NORTH CAROLINA COURT OF APPEALS REPORTS

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OF
NORTH CAROLINA

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WALTER E. BROCK

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1. Appointed 15 June 1978.
2. Appointed 15 May 1978 to succeed George Stuhl who retired 1 April 1978.
3. Appointed 20 July 1978.
4. District 27 divided into 27A and 27B effective 1 July 1978.
5. Appointed Chief Judge 1 July 1978.
6. Appointed 1 July 1978.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. GEORGE PHILLIP SINGS (ALIAS PHILLIP GEORGE SINGS)

No. 7726SC553

(Filed 3 January 1978)

1. **Criminal Law §§ 76.4, 98.2— violation of sequestration order—refusal to allow testimony—no error**

The trial court did not abuse his discretion in refusing to allow defendant's father to testify at a voir dire hearing to determine admissibility of defendant's pre-trial confession, since the father had violated the court's sequestration order, and the court could properly exclude him from testifying; furthermore, the father's testimony was merely cumulative, and defendant failed to show that he was prejudiced by its exclusion.

2. **Criminal Law § 76.6— in-custody statement—finding of voluntariness on voir dire—sufficiency of evidence**

The trial court did not err in denying defendant's motion to supress his in-custody statement where the court made findings based upon competent evidence that police officers told defendant that members of his family had helped them recover stolen property from defendant's residence but no threats were made to bring charges against the family members; defendant was informed of his constitutional rights mandated by *Miranda* for at least the third time immediately prior to giving his statement to police; defendant signed a waiver of rights form and made incriminating statements which were reduced to writing by a police officer; defendant was in good physical and mental condition at the time he gave the statement; the statement was sensible; defendant understood his constitutional rights and indicated that he did not wish to have a lawyer present; the statement was not the result of any alleged illegal search or seizure of defendant's premises; and defendant was not under the influence of any intoxicating liquor at the time he made the statement.

3. **Criminal Law § 75.3— illegally seized evidence—confronting defendant with—statement not rendered involuntary**

Even if a warrantless search conducted by police without defendant's knowledge and while he was in custody was illegal, the fact that defendant was shown items recovered during the search just prior to making incriminating statements did not, *ipso facto*, render the statements involuntary, since the use of illegally seized property is only one circumstance surrounding an in-custody statement to be considered in determining whether the statement is voluntary and admissible.

4. **Criminal Law § 21— taking defendant before magistrate—seven hour delay—no unreasonableness**

Where seven hours elapsed between the time defendant was arrested and the time he was taken before a magistrate for the purpose of setting bail, the delay was not unreasonable in violation of G.S. 15A-501 and 15A-511, since the delay was necessary in order for officers to recover stolen goods and to attempt to locate a person who was arrested with defendant but who escaped during recovery of the stolen goods.

APPEAL by defendant from *Grist, Judge*. Judgment entered 10 February 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 October 1977.

Defendant was indicted and tried for the offense of accessory after the fact to felonious breaking and entering and larceny. At trial, the State introduced defendant's statement in substance confessing to the charges against him, which he had given to police in the early hours of 3 January 1976, the night of his arrest. This statement was admitted pursuant to order of Barbee, Judge, entered 19 November 1976, denying defendant's motion to suppress the statement. The order of Judge Barbee was supported by findings of fact and conclusions of law and followed a pre-trial *voir dire* hearing at which the State and defendant presented evidence.

Further facts will be brought out as necessary in the discussion of the issues raised by this appeal.

The jury found defendant guilty as charged. From judgment sentencing him to imprisonment for not less than two nor more than three years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders and Associate Attorney Jane Rankin Thompson, for the State.

Walker & Walker, by Frank H. Walker, for defendant.

BROCK, Chief Judge.

[1] Defendant first assigns error to Judge Barbee's refusal to permit defendant's father to testify in defendant's behalf at the *voir dire* hearing. The record reveals that Judge Barbee, upon motion of defendant, had ordered the sequestration of all the witnesses at the *voir dire* proceeding and had instructed them not to discuss the case at all. Defendant's father was summoned by telephone by one of his children (not a witness) who was present in the courtroom and who informed him as to certain testimony which had been given in the proceeding. Judge Barbee excluded the witness' testimony due to violation of the sequestration order.

Defendant argues that the court either had no discretion or abused its discretion in excluding the testimony of defendant's father. We disagree. An order to sequester witnesses is issued in the sound discretion of the trial judge. *State v. Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972); *Lee v. Thornton*, 174 N.C. 288, 93 S.E. 788 (1917). The purpose of the sequestration order is to protect against colluded testimony; if the order is disobeyed, the court can exclude the witness from testifying. *Lee v. Thornton, supra.*

Furthermore, defendant has failed to show that he suffered any prejudice from Judge Barbee's action. The record shows that the witness told the court before being dismissed from the stand that he was present when defendant took a drink of vodka while being questioned by police officers at his (defendant's) house. This was merely cumulative of testimony previously given by defendant. No showing was made of any other material testimony that the witness would have given had he been allowed to testify. *See, State v. Hodge*, 142 N.C. 676, 55 S.E. 791 (1906). On the basis of the record before us, we cannot say that Judge Barbee abused his discretion in refusing to allow defendant's father to testify at the *voir dire* hearing. Defendant's first assignment of error is overruled.

Defendant next assigns error to the admission of his confession into evidence. He contends that his statement was not voluntary and thus inadmissible for four reasons: (1) it was triggered by the fruits of an illegal search and by threats to involve defendant's family in the case; (2) it was obtained while defendant was in a weakened condition due to lack of food and sleep and as a result of a consumption of alcohol; (3) it was obtained as a result of de-

fendant's detention in violation of G.S. 15A-501 and 15A-511; and (4) it was obtained by interrogation after defendant had stated that he did not wish to give a statement. We have thoroughly examined the record as to all these contentions and find them to be without merit.

[2] At the conclusion of the *voir dire* hearing, the presiding judge made findings of fact and conclusions of law and denied defendant's motion to suppress the statement. These findings of fact are conclusive and binding on appeal if supported by competent evidence. *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), judgment imposing death penalty vacated, 428 U.S. 908 (1976).

Judge Barbee found extensive facts regarding the events leading up to defendant's confession. He also found facts to the effect that the police officers told defendant that members of his family had helped them recover the stolen property from defendant's residence; that defendant was informed of his constitutional rights mandated by *Miranda* (for at least the third time) immediately prior to giving his statement to police; that defendant signed a waiver of rights form and made incriminating statements which were reduced to writing by one of the police officers; that defendant's statements were read back to him, and he read the written statement, made some changes, and signed it. The court further found as facts that defendant was in good physical and mental condition at the time he gave the statement; that the statement he gave was sensible; that he understood his constitutional rights and indicated that he did not wish to have a lawyer present; that the statement was not made by defendant pursuant to any "blackmail" or threats to bring charges against members of his family; that the statement was not the result of any alleged illegal search or seizure of defendant's premises; and that defendant was not under the influence of any intoxicating liquor at the time he made the statement. On the basis of the findings of fact, Judge Barbee concluded, *inter alia*,

> "VI. That the defendant was in full understanding of his constitutional rights to remain silent and his rights to counsel, and all other rights;
>
> VII. That the defendant purposely, freely, knowingly, understandingly, voluntarily and intelligently waived each of these rights and thereupon made a statement to the officers above mentioned;".

[3] Defendant contends that his confession was induced by the use of property recovered during an alleged illegal search of his residence. Judge Barbee declined to rule on the legality of the search, concluding instead that defendant was not induced by any illegal search or the fruits thereof. Assuming for the sake of discussion that the warrantless search conducted by police without defendant's knowledge and while he was in custody was indeed illegal, the fact that defendant was shown items recovered during the search just prior to making incriminating statements does not, *ipso facto*, render the statements involuntary. In *State v. McCloud*, 276 N.C. 518, 173 S.E. 2d 753 (1970), it was held that "voluntariness remains the test of admissibility of a confession, and the use of the illegally seized property is only one circumstance surrounding the in-custody statement to be considered in determining whether the statement is voluntary and admissible." 276 N.C. at 529, 173 S.E. 2d at 761. Other factors which the Supreme Court in *McCloud* felt must be weighed in determining admissibility of the confession included "failure of the record to show that: (1) defendant was mentally defective, (2) there was sustained interrogation or promise of reward resulting in a confession, (3) there were threats or coercive acts by the police accompanying or following the arrest, (4) defendant was held incommunicado, or (5) officers failed to promptly and fully warn him of his constitutional rights." *Id.*

In the instant case, there is competent evidence to support the findings that defendant was not coerced by threats to arrest his family; that he was not intoxicated; that he was in good physical condition; that he was fully apprised of his constitutional rights and signed a waiver of those rights. The record shows that defendant was not subjected to prolonged interrogation prior to confessing. The record fails to show that defendant was mentally defective. Furthermore, one of the police officers testified that defendant stated that he would have confessed earlier but he didn't want to get his roommate, Garcia, who was a suspect in the case, in trouble. Based on the entire record, we do not think that defendant's confession was the fruit of any illegal search. We find no error in the ruling by Judge Barbee.

The findings that defendant was in good physical and mental condition and was not intoxicated are supported by competent evidence and are thus conclusive. As such, there is no merit to

defendant's contention that the statement was obtained while he was in a weakened condition due to lack of food and sleep, and while under the influence of a drink of vodka consumed some eight hours prior to giving the statement.

[4] Defendant next contends that his statement was obtained as a result of his detention in violation of G.S. 15A-501 and 15A-511. The pertinent provisions of these two sections require that upon arrest of a suspect, law-enforcement officers must take the suspect before a magistrate for purpose of setting bail *without unnecessary delay.* Judge Barbee found as a fact that the delay in taking defendant before a magistrate was necessary. This finding is supported by uncontradicted evidence which shows that defendant and Garcia were first arrested and taken to the Law Enforcement Center around 8:30 p.m. on 2 January 1976; that upon separate questioning, Garcia agreed to lead police officers to the rest of the stolen property; that Garcia led the officers to the home of defendant's sister and brother-in-law, who took them back to defendant's house and showed them where the property was located; that while they were retrieving the property, Garcia escaped; that the officers searched the neighborhood in vain until about 1:30 a.m. on 3 January, and then returned to the Law Enforcement Center at which time defendant was questioned and gave his incriminating statement. Shortly after giving the statement, which he signed at 3:36 a.m., defendant was taken before a magistrate. This evidence clearly supports the finding of fact that the delay in taking defendant before a magistrate was necessary. The arresting officers were recovering the stolen goods and attempting to locate the escaped Garcia between the times of defendant's arrest and his making the statement. It appears that defendant was taken before a magistrate as soon as was reasonably possible.

Defendant further contends that his statement was taken after he had stated that he did not wish to give a statement. As noted *supra,* Judge Barbee found as a fact that defendant was advised of and chose to waive his constitutional rights, including the right to remain silent and to make no statements, and the right to have an attorney present. Although there is conflicting testimony on these points, the court's findings of fact are supported by competent evidence and are conclusive.

Thus defendant's second assignment of error is overruled.

Defendant's third and final assignment of error is to the failure of Judge Grist to reconsider the admissibility of the confession as a result of new evidence introduced at trial. This assignment of error is without merit. The alleged new evidence offered at trial was (1) the testimony of Officer Styron that when defendant was first taken to the Law Enforcement Center on 2 January, he stated that he didn't want to give a statement, and (2) testimony of defendant's father that defendant had taken a drink of vodka at the time of his arrest at his home. We find no prejudice in the trial judge's failure to reconsider the admissibility of defendant's statement on these facts. As to Officer Styron's testimony, although defendant refused to give a statement at 9:00 p.m., he was not interrogated at that time, and affirmatively waived his right to remain silent later, at 2:00 a.m. *See, State v. Jones*, 278 N.C. 88, 178 S.E. 2d 820 (1971). As to the testimony of defendant's father, as we noted *supra*, defendant testified that he had taken the drink, and his father's testimony was merely cumulative. This assignment of error is overruled.

In our opinion, defendant received a fair trial, free from prejudicial error.

No error.

Judges MARTIN and CLARK concur.

HESTER W. FAUCETTE v. WILLIAM T. GRIFFIN, MARY B. MARTIN, CAROL I. OWENS AND PATRICK B. McGINNIS, III

No. 771SC142

(Filed 3 January 1978)

1. Ejectment § 13.1; Trespass to Try Title § 2— superior title from common source—fitting description to land

In an action to remove cloud on title in which plaintiff claimed superior title from a common source, the trial court erred in granting summary judgment for plaintiff where plaintiff's evidence in support of the motion failed to fit the description in her chain of title to the land claimed and to show the land is embraced within the description.

2. Husband and Wife § 5.1— 1935 conveyance by wife—absence of husband's joinder

A 1935 deed purporting to convey real property of a married woman without the written assent of her husband was void under constitutional provisions then in effect, and the deed was not validated by a subsequent statute, G.S. 39-7.1, purporting to validate deeds executed by married women prior to June 8, 1965 without the assent of their husbands.

3. Estoppel § 1.1; Husband and Wife § 5.1— wife's conveyance without husband's joinder—divorce or husband's death—estoppel

While a married woman during coverture could deny the validity of a deed executed without the written assent of her husband, once the marriage relation was severed by the death of the husband or by divorce, the woman was estopped from recovering the land or defeating the title of her grantee or those in privity with him because of the lack of assent.

APPEAL by defendants from *Small, Judge.* Judgment entered 13 December 1976 in Superior Court, DARE County. Heard in the Court of Appeals 7 December 1977.

Civil action instituted by plaintiff to remove a cloud on title to real estate.

Plaintiff, Hester W. Faucette, in her complaint alleges sole ownership of a certain tract of land located in Dare County, North Carolina, and specifically described as follows:

> "That certain lot or parcel of land containing 20.50 acres, more or less, shown and designated as Lot No. 6 on the plot made by J. P. Tingle, Surveyor, bearing date of December 1, 1930, beginning at the shore of the Atlantic Ocean at the southeast corner of Lot No. 4 on said plot and running thence along the said ocean shore S 19° E 420 feet, thence West 2,250 feet to the southeast corner of Lot 5 on said plot, thence along the eastern boundary of said Lot No. 5 N 6° W 400 feet to the line of said Lot No. 4, and thence along the southern boundary of said Lot No. 4 East 2,160 feet to the ocean at the place of beginning, together with all the right, privileges and appurtenances thereunto belonging or in any wise appertaining."

Plaintiff's alleged title to the land described derives from the following deeds: (1) Deed dated 4 November 1964 from Beale J. Faucette to Beale J. Faucette and wife, Hester W. Faucette; (2) Deed dated 14 July 1942 from The First and Citizens National Bank of Elizabeth City to Beale J. Faucette; (3) Deed dated 15

March 1935 from Gladys Newbern Griggs to The First and Citizens National Bank of Elizabeth City.

Defendants claim title to the same tract of land pursuant to the following deeds: (1) Deed dated 17 August 1951 from E. S. Younce and wife, Daisy T. Younce, to Mary B. Martin (purporting to convey a portion of the above tract); (2) Deed dated 18 August 1951 from E. S. Younce and wife, Daisy T. Younce, to William T. Griffin (purporting to convey a portion of the above tract); (3) Deed dated 9 March 1953 from E. S. Younce and wife, Daisy T. Younce, to Lucille A. McGinnis (purporting to convey a portion of the above tract); (4) Deed dated 26 April 1951 from Harry McMullan, Jr., and wife, Neva W. McMullan, to E. S. Younce; (5) Deed dated 2 May 1950 from S. B. Baugham, Jr., to Harry McMullan, Jr.; (6) Deed dated 11 May 1949 from Gladys L. Matthews (formerly Gladys Griggs) and husband, Joseph A. Matthews, to S. B. Baugham, Jr.

Plaintiff alleges that she and the defendants "claim title to the parcel of land described . . . [above] from a common source and plaintiff has superior title to the said parcel from that common source." Plaintiff seeks a judgment declaring her to be the sole owner in fee simple of the land in controversy and setting aside the deeds constituting defendants' chain of title as a cloud on plaintiff's title.

The defendants filed an answer admitting that "plaintiff claims title to the disputed land from a common source with defendants" but denying that "plaintiff can legally connect with the common source by reason of a void instrument or instruments in her claimed chain of title." Defendants allege that "one of the instruments in the plaintiff's claimed or purported chain of title is void in that the husband of the purported feme grantor did not join in the execution of the conveyance when such joinder was required under . . . then existing law. . . ." Defendants in their counterclaim seek relief adjudging them to be the owners in fee simple of the land in issue and declaring the deeds constituting the plaintiff's chain of title to be a cloud on defendants' title.

Plaintiff filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, G.S. 1A-1. Plaintiff's motion was supported by the pleadings; the deposition of a land surveyor, David Cox, Jr.; the deposition of Hester W.

Faucette; exhibits consisting of surveyors' maps of the disputed property drawn in 1930 and 1959; exhibits consisting of an indenture executed on 24 June 1933 by Gladys Griggs and her husband, and The First and Citizens National Bank of Elizabeth City, and all deeds relevant to this action; plaintiff's requests and the responses to her requests for admissions; and plaintiff's interrogatories and the answers to her interrogatories. In opposition to plaintiff's motion the defendants filed a single affidavit stating that Gladys Newbern and Robert L. Griggs were married in 1929 and remained married during the year of 1935 and for several years thereafter.

The trial court granted the plaintiff's motion and entered summary judgment for plaintiff decreeing that plaintiff has superior title to the property described in the complaint and that "[t]he defendants have no right, title or interest in the aforesaid property." The defendants appealed.

Leroy, Wells, Shaw, Hornthal, Riley & Shearin, by Dewey W. Wells and Norman W. Shearin, Jr., for the plaintiff appellee.

White, Hall, Mullen & Brumsey, by Gerald F. White, and Kellogg, White and Reeves, by John M. Martin, for the defendant appellants.

HEDRICK, Judge.

Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Rule 56(c). In an action to remove a cloud on title to real property the plaintiff assumes the burden of proving "a title good against the whole world or good against the defendant by estoppel." *Mobley v. Griffin*, 104 N.C. 112, 114 (1889). To sustain this burden upon a motion for summary judgment the plaintiff must present uncontroverted facts sufficient to establish superior title in himself by any of the methods enumerated in *Mobley v. Griffin, supra* at 115. In this action plaintiff attempted to connect the defendant with a common source of title, and show in herself a superior title from that source. "To so establish . . . [her] title, plaintiffs must not only trace title to a common source, but . . . [she] must trace title to

the land in controversy to that source. [Citations omitted.] The plaintiffs must fit the descriptions in their chain of title and in the defendant's chain of title to the land claimed and show that the land claimed is embraced within their respective descriptions. [Citations omitted.]" *Allen v. Hunting Club*, 14 N.C. App. 697, 700, 189 S.E. 2d 532, 534 (1972); *see also Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971).

