.

88. *Id.* See, e.g., *Jones v. Bland*, 182 N.C. 70, 108 S.E. 344 (1921) (hotel owner had no duty to guest's visitor who fell down elevator in a part of hotel outside the scope of guest's invitation); *Money v. Travelers' Hotel Co.*, 174 N.C. 508, 93 S.E. 964 (1917)(same).

89. 55 N.C. App. 686, 286 S.E.2d 876 (1982).

90. The court granted summary judgment to the architects of the building (another party in the case) and that order was appealed by plaintiff pursuant to N.C.R. Civ. P. 54(b). In its discretion, the court of appeals also considered the other appeals from the trial court's denial of the remaining defendants' summary judgment motions. 55 N.C. App. at 690, 286 S.E.2d at 880.

status of guests in ruling on the motion of defendant innkeeper, Wedgewood South Corporation. Hilton Inns, defendant-franchisor, presented the court with an issue of first impression in North Carolina—tort liability of a franchisor to a third person.⁹¹

Plaintiff alleged that defendant Wedgewood, the owner of the inn, was negligent in maintaining a window without sufficient strength or protective devices to prevent one from falling through it. Allegations of liability of defendant Hilton were based on one or both of two theories: an agency relationship, or Hilton's failure to properly supervise Wedgewood's maintenance procedures. The trial court denied the summary judgement motion of both Hilton and Wedgewood, and they appealed.

Two issues were of primary significance on appeal. First, the court of appeals discussed the duty of care that Wedgewood, as innkeeper, owed to the deceased guest. Wedgewood contended that summary judgment was appropriate because the deceased had been a trespasser at the time of his death, and thus defendant was obligated only to avoid willfully or wantonly injuring him.⁹² No evidence of willful or wanton behavior by the defendant was before the court. The evidence showed that the deceased had met a performer (a singer) in the hotel bar early on the night of his death. When he attempted to visit the singer in her room and was denied entry, a struggle ensued that moved from the room into the hall and ended with the deceased falling through a hall window to his death. The court acknowledged that the deceased may have been a trespasser initially while in the singer's room, but that when the fracas moved into the hall, the deceased regained his status as an invitee. As an invitee, the deceased was owed a duty of reasonable care, and the court found sufficient evidence to permit a finding that Wedgewood violated that duty by failing either to replace the glass or to construct a protective device in front of the window.⁹³

A second issue concerned the liability of the franchisor, Hilton, to the deceased. The court refused to hold a franchise agreement, which stated that Wedgewood was not an agent of Hilton, to be determinative on the question of agency. Instead, the court noted that the agreement gave Hilton the right to inspect the premises of the inn in order to determine if Wedgewood operated in accordance with the Hilton operating manual. Based upon this clause, the court held that a jury might reasonably find that Hilton either controlled Wedgewood sufficiently to establish an agency relationship, or sufficiently controlled the maintenance of the inn to be liable, independently of any negligence, for not making sure that proper windows were installed.⁹⁴

91. 55 N.C. App. at 692, 286 S.E.2d at 88. For a detailed discussion of other jurisdictions' rulings on the subject, see Comment, *Liability of a Franchisor for Acts of the Franchisee*, 41 S. CAL. L. REV. 143 (1967); Comment, *A Franchisor's Liability for the Torts of His Franchisee*, 5 U.S.F.L. REV. 118 (1970).

92. 55 N.C. App. at 691, 286 S.E.2d at 880; see generally 62 AM. JUR. 2D, *Premises Liability* § 54 (1972).

93. 55 N.C. App. at 692, 286 S.E.2d at 881.

94. *Id.* at 692-93, 286 S.E.2d at 881.

Clauses such as the right of inspection clause emphasized by the court in *Wedgewood* are boilerplate language in most franchise agreements. The potential for basing an action for franchisor liability for negligent construction or maintenance upon such an ubiquitous clause, and upon nothing else, may greatly expand franchisor liability in North Carolina.

F. Public Utility's Duty To Maintain Attractive Nuisance

In *Green v. Duke Power Co.*⁹⁵ the Supreme Court of North Carolina discussed the duty of care owed by an occupant or owner of land to protect third parties from hazardous conditions that were not created or maintained by the owner or occupant. The court also discussed the applicability of the attractive nuisance doctrine to owners or occupants of property on which power company equipment is located pursuant to a valid easement.

Plaintiffs in *Green* sued Duke Power for negligence after their child touched an exposed, electrified portion of a ground level transformer. The transformer was located on land owned by defendant Housing Authority and leased by defendant Henry Thomas Eanes. Eanes testified during discovery that he knew the transformer was unlocked and that he had telephoned the Housing Authority to inform it of the dangerous condition. Upon learning of this testimony, Duke Power filed third-party actions against Eanes and the Housing Authority, seeking contribution based upon their failure to take any action to correct the hazardous condition. The trial court granted summary judgment for third-party defendants Eanes and Housing Authority; Duke Power appealed.⁹⁶

On appeal, Duke Power claimed a right of contribution from third-party defendants based on their alleged liability under the attractive nuisance doctrine. Duke Power cited two New Jersey cases holding landowners or occupants liable under this doctrine for injuries to children resulting from dangerous conditions known to the owner or occupant but not created or maintained by them.⁹⁷ The court in *Green* distinguished these cases by noting that defendants there had "knowingly suffered [the dangerous conditions] to continue."⁹⁸ The court also cited North Carolina authority that demands a

95. 305 N.C. 603, 290 S.E.2d 593 (1982).

96. *Id.* at 605, 290 S.E.2d at 594. The court of appeals had denied Duke Power's right to an immediate appeal of the trial court's grant of summary judgment for third-party defendants. *Green v. Duke Power Co.*, 50 N.C. App. 646, 274 S.E.2d 839 (1981). The appeal to the supreme court was solely on the issue of Duke Power's right to immediate appeal, but the court, pursuant to N.C. GEN. STAT. § 7A-31 (1981), elected to hear the merits of the case as well.

97. *Simmel v. New Jersey Coop Co.*, 28 N.J. 1, 10, 143 A.2d 521, 526 (1958); *Lorusso v. DeCarlo*, 48 N.J. Super. 112, 136 A.2d 900 (1957). Both cases involved fires set on a landowner's property by third persons in which infant trespassers were injured. The landowners' failure to extinguish the fires after learning of them comprised a "toleration" of the condition. The *Green* court contrasted those cases by noting that it appeared that defendants were free to take action to eliminate the hazard. The holding in *Green* implies that in order to "suffer a condition to continue," a defendant must first have the capability to eliminate the condition directly, rather than contact those who might do so.

98. 305 N.C. at 609, 290 S.E.2d at 597 (quoting *Benton v. Montague*, 253 N.C. 695, 704, 117 S.E.2d 771, 777 (1961)).

"knowing sufferance" before the imposition of liability.⁹⁹ The court interpreted "knowingly suffered to continue" as requiring the landowner or occupant to tolerate or acquiesce in the continuance of the dangerous condition.¹⁰⁰ The court then noted that third-party defendants in *Green* had no right to deny access to the transformer;¹⁰¹ nor was it reasonably practical for either third-party defendant to render the transformer harmless.¹⁰² Because of Duke Power's control over the easement, the court found that Duke Power had the sole duty to keep the transformer safe.¹⁰³ In order to knowingly suffer a hazard to continue, a defendant must first possess the potential to correct the danger and then fail to do so. The landowner's or occupant's knowledge of the hazard is irrelevant to the question of their own liability if they have no control over the hazard. The court further held that Eanes and the Housing Authority had no duty to inform Duke of the danger even though "it may be said that such notification would be reasonably calculated to prevent injury."¹⁰⁴

The decision of the supreme court in *Green* should clearly establish that holders of easements with exclusive control over the property are solely responsible for correcting hazards on the property. The attractive nuisance doctrine will not impose joint liability upon the owner or occupant of the subservient tenement, even if the owner or occupant has knowledge of the situation, but did not create the hazard and has no control over its continuance. For purposes of argument only, the court addressed the issue of imposing upon a landowner a duty to inform the easement holder of any danger of which the landowner has knowledge. The court's application of the evidence in *Green* to such a hypothetical duty indicated that the obligation could be met rather easily.¹⁰⁵

In *Beck v. Carolina Power & Light Co.*¹⁰⁶ the court of appeals discussed the duty of care imposed upon electric utilities. The court reaffirmed that utilities are held to a "highest degree of care"¹⁰⁷ standard, but observed that such a standard does not comprise a separate rule of negligence for utilities.

99. *Benton v. Montague*, 253 N.C. 695, 704, 117 S.E.2d 771, 777 (1961).

100. *Green*, 305 N.C. at 610, 290 S.E.2d at 597-98 (citing *Simmel v. New Jersey Coop. Co.*, 28 N.J. 1, 11, 143 A.2d 521, 526 (1958)).