[1] Defendants contend, and we agree, that the record before the trial judge did not connect plaintiff's title to the land in dispute to the common source because none of the evidence offered in support of the motion for summary judgment established the fact that the land purportedly conveyed by Gladys Griggs to The First and Citizens National Bank on 15 March 1935 was the same property described in plaintiff's chain of title, the complaint, and the defendants' chain of title. The property is described in that deed as: "All of the right, title and interest of the said Gladys Newbern Griggs in and to all of the estate and property, real and personal, belonging to the late Dr. J. M. Newbern, deceased, at the time of his death (except that certain farm in Currituck County, known as the Court House Farm)." Defendants' admission that the parties claimed title to the disputed property from a common source falls short of fitting the property described in plaintiff's chain of title to the description in the deed from Gladys Griggs to the bank. The materiality of this issue of fact is obvious.

[2] Defendants also contend that plaintiff cannot connect her title to the common source because the deed from Gladys Griggs to The First and Citizens National Bank of Elizabeth City, dated 15 March 1935, is void since it does not bear her husband's assent. According to constitutional provisions in effect in 1935, a deed purporting to convey real property of a married woman without the written assent of her husband was "inoperative as a deed and conveys nothing." *Buford v. Mochy*, 224 N.C. 235, 239, 29 S.E. 2d 729, 732 (1944). *See also Cruthis v. Steele*, 259 N.C. 701, 131 S.E. 2d 344 (1963); *Harrell v. Powell*, 251 N.C. 636, 112 S.E. 2d 81 (1960); Webster, Real Estate Law in North Carolina, § 382(f)(1) (1971). Plaintiff argues that such deeds have been validated by G.S. 39-7.1, which provides: "No conveyance, . . . or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments which was executed by such married woman prior to June 8, 1965, shall be invalid for the

reason that the instrument was not also executed by the husband of such married woman." However, in *Mansour v. Rabil*, 277 N.C. 364, 376, 177 S.E. 2d 849, 857 (1970), Justice Moore in discussing a similar curative statute (G.S. 39-13.1 purporting to validate all deeds executed prior to 7 February 1945 by married women who had not been privately examined) stated that "[a] void contract cannot be validated by a subsequent act, and the Legislature has no power to pass acts affecting vested rights." *See also Booth v. Hairston*, 193 N.C. 278, 136 S.E. 879 (1927).

[3] On the other hand, certain established principles of estoppel might be applicable to the facts of this case. It is true that during coverture a married woman could deny the validity of a deed executed without the assent of her husband. However, once the marriage relation was severed by the death of the husband or divorce a woman was estopped from "recover[ing] the land or defeat[ing] the title of her grantee, or those in privity with him" because of the lack of assent. *Cruthis v. Steele*, *supra* at 703, 131 S.E. 2d at 346; *Harrell v. Powell*, *supra; Buford v. Mochy*, *supra.*

The issue of the marital status of Gladys Griggs at the time she executed the deed to The First and Citizens National Bank and thereafter until she executed the deed to S. B. Baugham, Jr., dated 11 May 1949, is squarely raised by the evidence offered in support of and in opposition to the motion for summary judgment. The materiality of this issue to the ultimate disposition of the claims of the parties is demonstrated by the principles of law set out above.

Because the evidence relevant to the issues raised by the pleadings has not been fully developed, and all the issues of material fact necessary to a resolution of the dispute between the parties has not been determined, we have purposely not elaborated on or applied all of the legal principles discussed in the parties' briefs. We have pointed out some of the principles of law which may be significant in the final disposition of the cause only to demonstrate the materiality of some of the facts in controversy. To do more at this stage of the proceeding would serve no useful purpose.

We hold the record before us presents genuine issues of material fact for trial, and the court erred in entering summary judgment for plaintiff. The judgment appealed from is reversed

and the cause is remanded to the Superior Court of Dare County for further proceedings.

Reversed and remanded.

Judges MORRIS and ARNOLD concur.

GEORGE HARRIS v. E. L. BARHAM, T. W. GARDNER, WOODROW WILSON MANGUM AND FIRST CITIZENS BANK & TRUST COMPANY

No. 7610SC1028

(Filed 3 January 1978)

1. **Malicious Prosecution § 1— elements of the offense**

For plaintiff to establish liability for malicious prosecution against defendants, he must show that they (1) instituted, procured or participated in the criminal prosecution against him (2) with malice, (3) without probable cause, and (4) that the criminal proceedings terminated in his favor.

2. **Malicious Prosecution § 13— insufficiency of evidence**

In an action for malicious prosecution arising out of plaintiff's arrest by police officers on a charge of obtaining money by false pretense, the trial court properly granted summary judgment for defendants where plaintiff showed only one of the elements required to support his claim for malicious prosecution, that the criminal proceedings terminated in his favor.

APPEAL by plaintiff from *Smith (Donald L.), Judge.* Judgment entered 9 September 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 20 September 1977.

This is a civil action for malicious prosecution arising out of plaintiff's arrest by Raleigh Police officers on a charge of obtaining money by false pretense. Defendants Barham and Gardner are the police officers involved. Defendant Mangum is an officer of the defendant Bank. This appeal involves only plaintiff's claim against Mangum and the Bank and results from the trial court's ruling granting their motion for summary judgment dismissing the action as to them.

Samuel S. Mitchell for plaintiff appellant.

Reynolds & Howard by E. Cader Howard for appellees, Woodrow Wilson Mangum and First-Citizens Bank & Trust Company.

PARKER, Judge.

[1] For plaintiff to establish liability for malicious prosecution against defendants Mangum and the Bank, he must show that these defendants (1) instituted, procured, or participated in the criminal prosecution against him (2) with malice, (3) without probable cause, and (4) that the criminal proceedings terminated in his favor. *Cook v. Lanier*, 267 N.C. 166, 147 S.E. 2d 910 (1966); *Mooney v. Mull*, 216 N.C. 410, 5 S.E. 2d 122 (1939); Byrd, *Malicious Prosecution in North Carolina*, 47 N.C.L. Rev. 285, 286 (1969). In the present case the defendant appellees, as the parties moving for summary judgment, had the burden of establishing the absence of any triable issue of fact. "This burden may be carried by movant by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim." *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 29, 209 S.E. 2d 795, 798 (1974). We hold that defendant appellees in this case did successfully carry the burden of establishing the nonexistence of elements essential to support plaintiff's claim against them, and accordingly we affirm the trial court's judgment granting their motion for summary judgment and dismissing plaintiff's action as against them.

Appellees supported their motion for summary judgment by the verified pleadings, an affidavit of defendant Mangum, and depositions of plaintiff and of Mangum. These establish that there is no genuine issue as to the following facts:

On 1 August 1975 a person representing himself to be George Harris opened a checking account with First-Citizens Bank and Trust Company in Raleigh with a deposit of fifty dollars. On 22 August 1975 a detective with the Raleigh Police Department phoned defendant Mangum to inquire about this account, telling Mangum that a check for approximately $300.00 had been drawn on the account and returned for insufficient funds. When Mangum told the detective that he knew nothing about the account, the detective asked that he look into the matter and that he advise the Police Department if Harris should come into the Bank. Mangum did inquire into the George Harris checking account and learned from other employees of the Bank that several checks had been written on that account, all of which had been returned because the account contained insufficient funds. He also learned

that the Raleigh address and telephone number which had been given to the Bank when the account was opened were not correct, no person known as George Harris having lived at that address or having been listed at that telephone.

Prior to 20 August 1977 plaintiff had served in the Army at Fort Bragg. On that date he received an honorable discharge and made arrangements to return to his home in Illinois. On his way he stopped in Raleigh to visit a friend. On the morning of 22 August 1977, shortly after the detective's phone call to Mangum concerning the George Harris checking account, plaintiff, whose name is George Harris, entered the Bank for the purpose of purchasing traveler's checks. Plaintiff did purchase $600.00 worth of traveler's checks, paying for these with cash, since he did not wish to carry so much cash with him on his further trip home. While plaintiff was engaged in purchasing the traveler's checks, an employee of the Bank informed Mangum that George Harris was in the Bank. Mangum phoned this information to the Raleigh Police Department and then went to the Bank lobby, where plaintiff was just then completing purchase of the traveler's checks. Mangum approached the plaintiff and asked if he was George Harris. When Plaintiff replied that he was, Mangum asked plaintiff to accompany him to a small room adjoining the lobby. Plaintiff denied opening the account, and Mangum told him about the checks written on the account. In response to Mangum's request, plaintiff signed his name ten or twelve times so that his signature could be compared to the signature on the checking account. Mangum also repurchased the traveler's checks from plaintiff. The police officers then arrived at the bank, examined the documents relating to the account, and arrested plaintiff for false pretenses. The officers took plaintiff to the police station, but neither Mangum nor any other employee of the bank accompanied the officers to the station. Plaintiff was released after the District Court Judge found no probable cause at a preliminary hearing. A Wake County grand jury later indicted plaintiff on the same charge, but the criminal proceedings terminated when the State took a nol pros on the indictment. Neither Mangum nor anyone else from the bank signed a complaint against plaintiff, testified at the preliminary hearing, or testified before the grand jury.

[2] Analysis of the foregoing facts shows that of the four elements required to support plaintiff's claim for malicious pros-

ecution against Mangum and the Bank, he can establish only one, that the criminal proceedings terminated in his favor. Facts as to which there is no genuine issue clearly show the nonexistence of the remaining three elements. Absence of but one is fatal to plaintiff's claim. Therefore we discuss only the first.

It is undisputed that neither Mangum nor any other employee of the Bank ever signed any warrant or otherwise directly instituted any criminal proceeding against the plaintiff, nor did they procure anyone else to do so. Neither Mangum nor any other employee appeared at the preliminary hearing or before the grand jury. Indeed, the entire extent of Mangum's or the Bank's participation in this matter was to notify the police, as Mangum had been requested by them to do, when a person named George Harris came into the Bank. This he did only after information given him by the police and his own investigation indicated that someone using that name had perpetrated a fraud. This falls short of being the participation in a criminal prosecution required to establish the first element of a valid claim for malicious prosecution. "Merely giving honest assistance and information to prosecuting authorities . . . does not render one liable as a co-prosecutor." 52 Am. Jur. 2d *Malicious Prosecution* § 24, at 201-02 (1970). Whatever may be the ultimate outcome of plaintiff's action against the two police officers, "[i]t cannot be said that one who reports suspicious circumstances to the authorities thereby makes himself responsible for their subsequent action, . . . even when . . . the suspected persons are able to establish their innocence." *Charles Stores Co. v. O'Quinn*, 178 F. 2d 372, 374 (4th Cir. 1949).

We also hold that the undisputed facts clearly establish the nonexistence of the second and third elements essential to support a claim for malicious prosecution against appellees. It is, however, unnecessary for us to discuss the undisputed evidence in this regard since in any event summary judgment for appellees was required by the showing of the nonexistence of the first element.

Affirmed.

Judges MARTIN and ARNOLD concur.

WILLIAM CORBIE DAUGHTRY, JR. v. WILLIAM FRANKLIN TURNAGE AND J. A. EUBANKS AND SON, INC.

No. 7712SC89

(Filed 3 January 1978)

Automobiles § 76.1— contributory negligence—following too closely—excessive speed—failure to keep vehicle under control

In this action to recover for damages to plaintiff's tractor trailer which occurred when defendant's fertilizer truck blocked the road ahead of plaintiff's driver and plaintiff's driver drove the tractor trailer into a ditch to avoid hitting a pickup he was following, plaintiff's evidence showed that his driver was contributorily negligent as a matter of law in operating the tractor trailer at an excessive speed under the circumstances, failing to keep a safe distance between his vehicle and the pickup he was following, and failing to keep his vehicle under proper control.

Judge ARNOLD dissenting.

APPEAL by defendants from *Clark, Judge.* Judgment entered 26 August 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 16 November 1977.

Civil action wherein plaintiff, William Corbie Daughtry, Jr., seeks to recover $8,630.04 for damages to his 1972 GMC tractor trailer allegedly resulting from the negligence of the defendant William Franklin Turnage, the agent of the defendant J. A. Eubanks & Son, Inc. Issues of negligence and contributory negligence were submitted to the jury. By stipulation the parties set damages at $7,500. The jury found the defendants guilty of negligence and the plaintiff not guilty of contributory negligence. From a judgment on the verdict, defendants appealed.

Bowen & Lytch, by R. Allen Lytch, for the plaintiff appellee.

McLeod & Senter, by Joe McLeod, for the defendant appellants.

HEDRICK, Judge.

Defendants assign as error the denial of their motion for directed verdict. Defendants argue that the evidence discloses plaintiff's contributory negligence as a matter of law.

In order for a verdict to be directed on the basis of the contributory negligence of the plaintiff the evidence must establish

so clearly as to exclude all other conclusions the negligence of the plaintiff as a proximate cause of the damages sustained. *Parker v. Allen*, 2 N.C. App. 436, 163 S.E. 2d 105 (1968).

The motor vehicle accident giving rise to plaintiff's claim and the manner in which the respective vehicles were being operated can best be described by quoting from the record pertinent portions of the testimony of plaintiff's agent, the driver of plaintiff's vehicle.

> "At the time of the accident I had approximately seventy thousand pounds on it [the truck]. I was east-bound from Wade going towards New Bern, traveling on North Carolina 55. . . .
>
> "As you come into Seven Springs coming into the school zone, it is a straight level road and as you leave the school zone going into Seven Springs, it is a long tapered curve through the entire community of Seven Springs. . . . The curve is approximately, I'd say, a mile and a half to two miles long. . . . The accident that I was involved in on May 1, 1974 was approximately a half mile down the road from the original school building. This was in the Seven Springs community.
>
> "At the location where the accident occurred, Highway 55 is a long tapered road and the little road on which . . . [defendant's truck] turned off is at a right angle going North. I was traveling East and was approximately one thousand feet from the Turnage vehicle when I first saw it. I was coming out of the thirty-five mile per hour zone and I was traveling at approximately thirty-five when I first observed him. There was a vehicle approximately one hundred and fifty feet in front of me driven by Mr. Coor traveling East also. I had first seen this vehicle when it pulled out in front of me at the school about a half a mile up the road. He pulled right out in front of me and I maintained a distance of about one hundred and fifty feet. The Coor vehicle and my vehicle were both proceeding in an easterly direction. The Turnage vehicle was westbound and was approximately nine hundred to one thousand feet when I first observed it. When I first saw him he was probably five or six hundred feet below the turn off and I was approximately nine hundred feet up the road West

from him, or West from where the accident occurred. I did not continue to observe the Turnage vehicle because it was in its lane and it was coming at a moderate speed. When I first observed the Turnage vehicle it was approximately five hundred feet and I noticed he started moving into—crossing the yellow line in his lane. I was continuing to travel at a speed of approximatley thirty-five miles per hour and was approximately one hundred to one hundred and fifty feet behind the Coor vehicle maintaining the same distance always. The Turnage vehicle started moving into the East lane. As I approached him I got about three hundred feet from him and all of a sudden he just whipped over the complete whole road into the eastbound lane. I began to break my speed and I seen he was making a right-hand turn and was moving so I broke it down to probably thirty miles an hour and the vehicle in front of me broke down to about the same speed. I maintained a certain distance with him and all of a sudden the vehicle driven by William Turnage stopped. By then the pickup truck that was in front of me was probably fifty to seventy-five feet from him and I was probably one hundred and fifty feet behind him and by the time that I realized that the loaded fertilizer was stopped completely in the road—had the complete road covered and the pickup started to stop—he had only what a thirty five hundred pound pickup to stop and here I come with seventy thousand pounds of weight, plus going down a forty-five degree angle hill. I locked my brakes and I seen that I was not going to stop in time to avoid making contact with the pickup. So, in order to keep from hurting anybody I just whipped it to the side ditch. I released my brakes where I could steer it and hit the side ditch, where I hit the concrete culvert."

Other evidence tends to show that the Coor vehicle did not strike the defendant's truck and the plaintiff's truck did not strike either the Coor pickup or the defendant's truck. All of the evidence tends to show that plaintiff's truck was damaged when plaintiff's driver "whipped" the vehicle off the highway into the culvert and then overturned.

The duties imposed by law upon operators of motor vehicles are familiar reading but nevertheless bear repetition. A driver is obligated to keep a proper lookout in the direction of travel at all

times. *Clontz v. Krimminger*, 253 N.C. 252, 116 S.E. 2d 804 (1960). He is likewise responsible for keeping his vehicle under proper control and keeping a safe distance between his own vehicle and any which he might be following. *Burnett v. Corbett*, 264 N.C. 341, 141 S.E. 2d 468 (1965); *Clontz v. Krimminger, supra.* Above all, a driver of a motor vehicle must exercise that care which an ordinarily prudent person would exercise under like circumstances. *Black v. Milling Co.*, 257 N.C. 730, 127 S.E. 2d 515 (1962).

Applying the foregoing rules of the road to the evidence in the present case, the conclusion is inescapable that plaintiff's agent was negligent in the operation of plaintiff's vehicle and such negligence was a proximate cause of the damages suffered by plaintiff. The plaintiff's driver operated the truck at an excessive speed under the circumstances; he followed the pickup truck closer than was prudent under the circumstances; the plaintiff's driver failed to keep the vehicle he was operating under proper control so that he could bring the vehicle to a stop before colliding with other persons or vehicles on the public highway. The driver's contributory negligence in this case is demonstrated most vividly by his testimony that "I locked my brakes and I seen that I was not going to stop in time to avoid making contact with the pickup. So, in order to keep from hurting anybody I just whipped it to the side ditch. I released my brakes where I could steer it and hit the side ditch, where I hit the concrete culvert." Evidence tending to show that the 3500-lb. pickup truck could be stopped quicker and in shorter distance than plaintiff's truck carrying a 70,000-lb. load did not relieve plaintiff's driver of the duty of operating plaintiff's truck at such a rate of speed and in such a manner as to avoid causing damage or injury to himself. *See Roberson v. Coach Lines*, 9 N.C. App. 450, 176 S.E. 2d 359 (1970); *Parker v. Allen, supra; Burnett v. Corbett, supra; Black v. Milling Co., supra.*

The judgment appealed from is reversed.

Judge MORRIS concurs.

Judge ARNOLD dissents.

Judge ARNOLD dissenting.

The evidence does not compel a conclusion that defendant was contributorily negligent as a matter of law.

CHARLES RAYMOND NORRIS, BY HIS GUARDIAN *AD LITEM*, WILLIAM NORRIS v. FREDERICK ORMON WEST, JR.

No. 773SC122

(Filed 3 January 1978)

Pleadings § 9.1; Rules of Civil Procedure § 6— failure to file answer in time— excusable neglect—extension of time

The trial court did not err in finding that defendant's failure to file answer was the result of excusable neglect and in permitting defendant to file answer after the time for filing had expired where defendant failed to give his liability insurer adequate time in which to file answer because of his erroneous belief, based on his conversation with the officer who served process on him, that he had 30 days in which to deliver the summons and complaint to his insurance agent. G.S. 1A-1, Rule 6(b).

ON writ of certiorari to review order entered by *Ervin, Judge*. Order entered 14 January 1977 in Superior Court, PITT County. Heard in the Court of Appeals 1 December 1977.

William Norris, guardian *ad litem* for Charles Raymond Norris, instituted this action to recover damages for personal injuries sustained in a collision involving an automobile and a bicycle. Charles, a sixteen-year-old minor, was riding a bicycle when he was struck by defendant's automobile, and plaintiff alleged that the collision occurred as a result of defendant's negligent operation of his automobile. Plaintiff filed his complaint on 14 September 1976.

Defendant filed a motion on 3 November 1976 seeking an extension of time in which to answer. He alleged that he was served with a copy of the summons and complaint on 22 September by a deputy sheriff. Defendant had to answer the complaint within 30 days, but his conversation with the deputy sheriff led him to believe that he was only required to get the summons and complaint to his insurance agent within the 30-day period. Defendant had a busy work schedule, and he was sick for a few days, making it difficult for him to deliver the summons and complaint to his in-

surance agent. He was finally able to deliver the documents on 19 October. The insurance agent mailed the documents to Aetna Insurance Company, defendant's liability insurance carrier, on that same day. The summons and complaint arrived in Aetna's mailroom on 21 October, but because of the ensuing weekend and the routing of mail within the offices, Aetna's claims department did not receive them until 27 October. Upon receiving the documents, Aetna's claims department promptly contacted an attorney in Greenville, North Carolina, who sought the consent of plaintiff's attorney to an extension of time to answer. Plaintiff's attorney declined to consent, and defendant filed his motion asking the court to grant an extension of time. Defendant subsequently filed affidavits supporting the allegations made in his motion.

Plaintiff responded to defendant's motion, alleging that defendant had previously been served in another suit arising out of the same accident and that defendant had promptly delivered the documents relating to that case to his insurance agent. Plaintiff then moved for entry of default.

The court found facts in accord with the allegations in defendant's motion and concluded:

> [T]hat the defendant's conduct in failing to understand and comprehend the necessity of answering within the thirty (30) day period and in failing to give his liability insurance carrier adequate time in which to answer the Complaint constitutes excusable neglect under the provisions of Rule 6(b) of the North Carolina Rules of Civil Procedure.

Based upon its conclusions, the court granted defendant's motion for an extension of time and denied plaintiff's motion for entry of default.

Plaintiff gave notice of appeal and subsequently filed a petition for certiorari to the North Carolina Court of Appeals to perfect the appeal. This Court granted the writ.

Williamson, Shaffner & Herrin by Mickey A. Herrin for plaintiff appellant.

Speight, Watson & Brewer by W. W. Speight and William C. Brewer, Jr., for defendant appellee.

PARKER, Judge.

Plaintiff contends that the court erred in granting defendant's motion for an extension of time in which to file an answer to the complaint. G.S. 1A-1, Rule 6(b) gives the trial court the discretionary authority to enlarge the time period for filing an answer. If, as in this case, the request for such an enlargement is made after the expiration of the time to file, the court may enlarge the time period for filing if the failure to file was the result of excusable neglect. *Johnson v. Hooks*, 21 N.C. App. 585, 205 S.E. 2d 796 (1974). The trial court's finding of excusable neglect is supported by the record, and there has been no showing that the court abused its discretion in allowing defendant to file his answer. Therefore, the order of the trial court is

Affirmed.

Judges BRITT and VAUGHN concur.

DEBORAH ANNE BRITT, WIDOW; CHRISTINA CAROL BRITT, CHILD, BY HER GUARDIAN AD LITEM, DEBORAH ANNE BRITT; HARVEY C. BRITT, DECEASED, EMPLOYEE v. COLONY CONSTRUCTION COMPANY, EMPLOYER STANDARD FIRE INSURANCE COMPANY, CARRIER AND/OR CUMBERLAND UTILITIES, INC., EMPLOYER; AETNA INSURANCE COMPANY, CARRIER

No. 7710IC155

(Filed 17 January 1978)

1. Master and Servant § 49.1— workmen's compensation—contractor and subcontractor—employee of which employer

The Industrial Commission did not err in finding that decedent was an employee of defendant utility company rather than of defendant construction company when he was killed while working on the relocation of water lines for a highway construction project, and that a contractor-subcontractor relationship existed between the construction company and the utility company, where the evidence showed that the construction company was the general contractor for the highway project; the utility company was hired by the construction company to relocate water lines for the project; decedent was a member of the crew hired by the utility company; in order to circumvent a requirement that subcontractors on a highway project must be approved by the State, members of the crew supplied by the utility company were listed as "employees" of the construction company, paid by the construction company by its checks, and

shown on construction company W-2 and W-4 forms; the construction company deducted from sums otherwise due to the utility company the amounts it paid as wages to the utility company crew, payroll taxes on those wages, and workmen's compensation premiums and other insurance for the crew; only the utility company had the right to hire and fire the work crew; the utility company decided where members of the crew would work each day and its employee directed the crew in the performance of its work; the utility company used the crew on other unrelated projects during the time covered by its contract with the construction company and maintained separate payrolls for the crew members; the classification and pay rates of the crew members were determined by the utility company; and crew members were transported to and from the work site in a utility company vehicle.

2. **Master and Servant § 71.1— workmen's compensation—average weekly wage—wages from two sources**

The Industrial Commission properly determined that a deceased employee's average weekly wage was the aggregate of wages he received from both a contractor and a subcontractor where the Commission found that decedent in fact was an employee only of the subcontractor and that the subcontractor ultimately paid the contractor for wages it paid to the decedent.

3. **Master and Servant § 81— workmen's compensation—death benefits—estoppel of carrier to deny liability**

Where a contractor and subcontractor agreed that members of the subcontractor's work crew would be considered as "employees" of the contractor while working on a highway construction project, the contractor was reimbursed by the subcontractor for wages it paid to the crew and for workmen's compensation insurance premiums it paid on those wages, a member of the subcontractor's work crew was killed while working on the highway project, and the Industrial Commission found that decedent was in fact an employee of the subcontractor, the contractor's workmen's compensation insurance carrier was estopped to deny that it was liable for a portion of the workmen's compensation benefits due because of the employee's death if it accepted premiums for workmen's compensation insurance on the deceased employee.

APPEAL by defendants Cumberland Utilities, Inc. and Aetna Insurance Company from order of the North Carolina Industrial Commission entered 29 December 1976. Heard in the Court of Appeals 8 December 1977.

Plaintiffs instituted this proceeding before the Industrial Commission (Commission) to recover benefits allegedly due them under the Workmen's Compensation Act because of the death of employee Harvey C. Britt (Britt). A hearing on the claim was conducted by Deputy Commissioner Richard B. Conely.

The parties stipulated that on 14 April 1975 they were subject to the Workmen's Compensation Act; that on said date Stand-

ard Fire Insurance Company (Standard Fire) was the carrier for Colony Construction Company (Colony) and that Aetna Insurance Company (Aetna) was the carrier for Cumberland Utilities, Inc. (Utilities); and that on said date Britt sustained an injury by accident arising out of and in the course of his employment, resulting in his death.

The contested issues were: (1) Who was Britt's employer at the time of his injury? (2) What was his average weekly wage at the time? (3) Which carrier was responsible for compensation?

Colony and Standard Fire contended that Britt was an employee of Utilities at the time of his injury and that Aetna was responsible for compensation. Utilities and Aetna contended that he was an employee of Colony at the time and that Standard Fire was responsible for the compensation.

Following a hearing, Deputy Commissioner Conely found facts summarized (except where quoted) in pertinent part as follows:

In January 1975 Utilities hired a full crew of men away from another company. The crew included Archie S. Hunt and Britt. 20 January 1975 was the first day of employment of said crew by Utilities.

On 2 January 1975 Robert M. McNeill, president of Utilities, mailed a written proposal to Colony wherein Utilities proposed to furnish all labor and equipment required to lower and relocate the existing water lines under Owen Drive Expressway in Cumberland County, North Carolina. Said work was contemplated in a contract entered into by Colony with the North Carolina Department of Transportation (D.O.T.) on highway projects 8.2326306 and 8.2326307 (hereinafter sometimes referred to as 306 and 307). Said projects involved Federal aid. As part of its proposal, Utilities offered to include testing and sterilization of the new lines before connecting them with existing lines and promised strict adherence to the specifications for the projects at all times; it was understood that the Post Engineer at Fort Bragg and the D.O.T. would be in charge of inspection of the work. Each item of work was to be paid for on a unit price basis. (The unit price was shown on the exhibits to be a stated amount for each lineal foot of pipe installed.)

On 9 January 1975, S. D. Cribb, vice-president of Colony, sent a counter-proposal to Utilities which, on 10 January 1975, was acknowledged and accepted by McNeill on behalf of Utilities. The resulting contract provided, among other things, that Utilities would furnish labor, equipment, organization and incidental tools for the installation and testing of items of work done on said projects; that payment was to be made on a unit price basis less 10% retainage and less "advances." Colony was to furnish all necessary materials. Utilities was to complete the work within a reasonable time and under the "supervision and coordination of" Colony's project manager.

Colony was the general contractor of said projects and Utilities was a subcontractor thereon although Utilities was not approved as a subcontractor by the State and did not bid directly on the projects as a subcontractor.

After Colony and Utilities had entered into the aforesaid contract, McNeill and Cribb discussed the manner in which payment was to be made to Utilities and to the crew of employees supplied by Utilities for the work. The agreement they reached was as follows: that the employees supplied by Utilities would be listed on Colony's payroll as Colony employees; that said employees would be shown on Colony W-2 forms and W-4 forms; that said employees would be paid by Colony with its checks, based upon the records kept by Archie S. Hunt, at regular Colony pay periods; since D.O.T. paid Colony on a monthly basis, Colony would pay Utilities on a monthly basis for work performed and for which Colony had been paid, based upon the unit prices agreed to, less 10% retainage, less the gross amount of payroll paid to employees supplied by Utilities, and less 17% of the gross amount of said payroll; the 17% added deduction, actually money due and owing to Utilities, was to be taken by Colony to cover payroll taxes, Workmen's Compensation premiums for Utilities' employees and other insurance paid by Colony.

The asserted basis for the method of payment aforesaid was that on highway projects such as the ones in question, in order for a subcontractor to be considered "official", it must be approved by the State and maintain the same records as required for the general contractor; State approved subcontractors are not paid for the work performed until sixty or more days following completion of their work; and it is a common practice to avoid

"such red tape" by adopting the procedures aforesaid with non-approved subcontractors.

The subcontract entered into between Colony and Utilities was because Utilities had expertise in the installation of water pipe which Colony lacked. Colony was primarily a grading contractor, although it was licensed to do utility contracting. Colony was the general contractor to construct the highways which were the subject of projects 306 and 307. Installation of water lines was part of the regular business of Utilities.

The work contemplated in said subcontract began on 18 February 1975. Hunt was the foreman and Britt was a laborer in the work supplied by Utilities for the performance of said contract. Said work crew was the same group of men hired by Utilities in January 1975.

Prior to the time said crew began its work, McNeill told all of the men that during the time they were performing the work involved in the subcontract that they would be employees of Colony. He told Hunt to check with Colony if he needed parts or pipe fittings and that James was the man to speak with. McNeill also required his men to complete new Social Security and W-4 forms. Britt had no prior relationship with Colony.

W. W. Jones was the project manager for projects 306 and 307. James Dowless was Jones' immediate subordinate as supervisor of project 306. Both Jones and Dowless were employees of Colony.

No evidence was presented that Jones or Dowless or anyone else from Colony ever assumed control over the manner in which the work crew performed its work pursuant to the subcontract. To the contrary, the evidence showed that Hunt directed the crew in the performance of its work and that neither Dowless nor Jones ever did so. Nor did Jones or Dowless direct Hunt in the manner in which he performed his work as foreman of his crew. Jones coordinated the work on the project but did not direct the activities of the crew, which was consistent with the fact that Utilities possessed the expertise necessary to perform the subcontract.

The classification and weekly pay rate of the men in the crew, even as to their work done pursuant to the subcontract,

was determined by Utilities. Utilities determined the composition of the crew and only Hunt exercised the power to hire and fire men of said crew. Hunt alone kept the records of the number of hours worked by the crew and although he reported said hours to Jones, it appears that Jones received the information and passed it along to Colony so that the men under Hunt's supervision could be paid.

Although Colony initially paid members of the crew their wages, and held funds belonging to Utilities for the purpose of paying Workmen's Compensation insurance premiums for said employees, in fact Utilities indirectly paid those wages and other items since Colony withheld money owing to Utilities on the unit price of the work performed so as to recoup those expenditures.

During the performance of the work covered by the subcontract, Utilities used said crew, including Britt, on other unrelated projects and maintained separate payrolls for members of the crew. Utilities maintained Workmen's Compensation insurance for all of its employees, including Britt, with Aetna and said carrier had the Workmen's Compensation coverage for employees of Utilities at the time of Britt's injury.

During the time that he was working in the work crew performing said contract, and at the time of his death, Britt was an employee of Utilities and was not an employee of Colony. There was no evidence presented that Britt ever expressly consented to enter into any employment relationship between Utilities and Colony; there was no express appointment or contract of hire entered into between them; and the facts do not show acceptance by Britt of control and direction by Colony's employees over his activities while performing his work under the subcontract so as to warrant a conclusion that he impliedly consented to enter into a new and special employment relationship with Colony.

The wages earned by Britt while in the employ of Utilities include the wages Utilities paid directly and those it paid to him indirectly through Colony. "Thus, under these exceptional conditions it is determined and found as a fact that decedent's average weekly wage at the time of his injury was $89.25."

On 14 April 1975 as Britt, age 24, was working on the Owen Drive Expressway project, an embankment caved in on him causing multiple severe injuries. Hunt uncovered Britt and

transported him to the Cape Fear Valley Hospital in a Utilities van. Although numerous surgical procedures were performed, Britt died on 19 April 1975.

Britt and Deborah Anne Stead were legally married to each other on 5 July 1971 and continued to be married as of the date of Britt's death. Britt's wife was living with him and was dependent upon him for support at the time of his death. On 7 September 1973 Christina Carol Britt was born to said marriage and said child survived her father.

Based upon said findings of fact, Deputy Commissioner Conely made conclusions of law summarized as follows:

At the time of Britt's injury and at the time of his death, he was an employee of Utilities and was not an employee of Colony.

"At the time the decedent was injured his average weekly wage was $89.25. G.S. 97-2(5). By reason of the exceptional circumstances of this case, it would be unfair to the decedent and to his dependents to exclude from the computation of decedent's average weekly wage either the earnings he made on the Utilities payroll or those earned on the Colony payroll, since decedent was an employee only of Utilities, and Utilities ultimately paid the entire amount of the earnings on both payrolls. Such method, therefore, is the closest approximation of decedent's actual earnings as an employee of Utilities. Of course, when an employee who holds two separate jobs is injured in one of them, his compensation is based only upon his average weekly wages earned in the employment producing the injury. *Joyner v. Oil Co.*, 266 N.C. 519, 146 S.E. 2d 447. In the instant case, however, the decedent held only one job and was paid for that job on two separate payrolls. Even those separate payrolls merged into one, however, when Colony recouped its payroll payments to the decedent from Utilities."

The carrier on the risk at the time of Britt's injury was Aetna. Utilities maintained a policy of compensation insurance for all of its employees with Aetna at the time of Britt's injury. Because Britt was an employee of Utilities at the time he was injured, Aetna is determined to be the carrier on the risk and is liable under its policy with Utilities to pay the award here entered.

At the time of Britt's death, Deborah Anne Britt, his widow, and Christina Carol Britt, his child, were wholly dependent upon

him for support and are entitled to receive the entire benefits of the Act for the periods specified in the award. G.S. 97-38; G.S. 97-39.

Based upon the findings of fact and conclusions of law, Deputy Commissioner Conely ordered that Utilities and Aetna pay Britt's widow and child $59.50 per week for a period of four-hundred weeks from 19 April 1975, a total of $23,800, subject to an attorney fee set forth in the award; and that Utilities and Aetna also pay all medical expenses incurred by Britt as a result of his injuries and $500 on his burial expenses.

Defendants Utilities and Aetna appealed to the full Commission. On 21 December 1976 the full Commission entered an order affirming and adopting as its own the opinion and award filed by Deputy Commissioner Conely. On 29 December 1976, the full Commission entered an order making minor amendments to its previous order but reaffirmed and readopted as its own opinion and award filed by Deputy Commissioner Conely.

Defendants Utilities and Aetna appealed.

Teague, Johnson, Patterson, Dilthey & Clay, by C. Woodrow Teague and George W. Dennis III, attorneys for defendants Cumberland Utilities, Inc. and Aetna Insurance Company.

Nance, Collier, Singleton, Kirkman & Herndon, by James R. Nance, Jr., attorneys for plaintiffs.

Anderson, Broadfoot & Anderson, by Hal W. Broadfoot, attorneys for defendants Colony Construction Company and Standard Fire Insurance Company.

BRITT, Judge.

[1] Appellants contend first that the Commission erred in determining that Britt was an employee of Utilities rather than of Colony, and in concluding that a contractor-subcontractor relationship existed between Colony and Utilities. We find no merit in these contentions.

> "Upon review of an order of the Industrial Commission, this Court does not weigh the evidence, but may only determine whether there is evidence in the record to support the finding made by the Commission. *Garmon v. Tridair In-*

> *dustries*, 14 N.C. App. 574, 188 S.E. 2d 523 (1972). If there is any evidence of substance which directly or by reasonable inference tends to support the findings, the court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary. *Keller v. Wiring Co., supra*. . . ."