101. "Any interference . . . would clearly encroach upon the rights granted to Duke by the easement." 305 N.C. at 611, 290 S.E.2d at 598.

102. *Id.*

103. *Id.*

104. *Id.* at 612, 290 S.E.2d at 599.

105. The court found that, assuming *arguendo* an obligation were imposed upon landowners or occupants to take steps reasonably calculated to prevent injury, defendant Eanes might have met this obligation by warning children away from the transformer. 305 N.C. at 612, 290 S.E.2d at 599.

106. 57 N.C. App. 373, 291 S.E.2d 897, *aff'd per curiam*, 307 N.C. 267, 297 S.E.2d 397 (1982). Although the supreme court's per curiam opinion does affirm the court of appeals decision, it expressly states that the court of appeals opinion "stands without precedential value." 307 N.C. at 268, 297 S.E.2d at 398. Justice Harry Martin, a newcomer to the supreme court bench, did not participate in the decision because he had participated (by dissenting) at the court of appeals level. Without his participation, the supreme court was evenly divided. The decision to affirm is without precedential value because Justice Martin's participation would likely have led to a reversal of the court of appeals opinion.

107. *Id.* at 377, 291 S.E.2d at 900.

At trial the judge had correctly instructed the jury on the "highest degree of care" standard, but characterized the standard as a separate rule that applied to utilities. The court of appeals held that the higher standard is not a separate rule of negligence, but rather results from the general rule requiring the care that a prudent man ought to use under like circumstances.¹⁰⁸ The court noted that the higher standard stemmed from a judicial recognition that electricity is inherently dangerous, and reaffirmed the "highest degree of care" standard. It also found that the trial judge's incorrect characterization of the higher standard was not prejudicial in the light of his accurate description of that higher standard, and therefore affirmed the decision of the lower court.

G. Parental Supervision

In *Moore v. Crumpton*¹⁰⁹ the Supreme Court of North Carolina discussed a parent's duty to exercise reasonable control over a child's behavior. While upholding defendant parents' summary judgment at trial, the court explicitly recognized and clarified the circumstances under which a parent's failure to supervise may result in his liability for damages that result from the child's behavior.

Plaintiff in *Moore* was a rape victim who sought damages from the parents of her seventeen year-old assailant. Plaintiff claimed that defendants' liability resulted from their alleged failure to take reasonable steps to exercise control over their child's behavior. Defendants' answer and supporting affidavits established that psychiatric counselors had advised the parents that there was no reason to foresee that their son would be harmful to himself or others. For this reason, numerous experts had indicated to the parents that their son could not be involuntarily committed.

Based on the forecast of evidence in the pleadings, the trial court granted defendants' motion for summary judgment. The court of appeals affirmed the judgment¹¹⁰ and held that parents are not liable for the wrongful acts of their children unless there exists: (1) an agency relationship; (2) parental encouragement of the wrongful act; or (3) injury resulting from a dangerous instrumentality entrusted to the child by the parent.¹¹¹

On appeal, the supreme court concluded that the court of appeals applied the wrong rule of law. While acknowledging that certain earlier decisions could be read as limiting a parent's liability to those situations enumerated by the court of appeals,¹¹² the court overruled the earlier cases on that point, and

108. *Id.*

109. 306 N.C. 618, 295 S.E.2d 436 (1982).

110. *Moore v. Crumpton*, 55 N.C. App. 398, 285 S.E.2d 842 (1982).

111. *Id.* at 407, 285 S.E.2d at 847.

112. *E.g.*, *Hawes v. Haynes*, 219 N.C. 535, 14 S.E.2d 503 (1941)(parents not liable for son's negligent operation of automobile); *Robertson v. Aldridge*, 185 N.C. 292, 116 S.E. 742 (1923)(whether parent was negligent in entrusting automobile to reckless son was question for jury); *Linville v. Nissen*, 162 N.C. 95, 77 S.E. 1096 (1913)(parent not liable for son's negligent operation of automobile unless, at time of accident, son was acting within the scope of his employment at his father's business); *Brittingham v. Stadiem*, 151 N.C. 299, 66 S.E. 129 (1909)(parent not

proceeded to clarify the circumstances under which parental liability might be found.

The court first held that a parent's liability for failure to reasonably control his child results from the independent negligence of the parent and not from the imputed negligence of the child.¹¹³ A finding of such independent negligence requires that the parent have the ability and the opportunity to control the child, and that the parent know or should have known of the necessity for exercising such control.¹¹⁴ To be liable, the parent need not be aware of the potential for the exact harm in question in a particular case. Instead, it must be shown only that generally harmful consequences are reasonably foreseeable in the behavior of the child.¹¹⁵

The supreme court applied this modified rule to the facts of the case and affirmed the summary judgment of the lower courts. The court thus recognized a broad, general legal duty of the parent to supervise the behavior of his child. The extent of the duty is "in the final analysis . . . [a question] whether the particular parent exercised reasonable care under all of the circumstances."¹¹⁶ The particularly relevant circumstances are the foreseeability of the child's injurious behavior and the parent's ability to actually control such behavior.

The decision in *Moore* obviously expands the potential for parental liability for failure to supervise. The court's refusal to remand the case for submission to a jury, however, indicates that future plaintiffs must go to great lengths to show both the foreseeability of the child's injurious behavior and the obvious necessity for and ability of the parent to control such behavior.

H. Mental Distress

In *Wyatt v. Gilmore*¹¹⁷ the court of appeals held that a plaintiff's special physical susceptibility to fright did not preclude recovery for physical injuries resulting from mental distress, even though the injuries were due in part to plaintiff's special condition.¹¹⁸ Defendant in *Wyatt* negligently crashed his car into a tree in plaintiff's front yard. As a result of fright induced by the loud crashing noise, plaintiff suffered a heart attack.¹¹⁹ There was no physical impact on plaintiff's person,¹²⁰ no risk of direct physical injury to plaintiff,¹²¹

liable for customer's injury, inflicted by son, unless son was agent or servant of the parent, or parent approved of the action).

113. 306 N.C. at 623, 295 S.E.2d at 440; *Anderson v. Butler*, 284 N.C. 723, 202 S.E.2d 585 (1974).

114. 306 N.C. at 623, 295 S.E.2d at 440.

115. *Id.* at 624, 295 S.E.2d at 440.

116. *Id.*

117. 57 N.C. App. 57, 290 S.E.2d 790 (1982).

118. *Id.* at 60, 290 S.E.2d at 792.

119. *Id.* at 57, 290 S.E.2d at 791.

120. Courts have granted damages for mental distress more readily when an actual physical impact upon the plaintiff resulted directly from the defendant's negligence. See W. PROSSER, *supra* note 47, § 54, at 330-32 (4th ed. 1971). North Carolina decisions are in accord. See, e.g., *Williamson v. Bennett*, 251 N.C. 498, 503, 112 S.E.2d 48, 52 (1960).

and no injury would have occurred to a normal person. Nevertheless, the court reversed defendant's summary judgment and remanded for a jury determination on the issue of proximate cause.¹²²

North Carolina courts allow recovery for physical injury or disease resulting from fright or nervous shock caused by negligent acts.¹²³ Some courts and the Restatement of Torts, however, qualify this rule by denying recovery when the physical consequences from emotional stress occur only because of plaintiff's special susceptibility to injury.¹²⁴ Prior to *Wyatt*, North Carolina courts had never expressly rejected the Restatement rule.¹²⁵

In *Williamson v. Bennett*¹²⁶ the supreme court implied that a special susceptibility would not preclude recovery for injuries from emotional distress. In that case, plaintiff was driving her car when it was struck by defendant's car. Because of a preexisting neurosis, plaintiff feared that she had hit a child on a bicycle. This fear precipitated a neurotic reaction, causing plaintiff severe physical and emotional distress.¹²⁷ The court stated the peculiar susceptibility rule and denied recovery on the ground that the harm was too remote to be compensable.¹²⁸ Since the court denied recovery on grounds of proximate cause, the holding implied that the plaintiff had stated a legally cognizable cause of action, even though a normal person would not have been injured.¹²⁹ This interpretation of *Williamson* was not certain, however, since the court may have regarded the collision with plaintiff's car to be a physical impact that opened the door to mental distress damages.¹³⁰

Wyatt expressly rejected the Restatement rule on the rather nebulous ground that it places the issue of foreseeability within the scope of duty,¹³¹ rather than placing the issue of foreseeability within the scope of proximate cause.¹³² The difficulty with this approach is that the Restatement rule can be framed equally well in terms of proximate cause: a physical injury that results from a person's peculiar physical susceptibility to emotion is, as a matter of

121. North Carolina courts have also been more willing to allow recovery for physical injuries resulting from mental distress when the tortfeasor's conduct risks direct physical injury to the plaintiff. See, e.g., *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E.2d 541 (1964).

122. 57 N.C. App. at 63, 290 S.E.2d at 794.

123. See Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C.L. REV. 435 (1980).

124. RESTATEMENT (SECOND) OF TORTS § 313 comment C (1965) provides that when fright is unintentionally caused liability exists only if physical injury would result to a normal person. See, e.g., *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981) (defendant's conduct did not as a matter of law create the unreasonable risk of causing bodily harm necessary to recover damages for mental or emotional disturbance); *McMahon v. Bergeson*, 9 Wis.2d 256, 101 N.W.2d 63 (1960) (no recovery for emotional distress due to preexisting susceptibility to emotional disturbance not present in normal person).

125. See Byrd, *supra* note 123, at 464-65.

126. 251 N.C. 498, 112 S.E.2d 48 (1960).

127. *Id.* at 500-01, 112 S.E.2d at 49-50.

128. *Id.* at 507-08, 112 S.E.2d at 54-55.

129. See Byrd, *supra* note 123, at 446-47.

130. *Id.*

131. For example, the rule can be viewed as imposing a duty only to avoid conduct that can injure ordinarily susceptible persons.

132. 57 N.C. App. at 60-61, 290 S.E.2d at 792-93.

law, outside the bounds of proximate cause.¹³³ Nonetheless, the Restatement position has been expressly rejected. The new boundary for recovering for physical injuries resulting from emotional stress, as set by *Wyatt* and *Williamson*, lies somewhere between a neurotic response to a phantom child on a nonexistent bicycle and a heart attack caused by a startling noise.

I. Statute of Limitations

In what appears to be an issue of first impression, the court of appeals in *Selby v. Taylor*¹³⁴ held that the three-year statute of limitations for trespass upon real property,¹³⁵ rather than the one-year statute of limitations applicable to actions for personal libel and slander, controls actions for slander of title.¹³⁶ In *Selby* the former owner of a plot of land that was to be sold at a foreclosure sale alleged that defendant maliciously and fraudulently "published a paper writing" which stated that defendant was owner of the land and that anyone bidding on the land would do so at his peril. When the notice was read at the foreclosure sale, it discouraged others from bidding, causing plaintiff a loss.¹³⁷ The trial judge ruled that the action was not barred by the statute of limitations for personal slander, but dismissed the complaint for failure to state a cause of action.¹³⁸

On defendant's cross-appeal, the court of appeals characterized an action for slander of title as protection from interference with a sale of real property or from interference with a proprietary right.¹³⁹ Accordingly, the action is more appropriately grouped with trespass to real property than with personal slander. Therefore, the court affirmed the lower court's ruling that the three-year statute of limitations for trespass controls slander of title actions.¹⁴⁰

This decision clearly conforms with the North Carolina statutory scheme. The statute of limitations places an action for personal slander with other torts directed at the person.¹⁴¹ On the other hand, slander of title provides protection against an invasion to a property right. While courts in other jurisdictions have reached a contrary result, the division can usually be explained by a comparison of their differing statutory schemes.¹⁴²

133. See W. PROSSER, *supra* note 7, § 42, at 244-45, for a discussion of the interchangeability of duty and proximate cause.

134. 57 N.C. App. 119, 290 S.E.2d 767, *cert. denied*, 306 N.C. 387, 294 S.E.2d 212 (1982).

135. N.C. GEN. STAT. § 1-52(3) (1979 & Cum. Supp. 1981).

136. N.C. GEN. STAT. § 1-54(3) (1979) provides for a one-year limitation applicable to actions "for libel, slander, assault, battery, or false imprisonment."

137. 57 N.C. App. at 119, 290 S.E.2d at 768.

138. *Id.* at 120, 290 S.E.2d at 768.

139. *Id.* at 122, 290 S.E.2d at 769. The court relied on *Coley v. Hecker*, 206 Cal. 22, 272 P. 1045 (1928), in which slander of title was characterized as protection against an injury to real property.

140. 57 N.C. App. at 123-24, 290 S.E.2d at 770.

141. See *supra* note 137.

142. See *Old Plantation Corp. v. Maule Indus.*, 68 So. 2d 180 (Fla. 1953) (no special statute of limitations for injuries to real property); *Walley v. Hunt*, 212 Miss. 294, 54 So. 2d 393 (1951) (statute applies to actions for slander of person or title). But see *McDonald v. Green*, 176 Mass. 113, 57 N.E. 211 (1900) (classifying slander of title with personal slander).

The court of appeals also found that a cause of action had been stated in *Selby*. Although defendants conceded that plaintiff had sufficiently alleged publication of false words with malicious intent,¹⁴³ they contended that plaintiff had not sufficiently alleged special damages. The court found that the discouragement of prospective purchasers' bidding at a public sale, with the resulting monetary loss to plaintiff, met the special damages requirement.¹⁴⁴ There is disagreement among jurisdictions whether the injured party must identify a particular purchaser who was prevented by the slander from purchasing the property.¹⁴⁵ Due to the paucity of slander of title cases in North Carolina, the courts have not yet addressed this issue. Since plaintiff in *Selby* had alleged that Weyerhaeuser Corporation, among others, was discouraged from bidding, the purchaser requirement remains unresolved in North Carolina.

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143. 57 N.C. App. at 120-21, 290 S.E.2d at 768-69. For a discussion of the elements of slander of title, see *Cardon v. McConnell*, 120 N.C. 461, 27 S.E. 109 (1897).

144. 57 N.C. App. at 121, 290 S.E.2d at 769. For a comprehensive review of the special damages requirement of slander of title, see Annot. 4 A.L.R.4th 532 (1981).

145. Annot. 4 A.L.R.4th 532 (1981).

XII. WORKER'S COMPENSATION

A. *Compensable Injuries*

To recover under the North Carolina Worker's Compensation Act,¹ a claimant must show that an injury or death resulted from an accident² arising out of and in the course of his employment.³ By liberally construing the "arising out of" and the "in the course of" employment requirements in several cases in 1982,⁴ the North Carolina Supreme Court further broadened the comprehensive coverage given employees for work-related injuries.

In *Hoyle v. Isenhour Brick & Tile Co.*⁵ the decedent, a cull brick stacker employed by defendant, was killed in a forklift accident. The decedent's job required him to work at a specific station in defendant's brickyard to remove imperfect bricks from a conveyor and band them in the form of a box. A forklift operator periodically removed the culls from the decedent's station. Defendant had issued strict instructions prohibiting the operation of forklifts by unauthorized personnel. Although decedent was not authorized to operate forklifts, evidence showed that on two separate occasions prior to the accident, decedent was observed by supervisors operating a forklift to move bricks.⁶ On each occasion, decedent was reprimanded, reminded of the rule against unauthorized operation of the forklifts, and warned that if caught again he would be disciplined.⁷ On the night of the accident, the forklift operator told decedent that he could use the forklift to move his bricks. Decedent loaded his stack of culls and removed them from his station. He was found later that evening in a storage warehouse, pinned under the overturned forklift.⁸

Decedent's children filed a claim for death benefits under G.S. 97-38 and 97-39.⁹ The Industrial Commission found that the accident did not arise in

1. N.C. GEN. STAT. §§ 97-1 to -122 (1979).

2. For purposes of the Worker's Compensation Act, an accident is a separate event preceding and causing the injury, *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 24, 264 S.E.2d 360, 362 (1980), and involves an interruption of the work routine and the introduction of unusual conditions likely to result in unexpected consequences. Thus, employees who sustain injury while performing their usual jobs in the usual manner are generally denied recovery. See *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 292 S.E.2d 763 (1982); *Trudell v. Seven Lakes Heating & Air Conditioning Co.*, 55 N.C. App. 89, 284 S.E.2d 538 (1981); *Dyer v. Mack Foster Poultry & Livestock, Inc.*, 50 N.C. App. 291, 273 S.E.2d 321 (1981); *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E.2d 360 (1980).

North Carolina's adherence to the usual/unusual distinction reflects a minority position today. See 1B A. LARSON, WORKMEN'S COMPENSATION LAW § 38 (1982) (hereinafter cited as A. LARSON). Cf. Comment, *Injury by Accident in Worker's Compensation: Alternatives to an Outmoded Doctrine*, 59 N.C.L. REV. 175 (1980).

3. N.C. GEN. STAT. § 97-2(6)(Supp. 1981). See *infra* notes 10-20 and accompanying text.

4. See *Powers v. Lady's Funeral Home*, 306 N.C. 728, 295 S.E.2d 473 (1982); *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982); *Felton v. Hospital Guild of Thomasville*, 57 N.C. App. 33, 291 S.E.2d 158 (1982).