Russell v. Yarns, Inc., 18 N.C. App. 249, 252, 196 S.E. 2d 571 (1973).

We hold that the evidence was more than sufficient to support the Commission's finding that Britt was an employee of Utilities at the time of the accident which cost him his life. Among other things, the evidence showed that the work crew including Britt and its foreman, Hunt, was hired by Utilities, that a vehicle owned by Utilities and operated by Hunt transported Britt to and from his work each day, that only Utilities had the right to hire and fire, that Utilities decided where Britt would work each day and each hour of the day, and that Utilities determined the amount of his wages. The evidence further showed that the only supervision Colony exercised over the work crew was to see that their work met the D.O.T. specifications.

We also hold that the Commission did not err in concluding that a contractor-subcontractor relationship existed between Colony and Utilities. A subcontractor has been described as "[o]ne who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance." *Lester v. Houston*, 101 N.C. 605, 611, 8 S.E. 366 (1888). Clearly the relationship between Colony and Utilities met this description. It is true that Colony and Utilities agreed that Britt and other members of the work crew would be "employees" of Colony while working on projects 306 and 307, but their agreement to that designation cannot operate to the prejudice of the members of the crew under the facts in this case. The Commission properly determined that the primary reason for the designation was to circumvent certain requirements of the D.O.T.

[2] Appellants contend next that the Commission erred in determining that Britt's average weekly wage was $89.25, this being the aggregate of his wages received from Colony and Utilities. For the reasons hereinbefore and hereinafter stated, we find no

merit in this contention. Our courts have declared many times that the Workmen's Compensation Act will be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow and strict construction. *Stevenson v. Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972); *Hewett v. Garrett*, 274 N.C. 356, 163 S.E. 2d 372 (1968); *Conklin v. Hennis Freight Lines, Inc.*, 27 N.C. App. 260, 218 S.E. 2d 484 (1975).

[3] Appellants contend that defendants Colony and Standard Fire are estopped from denying that the employer-employee relationship existed between Colony and Britt, and that Colony and Standard Fire should pay at least a part of the benefits awarded to plaintiffs. We think this contention has merit.

It is well settled in this jurisdiction that the law of estoppel applies in Workmen's Compensation proceedings as in other cases. *Aldridge v. Motor Co.*, 262 N.C. 248, 136 S.E. 2d 591 (1964); *Ammons v. Sneeden's Sons, Inc.*, 257 N.C. 785, 127 S.E. 2d 575 (1962); *Biddix v. Rex Mills*, 237 N.C. 660, 75 S.E. 2d 777 (1953); *Greene v. Spivey*, 236 N.C. 435, 73 S.E. 2d 488 (1952); *Pearson v. Pearson, Inc.*, 222 N.C. 69, 21 S.E. 2d 879 (1942); *Allred v. Woodyards, Inc.*, 32 N.C. App. 516, 232 S.E. 2d 879 (1977); 8 Strong's N.C. Index 3d, Master and Servant, § 81, page 649.

In *Aldridge v. Motor Co., supra*, the evidence established that the officers of a close corporation owned certain realty, including the building in which the corporate business was carried on; that the officers employed the claimant to keep their several properties in repair, and told the local agent of their insurer that they wanted the employee covered by the corporation's compensation insurance policy; and that, in response to the agency's assurance that this would be accomplished by putting the employee on the corporation's payroll, they did so, so that his remuneration was included in computing the insurance premium. The court held that the insurer was estopped from denying that an injury to such employee while repairing property unconnected with the corporate business was within the coverage of the policy.

In the case at hand the evidence disclosed that Colony and Utilities agreed that when Utilities' work crew, including Britt, was working on projects 306 and 307, members of the crew would be Colony's "employees"; that Colony made deductions from its

payments to Utilities to cover Workmen's Compensation insurance premiums on the wages paid Britt and other members of the crew; and that Colony's carrier, defendant Standard Fire, accepted those premiums.

While the cited cases, establishing or following the principle that the law of estoppel applies in Workmen's Compensation proceedings as in other cases, dealt with claims as between employees and carriers, we perceive no reason why the principle would not apply also to claims as between carriers.

"The doctrine of estoppel springs from equitable principles and the equities in the case." 28 Am. Jur. 2d, Estoppel and Waiver, § 28, page 629. Certainly it would be inequitable in this case to limit Britt's dependents to a recovery of benefits based on the part of his labors performed on Colony projects. In like manner, we think it would be inequitable for Standard Fire to escape all liability after Colony collected premiums for Workmen's Compensation insurance on Britt's wages and Standard Fire accepted those premiums.

We hasten to add that while the Commission found as a fact that Colony made deductions to cover Workmen's Compensation insurance premiums on Britt, it made no finding that those premiums were accepted by Standard Fire although there is evidence to that effect.

For the reasons stated, while holding that the Commission properly determined that Britt was an employee of Utilities and that his dependents are entitled to recover benefits based on his aggregate wages received from Utilities and Colony, we also hold that the Commission should have made a finding as to Standard Fire's acceptance or non-acceptance of Compensation insurance premiums collected by Colony on Britt's wages paid by Colony.

Consequently, this cause is remanded to the Industrial Commission for further findings of fact and determinations. Should the Commission find that said premiums were accepted by Standard Fire, then the Commission will determine the proportion that the wages paid Britt by Colony bears to his total wages for the period of time during which he worked for Utilities and Colony. The Commission will then amend its order to provide that Standard Fire pay its proportionate part of the award.

The Commission may receive such additional evidence as it deems necessary to make said findings and determinations.

Remanded.

Judges PARKER and VAUGHN concur.

NORTH BROOK FARM LINES, INC. v. GEORGE W. McBRAYER

No. 7727DC145

(Filed 17 January 1978)

1. **Rules of Civil Procedure §§ 4, 55— nonresident defendant—default judgment—service of process within N. C. not required**

The trial court erred in concluding as a matter of law that a default judgment could not be entered against a nonresident defendant unless said nonresident defendant was actually served with summons with a copy of the complaint attached within the boundaries of North Carolina, since G.S. 1A-1, Rule 4(j)(9)b clearly authorizes under certain conditions service of process by registered mail where the party to be served cannot be served within and is not an inhabitant of this State.

2. **Rules of Civil Procedure § 55— nonresident defendant—default judgment—no opportunity to appear required**

The trial court erred by concluding as a matter of law that a default judgment could not be entered against a nonresident defendant without providing the defendant an opportunity to appear by forwarding said defendant a copy of the trial calendar at least three days prior to the term of civil court in which defendant's case had been calendared.

3. **Rules of Civil Procedure § 55— entry of default—no motion to set aside—setting aside improper**

Where the clerk properly made an entry of default against the nonresident defendant after plaintiff filed two affidavits showing that service was had on defendant by certified mail pursuant to Rule 4(j)(9)b, that defendant had failed to respond within the required time, and that defendant was neither an incompetent nor an infant, the trial court erred in setting aside the entry of default, since defendant failed to make or file a motion to set aside the entry of default as required by Rules 55(d), 5(a),(d),(e), and 7(b).

4. **Rules of Civil Procedure § 55— nonresident defendant—failure to show jurisdictional grounds—default judgment improper**

The trial court properly set aside the default judgment against the nonresident defendant since plaintiff failed to comply with the proof of jurisdictional grounds requirement of G.S. 1-75.11 in that it failed to make and

file any affidavit or other evidence which showed the necessary grounds for personal jurisdiction under G.S. 1-75.4 not shown in plaintiff's verified complaint.

APPEAL by defendant from *Phillips, Judge.* Order entered 8 December 1976 in District Court, LINCOLN County. Heard in the Court of Appeals 7 December 1977.

On 4 June 1976 plaintiff filed a verified complaint alleging that defendant was a resident of Georgia, that plaintiff had loaned defendant money in the amount of $5,000 during the period from 8 April 1976 through 1 June 1976, and that defendant had failed to repay. On the same date summons was issued and an affidavit in attachment was filed by plaintiff. In the affidavit plaintiff alleged that defendant was not a resident of North Carolina and that he was intending to defraud his creditors by removing property from the state. The clerk entered an attachment order and the sheriff levied on defendant's tractor-trailer and a refrigeration unit.

Defendant could not, after due diligence, be served within North Carolina. On 24 June 1976 plaintiff mailed a copy of the summons and complaint by certified mail, return receipt requested, to defendant at an address in Georgia. According to the certified receipt, defendant received the summons and complaint on 28 June 1976. On 10 August 1976, plaintiff filed an affidavit pursuant to G.S. 1A-1, Rule 4(j)(9)b, showing service of process by certified mail on defendant and a request for entry of default since defendant had failed to respond to the summons and complaint within the time allowed by the Rules of Civil Procedure. On the same date, the clerk entered default pursuant to G.S. 1A-1, Rule 55(a).

On 18 August 1976 a hearing was held on plaintiff's motion for judgment by default before Judge Bulwinkle who found facts to the effect that plaintiff, a North Carolina corporation, filed a complaint against defendant, a Georgia resident, on 4 June 1976, seeking to recover $5,000 allegedly loaned to defendant; that on the same date the court caused to be attached a tractor-trailer belonging to defendant; that defendant received a copy of the summons and complaint by certified mail; that plaintiff and defendant entered into several agreements whereby defendant was to furnish tractor-trailers and drivers who were to deliver freight

and other cargo for which plaintiff had arranged delivery; that in carrying out these agreements, defendant's vehicles and drivers were frequently in North Carolina and even came by plaintiff's place of business; that defendant was in constant communication with plaintiff's business office in North Carolina; that "the defendant was engaged in and doing substantial business in North Carolina" pursuant to his agreements with plaintiff; and that according to plaintiff's records, defendant actually owed plaintiff $5,926.93 but plaintiff was limited to default judgment relief of $5,000 since that was the amount which he had requested in his complaint. Based on the findings of fact, the court concluded as a matter of law that it had *in personam* jurisdiction over defendant, that it had *in rem* jurisdiction over defendant's attached property, and that defendant was indebted to plaintiff in the amount of $5,926.23. Judge Bulwinkle then ordered that plaintiff have an *in personam* judgment against defendant in the amount of $5,000, and an *in rem* judgment on the attached tractor-trailer which was to be sold with proceeds being applied against the $5,000 *in personam* judgment. The judgment was filed 24 August 1976.

On 30 September 1976, defendant, pursuant to G.S. 1A-1, Rule 60, moved to set aside the default judgment on three different grounds: first, while admitting that he was served with summons and complaint (by certified mail) on 28 June 1976, defendant asserted that he was never served with an affidavit in attachment, that he did not have legal counsel in North Carolina on 10 August 1976 when the entry of default was made, and that plaintiff did not file a proper motion or affidavit moving for entry of a default judgment as required by Rule 55(b)(1); second, on the grounds of surprise, inadvertence and excusable negligence in that he had no notice of the attachment and levy on his tractor-trailer in North Carolina; and third, on the ground that there was a controversy as to the amount he was indebted to plaintiff.

Defendant also asked that he be allowed to post a $5,000 bond in order to secure a release of his personal property that was being held pursuant to the attachment. On 5 October 1976 defendant posted a $5,000 bond, and an order was entered for the release of the attached property.

On 8 December 1976, Judge Phillips entered an order granting defendant's motion to set aside the default judgment and

made the four following "findings of fact" to which plaintiff excepted:

> That under and by virtue of the laws and statutes of the State of North Carolina, a default judgment cannot be entered against a nonresident defendant unless and until said nonresident defendant was actually served with summons with copy of complaint attached, within the boundaries of the State of North Carolina;
>
> EXCEPTION NO. 1.
>
> That, further, a judgment of default cannot be entered against a nonresident defendant without providing the defendant an opportunity to appear, by forwarding said defendant a copy of the trial calendar at least three days prior to a term of civil court in which the defendant's case has been calendared;
>
> EXCEPTION NO. 2.
>
> That in the civil action at hand, entry of default against this nonresident defendant was improper under the laws and statutes of the State of North Carolina and should be set aside;
>
> EXCEPTION NO. 3.
>
> That the default judgment entered on the 18th day of August, 1976 and filed in this civil action is also improper against this nonresident defendant and must be set aside.
>
> EXCEPTION NO. 4.

Plaintiff appealed.

Thomas M. Shuford, Jr., for plaintiff appellant.

M. Clark Parker for defendant appellee.

BRITT, Judge.

Although Judge Phillips classified the four statements to which plaintiff takes exception as findings of fact, they are in fact conclusions of law and for purposes of appellate review will be treated as such. "A conclusion or inference of law by the lower court is reviewable, even though the lower court denominates it a

finding of fact." 1 Strong's N.C. Index, Appeal and Error § 57.3, p. 345. *See Roberts v. Coca-Cola Bottling Company*, 256 N.C. 434, 124 S.E. 2d 105 (1962).

[1] Plaintiff contends first that the trial court erred in concluding as a matter of law that a default judgment cannot be entered against a nonresident defendant unless said nonresident defendant is actually served with summons with a copy of the complaint attached within the boundaries of North Carolina. We find merit in this contention.

G.S. 1A-1, Rule 4(j)(9)b clearly authorizes service of process by registered or certified mail on any party to an action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, where the party to be served cannot after due diligence be served within, and is not an inhabitant of, this state.

This being an action in contract for $5,000, the district court had jurisdiction of the subject matter. G.S. 7A-240, 243. The next question is, did said court have grounds for *personal* jurisdiction as provided in G.S. 1-75.4? We answer in the affirmative.

G.S. 1-75.4(5) provides that a court of this state having jurisdiction of the subject matter has jurisdiction over a person served pursuant to Rule 4(j) in any action which:

a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or

b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or

c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or . . . .

The record and the facts found by Judge Bulwinkle establish that plaintiff fully complied with Rule 4(j)(9)b with respect to the alternate method of service of process by certified mail, and that the court had personal jurisdiction over defendant under the provisions of G.S. 1-75.4(5). We hold that the District Court of Lincoln County had personal jurisdiction over defendant. *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945); *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E. 2d 676 (1974).

[2] Next, plaintiff contends that the trial court erred by concluding as a matter of law that a default judgment could not be entered against a nonresident defendant without providing the defendant an opportunity to appear by forwarding said defendant a copy of the trial calendar at least three days prior to the term of civil court in which defendant's case has been calendared. We find merit in this contention.

A review of the Rules of Civil Procedure, the General Rules of Practice for the Superior and District Courts, and the North Carolina case law does not reveal any basis for Judge Phillips' conclusion of law to which plaintiff's Exception No. 2 relates. G.S. 1A-1, Rule 55(b)(2), requires that a defendant *who has appeared in the action* be served with written notice of the application for a default judgment at least three days prior to the hearing on the application. However, this provision is inapplicable in the present case since the defendant did not make an appearance in the action prior to the entry of default by the clerk on 10 August 1976 or the default judgment on 18 August 1976.

[3] Plaintiff contends next that Judge Phillips erred by setting aside the entry of default against the nonresident defendant. We agree with this contention.

Under Rule 55(a), entry of default by the clerk is proper "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit or otherwise." In the present case, plaintiff filed two affidavits on 10 August 1976 showing that service was had on defendant by certified mail on 28 June 1976 pursuant to Rule 4(j)(9)b, that defendant had failed to respond within the required time, and that defendant was neither an incompetent

nor an infant. Based on this information, the clerk made an entry of default on 10 August 1976. This entry of default by the clerk must stand until properly set aside.

Rule 55(d) governs the setting aside of an entry of default and provides:

> (d) *Setting aside default.* — For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b).

In the present case, the defendant properly made and filed a motion to set aside the *default judgment* in accordance with Rules 60(b), 7(b) and 5(a), (d), (e), but he failed to make or file a motion to set aside the *entry* of default as required by Rules 55(d), 5(a), (d), (e), and 7(b).

Rule 5 sets forth the requirements for service and filing of pleadings and motions. Rule 7(b)(1) provides that "[a]n application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state the grounds therefor, and shall set forth *the relief or order sought.* . . ." (Emphasis ours.)

In his "motion" filed 30 September 1976, defendant sets forth four motions. In the first one he asks that the default judgment dated 18 August 1976 be set aside and states several reasons therefor. In his second and third motions he asks that the default judgment be set aside on the grounds (1) of surprise, inadvertence and excusable negligence, and (2) that there is a controversy as to whether defendant is indebted to plaintiff in any amount. In the fourth motion he asks for the release of his property upon the posting of bond. At no place in his "motion" does defendant ask that the entry of default be set aside.

We hold that Judge Phillips erred in finding and concluding that the entry of default was improper and should be set aside.

[4] Plaintiff contends next that the trial court erred in setting aside the default judgment of 18 August 1976. We find no merit in this contention.

Judge Phillips' ruling setting aside the default judgment was proper because the plaintiff failed to comply with the proof of jurisdictional grounds requirement of G.S. 1-75.11 before Judge Bulwinkle granted the default judgment.

G.S. 1-75.11 provides:

> Judgment against nonappearing defendant, proof of jurisdiction. — Where a defendant fails to appear in the action within apt time the court shall, before entering a judgment against such defendant, require proof of service of the summons in the manner required by § 1-75.10 and, in addition, shall require further proof as follows:
>
> (1) Where Personal Jurisdiction Is Claimed Over the Defendant. — Where a personal claim is made against the defendant, the court shall require proof by affidavit or other evidence, *to be made and filed*, of the existence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over the defendant. The court may require such additional proof as the interests of justice require. (Emphasis added.)
>
> (2) Where Jurisdiction Is in Rem or Quasi In Rem — Where no personal claim is made against the defendant, the court shall require such proofs, by affidavit or otherwise, as are necessary to show that the court's jurisdiction has been invoked over the status, property or thing which is the subject of the action. The court may require such additional proof as the interests of justice require.

In the case at hand, plaintiff fulfilled all the requirements for entry of default by the clerk, and for default judgment under Rule 55, but he failed to meet the proof of jurisdictional grounds requirement of G.S. 1-75.11. G.S. 1-75.11 basically requires two things before a default judgment can be entered against a nonappearing defendant who was served by certified mail. First, there must be proof of service of summons in the manner required by G.S. 1-75.10(4). Plaintiff's affidavits of 10 August 1976 fulfilled this requirement. Second, "[w]here a personal claim is made against the defendant, the court shall require proof by affidavit or other evidence, *to be made and filed*, of the existence of

any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over the defendant." (Emphasis added.) Plaintiff failed *to make and file* any *affidavit or other evidence* which showed the necessary grounds for personal jurisdiction under G.S. 1-75.4 not shown in plaintiff's verified complaint. We hold that Judge Phillips properly set aside the default judgment. *Hill v. Hill*, 11 N.C. App. 1, 180 S.E. 2d 424, *cert. denied* 279 N.C. 348, 182 S.E. 2d 580 (1971).

Finally, plaintiff contends that the trial court erred in signing the order setting aside the entry of default and the default judgment. For the reasons stated above, we conclude that the court did err in setting aside the entry of default, but it did not err in setting aside the default judgment.

The provisions of the order appealed from to which plaintiff's Exceptions 1, 2 and 3 relate, and the provision setting aside the entry of default, are vacated; the remaining provisions of the order are affirmed and this cause is remanded to the district court for further proceedings.

Reversed in part, affirmed in part, and cause remanded.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. LAWRENCE RAYE BYRD

No. 7710SC604

(Filed 17 January 1978)

Criminal Law §§ 75.12, 177.2— in-custody statements barred under Miranda decision—use for impeachment—absence of determination of voluntariness—remand for hearing

In this incest prosecution in which inculpatory statements made by defendant during custodial interrogation were excluded by the trial court as substantive evidence on the ground that the illiterate defendant did not have the mental capacity to understand his right to counsel, the trial court erred in admitting the inculpatory statements on rebuttal for the purpose of impeaching defendant without first finding that the statements were made voluntarily and understandingly, and the case is remanded to the superior court for a hearing to determine whether the statements were so made. If the presiding judge determines that the statements were not made voluntarily and

understandingly, he should enter an order setting aside defendant's conviction and granting him a new trial.

APPEAL by defendant from *Clark, Judge*. Judgments entered 28 March 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 29 November 1977.

Defendant pled not guilty to two charges of incest with his stepdaughter, age 19, on 29 December and 30 December 1976.

The stepdaughter testified that on 29 December 1976 she took her mother to the hospital, that after she went to bed that night defendant came to her bedroom and had sexual intercourse with her. On the following night defendant again came to her bedroom and had sexual intercourse with her. Defendant had been having sexual intercourse with her intermittently for seven or eight years. She did not tell her mother, an invalid, because she was afraid that her mother would try to protect her and defendant, who on occasions had beaten them, would hurt her mother. On 31 December 1976 she told her boyfriend because she was upset and could not take it. On the following day she went to the hospital and told her mother, and then talked to Deputies Lockamy and Lanier.

Defendant was called by phone and came to the Sheriff's office. The deputies talked to him. The trial court ordered a *voir dire* to determine the admissibility of defendant's statement.

In the *voir dire* hearing Deputies Lockamy and Lanier testified that defendant was told he was suspected of having sexual intercourse with his stepdaughter; his *Miranda* rights were read to him; when they learned that defendant could not read or write (other than to sign his name) the rights were explained to him and he said that he understood; defendant signed a written waiver form after it was fully explained to him. Defendant testified in the hearing that he was told to sign a paper and he did so, that Deputy Lockamy began yelling at him like a maniac, pounding the table and hollering that defendant attacked her; that he had a headache and was nervous; and that he never got out of the first grade and quit school at age 14.

The trial court found that defendant was subjected to a custodial interrogation that defendant had been fully advised of his *Miranda* rights, but that defendant was "not then of such men-

tal capacity to fully understand that he did then have the right and privilege to request the assistance of an attorney, if desired . . . ." The defendant's statement was found inadmissible.

Defendant testified at trial, denying that he ever had sexual intercourse with his stepdaughter; that he loved her and his wife and had never beaten her. He was cross-examined about statements he made to Deputy Lockamy but denied making any statement implying guilt.

On rebuttal, Deputy Lockamy testified, over defendant's objection, that when he asked defendant if he had sexual relations with his stepdaughter on 29 December 1976, defendant replied, "I guess there is no . . . reason. . . . I do a lot of things I know is wrong. . . . I reckon I will lose everything." Defendant was asked why he did it and replied, "I don't know." He asked defendant several times if he had sexual intercourse with his stepdaughter, and defendant said he didn't remember it and "I guess there is no . . . reason."

Defendant was convicted of both charges, and appeals from judgment imposing prison terms.

Attorney General Edmisten by Associate Attorney Donald W. Grimes for the State.

Thomas L. Barringer for defendant appellant.

CLARK, Judge.

The first issue raised by this appeal is whether the trial court erred in admitting on rebuttal for the purpose of impeachment inculpatory statements made by defendant to the investigating officer during custodial interrogation but denied by defendant at trial.

For the first time since *Miranda* [*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966)] laid down definitive rules to prevent police abuse in custodial interrogations, the United States Supreme Court, in *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971), contracted rather than expanded the exclusionary rule by its holding that in-custody statements made voluntarily and understandingly, even though excluded by *Miranda* from the prosecution's case in chief as

substantive evidence, may be used to impeach a testifying defendant's credibility.

The court rejected the idea that this expansion would encourage impermissible police conduct for that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." However, to be admissible as impeachment evidence, it is clear that the confession must satisfy the legal standards of trustworthiness—that it was voluntarily and understandingly made though *Miranda*-barred. And see *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed. 2d 570 (1975).

In *State v. Bryant*, 280 N.C. 551, 187 S.E. 2d 111 (1972), where the State in its case in chief did not attempt to offer the defendant's custodial confession, but after defendant on cross-examination denied he told law officers that he used a knife and choked the rape victim, the State offered in rebuttal the testimony of an interrogating officer that defendant told him he used a switchblade knife and choked her. Defendant's admission was *Miranda*-barred because he admittedly had not waived his right to counsel. The trial court instructed the jury that the evidence was admitted for purpose of impeachment only, but made no finding that the admission was voluntarily and understandingly made. In finding no error the Supreme Court overruled *State v. Catrett*, 276 N.C. 86, 171 S.E. 2d 398 (1970), which held a *Miranda*-barred confession not admissible for any purpose, because it was based on an interpretation of the *Miranda* decision, but that interpretation was rejected by the United States Supreme Court in *Harris v. New York*, *supra*.

State v. Bryant, *supra*, did not discuss the absence of any finding by the trial court that defendant's admission met the legal standards of trustworthiness, but it does not appear that defendant requested a *voir dire* or offered evidence contradicting voluntariness. Though *Bryant* and *Oregon v. Hass*, *supra*, are authority for the proposition that where there is no evidence of involuntariness or coercion the trial court is not required to find that the *Miranda*-barred admission was voluntary, it is the better practice for the trial judge to chart the admissibility of a *Miranda*-barred admission by finding, either after *voir dire* during the State's case in chief or upon defendant's objection during rebuttal, whether the statement was voluntarily and understandingly made. And if found to have been voluntarily made, the trial

judge should find that he was so satisfied by the preponderance of the evidence in order to meet the standard of proof required by the prosecution in *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed. 2d 618 (1972).

In the case before us we do not find *State v. Bryant, supra,* to support the admissibility of defendant's *Miranda*-barred admission made to the interrogating officer. In the case *sub judice* the trial court found that the illiterate defendant did not have the mental capacity to understand his right to counsel. This showing of illiteracy and finding of mental incapacity to understand his right to counsel casts some doubt not only upon his capacity to understand any of the *Miranda* rules but also upon the voluntariness of his admission in light of defendant's testimony that the interrogating officers shouted at him and beat on the table. Under these circumstances, with the burden on the State to satisfy the trial judge of voluntariness by the preponderance of the evidence, we find that the trial judge erred in admitting defendant's admission for impeachment in the absence of a finding of voluntariness. See *State v. Langley*, 25 N.C. App. 298, 212 S.E. 2d 687 (1975), where the circumstances surrounding the custodial interrogation are somewhat similar to those in the case before us, but the trial judge in *Langley* did not instruct the jury that the rebuttal testimony was admitted for purpose of impeachment only. The trial court in the case *sub judice* properly instructed the jury that defendant's statement was not substantive evidence but for impeachment.

Nor do the circumstances in the case before us justify a finding of harmless error. In *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed. 2d 1 (1972), there was a ruling of harmless error, but there was "overwhelming evidence of guilt," including three properly admitted pre-indictment confessions that revealed essentially the same information as his statement to the undercover officer. In the case *sub judice* there were no other properly admitted confessions and the evidence of defendant's guilt cannot be classed as overwhelming. We find prejudicial error requiring remand to the trial court for determination of whether the statement made by the defendant during custodial interrogation was voluntarily and understandingly made. However, we do not find it necessary to order a new trial because the question of voluntariness may be determined by the trial court and there was no

other harmful error. Where there is prejudicial error in the trial court involving an issue or matter not fully passed on and determined by the court, this Court has remanded the action to the trial court for appropriate proceedings to determine the issue or matter without ordering a new trial. *See State v. Roberts*, 18 N.C. App. 388, 197 S.E. 2d 54 (1973), remanded for determination of whether defendant was denied a speedy trial; *State v. Martin*, 18 N.C. App. 398, 197 S.E. 2d 58 (1973), remanded for determination of whether there was a plea bargain; *State v. Moses*, 25 N.C. App. 41, 212 S.E. 2d 226 (1975), and *State v. Ingram*, 20 N.C. App. 35, 200 S.E. 2d 417 (1973), remanded in both cases for determination of whether identification at trial was of independent origin and untainted by illegal pretrial identification procedure.

We have carefully examined the defendant's three other assignments of error and find that they involve matters which rest largely within the broad discretion of the trial judge, and we find no abuse of discretion and no showing of harmful prejudice.

Therefore, this cause is remanded to the Superior Court of Wake County where a judge presiding over a criminal session will conduct a hearing, after due notice and with defendant and his counsel present, to determine whether the statement allegedly made by the defendant to Deputy Sheriff R. D. Lockamy, a rebuttal witness for the State, during custodial interrogation was made voluntarily and understandingly. If the presiding judge determines that the statement was not voluntarily and understandingly made, he will make his findings of fact and conclusions and enter an order vacating the judgment appealed from, setting aside the verdict, and granting defendant a new trial. If the presiding judge determines by the preponderance of the evidence that the statement of the defendant was made voluntarily and understandingly, he will make his findings of fact and conclusions, and order commitment to issue in accordance with the judgment appealed from and entered on 28 March 1977.

No error in the trial except on the issue of whether defendant's custodial statement was voluntary.

Remanded with instructions.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. WALTER LEE ROY JONES

No. 7720SC398

(Filed 17 January 1978)

1. **Homicide § 21.7— spanking baby—second degree murder—sufficiency of evidence**

Evidence was sufficient to support a verdict finding defendant guilty of second degree murder where it tended to show that the twenty month old infant victim was alive and well before being left alone with defendant, the husband of the child's mother; three and a half hours later the child was dead; during that entire time the child and defendant were alone together; the child's death resulted from a trauma sufficiently severe to tear his liver almost in two; defendant required the baby to stand at attention for a protracted period; and defendant admitted that he spanked the baby and hit the baby hard.

2. **Homicide § 14.1— attack on infant with hands—malice implied**

The malice required for second degree murder may be implied from evidence that the victim's death resulted from an attack by hands alone, without use of other weapons, when the attack was made by a mature man upon a defenseless infant.

APPEAL by defendant from *Gavin, Judge*. Judgment entered 24 February 1977 in Superior Court, STANLY County. Heard in the Court of Appeals 29 September 1977.

Defendant was tried on his plea of not guilty to an indictment charging him with the first degree murder of Michael Leak, the twenty-month old son of defendant's wife. The child was born approximately one year prior to the marriage of defendant and Vivian Leak Jones, the child's mother.

The State presented evidence to show: On 16 January 1977 Henrietta Williams and Floyd Ingram visited in the home of defendant and his wife, arriving sometime between 6:00 and 7:00 p.m. About 7:00 p.m. Vivian Leak Jones purchased a half-pint of vodka for defendant. About 8:30 p.m. Miss Williams and Mrs. Jones left the house. When they left, Michael appeared to be healthy and uninjured. Ingram noticed that Michael was somewhat irritable, and he observed defendant spanking the child on the leg with a plastic comb. Defendant told Michael to be quiet and then made him stand at attention. Ingram left the house at approximately 9:30 p.m. When he left, Michael was still standing

at attention and had been standing at attention approximately five to fifteen minutes. The child was uninjured when Ingram left.

Mrs. Jones returned to the house alone at approximately 1:00 a.m. to find defendant and Michael lying on the same bed. Defendant was asleep, and after being awakened, he and Mrs. Jones drank two beers each as they talked and watched television. After drinking the beers, defendant went into the bathroom, and Mrs. Jones walked over to the bed where Michael was lying to check on him. She then discovered that Michael was not breathing. Mrs. Jones did not move the child; she only felt to see if he was breathing. She called to defendant, and he returned immediately to the bedroom to check on Michael. Defendant lifted the child, looked in his eyes, and touched his chest area. Mrs. Jones observed no injuries on Michael, but there was some blood on his diaper.

Leaving the dead child in the house, both defendant and Mrs. Jones went to a neighbor's house to call the police. When Henry Griffin, a police officer, arrived at the house at approximately 2:30 a.m., defendant appeared calm and unemotional, and he did not appear to be under the influence of any intoxicating beverage. The only light in the bedroom came from the television, which was still on. Michael's body was still on the bed. While Officer Griffin examined the body, defendant sat and watched television. The television was quite loud, and Officer Griffin's partner had to ask defendant to lower the volume on the television so he could obtain information from defendant. Officer Griffin observed that Michael had a swollen and slightly scratched upper lip and a small blood spot under each nostril. He also described a bloody spot or streak on the bed "where it appeared the child had been drug across the bed."

The pathologist who performed an autopsy on 17 January 1977 testified that there were large, apparently diluted, blood stains on the child's diapers and caked blood over his buttocks and between his legs and beneath his scrotum. There were small amounts of blood within the nostrils. There were both old and recent abrasions and bruises on the child's body, these being on his chest, abdomen, and right forearm. There was a recent abrasion on his upper lip, a recent bruise on the left forehead, and a fresh abrasion over the right buttock. Inside the child's chest cavity there was a large area of fresh hemorrhage beneath the surface

of the right diaphragm and in the base of the right lung. Within his abdomen there was approximately 75 to 100 milliliters of fresh blood and free lying blood clots, and a "very large V-shaped, irregular laceration of the liver on its left side, almost in the midline that virtually, but not completely, bisected the liver, that is, broke it in two." Hemorrhage extended downward from the liver into an area which showed a rupture of the urethra. There was a small amount of bloody urine in the urinary bladder.

In the opinion of the pathologist, the child's death was caused by the blood and blood clots in the peritoneal cavity, secondary to the rupture of the liver, which was in turn caused by some trauma, and death "probably occurred somewhere within five minutes after the trauma occurred." Concerning the trauma, the pathologist testified:

> This type of trauma, in my opinion, was such that it created an intense and rather sudden increase in the intra-abdominal pressure, so that the pressure on the liver and the capsule that surrounds the liver, couldn't stand this pressure, and it ruptured. I could say you could liken it to squeezing a balloon to the point where it pops.

On cross-examination, the pathologist testified that the only recent abrasions on the child's body were the one on the lip and the one on the right buttock; that the other abrasions "could have happened days or weeks or months before;" that in his opinion the trauma that resulted in rupturing the liver was inflicted to the child's abdomen; that he did not find any abrasions to the abdomen that he could say would be a causative factor of trauma; and that it was extremely unlikely that any trauma inflicted to the buttocks of the child could have caused a rupture of the child's liver.

Police Officer Bruce McSwain interviewed defendant on the day following Michael Leak's death. Officer McSwain took defendant's statment and reduced it to writing, and defendant signed the written statement. The text of the statement, which was introduced in evidence after a *voir dire* hearing was conducted to determine its competency, is as follows:

> About 10:00 P.M. on Saturday night, my wife, Vivian Marie Jones, was at the Sportsman's Club. I, Walter Lee Roy Jones, spanked Michael Leak with a comb. He had been crying. I

spanked the baby on the back. I don't know how many times I hit the baby. I was pissed off at the baby for crying. I had drunk some vodka. I started drinking about 7:30 P.M. I drunk a half pint by 9:00 P.M. I was feeling bad. I had something on my mind. I was supposed to go to Court on January the 17, 1977. I was trying to find out how I could raise the money. The baby kept crying, and he got on my nerves. I kept telling him to hush up. He kept crying. It looked like he would stop, and then start back up. I was spanking the baby on the floor. I had ahold of one of his hands and was spanking the baby on the back. He hit his mouth on the side of the bed. After I spanked the baby, I put it to bed, and it went to sleep. The shirt the baby had on had blood on it. I took the shirt off and put it in the laundry basket. I spanked the baby hard. I would say that I spanked it bad. When I first grabbed the baby, I grabbed it up by the collar. I told him I was going to spank him. I, Walter Jones, yelled at him. I slapped him. I started spanking him with the comb. Then I spanked him with my hands. I told him to hush. He didn't hush. I spanked him some more with my hands. I hit him hard. I know I hit him hard. He didn't want to stand up. I kept telling him to stand up. He was a hard-headed child. Sometimes, I would stand him up and make him stand there for thirty minutes for punishment.

The defendant did not introduce evidence. The jury found him guilty of second degree murder. From judgment on the verdict, defendant appealed.

Attorney General Edmisten by Associate Attorney James L. Stuart for the State.

Coble, Morton, Grigg & Odom by Ernest H. Morton, Jr., for defendant appellant.

PARKER, Judge.

At the close of the evidence, the court granted defendant's motion to dismiss the charge of first degree murder but denied his motion to dismiss as to all lesser included offenses. On this appeal, the sole question presented for review concerns the court's denial of defendant's motion to dismiss the charges of second degree murder and voluntary manslaughter. Defendant concedes

that the evidence was sufficient to carry the case to the jury on the charge of involuntary manslaughter, but he contends it was insufficient to support a verdict finding him guilty of second degree murder or voluntary manslaughter. We find no error.

"A motion to nonsuit in a criminal case requires consideration of the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. . . . If there is substantial evidence — whether direct, circumstantial, or both — to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied." *State v. McKinney*, 288 N.C. 113, 117, 215 S.E. 2d 578, 581-82 (1975). Viewing the evidence in the present case in the light most favorable to the State, we find it sufficient to support findings both that the offense of second degree murder was committed and that defendant committed it.