5. 306 N.C. 248, 293 S.E.2d 196 (1982).

6. *Id.* at 249, 293 S.E.2d at 197.

7. *Id.*

8. *Id.* at 250, 293 S.E.2d at 197.

9. N.C. GEN. STAT. § 97-38 (Supp. 1981) provides for payment of death benefits to an employee's dependents. N.C. GEN. STAT. § 97-39 (1979) defines the class of dependents who may receive benefits.

the course of decedent's employment and denied compensation.¹⁰ The court of appeals affirmed the Commission's decision, and held that deceased's operation of the forklift, in light of prior warnings and rules prohibiting the practice, constituted a departure from the job for which the deceased had been employed.¹¹

In reversing the court of appeals, the supreme court began its analysis with a construction of the statutory language "arising out of and in the course of employment." The court concluded that an injury arises out of employment when:

it is a natural and probable consequence or incident of the employment and a natural result of one of its risks so that there is some causal relation between the injury and the performance of some service of the employment. An accident arises out of and in the course of the employment when it occurs while the employee is engaged in some activity or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business.¹²

After construing the statutory language, the court surveyed the case law and found two decisions especially convincing. In *Parsons v. Swift & Co.*¹³ an employee was killed when the tractor he was operating overturned and crushed him. Although the employee's job was simply to haul filler in a wheelbarrow, the court awarded death benefits and noted that even though there existed a company rule prohibiting him from operating the tractor, the employee's conduct was in furtherance of his employer's business.¹⁴ The evidence showed that the tractor was blocking decedent's path and that two tractor operators had refused to move it when asked by decedent.¹⁵ In *Hensley v. Carswell Action Committee*¹⁶ an employee was cutting weeds around a lake. Against his employer's specific instructions not to go into the water, the employee attempted to cross the lake to cut some weeds and drowned. The court reversed the Commission's denial of death benefits and held that, since decedent's conduct was in furtherance of his employer's business, his disregard of orders was not a deviation from his employment sufficient to destroy the causal connection between the accident and his employment.¹⁷ The *Hoyle*

10. 306 N.C. at 250, 293 S.E.2d at 198.

11. *Id.* See *Hoyle v. Isenhour Brick & Tile Co.*, 55 N.C. App. 675, 681, 286 S.E.2d 830, 834-35 (1982).

12. 306 N.C. at 252, 293 S.E.2d at 198-99 (quoting *Clark v. Burton Lines*, 272 N.C. 433, 437, 158 S.E.2d 569, 571-72 (1968)). See *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E.2d 676 (1980); *Brown v. John Brown Serv. Station*, 45 N.C. App. 255, 262 S.E.2d 700 (1980). Although the "arising out of" and the "in the course of" employment requirements are distinct elements of an accident, they are not applied entirely independently of one another. Deficiencies in one element may therefore be bolstered by strengths in the other. 306 N.C. at 252, 293 S.E.2d at 199. See LARSON, *supra* note 2, at § 29.10.

13. 234 N.C. 580, 68 S.E.2d 296 (1951).

14. *Id.* at 582-83, 68 S.E.2d at 299.

15. *Id.* at 582, 68 S.E.2d at 297.

16. 296 N.C. 527, 251 S.E.2d 399 (1979).

17. *Id.* at 529, 251 S.E.2d at 402.

court found *Hensley* and *Parsons* dispositive of the question whether an employee's deviation from "the confines of a narrow job description" is in itself sufficient to bar recovery.¹⁸ The court concluded that as long as the employee's conduct was in furtherance of the employer's business, such a deviation was not an absolute bar to recovery even if it had been prohibited by the employer.¹⁹ Because decedent in *Hoyle* was acting in furtherance of his employer's business, the court held that his operation of the forklift was not a deviation from his job sufficient to remove decedent from the Act's coverage.²⁰

Although *Hoyle* is consistent with the current, liberal interpretation of the statute, the decision leaves an important question unanswered. The Act was designed in part to eliminate the employee's fault as a basis for denying recovery.²¹ This purpose is reflected in the court's willingness to interpret the statute expansively, ensuring coverage for many employee accidents that may be related only remotely to employment.²² In cases in which coverage is extended to an employee whose conduct contravenes express rules and policies of the employer, the employer becomes in effect a "guarantor" of the employee's safety.²³ As a counterweight to the imposition of such liability, the

18. 306 N.C. at 259, 293 S.E.2d at 203. See also *Hartley v. Prison Dep't.*, 258 N.C. 287, 128 S.E.2d 598 (1962) (employee injured while climbing fence on shortcut to his employment post in violation of prison rules); *Taylor v. Dixon*, 251 N.C. 304, 111 S.E.2d 181 (1959) (employee injured while operating tractor against express orders of then present supervisor); *Teague v. Atlantic Co.*, 213 N.C. 546, 196 S.E. 875 (1938) (employee killed while riding conveyor belt meant to carry crates between floors at employer's building).

19. 306 N.C. at 259-260, 293 S.E.2d at 202-03.

20. *Id.* at 260, 293 S.E.2d at 203. The court stated:

[W]hen there is a rule or prior order and the employee is faced with the choice of remaining idle in compliance with the rule or order or continuing to further his employer's business, no superior being present, the employer who would reap the benefits of the employee's act if successfully completed should bear the burden of injury resulting from such acts.

Id. at 259, 293 S.E.2d at 202. See *Guest v. Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E.2d 596, 600 (1955).

In dissent, Justice Meyer concluded that the majority placed too much emphasis upon the question whether, even in defying specific instructions, the employee was still acting in furtherance of the employer's business. 306 N.C. at 262, 293 S.E.2d at 204-05 (Meyer, J., dissenting). He criticized the majority's rule that no order of prohibition is effective unless that order is given by a supervisor who is present at the time of the accident. *Id.* at 261, 293 S.E.2d at 204. Noting that the realities of the workplace mandate that a supervisor cannot be present at all times, Justice Meyer urged that holding the employee's activity, even though prohibited, within the course of his employment for purposes of the Act denies the employer any ability to protect his employees "from the danger of, and himself from liability for such activity." *Id.* Cf. A. LARSON, *supra* note 2, at § 31.14.

21. *Hoyle*, 306 N.C. at 256, 293 S.E.2d at 201; *Hartley v. Prison Dep't.*, 258 N.C. 287, 290, 128 S.E.2d 598, 600 (1962).

22. The potentially large liability of an employer is frequently justified as a cost of doing business. See *Hoyle*, 306 N.C. at 254, 293 S.E.2d at 202. See also LARSON, *supra* note 2, § 31.14.

23. There are, however, some qualifications to this proposition. N.C. GEN. STAT. § 97-12 (1979) provides that:

[W]hen the employee's injury or death is caused by the willful breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury, compensation shall be reduced by ten percent.

Section 97-12(3) also provides that "No compensation shall be payable if the injury or death of the employee was proximately caused by . . . (3) His willful intention to injure or kill himself or another." In *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 295 S.E.2d 458 (1982), decedent

employer should be able to exercise some degree of control over the performance of his employee's work. Because the employer's control will naturally be based upon work policies and regulations, some conduct which contravenes employment rules must fall outside of the scope of employment, even if that conduct indirectly benefits the employer.²⁴ The *Hoyle* decision, however, failed to address the question whether, and to what extent, an employer may exercise such control in order to protect himself from liability.

In *Felton v. Hospital Guild of Thomasville*²⁵ the North Carolina Court of Appeals construed the "arising out of" and "in the course of" employment requirements in the context of the "special errand" rule.²⁶ As a part of her duties as hospitality shop manager, claimant purchased food and other items that were sold in the shop. On the day of the accident, claimant phoned a local bakery with her order, intending to pick it up on her way to work. On the way to her car, less than thirty feet from her front door, claimant slipped on a thin layer of ice and fractured her hip.²⁷

The Commission denied recovery and found that although claimant was preparing to undertake a special errand for her employer, the mission began at "the time plaintiff physically left her property or premises."²⁸ On appeal, the court found that the Commission erred in its adoption of a "bright line" test to

was stabbed to death by a co-worker in the parking lot of her employer's plant. The evidence showed that decedent and her co-worker had been arguing, that decedent challenged the co-worker, that she waited outside the plant for her, and then pushed her up against a car. *Id.* at 708, 295 S.E.2d at 460. A struggle ensued and decedent was stabbed. *Id.* Noting that G.S. 97-12(3) provided an affirmative defense to a claim under the Act, the court found that decedent's employer had produced sufficient evidence to show that decedent had the willful intention to injure another. *Id.* at 710-11, 295 S.E.2d at 461. Because the evidence also showed that decedent's death was "proximately caused by" an act resulting from such intent, recovery was denied.