[1] There was evidence from which the jury could find that at 9:30 p.m. on 16 January 1977 Michael Leak, a twenty-month old baby boy, was alive and well. Three and a half hours later he was dead. During that entire time he and defendant were alone together in the house. His death resulted from a trauma sufficiently severe to tear his liver almost in two. At the beginning of the three and a half hour period the baby, although well, bore abrasions and bruises which furnish mute evidence that he had previously been subjected to physical abuse by someone. At the beginning of the three and a half hour period the defendant, a grown man, was engaged in forcing the baby to stand at attention for a protracted period. Defendant admitted that he later "spanked the baby on the back," that he didn't "know how many times [he] hit the baby," that he "was pissed off at the baby for crying," that the baby kept crying and he kept telling him to hush up, that he "spanked the baby hard," that he would say that he "spanked it bad," that he "started spanking him with the comb" and then spanked him with his hands, that he "hit him hard," that he knew he "hit him hard." Although defendant's statement to the officer was that after he spanked the baby, he put it to bed and it went to sleep, the State was not bound by the exculpatory portion of defendant's confession, since there was other evidence tending to throw a different light on the circumstances of the homicide. *State v. Bright*, 237 N.C. 475, 75 S.E. 2d 407 (1953). The more rea-

sonable inference which the jury could draw from all of the evidence in this case is that the baby did not go to sleep but that he died and that his death resulted immediately and proximately from the hard blows inflicted on him by the defendant. That the pathologist was unable to identify any particular recent bruise or abrasion on the outside of the child's body as having been caused by the particular blow which ruptured his liver and resulted in his death does not require an inference that defendant never delivered such a blow. The more reasonable inference from all of the evidence is that he did.

[2] "A specific intent *to kill*, while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder or manslaughter." *State v. Gordon*, 241 N.C. 356, 358, 85 S.E. 2d 322, 324 (1955). "Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Foust*, 258 N.C. 453, 458, 128 S.E. 2d 889, 892 (1963). The malice required for second degree murder may be implied from evidence that the victim's death resulted from an attack by hands alone, without use of other weapon, when, as here, the attack was made by a mature man upon a defenseless infant. *State v. Sallie*, 13 N.C. App. 499, 186 S.E. 2d 667 (1972). We find the evidence in the present case sufficient to sustain the jury's verdict finding defendant guilty of second degree murder.

No error.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. OBIE CARRINGTON, JR.

No. 7715SC575

(Filed 17 January 1978)

1. Criminal Law § 11— accessory after the fact— sufficiency of indictments

Indictments were sufficient to charge defendant with the crimes of being an accessory after the fact to murder and armed robbery by an unknown black male after the court struck references in the indictments to a named person who had earlier been acquitted of the murder and robbery.

2. Criminal Law § 11; Indictment and Warrant § 12.2— accessory after fact—indictment—striking reference to named principal

The trial court did not err in striking any reference to "Arthur Parrish" from indictments charging defendant with being an accessory after the fact to murder and armed robbery by Arthur Parrish and another unknown black male since the change in the indictments did not expand the charges against defendant and did not constitute an amendment prohibited by G.S. 15A-923(e).

3. Indictment and Warrant § 12— meaning of "amendment"

As used in the statute prohibiting the amendment of an indictment, G.S. 15A-923(e), *amendment* means any change in the indictment which would substantially alter the charge set forth in the indictment.

4. Criminal Law § 11— accessory after the fact—instructions—specific intent

The trial court in a prosecution for being an accessory after the fact to murder and armed robbery did not err in failing to instruct on "specific intent" to aid the principal.

APPEAL by defendant from *Baley, Judge.* Judgment entered 4 March 1977 in Superior Court, ORANGE County. Heard in the Court of Appeals 16 November 1977.

In March 1975, defendant Carrington was indicted for the murder and armed robbery of Otis Rigsbee, Jr. An alleged co-defendant, Arthur Parrish, was tried in June 1976, for the murder and armed robbery of Otis Rigsbee, Jr., and Parrish was acquitted. On 2 August 1976, defendant Carrington was reindicted both as a principal and as an accessory before the fact to Arthur Parrish, and "one other black male, name unknown," in the murder and robbery. Defendant was acquitted as a principal but a hung jury caused the court to declare a mistrial on the charge of accessory before the fact.

On 20 September 1976, three days after the mistrial was declared, defendant was indicted on new charges of accessory after the fact to Arthur Parrish and an unknown black male in the murder and armed robbery of Otis Rigsbee, Jr. Defendant was also indicted for the felonious receipt of stolen property.

At defendant's trial in February 1977, the State put on evidence tending to show that defendant had been employed for about two years at Rigsbee's Liberty Market, the scene of the alleged murder and robbery, in Durham. Mrs. Mary Rigsbee, the wife of the deceased, Otis Jackson (Jack) Rigsbee, Jr., and Otis Jackson Rigsbee both testified that it was normal procedure for opening the business that one of the Rigsbees would unlock the

padlock on the front door at approximately 5:00 a.m. and would hook the lock on the inside of the door without locking it. Until 7:00 a.m. only one person would be in the market unless the other Rigsbee arrived early. The back door to the market would never be opened until after 7:00 a.m. at which time more than one employee would be present.

On Monday, 17 February 1975, according to State's witness, Donna Garner, an employee of Liberty Market, Arthur Parrish, who had been in the market on numerous occasions, came in and talked briefly with the defendant. On the morning of 18 February 1975, Otis Jackson Rigsbee was in Florida, and Jack Rigsbee was to open the market. According to the testimony of his wife, he left home at about 4:30 a.m. Arthur Holland, a deliveryman, stated that he normally arrived at Liberty Market a few minutes before 6:00 a.m. when the store normally opened. On Tuesday, 18 February 1975, Holland and William Young, another deliveryman, waited for a while at the front of the store, but had to leave without completing their deliveries. Neither man saw any activity in the store. A little before 7:00 a.m., Ernest Lee Tilley, an employee at Liberty Market, arrived and found the store unopened. Tilley was summoned by defendant to come across the street to a cafe for breakfast.

After breakfast Tilley and defendant went back to the market where Tilley noticed that the front door had been unlocked and the padlock moved to the inside. Getting no response at the front door, Tilley went behind the market, saw Jack Rigsbee's car, and found the backdoor unlocked. Tilley let defendant in the front door, and they both looked for Rigsbee. When they could not find him, defendant called the police. While defendant was phoning the police, Tilley let a meat deliveryman into the store, and they found the body of Rigsbee in the meat cooler.

Albert Dorsett-Williams testified for the State that twice on 18 February 1975, defendant had come into Soundhaus, a retail stereo store, and on the second occasion had purchased $625 worth of component stereo equipment. Defendant paid for the equipment with a stack of small bills and signed a receipt as James Johnson. Glenda Clements, who was living with the defendant on 18 February 1975, testified that on the Sunday before 18 February 1975, defendant told her that he was going to visit his

mother on the 18th and that he would leave home about 5:00 a.m. She also testified that in December 1976, defendant told her that on 18 February 1975 he had picked up Arthur Parrish, had taken him to the market and then home again. She stated that defendant further told her that a third person had hidden upstairs at the Liberty Market on Monday, 17 February, and "that was the way they entered the Market, or he, or whoever."

Dr. June Gunter, an expert in pathology, testified that he had conducted an autopsy on Jack Rigsbee and that either of two chest wounds or a neck wound would have caused death.

A Durham police officer, Edward Sarvis, testified that on 20 February, he requested that the defendant come to the station house after Rigsbee's funeral. At that time defendant admitted "ripping off" a few dollars from the market and consented to take police officers to his home to get the money. There police officers discovered $960. After defendant and the police officers had returned to the police station, defendant made and signed a statement which was allowed into evidence.

The defendant was acquitted of the crime of accessory before the fact of the crimes of murder and robbery with a dangerous weapon. He was found guilty as accessory after the fact of the crimes of murder and robbery with a dangerous weapon, and guilty of feloniously receiving stolen property. Defendant appeals.

Attorney General Edmisten, by Associate Attorney Thomas F. Moffitt and Assistant Attorney General Sandra M. King, for the State.

James V. Rowan and Anthony J. Bocchino for defendant appellant.

ARNOLD, Judge.

I.

Defendant moved to dismiss the indictments charging him with being an accessory after the fact to Arthur Parrish who had earlier been acquitted. The trial court denied the motion, but it excised mention of Parrish from the indictments which also charged defendant with being an accessory after the fact to an

unknown black male. Defendant now argues that the action of the trial court denied him his due process rights under both the United States and North Carolina Constitutions. We cannot agree.

[1] The United States Supreme Court has held that an indictment is sufficient if it, "first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117, 41 L.Ed. 2d 590, 620, 94 S.Ct. 2887, 2907 (1974). In applying these two tests to the indictments we find that the trial court did not err in denying defendant's motion to dismiss. Portions of the original indictment charging defendant with being an accessory after the fact of first degree murder demonstrate the clarity of the charge against defendant and allow defendant to plead any conviction in bar of future prosecutions:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 19th day of February, 1976, in Durham County Obie Carrington, Jr. unlawfully and wilfully did feloniously give aid and assistance to (Arthur Junior Parrish and) one (other) black male, name unknown, who had unlawfully, wilfully and feloniously killed and murdered Otis Jackson Rigsbee, Jr., during an Armed Robbery of the said Otis Jackson Rigsbee, Jr., at Rigsbee's Liberty Market, 349 West Main St., Durham, N. C. on the 18th day of February, 1975. At the time of the giving of aid and assistance, the defendant knew that (Arthur Junior Parrish and) the aforesaid (other) black male, name unknown, had committed the felony of Murder, by killing Otis Jackson Rigsbee, Jr., while robbing him with dangerous weapons."

The indictment charging defendant with being an accessory after the fact of armed robbery is equally clear.

[2] Defendant argues further that the trial court erred in striking reference to Arthur Parrish. Defendant submits that, under *United States v. Dawson*, 516 F. 2d 796 (9th Cir.), *cert. denied sub nom Dawson v. United States*, 423 U.S. 855, 46 L.Ed. 2d 80, 96 S.Ct. 104 (1975), the focal point in questioning the permissibility of a change made in the indictment appears to be whether the change involves a broadening or a narrowing of the charge.

However, defendant incorrectly argues that the omission of any reference to Arthur Parrish expands the charge. The State was still required to prove all the elements of accessory after the fact; given the rather elusive evidence available concerning the unknown black male, the State's task was considerably greater when it was required to show that defendant aided and assisted that unknown man.

[3] This court is cognizant of G.S. 15A-923(e), which states that no bill of indictment may be amended. Nothing in that statute or in North Carolina case law defines the term "amendment." Since we must interpret statutes in a manner which would avoid illogical consequences, *see, e.g. Helms v. Powell*, 32 N.C. App. 266, 231 S.E. 2d 912 (1977), we define "amendment" to be any change in the indictment which would substantially alter the charge set forth in the indictment. No such change was made in the present case.

II.

An assignment of error closely related to the previous one is the alleged error of the trial court in admitting evidence concerning Arthur Parrish, in referring to Arthur Parrish during jury instructions, and in instructing the jury that the defendant had been indicted and charged with aiding, counselling and procuring Parrish and another to kill and rob Jackson Rigsbee, Jr. Evidence about Arthur Parrish was an inevitable part of the trial, and we can find no error in its admission. In its instructions to the jury, the trial court, by necessity, referred to Arthur Parrish.

In reviewing the jury instructions we find error only in the court's reference to defendant's indictment as an accessory before the fact. This error, however, was not prejudicial to defendant inasmuch as he was acquitted of the charges relating to accessory before the fact. Furthermore, in the court's instructions, the jury was repeatedly charged that in order to find defendant guilty of accessory after the fact of murder and of robbery it had to find beyond a reasonable doubt that an unknown black male committed these crimes. Viewing the instructions as a whole they contain no error prejudicial to defendant.

III.

[4] The final assignment of error which we consider is defendant's argument that the trial court erred when, in responding to

the jury's request, it reinstructed the jury concerning the charges of accessory after the fact of murder and armed robbery. While the trial court restated the law very briefly, we can find, in construing the full context of the charge, *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied sub nom Sanders v. North Carolina*, 423 U.S. 1091, 47 L.Ed. 2d 102, 96 S.Ct. 886 (1976), no error prejudicial to defendant. Defendant's argument that the court erred in failing to instruct on "specific intent" to aid the principal is not supported by North Carolina law. *See* G.S. 14-7 and cases annotated thereunder.

We have reviewed defendant's other contentions but find in them

No error.

Judges MORRIS and HEDRICK concur.

DIAN B. DIGSBY AND JAMES W. DIGSBY v. JOHN WAYNE GREGORY

No. 7626DC955

(Filed 17 January 1978)

1. Automobiles § 89.1— automobile parked on road—last clear chance—sufficiency of evidence

In an action to recover for personal injuries and property damage sustained by plaintiffs when defendant collided with the rear of their automobile, the trial court did not err in submitting an issue of last clear chance, since the evidence that defendant was traveling 30 to 35 mph when plaintiffs' parked car first came into view about a block away was sufficient to permit the jury to find that defendant should have discovered plaintiffs' perilous position in time to avoid the accident.

2. Trial § 52— damages—setting aside verdict—discretionary matter

The trial court's decision to set aside the jury's verdict as to the damage issues was a discretionary matter, and in the absence of evidence of abuse of that discretion, the decision is not subject to appellate review.

3. Appeal and Error § 62.2— damage issues—partial new trial improper

In an action to recover for personal injuries and property damage sustained in an automobile accident, the trial judge should have granted defendant's motion to set aside the entire verdict rather than just that portion related to damages and to order a new trial on all issues, since the issues of negligence, contributory negligence, last clear chance, and damages were so inextricably interwoven that a new trial on all issues was necessary.

Digsby v. Gregory

APPEAL by defendant from *Stukes, Judge.* Order entered 1 July 1976 in District Court, MECKLENBURG County. Heard in the Court of Appeals 26 September 1977.

This is an action to recover for personal injuries and property damage sustained in an automobile collision which occurred 9 August 1973 on Meisenheimer Road in Mecklenburg County. At the point of the accident Meisenheimer Road is a narrow rural road paved with asphalt, the pavement being so narrow that two cars cannot pass each other unless one of them moves partly onto the shoulder. The pleadings raised issues of negligence, contributory negligence, and last clear chance.

Plaintiff's evidence in substance showed the following: Shortly prior to the accident the plaintiff, Dian B. Digsby, drove a car owned by her husband, the plaintiff James W. Digsby, to the location where the collision occurred. Mr. Digsby had preceded her there in another car, which he had parked partially on and partially off the road at a point "about a block" beyond the crest of a hill. Mrs. Digsby pulled up directly behind him and stopped "pretty close up to the back" of his car, with the right wheels of her car on the shoulder and the left wheels on the pavement. She kept the motor running but put the transmission in park. Mr. Digsby walked to the driver's side of the car and stood on the pavement talking to Mrs. Digsby, who remained seated in the car. After they had thus talked for about five minutes, a car driven by defendant approached from the rear, traveling about 30 to 35 miles an hour. When Mr. Digsby saw defendant's car approaching, he got out of the road by walking around the front of the car in which his wife was seated and going to the passenger's side near the ditch. He saw defendant's car "for about a block" before the accident occurred, and it appeared the defendant "was letting off on the speed a little bit before the accident." The car driven by defendant struck the rear of the car in which Mrs. Digsby was seated, damaging the rear of that car and injuring Mrs. Digsby. Mr. Digsby testified that in his opinion the fair market value of his car immediately before the collision was $2000.00 and immediately after was $1200.00. Mrs. Digsby and a chiropractor who first treated her in July 1975 testified concerning her injuries.

Defendant testified:

> I saw Mrs. Digsby go over the hill and pulled out behind her and started down the hill. She had already gotten to the

bottom of the hill before I got down there; and at the bottom of the hill, there was some sand. It had rained maybe two days or the day before, and the sand was right there in the flat. The car was sitting at that time. I started slowing up; and as I got a little closer to the car, I started slowing up more because I saw them just sitting there. When I realized that they were not moving, I hit my brakes; but at that time I was over the sand, and I slid into her car. I would estimate ten to twelve car lengths from the point of impact to the top of the hill.

* * *

. . . I did not see Mr. Digsby prior to the accident.

The jury answered issues of negligence, contributory negligence, and last clear chance in the affirmative and awarded plaintiff Dian B. Digsby $66.50 for her personal injuries and plaintiff James W. Digsby $350.00 for damage to his automobile. The plaintiff moved to set aside the verdict as to the damage issues on the grounds that the jury's verdict on those issues was contrary to the weight of the evidence. The defendant moved for judgment in accord with the verdict or, in the alternative, to set aside the entire verdict as to all issues. The court granted plaintiffs' motion and denied defendant's.

From order setting aside the jury's verdict on the issues as to damages and granting a partial new trial confined to those issues, defendant appealed.

Rodney Dean and C. Byron Holden for defendant appellant.

No counsel contra.

PARKER, Judge.

Although not a final judgment, the court's order is appealable because it grants a new trial as to damages. G.S. 1-277(a); G.S. 7A-27(d).

Defendant appellant first contends that the court erred in failing to instruct the jury that the plaintiffs were guilty of contributory negligence as a matter of law in that their own evidence establishes that they violated the provisions of G.S. 20-161(a) and (b). The error, if any, was harmless, since the jury answered the issue of contributory negligence in defendant's favor. "Appellant may not complain of alleged error in respect to an issue answered

in his favor." 1 Strong, N.C. Index 3d, Appeal and Error, § 53, p. 329.

[1] Defendant next contends that the court erred in submitting an issue of last clear chance. "The doctrine [of last clear chance] applies if and when it is made to appear that the defendant discovered, or by the exercise of reasonable care should have discovered, the perilous position of the party injured or killed and could have avoided the injury, but failed to do so." *Earle v. Wyrick*, 286 N.C. 175, 178, 209 S.E. 2d 469, 470 (1974). While the evidence in the present case is susceptible to varying interpretations, we find it sufficient, when viewed in the light most favorable to the plaintiffs, to permit the jury to find that defendant should have discovered plaintiffs' perilous position in time to avoid the accident. *See* Annot., 34 A.L.R. 3d 570 (1970). Traveling at a speed of 30 to 35 miles per hour, a driver exercising due care should be able to avoid striking a parked car which comes into view a block away. It is not true, as defendant contends, that the evidence shows that the plaintiff, Mrs. Digsby, could have escaped at any time, almost up to the moment of impact, from the perilous position in which her own negligence had placed her. Her car was parked "pretty close up to the back" of her husband's, and although her motor was running, her transmission was in park, and the jury could reasonably find that it would have required more time than was available to her after defendant's car came into view in which to move her vehicle to a place of safety. We find no error in the submission of the issue of last clear chance.

[2] Defendant next contends that the court erred in refusing to accept the verdict and in failing to sign the judgment in accord with the verdict which was tendered by the defendant. Plaintiffs' motion to set aside the verdict on the damage issues on the grounds that the jury's verdict on those issues was contrary to the weight of the evidence was addressed to the sound discretion of the trial court, 7 Strong, N.C. Index 2d, Trial, § 52, and it is well settled in this jurisdiction "that the action of the trial judge in setting aside a verdict in his discretion is not subject to review on appeal in the absence of an abuse of discretion." *Goldston v. Chambers*, 272 N.C. 53, 59, 157 S.E. 2d 676, 680 (1967). The record discloses no abuse of discretion, and therefore the portion of the

trial court's order setting aside the jury's verdict as to the damage issues is not subject to appellate review.

[3] When the trial judge set the verdict aside he limited the new trial to the issues of damages, and we agree with defendant's contention that the new trial should also include the issues relating to liability. Although the trial judge has the discretionary authority to order a partial new trial, he should do so only if the issue to be tried is distinct and separable from the other issues. The possibility of an error on one issue affecting the entire verdict is particularly acute " 'where the error in the verdict relates to the amount of damages assessed and it appears that this error was not the result of any ruling by or charge from the trial judge, but was committed solely by the jury itself after retiring to consider its verdict.' " *Robertson v. Stanley*, 285 N.C. 561, 569, 206 S.E. 2d 190, 195 (1974), *quoting* 58 Am. Jur. 2d, New Trial, § 25 (1971).

In the present case, the trial judge apparently concluded that the jury had improperly determined the amount of damages. The evidence, however, presented extremely close questions for the jury to determine, not only on the issues as to the amount of damages, but also on the issues as to liability. Under all of the evidence in this case, we conclude that the issues of negligence, contributory negligence, last clear chance, and damages "are so inextricably interwoven that a new trial on all issues is necessary." *Robertson v. Stanley, supra*, 285 N.C. at 569, 206 S.E. 2d at 196. We hold that the trial judge should have granted defendant's motion to set aside the entire verdict and to order a new trial on all issues. The order appealed from is modified accordingly, and a new trial is ordered on all issues.

New trial.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. ERNEST LEE HOLLEY

No. 771SC345

(Filed 17 January 1978)

1. **Assault and Battery § 14.4— felonious assault—intent to kill—inference from the evidence**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries, the jury could find that defendant intended to kill the victim from evidence that defendant deliberately shot the victim at close range with a twelve-gauge shotgun.

2. **Larceny § 7.3— allegation of special and general ownership—proof of special ownership only**

In a prosecution upon an indictment charging larceny, after breaking into and entering the dwelling of Lillie Mae Beasley, of a shotgun "the personal property of Johnny K. Leary and in the possession of Lillie Mae Beasley," there was no fatal variance between indictment and proof where the State's evidence showed only the special property interest of Lillie Mae Beasley in the shotgun in that she had lawful custody and possession of the gun to furnish her protection, since the State's allegation and proof as to the special ownership interest was sufficient and the additional allegation in the indictment as to the general ownership by Johnny K. Leary may be treated as surplusage.

APPEAL by defendant from *Walker (Ralph), Judge.* Judgments entered 8 December 1976 in Superior Court, CHOWAN County. Heard in the Court of Appeals 22 September 1977.

In Case No. 76CR1879 defendant was charged by indictment with (1) feloniously breaking and entering the dwelling of Lillie Mae Beasley, and (2) the felonious larceny therefrom after such breaking and entering of "an Ivor Johnson, Single Barrell (sic), 12 Gauge Shot Gun the personal property of Johnny K. Leary and in the possession of Lillie Mae Beasley."

In Case No. 76CR1854 defendant was charged by indictment with felonious assault upon Willie Moore with a deadly weapon, to wit: a shot gun, with intent to kill inflicting serious injuries.

The cases were consolidated for trial and defendant pled not guilty to all charges. The State presented evidence to show that on the night of 13 November 1976 defendant broke into the dwelling house of Lillie Mae Beasley while she was away from home and stole a shotgun which she kept behind her bed. Mrs. Beasley testified that the gun belonged to her father and that she was keeping it for protection. The investigating officer, Deputy

Sheriff Glenn Perry, testified without objection: "She (referring to Mrs. Beasley) told me the gun belonged to her father, and her father was standing there, and he told me the name and type. The name and type was twelve-gauge shotgun, single-barrel, Ivor Johnson."

The State also presented evidence to show that in the early morning of 14 November 1976 defendant shot Willie Moore with a shotgun. Defendant was waiting in a ditch near the intersection of two roads when Moore drove up in his automobile. When Moore stopped at the intersection, defendant came out of the ditch carrying a shotgun and told Moore to "Hold it." As defendant approached the car from the driver's side, he held the gun up. Moore then "laid down to the right" with his hands on the steering wheel. Defendant fired the gun when he was a few feet from the car (Moore testified that before defendant shot "he got about as close to my car as me to the Judge"), the shots striking Moore in both arms and in his chest. The windows on both the left and right front doors of the car were shot out. It was stipulated that the injuries sustained by Moore were of a serious nature, to the extent that he had to be hospitalized for nine days in the Chowan hospital.

Margaret Holley, defendant's great-aunt, testified that defendant came to her home on the morning of 14 November 1976 and stated in the presence of Moore's wife, who is Margaret Holley's daughter, that "I got him, I shot Jack." (There was evidence that Willie Moore was also known as Jack Moore.) When Margaret Holley asked defendant what he had done with the gun, he replied that he "[t]hrowed it overboard."

Defendant did not testify.

The jury found defendant guilty as charged on all counts. In Case No. 76CR1854 defendant was sentenced to prison for a term of not less than eight nor more than ten years. In Case No. 76CR1879 the two counts were consolidated for judgment, and defendant was sentenced to prison for not less than four nor more than six years, this sentence to run consecutively to the sentence imposed in Case No. 76CR1854.

Defendant appealed in both cases.

Attorney General Edmisten by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

John C. Morehead for defendant appellant.

PARKER, Judge.

[1] In Case No. 76CR1854 defendant contends that there was insufficient evidence to support the jury's finding that he intended to kill when he shot Moore with the shotgun. There is no merit in this contention. An intent to kill "may be inferred from the nature of the assault, the manner in which it is made, the conduct of the parties, and other relevant circumstances." *State v. Revels*, 227 N.C. 34, 36, 40 S.E. 2d 474, 475 (1946). It must frequently be proved by circumstantial evidence, *State v. Jones*, 18 N.C. App. 531, 197 S.E. 2d 268 (1973), and "is ordinarily shown by proof of facts from which an intent to kill may be reasonably inferred." *State v. Thacker*, 281 N.C. 447, 455, 189 S.E. 2d 145, 150 (1972).

In this case the evidence shows that defendant deliberately shot Moore at close range with a twelve-gauge shotgun. It is well known that a twelve-gauge shotgun fired at close range is a deadly weapon. The jury could reasonably infer that defendant intended the normal and natural result of his deliberate act. Indeed, it is difficult to see how any other inference is reasonably possible from the evidence in this case. Defendant's assignment of error in Case No. 76CR1854 is overruled.

[2] In Case No. 76CR1879 defendant contends that there was a fatal variance between the indictment and the proof with respect to the ownership of the shotgun. The indictment charged defendant with the crime of larceny, after breaking and entering into the dwelling of Lillie Mae Beasley, of "an Ivor Johnson, Single Barrell (sic), 12 Gauge Shot Gun the personal property of Johnny K. Leary and in the possession of Lillie Mae Beasley." Lillie Mae Beasley testified for the State regarding the ownership of the shotgun and her possessory interest in it. She referred to the shotgun as "my gun," but testified that it actually belonged to her father. She did not testify what her father's name was, and the State's evidence fails to disclose the identity of Johnny K. Leary or his connection with the gun. She did testify that she kept the shotgun in her bedroom for protection.

It is, of course, well settled "that the indictment in a larceny case must allege a person who has a property interst in the property stolen and that the State must prove that that person has ownership, meaning title to the property or some special property interest." *State v. Greene*, 289 N.C. 578, 584, 223 S.E. 2d 365, 369 (1976). In this regard, the property may be laid "either in him who has the *general* property or in him who has a *special* property," *State v. Jenkins*, 78 N.C. 478, 479 (1878), or in both. *State v. Greene, supra.* In the present case the indictment did allege both the general owner, Johnny K. Leary, and the special owner, Lillie Mae Beasley, but the State's proof showed only the special ownership interest of Lillie Mae Beasley. We hold this to be sufficient and find no fatal variance. The State's allegation and proof as to the special ownership interest was entirely consistent, and the additional allegation in the indictment as to the general owner may be treated as surplusage. Even had the indictment incorrectly alleged that Lillie Mae Beasley was the general owner while the State's evidence showed only her special property interest (that she had lawful custody and possession of the gun for a particular purpose, i.e., to furnish her protection), there would have been no fatal variance. *State v. Smith*, 266 N.C. 747, 147 S.E. 2d 165 (1966); *State v. Law*, 228 N.C. 443, 45 S.E. 2d 374 (1947); *State v. Hauser*, 183 N.C. 769, 111 S.E. 349 (1922); *State v. Allen*, 103 N.C. 433, 9 S.E. 626 (1889); *State v. Robinette*, 33 N.C. App. 42, 234 S.E. 2d 28 (1977); *State v. Carr*, 21 N.C. App. 470, 204 S.E. 2d 892 (1974); *State v. Cotten*, 2 N.C. App. 305, 163 S.E. 2d 100 (1968). Still less should a variance be found here, where the indictment correctly alleged and the State's evidence showed her special property interest. The purpose of the requirement that the indictment in a larceny case must allege the ownership of the stolen property is to "(1) inform defendant of the elements of the alleged crime, (2) enable him to determine whether the allegations constitute an indictable offense, (3) enable him to prepare for trial, and (4) enable him to plead the verdict in bar of subsequent prosecution for the same offense." *State v. Greene, supra* at 586, 223 S.E. 2d at 370. All of these purposes were adequately served in the present case by the allegations in the indictment as to the special possessory interest of Lillie Mae Beasley and by the State's evidence which fully supported those allegations.

State v. Eppley, 282 N.C. 249, 192 S.E. 2d 441 (1972), cited and relied on by defendant, is not here controlling. In that case

the indictment charged the larceny of a shotgun, the property of James Ernest Carriker, while the State's evidence showed that the gun belonged to Carriker's father. In finding a fatal variance, our Supreme Court pointed out that in that case "nothing in the evidence shows that this witness [James Ernest Carriker] was a bailee of the shotgun or had any other property interest therein." 282 N.C. at 259, 192 S.E. 2d at 448. Here, not only did the State's evidence show that Lillie Mae Beasley was keeping the gun for her protection, but the indictment specifically alleged her possession of the gun. Moreover, in the present case, unlike the situation in *State v. Eppley, supra*, there was no positive showing of any variance between the allegation in the indictment as to ultimate ownership and the State's proof in that regard. Nothing in the evidence showed that Johnny K. Leary was not Lillie Mae Beasley's father. (Indeed, the record as a whole strongly suggests that he was. Deputy Sheriff Perry, who swore to the warrant, testified without objection before the jury that Lillie Mae Beasley told him in her father's presence that the gun belonged to her father and that her father then told Perry the name and type of the gun. It is reasonable to suppose that at the same time he also told Perry that his name was Johnny K. Leary, or that Perry already knew this to be the case, because Perry, in swearing to the warrant, described the shotgun by make and type as Lillie Mae Beasley's father had told him and at the same time swore that ultimate ownership was in Johnny K. Leary.)

We find no fatal variance between the State's allegation and proof as to Lillie Mae Beasley's possessory interest in the shotgun.

No error.

Judges MARTIN and ARNOLD concur.

MAXINE V. MOORE, AS EXECUTRIX OF THE ESTATE OF ALLAN PRATT MOORE, AND MAXINE V. MOORE, INDIVIDUALLY v. UNION FIDELITY LIFE INSURANCE COMPANY

No. 7721DC118

(Filed 17 January 1978)

1. **Insurance § 67— death by accident—burden of proof**

In an action to recover proceeds under a policy insuring against death by accident or accidental means, the burden is upon the plaintiff to show that the insured's death resulted from accident or accidental means within the terms of the policy.

2. **Insurance § 67— death by accident—unexplained violence—prima facie showing of coverage**

Where the plaintiff beneficiary offers evidence tending to show that the insured met his death by unexplained, external violence, a presumption arises that the death resulted from an accident, thus making out a *prima facie* case of coverage entitling plaintiff to go to the jury; however, if the plaintiff fails to show coverage, or if plaintiff's evidence establishes a defense excluding the death from coverage, a directed verdict against plaintiff is proper.

3. **Insurance § 67.2— death by accident—unexplained death by shooting—sufficiency of evidence for jury**

Plaintiff's evidence was sufficient to be submitted to the jury in an action on a policy insuring against death by accident where it tended to show that decedent's body was found lying in front of his car on a dirt road in a rural area, there was a bullet hole in decedent's head with powder burns around it, and a gun was lying at decedent's right foot, since the evidence showed an unexplained death by violence and did not establish defendant insurer's defense of death by suicide as a matter of law.

Judge CLARK dissenting.

APPEAL by plaintiff from *Clifford, Judge.* Judgment entered 15 September 1976 in District Court, FORSYTH County. Heard in the Court of Appeals 30 November 1977.

Plaintiff, both individually and as executrix of her deceased husband's estate, filed complaint seeking to recover under a life insurance policy issued by defendant to the deceased. As executrix, plaintiff sought to recover a return on premiums; as an individual and beneficiary, plaintiff sought to recover the principal sum of $10,000.

Defendant answered, denying liability. Specifically, defendant alleged that the deceased's death resulted from a non-insured

risk, suicide, and that if it were liable for any amount, plaintiff was only due $5,000.

Plaintiff testified that her husband had retired from Hennis Freight Lines because of a heart condition, but had "a good income" from his disability payments and had no financial worries. The deceased would sometimes get "keyed up and get a flight of ideas like he could make money"; and when he got like this, he would buy and sell and trade for days without rest. He had been hospitalized in 1953 and 1969, and again in 1973 shortly before his death. On Friday (14 September 1973), the deceased left home to go to a farm which they owned in Virginia to make arrangements for an auction sale. His death was reported to plaintiff the next day. Plaintiff also testified that her husband owned several guns and "usually always had a gun."

Joe Dalton testified that he was squirrel hunting on the morning of 15 September 1973 and found the deceased's body lying in front of his car on a dirt road which led to deceased's farm. There was a bullet hole in deceased's head and a gun lying at deceased's right foot. Dalton testified that "there was no sign that anybody else had been around there." Jack Dickson, the deceased's son-in-law, testified that "the only way that you could tell that [deceased] was ill, if you put it that way, he just wanted to buy everything he saw" and that deceased seemed calm and normal after his 1973 hospitalization. Finally, deceased's daughter Cathy Norris testified, as had the other witnesses, that the deceased was never depressed, that he was a jolly man, and that he would sometimes get "wound up like and he liked to buy and sell things, and trade things."

At the close of plaintiff's evidence, the judge reserved ruling on defendant's motion for a directed verdict. The judge also ruled that the principal sum payable under the policy was $5,000, not $10,000 as claimed by plaintiff.

Defendant presented the Sheriff, medical examiner, and a local resident, all of whom described the scene of deceased's death. Their testimony tended to show that deceased's automobile was found pulled off to the side of a road, that the keys were in the ignition, that no other automobile tracks led to the scene, that there was no disturbance at the scene and defendant's clothing had not been disturbed, that deceased's wallet was in his pocket

and contained $91, that there was a gun shot wound and a "very strong powder burn" over deceased's right eye, that a .32 caliber pistol with one spent shell was lying next to deceased's right foot, and that the time of death was estimated at 10:00 p.m. on the night of 14 September.

At the close of defendant's evidence, the judge allowed defendant's motion for a directed verdict and judgment was entered dismissing plaintiff's action.

Thomas J. Keith, for the plaintiff.

Hudson, Petree, Stockton, Stockton & Robinson, by James H. Kelly, Jr. and Grover Gray Wilson, for the defendant.

MARTIN, Judge.

[1, 2] At the outset, we recognize and adhere to the general rule that in an action to recover proceeds under a policy insuring against death by accident or accidental means, the burden is upon the plaintiff to show that the insured's death resulted from accident or accidental means within the terms of the policy. *Barnes v. Insurance Co.*, 271 N.C. 217, 155 S.E. 2d 492 (1967); *Warren v. Insurance Co.*, 215 N.C. 402, 2 S.E. 2d 17 (1939). It is also well settled law in this jurisdiction that where the plaintiff beneficiary offers evidence tending to show that insured met his death by *unexplained*, external violence, a presumption arises that the death resulted from accident—thus, making out a *prima facie* case of coverage entitling plaintiff to go to the jury. *Barnes v. Insurance Co., supra*; 2 Stansbury's N.C. Evidence § 224 (Brandis Rev. 1973); *cf. Slaughter v. Insurance Co.*, 250 N.C. 265, 108 S.E. 2d 438 (1959). However, if the plaintiff fails to show coverage, or if plaintiff's evidence makes out a case of coverage and at the same time establishes a defense excluding the death from coverage, a directed verdict against plaintiff is proper. *Slaughter v. Insurance Co., supra.*

[3] The question before this Court is whether, in light of the principles stated above, the trial court's allowance of defendant's motion for directed verdict was proper. We are of the opinion that it was not.

In support of the judgment entered in its favor, defendant relies on the *Slaughter* case where the driver of a taxicab was found, shot to death, 22 miles from his cab with his money and

pistol missing. Notwithstanding the evidence clearly established death by external and violent means, the Court affirmed a nonsuit for the defendant insurance company holding that plaintiff's own evidence showed an intentional, not an accidental killing and thus, not only showed a lack of coverage, but also established a defense to coverage—murder. Regarding the plaintiff's evidence in the *Slaughter* case, the Court said, "*All* the evidence points to an intentional killing with robbery as the motive. This evidence . . . *leaves no basis* for a finding of death as the result of accident as the term 'accident' is generally understood." (Emphasis added.)