The court dismissed the argument that G.S. 97-12(3) required that the claimant's intent to injure another be the "sole" proximate cause of her death. *Id.* at 711-12, 295 S.E.2d at 462. Noting that use of a sole proximate cause standard would virtually emasculate the statutory defense (the actions of an employee's intended victim could always be "one" cause of injury), the court expressly held such a standard inapplicable. *Id.*

24. If an employee were given unchecked discretion and allowed to justify himself in all cases with the plea that his conduct benefitted his employer, the coverage of the Act would amount to an imposition of strict liability. The court in *Hoyle* implicitly recognized that a line must be drawn, but failed to consider how far the "in furtherance of employer's business" justification could extend. Rather, it stated only that in order to break the causal connection that authorizes coverage under the Act, the employee must have violated a prohibition or warning issued by a supervisor present at the time of the accident. 306 N.C. at 259, 293 S.E.2d at 202. There remains, however, need for a more concrete definition of the scope of the employer's control. For a more comprehensive discussion of this problem, see A. LARSON, *supra* note 2, § 31.

25. 57 N.C. App. 33, 291 S.E.2d 158 (1982).

26. The "special errand" rule represents an exception to the general rule that an injury suffered by an employee while going to and coming from work is not an injury arising out of and in the course of employment. *Id.* at 34, 291 S.E.2d at 159. See *Powers v. Lady's Funeral Home*, 306 N.C. 728, 295 S.E.2d 473 (1982); *Hardy v. Small*, 246 N.C. 581, 99 S.E.2d 802 (1959). Thus, if an employee is engaged in a special errand on his employer's behalf, the "coming and going" rule will not bar recovery for his injuries suffered in route so long as the injuries arose out of the employment. Once it is established that the employee is engaged in a special errand, "the declared policy of the state requires a liberal construction in favor of the employee." *Felton* 57 N.C. App. at 35, 291 S.E.2d at 160. See *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E.2d 281 (1972).

27. 57 N.C. App. at 33, 291 S.E.2d at 159.

28. *Id.*

be used in determining when a special errand commences.²⁹ Thus, the question remained whether plaintiff's accident arose out of her employment. The court concluded that an accident arises out of employment when it occurs in the course of employment and "the conditions or obligations of the employment put the employee in the position or at the place where the accident occurs."³⁰ Since the obligations of plaintiff's employment required her to be in the place where the accident occurred, and since plaintiff's special errand had begun before she was injured, the court determined that her accident arose out of and in the course of her employment.³¹

Despite its equitable result, the court's decision in *Felton* is problematic. The court in effect substituted one bright line test for another, narrowing the Commission's "boundaries of the claimant's property" test to a "boundaries of the claimant's home" test for purposes of the "in the course of employment" requirement.³² The most troublesome aspect of *Felton*, however, is the court's interpretation of the "arising out of employment" requirement. In North Carolina, a compensable injury cannot arise from "a hazard common to others."³³ To be compensable, an injury must result from a risk peculiar to or incidental to the claimant's employment.³⁴ In *Felton*, plaintiff's injury was not the result of a risk peculiar to her employment. As Judge Whichard observed in dissent,

29. *Id.* (citing *Massey v. Board of Educ.*, 204 N.C. 193, 197-98, 167 S.E. 695, 698 (1933)). The Commission's test was used to determine that plaintiff had not entered the course of employment at the time the accident occurred. The court of appeals held that, on these facts, plaintiff had begun her special errand. *Id.* at 35, 291 S.E.2d at 160.

30. *Id.* at 35, 291 S.E.2d at 160. *Cf.* *Strickland v. King*, 293 N.C. 731, 239 S.E.2d 243 (1977) (although employee's injury occurred on employer's private road, recovery denied because the risks encountered on the road were no different from those encountered on a public highway). *See infra* note 33 and accompanying text.

31. 57 N.C. App. at 35, 291 S.E.2d at 160.

32. The court emphasized that once plaintiff had left the safety of her house, she entered the course of her employment. *Id.* (citing *Charak v. Leddy*, 23 A.D.2d 437, 261 N.Y.S.2d 486 (1965)). *See also* *Safeway Stores v. Worker's Compensation Advisory Bd.*, 104 Cal. App. 3d 528, 163 Cal. Rptr. 750 (1980) (plaintiff working late attacked by assailant as he entered his house; court awarded benefits, noting that because plaintiff had not yet reached the safety of his house, he had not left the course of his employment).

33. 57 N.C. App. at 39, 291 S.E.2d at 162 (Whichard, J., dissenting). For an accident to arise out of employment, "the causative danger must be peculiar to the work and not common to the neighborhood." *Id.* (quoting *Bryan v. T.A. Loving Co.*, 222 N.C. 724, 728, 24 S.E.2d 751, 754 (1943)). *See* *Brannon v. Westchester Academy*, 42 N.C. App. 58, 60, 255 S.E.2d 613, 614 (1979). The test excludes an injury caused by a hazard to which the workman would have been equally exposed apart from the employment. *See* *Bartlett v. Duke Univ.*, 284 N.C. 230, 200 S.E.2d 193 (1973).

In dissent, Judge Whichard considered the following hypothetical:

Plaintiff and her next door neighbor are employed as comanagers of the hospitality shop. . . . It is plaintiff's duty to go by the bakery on the way to work one morning, and the neighbor's duty the next, on a continuing alternating basis. On the morning in question plaintiff and the neighbor while proceeding simultaneously toward their respective cars to depart, plaintiff for the bakery, and the neighbor directly for the hospital, fall simultaneously on the ice and sustain identical injuries. Under the majority's reasoning, plaintiff recovers, and the neighbor does not. I find neither logic nor justice in such a result.

57 N.C. App. at 40, 291 S.E.2d at 162 (Whichard, J., dissenting).

34. *See* *Strickland v. King*, 293 N.C. 731, 239 S.E.2d 243 (1977); *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E.2d 577 (1976); *Bartlett v. Duke Univ.*, 284 N.C. 230, 200 S.E.2d 193 (1973); *Lee v. F.M. Henderson & Assocs.*, 284 N.C. 126, 200 S.E.2d 32 (1973).

plaintiff's injury was the result of a hazard encountered by everyone venturing outdoors on the morning in question, whether or not they were employed by defendant.³⁵

B. Occupational Diseases

For purposes of the Act, the disability of an employee "resulting from an occupational disease described in G.S. 97-53 shall be treated as the happening of an injury by accident."³⁶ To prove a claim for occupational disease benefits, a claimant must show that he suffered injury from an occupational disease³⁷ that causes disability.³⁸

In *Frady v. Groves Thread*³⁹ the North Carolina Court of Appeals construed the term "last injurious exposure" for purposes of G.S. 97-57.⁴⁰ Plaintiff in *Frady* worked twenty-three years in the cotton twisting department of another company before joining defendant in 1966 as an employee in a similar capacity. After six months with defendant, plaintiff obtained a new job with United Spinners Co. During six years with United Spinners, plaintiff was exposed only to synthetics dust.⁴¹ Plaintiff alleged a claim under the Act for

35. 57 N.C. App. at 39, 291 S.E.2d at 162.

Compare *Felton* with *Powers v. Lady's Funeral Home*, 306 N.C. 728, 295 S.E.2d 473 (1982). Plaintiff in *Powers* was a mortician and embalmer, on call twenty-four hours a day. His duties included calling on bereaved families and preparing bodies for burial. On the night of the accident, plaintiff was called to collect a body. After embalming the body, plaintiff returned home to shower and ready himself for other duties. The exigencies of the employment required plaintiff's return home since the funeral home was without shower facilities. Plaintiff was severely injured when his car, parked in his driveway, suddenly began rolling and hit him.

The court rejected the conclusion that plaintiff's "special errand" ended when he returned to his own property, and observed that plaintiff's duties had not ended upon his return home. *Id.* at 731, 295 S.E.2d at 475. Because plaintiff's employment required him to be at the place where he was injured, "subjecting him to additional risks thereto," the court held that his injury "arose out of" employment. *Id.* at 731-32, 295 S.E.2d at 475-76 (citing *Clark v. Burton Lines*, 272 N.C. 433, 150 S.E.2d 569 (1968); *Hardy v. Small*, 246 N.C. 581, 99 S.E.2d 862 (1957)).

36. N.C. GEN. STAT. § 97-52 (1979).

37. See *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 97, 265 S.E.2d 144, 146 (1980); *Lumpkins v. Fieldcrest Mills*, 56 N.C. App. 653, 656, 289 S.E.2d 848, 850 (1982). G.S. 97-53 contains a list of twenty-seven specific diseases and one catch-all provision, subsection 13, which provides coverage for any disease "proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." On the question of proof of a disease under subsection 13, see *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981); *Lumpkins v. Fieldcrest Mills*, 56 N.C. App. 653, 658, 289 S.E.2d 848, 851-52 (1982).

38. Disability is defined as the incapacity due to injury to earn the wages the employee was receiving at the time of injury in the same or any other employment. N.C. GEN. STAT. § 97-2(9) (1979). See *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682, 683 (1982); *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 187, 292 S.E.2d 766, 768 (1982). The test for disability is whether and to what extent earning capacity is impaired. *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 623, 292 S.E.2d 144, 147 (1982); *Lucas v. Burlington Indus.*, 57 N.C. App. 366, 368, 291 S.E.2d 360, 361 (1982); *Mills v. J.P. Stevens & Co.*, 53 N.C. App. 341, 343, 280 S.E.2d 802, 803 (1981).

39. 56 N.C. App. 61, 286 S.E.2d 844 (1982).

40. The statute provides in part: "In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease . . . shall be liable." N.C. GEN. STAT. § 97-57 (1979).

41. 56 N.C. App. at 63, 286 S.E.2d at 845.

damages resulting from byssinosis⁴² against defendant and United Spinners. Medical testimony indicated that plaintiff's respiratory disease was caused primarily by cigarette smoking and cotton dust exposure.⁴³ The court found that the evidence justified the Commission's conclusion that defendant was plaintiff's employer at the time of his last injurious exposure.⁴⁴ The court concluded that although plaintiff's exposure to synthetics dust may have played a part in plaintiff's condition, plaintiff failed to prove that employment involving the handling of synthetics was associated with any occupational disease.⁴⁵ Thus, the court denied plaintiff's claim against United Spinners.⁴⁶

In *Taylor v. Cone Mills Corp.*⁴⁷ plaintiff sought an award for occupational disease, alleging that he contracted byssinosis during his employment with defendant from 1949-1963. The evidence showed that plaintiff suffered from a respiratory disease "due to a long-term exposure to cotton trash dust."⁴⁸ At the time of plaintiff's disablement in 1963, however, the Act did not provide for compensation of disability caused by byssinosis. Thus, plaintiff's only avenue of recovery lay in G.S. 97-53(13),⁴⁹ the 1963 version of which⁵⁰ allowed compensation for "infection or inflammation of the skin or eyes or other external contact surfaces or oral or nasal cavities due to irritating oils, cutting com-

42. Byssinosis is defined as "cotton-mill fever, an occupational respiratory disease of cotton, flax, and hemp workers. It is characterized by symptoms (especially wheezing) most severe at the beginning of each work week." *STEDMAN'S MEDICAL DICTIONARY* 207 (4th unab. lawyer's ed. 1976).

43. 56 N.C. App. at 63, 286 S.E.2d at 845. A conclusion that plaintiff's condition was due in part to cigarette smoking is not in itself sufficient to bar recovery for a compensable disease. See *infra* note 46. The general rule is that an employer takes his employee as he finds him and will be liable for the full extent of his employee's compensable injury even though a pre-existing condition contributes to the degree of injury. *Id.* at 65, 286 S.E.2d at 845. See *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 622, 292 S.E.2d 144, 146 (1982); *Morrison v. Burlington Indus.*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981).

44. 56 N.C. App. at 65, 286 S.E.2d at 847.

45. *Id.* Plaintiff therefore failed to prove that his occupational disease arose out of his employment with United Spinners. See *Brown v. J.P. Stevens & Co.*, 49 N.C. App. 118, 270 S.E.2d 602 (1980); *Moore v. J.P. Stevens & Co.*, 47 N.C. App. 744, 269 S.E.2d 159 (1980). The Supreme Court of North Carolina only recently authorized apportionment of damage awards in disease cases in which only a portion of the injury is due to work-related exposure. In *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981), the court stated:

When a claimant becomes incapacitated for work and part of that incapacity is caused, accelerated or aggravated by an occupational disease and the remainder of that incapacity for work is not caused, accelerated or aggravated by an occupational disease, the [Act] requires compensation only for that portion of the disability caused, accelerated or aggravated by the occupational disease.

Id. at 18, 282 S.E.2d at 470.

On the question of causation generally, see *Walston v. Burlington Indus.*, 304 N.C. 670, 285 S.E.2d 822 (1982); *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981); *Harrell v. Yarns*, 56 N.C. App. 697, 289 S.E.2d 846 (1982); *Lumpkins v. Fieldcrest Mills*, 56 N.C. App. 653, 289 S.E.2d 848 (1982).

46. 56 N.C. App. at 68, 286 S.E.2d at 847.

47. 306 N.C. 314, 293 S.E.2d 189 (1982).

48. *Id.* at 315, 293 S.E.2d at 190.

49. See *supra* note 7.

50. It is generally agreed that the statute in effect at the time of disability governs. See *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 645, 256 S.E.2d 692, 698 (1979). For a more comprehensive discussion, see 4 A. LARSON, *supra* note 2, § 95.

pounds, chemical dust. . . and any other materials or substances.”⁵¹ The Commission concluded as a matter of law that plaintiff did not suffer from a compensable disease because the respiratory surfaces of the lung were not “external contact surfaces.”⁵² The court of appeals affirmed the Commission’s denial of benefits.⁵³

The supreme court reversed on the ground that the court of appeals erred in construing the term “external contact surfaces” in accord with its ordinary and common meaning.⁵⁴ The court concluded that for purposes of the Act the term was technical and that expert medical testimony was essential for its definition.⁵⁵ Because medical evidence at plaintiff’s hearing tended to prove that the respiratory surfaces of the lung were external contact surfaces, and because such evidence was uncontroverted, the court held that plaintiff’s claim was included in the statute’s coverage.⁵⁶

Although *Frady* and *Taylor* do not in themselves represent any significant changes in occupational disease coverage under the Act, they remain important as illustrations of the North Carolina courts’ willingness to construe the statutory provisions liberally in favor of compensation. Apart from the manifestations of the judiciary’s liberal position, however, the case law in the occupational disease area appears to have become settled.⁵⁷ Thus the courts’ tasks, as in *Frady* and *Taylor*, will become increasingly those of refining settled principles and closely construing statutory language.

51. (emphasis added).

52. 306 N.C. at 318, 293 S.E.2d at 191.

53. *Id.*

54. *Id.* at 318-19, 293 S.E.2d at 194.

55. *Id.*

56. *Id.* at 324, 293 S.E.2d at 195. Because the court held that G.S. 97-53(13), as it stood in 1963, governed the claim, the issue whether Chapter 1305 of the 1979 North Carolina Session Laws applied was not addressed. The Deputy Commissioner cited Chapter 1305 and awarded plaintiff \$7,000 under G.S. 97-31(24), which allows recovery for injury to an “important external or internal organ.” 306 N.C. at 317, 293 S.E.2d at 191. Chapter 1305 provides in part:

AN ACT TO PROVIDE THAT BYSSINOSIS, KNOWN AS ‘BROWN LUNG DISEASE,’ SHALL BE DEEMED AN OCCUPATIONAL DISEASE WITHIN THE MEANING OF G.S. § 97-53(13) FOR PURPOSES OF WORKER’S COMPENSATION CLAIMS REGARDLESS OF THE DATE THE DISEASE ORIGINATED.

1. Claims for “brown lung disease,” which can be proved under G.S. § 97-53(13) shall be compensable regardless of the employee’s date of last injurious exposure.

Act of June 25, 1980, ch. 1305, 1979 N.C. Sess. Laws 217 (Reg. Sess.). The full Commission and the court of appeals agreed that Chapter 1305 was inapplicable to the case. 306 N.C. at 318, 293 S.E.2d at 191-92.

57. One question that may come to the forefront in the near future is how to apportion damages in occupational disease cases. See *supra* note 46. See also *Survey of Developments in North Carolina Law, 1981—Administrative Law*, 60 N.C.L. Rev. 1194-97 (1982). In *Morrison*, Justice Exum (joined by Justice Carlton) urged in dissent that the majority’s authorization of apportionment was improper:

An occupational disease need not be the sole cause of a worker’s incapacity for work in order for the worker to be compensated to the full extent of such incapacity. If an occupational disease combines or interacts with certain pre-existing physical infirmities as to render the worker totally incapacitated for work, our statutes permit an award for total incapacity where, as here, the pre-existing, non-job-related physical infirmities in themselves and absent the occupational disease, are insufficient to cause any incapacity for work.

Morrison v. Burlington Indus., 304 N.C. 24, 282 S.E.2d 473 (Exum, J., dissenting).

C. Procedure and Terminology

The principle that the Industrial Commission, as a "creature of the General Assembly," has only those powers delegated to it by statute⁵⁸ was the primary focus of 1982 procedural developments under the North Carolina Worker's Compensation Act.⁵⁹ The General Assembly breathed additional vigor into its "creature" by vesting the Industrial Commission and its appointed deputies with the power to "hold persons, firms or corporations in contempt as provided in Chapter 5A of the General Statutes"⁶⁰

The courts have seemed inclined to leave procedural expansiveness to the legislature. In *Buck v. Procter & Gamble Manufacturing Co.*⁶¹ the court of appeals held that the certification process, whereby the court certified to the Industrial Commission the court's opinion denying plaintiff's attorneys' fees incurred on appeal, did not constitute a "hearing on review." Accordingly, the Commission lacked the authority under G.S. 97-88 to award plaintiff these fees.⁶² This decision is hardly surprising, since a contrary result would have given the Commission the power to reverse decisions of the court of appeals.

In *Sparks v. Mountain Breeze Restaurant & Fish House, Inc.*⁶³ the court of appeals adopted a narrow test⁶⁴ in limiting the Commission's authority to award attorneys' fees when a hearing has been "defended without reasonable ground."⁶⁵ The facts of the case⁶⁶ were held sufficient to raise a credibility issue, which in turn justified characterizing the defense as "not without reason."⁶⁷ The result of the court's holding is that a defendant who can reasonably attack a claim's credibility can defend without incurring liability for

58. *Bowman v. Comfort Chair Co.*, 271 N.C. 702, 704, 157 S.E.2d 378, 380 (1967).

59. N.C. GEN. STAT. §§ 97-1 to -101 (1979 & Cum. Supp. 1981).

60. Act of June 18, 1982, ch. 1243, 1982 N.C. Sess. 135 (Reg. Sess.) (amending N.C. GEN. STAT. §§ 97-79(6), -80(a) (1979)). N.C. GEN. STAT. 97-79(b) now provides:

The Commission may appoint deputies who shall have the same power to issue subpoenas, administer oaths, conduct hearings, hold persons, firms or corporations in contempt as provided in Chapter 5A of the General Statutes, take evidence, and enter orders, opinions, and awards based thereon as is possessed by the members of the Commission, and such deputy or deputies shall be subject to the State Personnel System.

N.C. GEN. STAT. 97-80(a), in pertinent part, now provides as follows:

The Commission may make rules, not inconsistent with this Article, for carrying out the provisions of this Article. Processes and procedure under this Article shall be as summary and simple as reasonably may be. The Commission or any member thereof, or any person deputized by it, shall have the power, for the purpose of this Article, to tax costs against the parties, and to subpoena witnesses, administer or cause to have administered oaths, hold persons, firms or corporations in contempt as provided in Chapter 5A of the General Statutes, and to examine or cause to be examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute. . . .

61. 58 N.C. App. 804, 295 S.E.2d 243 (1982).

62. *Id.* at 807, 295 S.E.2d at 245.

63. 55 N.C. App. 663, 286 S.E.2d 575 (1982).

64. "The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness." *Id.* at 665, 286 S.E.2d at 576.

65. N.C. GEN. STAT. § 97-88.1 (1979).

66. The claimant had not reported the alleged accident when it occurred, nor did he report it two days later when he phoned his employer. The employer received no notice of the accident until nineteen days after it allegedly occurred.

67. 55 N.C. App. at 665, 286 S.E.2d at 576.

attorneys' fees. The statute provides that the Commission make the determination whether the defense was "without reasonable ground."⁶⁸ *Sparks* draws into question the degree of latitude the appellate courts will allow the Commission in making that determination.⁶⁹

The courts' approach has been more expansive, however, when the legislature has amended an applicable statute between the time the claim was filed and the time the appeal was heard, perhaps reflecting the courts' awareness of a shift in state policy.⁷⁰ In *Smith v. American & Efrid Mills*⁷¹ the supreme court interpreted the provision in the relevant version of G.S. 97-59 that required that all treatment for occupational disease "be first authorized by the Industrial Commission after consulting with the Advisory Medical Commission."⁷² Noting that a strict reading of the statute would require a claimant to make an accurate self-diagnosis of his condition because treatment expenses prior to consultation with the Advisory Medical Commission would not be compensable, the court rejected a strict construction. Instead, the prior approval requirement was held to apply only to cases in which it is "reasonably practical to seek such prior approval."⁷³ The present version of G.S. 97-59 does not call for prior authorization, but requires only that medical bills be approved by the Commission.⁷⁴ The court took note of this change in reaching its conclusion.⁷⁵

Finally, in *Gantt v. Edmos Corp.*,⁷⁶ the court of appeals reaffirmed that an informal letter may sometimes serve as the filing of a claim, but that the letter in the instant case fell far short of minimal compliance with the statute.⁷⁷

68. N.C. GEN. STAT. § 97-88.1 (1979).

69. See, e.g., *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982), in which the denial of attorney fees was held to be properly within the Commission's discretion; *Cloutier v. North Carolina Division of Prisons*, 57 N.C. App. 239, 291 S.E.2d 362 (1982) (error for the Commission not to approve a reasonable fee agreement (one-third of claimant's recovery)). In *Cloutier*, travel expenses which claimant's attorney incurred in taking a necessary deposition in Florida were held properly taxed to defendant. *Id.* at 248, 291 S.E.2d at 368.

70. This type of expansiveness is not limited to procedural issues. In *Taylor v. Cone Mills Corp.*, 306 N.C. 314, 293 S.E.2d 189 (1982), the supreme court defined "external contact surfaces" under G.S. 97-53(13) to include the respiratory surface of the lungs of certain byssinosis claimants. See *supra* notes 48-57 and accompanying text.

71. 305 N.C. 507, 290 S.E.2d 634 (1982).

72. Act of March 26, 1935, ch. 123, 1935 N.C. Sess. Laws 130 (Codified as amended at N.C. GEN. STAT. § 97-59 (Supp. 1981)).

73. 305 N.C. at 514, 290 S.E.2d at 638-39. The court had used similar logic in *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980), in interpreting the time of disablement requirement of G.S. 97-58.

74. N.C. GEN. STAT. § 97-59 (Supp. 1981).

75. 305 N.C. at 514, 290 S.E.2d at 639.

76. 56 N.C. App. 408, 289 S.E.2d 75 (1982).

77. *Id.* at 410-11, 289 S.E.2d at 77. Compare *Gantt* with *Cross v. Fieldcrest Mills, Inc.*, 19 N.C. App. 29, 198 S.E.2d 110 (1973) in which the timely letter from claimant's counsel to the Commission specifically requesting a hearing on claimant's alleged injury constituted a "rather minimal compliance" with the filing requirements of G.S. 97-24. *Id.* at 30-31, 198 S.E.2d at 112. In *Gantt* the letter contained no request for a hearing and no assertion that claimant was demanding compensation. 56 N.C. App. at 410, 289 S.E.2d at 77. The letter was addressed to the insurance carrier, with a copy to the Commission, and it implied that matters concerning the injury were already being handled adequately, without the Commission's involvement. *Id.* at 409, 410-11, 289 S.E.2d at 76, 77.

Several 1982 decisions considered the definitions of particular terms of the Act. The courts construed "change of condition,"⁷⁸ "accident,"⁷⁹ "employee,"⁸⁰ "important internal organ,"⁸¹ "loss of important internal organ,"⁸² and "external contact surfaces."⁸³

Only *Taylor*⁸⁴ significantly expanded the law, but the expanded definition of "external contact surfaces" is not likely to have a great impact because the legislature has already amended the Act to expand coverage for byssinosis claims.⁸⁵ In *Taylor* the surfaces of the lungs were held to be "external contact surfaces" within the meaning of the pre-1963 version of G.S. 97-53(13). Because only a limited number of potential claimants would be likely to remain outside the "gap" of a pre-1979 loophole⁸⁶ in the Act's coverage, the present impact of *Taylor* is minimal.⁸⁷ The current version of G.S. 97-53(13) does not refer to "external contact surfaces" (in reference to occupational diseases or inflammations), but rather to "[any] disease" (except hearing loss) attributable to the employment, to which the general public is not exposed.⁸⁸

78. See *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 296 S.E.2d 456 (1982) (a change in the doctor's opinion concerning the claimant's pre-existing condition based upon a subsequent examination and a deterioration of physical condition is a "change of condition" for purposes of warranting a change of disability rating under G.S. 97-47).

79. See *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E.2d 582 (1982). In *Daniels* the court held that an assault by employer's president on an employee who had just been terminated was an "accident" as defined by the Act. *Id.* at 558, 286 S.E.2d at 584. Because co-employee immunity under G.S. 97-9 was held inapplicable to an intentional assault, plaintiff could maintain both a Worker's Compensation claim against the employer and a tort action against the fellow employee. *Id.* at 560, 286 S.E.2d at 586. Because the co-employee, president of the company, was held not to be the alter ego of the employer, plaintiff was barred by the exclusivity provision of G.S. 97-10.1 from bringing an assault action against the employer. *Id.* at 561, 286 S.E.2d at 585-86.

80. See *Turner v. Epes Transp. Sys.*, 57 N.C. App. 197, 290 S.E.2d 714 (1982). In *Turner* claimant had a contract with defendant employer for the transportation of goods. The contract referred to claimant as an independent contractor, and claimant was not subject to any significant day-to-day supervision. Nevertheless, the court held that defendant's issuance of an Interstate Commerce Commission franchise sticker to claimant created an employer-employee relationship so that claimant was an "employee" for purposes of the Act. *Id.* at 198-99, 290 S.E.2d at 715.

81. See *Cloutier v. North Carolina Div. of Prisons*, 57 N.C. App. 239, 291 S.E.2d 362 (1982) (sinuses).

82. See *id.* at 241, 291 S.E.2d at 364 (loss of taste and smell).

83. See *Taylor v. Cone Mills Corp.*, 306 N.C. 314, 293 S.E.2d 189 (1982) (respiratory surface of the lungs).

84. *Id.*

85. The Act was amended in 1963, 1971, and 1979 to bring byssinosis claims fully within the statute. For a discussion of the interplay between the three amendments, and the reasons why all three were needed, see *Survey of Developments in North Carolina Law, 1980—Workers' Compensation*, 59 N.C.L. REV. 1033-34 (1981).

86. The claim in *Taylor*, filed in 1975, fell into a noncoverage "gap" in G.S. 97-53(13), a loophole closed by the 1979 amendment. The loophole prevented post-1971 claimants whose last exposure had been pre-1963 and whose disability had been pre-1971 from receiving compensation. See *Survey of Developments in North Carolina Law, 1980—Administrative Law*, 59 N.C.L. REV. 1017, 1033-34 (1981).

87. Curiously, post-1971 byssinosis claimants whose last exposure and disablement both occurred between 1963 and 1971 would have two theories of recovery under the Act, because byssinosis could be deemed an inflammation of "an internal or external organ or organs" or of an "external contact surface." Because claimants must file within two years of disablement, these theories would apply only to still-unresolved pre-1973 claims, certainly a rare or extinct breed.

88. N.C. GEN. STAT. § 97-53(13) (1979).

D. Availability of Benefits

In *Deese v. Southeastern Lawn & Tree Expert Co.*⁸⁹ the supreme court reviewed the amount of compensation to which a deceased worker's widow and three minor children were entitled under the Act.⁹⁰ The issue was whether G.S. 97-38 required reapportionment among the remaining dependent children of the share of a child who reached majority after the expiration of the initial compensation period of 400 weeks.⁹¹ The court held that the Act fixes a recipient's share at the time of death of the worker. Reapportionment of the share of a child who reaches majority occurs only if the child reaches majority within the initial 400-week compensation period.⁹²

In dissent, Justice Mitchell, joined by Justices Exum and Carlton, stated that the court's construction was needlessly harsh and inequitable.⁹³ The minority would have liberally construed the statute to provide for reapportionment of the award among remaining eligible recipients.⁹⁴

It is difficult to comprehend how the court's opinion follows the "sound rules of statutory construction" that the Act "should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions."⁹⁵ The majority's holding, although not illogical, was certainly not compelled, given the ambiguity of the statute. The legislature, in expanding the benefits available under G.S. 97-38, showed no intent to create the inequities that may arise under the court's interpretation.⁹⁶

In *Smith v. American & Efrd Mills*⁹⁷ the supreme court held that the more specific statutory provision requiring an employer to provide treatment to an

89. 306 N.C. 275, 293 S.E.2d 140 (1982). This same issue was considered in *Chinault v. Pike Electrical Contractors*, 306 N.C. 286, 293 S.E.2d 147 (1982).

90. 306 N.C. at 277, 293 S.E.2d at 142. The relevant portion of N.C. GEN. STAT. § 97-38 (Cum. Supp. 1981) reads as follows:

If death results proximately from the accident . . . the employer shall pay . . . to the person or persons entitled thereto as follows: (1) Persons wholly dependent for support upon the earnings of the deceased shall . . . be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. If there be only one person wholly dependent, then that person shall receive the entire compensation payable Compensation payments due on account of death shall be paid for a period of 400 weeks from the date of the death of the employee; provided, however, after said 400-week period . . . compensation payments due a dependent child shall be continued until such child reaches the age of 18.

91. 306 N.C. at 277, 293 S.E.2d at 142.

92. *Id.* at 279-80, 293 S.E.2d at 144.

93. *Id.* at 284, 293 S.E.2d at 147 (Mitchell, J., dissenting).

94. *Id.*

95. *Id.* at 277, 293 S.E.2d at 142-43.

96. The dissent observed that the total amount paid to the dependents of a worker making \$270 per week before his death would vary in relation to the number of dependents and their ages. If the worker were survived by a single one-year-old child, the total compensation paid to that child would be \$40,560 greater than the total compensation paid to three minor children aged one, five, and ten years surviving an identical worker. *Id.* at 283, 293 S.E.2d at 146 (Mitchell, J., dissenting). These inequities would not occur if the total award were reapportioned whenever a minor child reaches majority.

97. 305 N.C. 507, 290 S.E.2d 634 (1982).

employee in the event of disability from occupational disease⁹⁸ controlled over the more general provision⁹⁹ regarding medical supplies.¹⁰⁰ Accordingly, in the event of disability from occupational disease,¹⁰¹ the employer must pay for medical treatment whenever such treatment would "tend to provide needed relief."¹⁰² In *Smith* it was held to be error to limit the award of medical expenses to the period during which disability payments were provided.¹⁰³

In *Buie v. Daniel International Corp.*¹⁰⁴ punitive damages for retaliatory discharge were denied because G.S. 97-6.1(b) limits recovery to damages "suffered by the employee."¹⁰⁵ The court reasoned that punitive damages are not "suffered" by a claimant and rejected the argument that public policy would be better served by the threat of punitive damages.¹⁰⁶ G.S. 97-6.1(b) was enacted in response to the court of appeals' holding in *Dockery v. Lampart Table Co.*¹⁰⁷ that no private cause of action existed for a claimant seeking redress for a retaliatory discharge that occurred after filing a compensation claim.¹⁰⁸ Arguably, the legislature intended to create a new "tort" to further the public policies of the Act. If so, the statute should have been construed more liberally.

KEN R. BRAMLETT, JR.
DAVID G. UFFELMAN

98. N.C. GEN. STAT. § 97-59 (Cum. Supp. 1981). The statute provides:

Medical, surgical, hospital, nursing services, medicine, sick travel, rehabilitation services and other treatment as may reasonably be required to tend to lessen the period of disability or provide needed relief shall be paid by the employer in cases in which awards are made for disability or damage to organs as a result of an occupational disease . . .

99. N.C. GEN. STAT. § 97-25 (1979).

100. 305 N.C. at 512, 290 S.E.2d at 638.

101. Plaintiff in *Smith* was partially disabled from 1970-78 and became totally disabled in 1978. *Id.* at 508-09, 290 S.E.2d at 636-37. G.S. 97-29 was amended in 1973, three years after plaintiff's partial disability began, to increase eligibility for totally disabled claimants. Act of April 12, 1974, ch. 1308, 1973 N.C. Sess. Laws 609. Because plaintiff had no right to recover for total disability until 1978, his claim vested at that time, and the version of G.S. 97-29 in effect at that time (the 1973 version) was properly applied. 305 N.C. at 511, 290 S.E.2d at 636.

The court followed the line of cases following *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979), to dispose of a constitutional objection to the court's purportedly retroactive application of substantive law. This potential constitutional issue was previously identified in *Survey of Developments in North Carolina Law, 1980—Administrative Law*, 59 N.C.L. REV. 1017, 1034-36 (1981).

102. 305 N.C. at 513, 290 S.E.2d at 638.

103. *Id.* at 513, 290 S.E.2d at 636-37.

104. 56 N.C.App. 445, 289 S.E.2d 118 (1982).

105. *Id.* at 447, 289 S.E.2d at 119 (quoting N.C. GEN. STAT. § 97-6.1(b) (1979)).

106. *Id.* at 447, 289 S.E.2d at 119.

107. 36 N.C. App. 293, 244 S.E.2d 272 (1978).

108. 56 N.C. App. at 446-47, 289 S.E.2d at 119. For a discussion of the enactment of the retaliatory discharge provision in response to *Dockery*, and an analysis of the possible scope of the provision, see Note, *Worker's Compensation—Retaliatory Discharge—The Legislative Response to Dockery v. Lampart Table Co.*, 58 N.C.L. REV. 629 (1980). The note did not identify the punitive damages issue, perhaps assuming that the new "tort" would include the right to seek punitive damages.