Viewing plaintiff's evidence in the instant case, we cannot say that the *only* reasonable inference to be drawn therefrom establishes defendant's defense of suicide as a matter of law. Unlike the strong evidence in the *Slaughter* case, the evidence in the instant case neither establishes nor suggests an explanation for the insured's death. We do not know why the gun discharged in proximity to the deceased's head while he was in front of his car on a dirt road—the explanation could be suicide; but certainly the fact that the gun discharged at close range does not exclude the possibility of accident. *See Barnes v. Insurance Co., supra.* Accordingly, plaintiff's showing of unexplained death by violence is sufficient to take the case to the jury where the burden of the issue of death by accidental means remains upon the plaintiff. *Barnes v. Insurance Co., supra; Warren v. Insurance Co., supra.*

The trial court also held that the insurance policy together with the application was not ambiguous, and that the amount in controversy in addition to the refund, was $5,000. From our careful examination of the policy, application and riders, we find the trial court was correct in this holding.

Affirmed in part; reversed in part.

Chief Judge BROCK concurs in the result.

Judge CLARK dissents.

Judge CLARK dissenting.

Assuming that the presumption against suicide, plus any suppositious evidence considered in the light most favorable to the

plaintiff, was sufficient to take the case to the jury, in my opinion other evidence offered by the plaintiff negates the presumption and any evidence favorable to her case and establishes the defense of suicide.

Plaintiff's evidence tended to show that deceased insured had several guns and was proficient with firearms. He usually had a gun with him. He was found in a wooded area, a bullet hole in his forehead, lying in front of his car, a gun lying at his right foot. Powder burns were around the bullet hole. It had rained; there was grass in the area; and there was no sign that anyone else had been around there. His wallet, with money in it, was in his pocket. He had a history of mental illness, resulting in treatment at a mental institution, the last for a period of 50 days about. He was on medication, lithium and "coumadin."

Plaintiff's evidence failed to show coverage within the policy.

DORIS M. BEAMAN v. RAYMOND GUY SHEPPARD AND THE TOWN OF SNOW HILL, A MUNICIPAL CORPORATION

No. 778SC95

(Filed 17 January 1978)

1. **Automobiles § 46— opinion evidence as to speed—admissibility**

In an action to recover damages for personal injuries sustained in an automobile accident, the trial court did not err in allowing defendant to state his opinion as to the speed of plaintiff's vehicle where the evidence tended to show that defendant observed plaintiff's vehicle coming towards him continuously for about four car lengths or approximately eighty feet.

2. **Automobiles § 72— sudden emergency—sufficiency of evidence to support instruction**

In an action to recover damages for personal injuries sustained in an automobile accident, the trial court did not err in instructing on the doctrine of sudden emergency where the evidence tended to show that defendant pulled his truck off the paved portion of the road because plaintiff's vehicle was headed directly towards him, and defendant pulled back onto the road to avoid hitting a road sign.

3. **Automobiles § 90— sudden emergency—insufficient instructions—party who may raise issue on appeal**

Any error of the trial court in failing to relate properly the doctrine of sudden emergency to the issue of defendants' negligence was prejudicial to

defendants, and plaintiff, who was not prejudiced by such failure, could not raise the issue on appeal.

APPEAL by plaintiff from *Tillery, Judge.* Judgment entered 4 October 1976 in Superior Court, GREENE County. Heard in the Court of Appeals 30 November 1977.

Plaintiff instituted this action to recover damages for personal injuries sustained in an automobile collision allegedly caused by the actionable negligence of defendants.

Defendants, answering jointly, denied any negligence on their part and pleaded in bar of plaintiff's action the contributory negligence of plaintiff. In addition, defendants set up a counterclaim for personal injury and property damage allegedly resulting from negligence of plaintiff. It is admitted in defendants' answer that at the time of the collision, defendant Raymond Guy Sheppard was operating a 1973 Chevrolet truck owned by defendant Town of Snow Hill, and was acting as an agent and servant of the Town of Snow Hill within the course and scope of his employment by said town.

Plaintiff's evidence tended to show that at approximately 8:00 a.m. on 29 March 1974, she was driving a Pontiac automobile in a northerly direction on Highway 91 just north of Snow Hill. The weather was dry and clear and plaintiff's automobile was in excellent condition. As plaintiff was proceeding along the highway in her lane, she observed a small red car approaching in the southbound lane. A truck was following closely behind the red car and as plaintiff met this car, the truck ran off the road on its right side. When the truck pulled back on the road, it immediately went into a skid and headed straight towards plaintiff's car, crossing the center line into plaintiff's lane of travel. Plaintiff was as far to the right as she could get in her lane, but was unable to avoid the collision. Plaintiff testified that she had passed a white car about a quarter of a mile before the scene of the accident and was traveling about 55 m.p.h.

Defendants' evidence tended to show that on the morning in question Alice Sutton was proceeding in a northerly direction along Highway 91 in a white Chevrolet. She had just rounded a curve and started down a straightaway when she was passed by plaintiff's automobile. At this time, a red car and a truck were

coming from the opposite direction and Mrs. Sutton saw the red car pull off the road onto the right shoulder. Mrs. Sutton slowed down to enable plaintiff to return to the northbound lane. The truck traveling behind the red car had also pulled off the road. Mrs. Sutton measured the distance from where she was passed to the point of collision to be 125 of her paces. Raymond Sheppard, Jr. testified that he was driving a red car south on Highway 91 and had observed his father, defendant Raymond Sheppard, Sr., in a truck at an intersection; he did not see his father's truck again until after the collision. He further testified that he saw plaintiff's automobile pull out to pass and that when he realized she was going to hit him, he braked and pulled off the road onto the shoulder. Defendant Raymond Sheppard, Sr. testified that on the date in question he was traveling in a truck behind his son's car when he saw it pull off the road. Plaintiff's automobile was headed towards him so he pulled his truck to the right. Thinking he was going to hit a sign, defendant pulled back to the road and hit his brakes; his truck started sliding and collided with plaintiff's automobile. Defendant testified that, in his opinion, plaintiff's automobile was traveling 65 to 70 m.p.h. just prior to the collision. Teresa Whitley testified that she was driving behind defendant's truck and that the collision took place in the center of the road.

The jury found that the plaintiff was not injured by defendants' negligence; that defendant Sheppard and defendant Snow Hill were injured and damaged, respectively, by plaintiff's negligence; and that defendants were entitled to recover a total of $53,073.85 for such injury and damage. Plaintiff appealed to this Court.

White, Allen, Hooten & Hines, by Thomas J. White III, and Wallace, Langley, Barwick, Llewellyn and Landis, by R. S. Langley, for the plaintiff.

Teague, Johnson, Patterson, Dilthey & Clay, by C. Woodrow Teague and Dan M. Hartzog, and Lewis, Lewis & Lewis, by John B. Lewis, Jr., for the defendants.

MARTIN, Judge.

[1] Plaintiff first contends that the trial court erred in allowing, over objection, defendant Sheppard to state his opinion as to the

speed of plaintiff's vehicle. Plaintiff argues that defendant did not have sufficient opportunity under the circumstances to judge the speed of plaintiff's vehicle and form an intelligent opinion.

The rule is well established that it is competent for a person of ordinary intelligence and experience to state his opinion as to the speed of a vehicle when he has had *reasonable opportunity to observe* the vehicle and judge its speed. *State v. Clayton*, 272 N.C. 377, 158 S.E. 2d 557 (1968); *State v. McCall*, 31 N.C. App. 543, 230 S.E. 2d 195 (1976); *Johnson v. Douglas and Ferguson v. Douglas*, 6 N.C. App. 109, 169 S.E. 2d 505 (1969). The trial court must determine from the facts and circumstances as they appear in the evidence whether the witness has had a reasonable opportunity to observe the vehicle and judge its speed. *Johnson v. Douglas* and *Ferguson v. Douglas, supra.*

In the instant case, defendant testified to the effect that he observed the plaintiff's vehicle coming towards him continuously for about four car lengths or approximately 80 feet. He then stated that, in his opinion, plaintiff's vehicle was traveling 65 to 70 miles per hour. Though similar to the facts of cases in which such opinion testimony was excluded, *see Fleming v. Twiggs*, 244 N.C. 666, 94 S.E. 2d 821 (1956); *Johnson v. Douglas* and *Ferguson v. Douglas, supra*, the instant case is distinguishable in that defendant's observation of plaintiff's vehicle was continuous—an important factor in assessing the sufficiency of his observation. Any question as to defendant's ability to judge the speed of plaintiff's vehicle based on his opportunity to observe goes to the weight of his testimony rather than its admissibility. *Ray v. Membership Corp.*, 252 N.C. 380, 113 S.E. 2d 806 (1960); *State v. McCall, supra.* Accordingly, this contention is without merit.

[2] Plaintiff further contends that the trial court erred in its charge to the jury relative to the doctrine of sudden emergency. She argues, in the first instance, that the doctrine of sudden emergency was not applicable to the instant case, and additionally, that the court failed to relate the instructions on the doctrine to any issue in the case.

Defendants in the instant case invoked and relied upon the doctrine of sudden emergency. This doctrine, simply stated, is that " '[o]ne who is required to act in an emergency is not held by the law to the wisest choice of conduct, but only to such choice as

a person of ordinary care and prudence, similarly situated, would have made.' " *Rodgers v. Thompson*, 256 N.C. 265, 123 S.E. 2d 785 (1962). *Davis v. Connell*, 14 N.C. App. 23, 187 S.E. 2d 360 (1972). Defendants' evidence tended to show that defendant Sheppard pulled his truck off the paved portion of the road because plaintiff's vehicle was headed directly towards him; and he pulled back onto the road to avoid hitting a road sign. Thus, the evidence was clearly sufficient to raise an inference that defendant was confronted by a "sudden emergency." Accordingly, it was for the jury to determine the effect of the doctrine on the facts of the instant case and an instruction thereon was proper. *See Day v. Davis*, 268 N.C. 643, 151 S.E. 2d 556 (1966); *Davis v. Booth*, 29 N.C. App. 742, 225 S.E. 2d 588 (1976).

[3] After instructing the jury on the substantive issues arising in the case, the trial court, without relating it to any particular issue, gave the jury a correct general instruction relating to the doctrine of sudden emergency. Plaintiff contends that this was error for which she is entitled to a new trial. We cannot agree.

It is true that our Supreme Court has held that where a party is charged with negligence, the failure to relate that party's plea of sudden emergency and the evidence pertinent thereto to the issue of negligence is erroneous and prejudicial, and is not cured by a later general instruction not related to the particular issue. *Day v. Davis, supra; Hunt v. Truck Supplies*, 266 N.C. 314, 146 S.E. 2d 84 (1966). In the instant case, it is defendants who seek to have the jury scrutinize their actions in light of the sudden emergency doctrine. Thus, any failure to properly relate this doctrine to the issue of defendants' negligence before the jury is prejudicial to *defendants*; plaintiff, however, is not prejudiced thereby and cannot be heard to complain. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968).

Plaintiff's remaining assignments of error are without merit. The judgment of the trial court is hereby affirmed.

Chief Judge BROCK and Judge CLARK concur.

DONALD SEARSEY (EMPLOYEE) v. PERRY M. ALEXANDER CONSTRUCTION CO. (EMPLOYER) AND AETNA CASUALTY & SURETY CO. (CARRIER)

No. 7728IC106

(Filed 17 January 1978)

Master and Servant § 55.3— workmen's compensation— sudden breakthrough of air hammer and jerking of employee— accident

In an action to recover workmen's compensation benefits for a back injury suffered by plaintiff employee when an air hammer which he was using to break the concrete cap over a well suddenly broke through the concrete and jerked him, the deputy commissioner's finding that it was unusual for an air hammer to break through suddenly and jerk the operator was supported by the evidence and supported her conclusion that plaintiff was injured by an accident, notwithstanding plaintiff may have known of the risks involved in operating the hammer over air.

APPEAL by defendants from Order of North Carolina Industrial Commission entered 18 August 1976. Heard in the Court of Appeals 29 November 1977.

Plaintiff filed a claim with the North Carolina Industrial Commission for compensation for a back injury which arose out of and in the course of his employment on 5 November 1975, while he was using an air hammer (jackhammer) to break the concrete cap over a well. The injury resulted in hospitalization, surgery and temporary total disability.

The case was heard before Deputy Commissioner Denson on 16 April 1976. Plaintiff's evidence tended to show that he was an experienced construction worker who had worked for Alexander Construction Company for about 20 years. Plaintiff testified that the air hammer broke suddenly through the concrete and jerked him; that he had used an air hammer occasionally; that he had several times operated over air; that he knew he was operating over air when he was hurt, breaking out the concrete cover on a well; that he knew "in using the air hammer or pavement breaker, when it breaks through the pavement, then, of course, it is going to drop down, and when it drops down the weight of it gives you a jolt; it will naturally give you a jolt. . . ." He further testified that he knew that air hammers break through suddenly when being operated over air about 90% of the time. Plaintiff's employer testified to the difficulty of operating an air hammer over air; that the hammer weighs 80 pounds; that sudden

breakthrough occurs only five percent of the time when the hammer is operating over cushioning gravel or ground; that plaintiff was an excellent employee who had worked with an air hammer only a very small percentage of the time, but it was a regular part of his duties. He testified further that, while an experienced operator will attempt to pull the hammer back if it starts to break through suddenly to avoid injury, an operator cannot know ahead of time that his hammer is about to break through, and when there is a breakthrough the hammer does not fall but drives itself down.

Deputy Commissioner Denson found that it was unusual, "although not unnatural" for the air hammer to break through suddenly and "jerk the operator," and that the jerk caused plaintiff's injury. She concluded that plaintiff had been injured by an accident arising out of and in the course of his employment and awarded compensation. Defendants appealed to the Full Commission which affirmed the award. Defendants appeal.

Gudger, McLean, Leake, Talman & Stevenson by A. E. Leake for plaintiff appellee.

Uzzell & Dumont by J. William Russell for defendant appellants.

CLARK, Judge.

Defendants attack the Commissioner's award as invalid because the plaintiff's injury was caused not by an accident but by an expected, foreseen event which was part of plaintiff's usual work. G.S. 97-2(6) of the Workmen's Compensation Act limits compensation to recovery for

> ". . . *injury by accident* arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident." [Emphasis added.]

An "accident" is an unlooked for and untoward event not expected or designed by the employee. *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 124 S.E. 2d 109 (1962). An "accident" is not established by the mere fact of injury but is to be considered as a separate event preceding and causing the injury. *Beamon v. Grocery*, 27 N.C. App. 553, 219 S.E. 2d 508 (1975); *Bigelow v. Tire*

Sales Co., 12 N.C. App. 220, 182 S.E. 2d 856 (1971). No matter how great the injury, if it is caused by an event that involves both an employee's normal work routine and normal working conditions it will not be considered to have been caused by accident. 8 Strong's N.C. Index, 3d ed., Master & Servant, § 55.1, p. 534; *Pardue v. Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747 (1963); *Pulley v. Association*, 30 N.C. App. 94, 226 S.E. 2d 227 (1976). In the case *sub judice*, the Deputy Commissioner found:

> "In the *normal* operation of an air hammer, there is some material under the pavement which is being broken which allows the operator of the air hammer to draw it back slowly. *It is unusual*, in the operation of the air hammer, —although not unnatural—for the air hammer to jerk the operator when it breaks through the pavement." [Emphasis added.]

Her finding that the sudden breakthrough was unusual and not part of plaintiff's normal work routine and normal working conditions was amply supported by the evidence. The employee's use of the air hammer was usual in the sense that he regularly, though not often, used the tool in breaking concrete. Most of the time he used it to break concrete over soil or other supporting material. But at the time of the injury he was engaged in using the air hammer to break a concrete cap, reinforced for strength with steel, over (air) a well, which operation he did rarely. The drill of the hammer is driven downward by compressed air, aided by the weight of the hammer. The rate of penetration by the drill into the reinforced concrete is variable because the reinforcing steel will slow, if not stop temporarily, the penetration. The intermittent driving force of the compressed air gives the hammer a bucking or jerking action. Under these circumstances it was obviously difficult for the employee to determine the moment when the hammer would break through the concrete so that he could protect himself by lifting the hammer to minimize the sudden downward driving force. Under these circumstances, the sudden breakthrough of the air hammer was not expected or designed by the employee.

Defendants further contend that plaintiff's obvious knowledge of the risk involved in operating the hammer over air coupled with his knowledge that he was operating over air when he was hurt defeat his claim. We have stated earlier that an acci-

dent cannot be expected or designed. It is clear that these qualifications operate narrowly to exclude intentional injurious acts. *Petty v. Transport, Inc.*, 276 N.C. 417, 173 S.E. 2d 321 (1970). Knowledge of risk ignored such as constitutes negligence is not grounds for denial of compensation. *Hicks v. Guilford County*, 267 N.C. 364, 148 S.E. 2d 240 (1966). To withhold compensation from a non-negligent employee because he knew the risks of his work, even though that work was unusual to him, would defeat the purpose of Workmen's Compensation. An employee must be compensated for such injury when he is *required* to do a piece of work and has no choice but to do it as best he can. We are mandated to construe the Workmen's Compensation Act as liberally as possible so as not to deny benefits on technical, narrow and strict grounds. *Cates v. Construction Co.*, 267 N.C. 560, 148 S.E. 2d 604 (1966). Plaintiff's knowledge of the risks of operating an air hammer over air did not make his "unusual" task usual; it did not make even a probable injury "expected." The evidence demonstrated that even an experienced operator over air could not know precisely when the hammer would break through.

The Deputy Commissioner's finding that the event of sudden breakthrough which injured the plaintiff was unusual was amply supported by the evidence and justified her conclusion that the event was an accident. The order of the Full Commission adopting the opinion and award of the Deputy Commissioner is

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. EDWARD E. BRIDGES AND LINDA B. McGINNIS

No. 7727SC655

(Filed 17 January 1978)

1. Arrest and Bail § 3— detention without arrest warrant—conditions

A law officer, not aided by the "stop and frisk" doctrine or the right to stop a motorist, may lawfully detain a person where there is a need for immediate action, if, upon personal observation or reliable information, he has an honest and reasonable suspicion that the suspect either has committed or is

preparing to commit a crime; however, the detention should be reasonable as to time and manner.

2. Arrest and Bail § 3— warrantless detention of defendant—officer's reasonable suspicion that crime was committed

Though law officers who detained defendant in S. C. did not have the benefit of either the "stop and frisk" doctrine, because there was nothing to indicate that defendant was armed and dangerous, or the right to stop and investigate for possible violation of motor vehicle laws because this had been done previously in N. C., the officers did have an honest and reasonable suspicion that defendant had committed the crime of larceny, since defendant had been observed circling a residential neighborhood with another person; he had been seen by one of the residents walking down the road carrying something; and an officer who earlier stopped defendant's vehicle for a license check observed fishing rods, a tool box and other property in plain view in the vehicle.

APPEAL by defendants, Edward E. Bridges and Linda B. McGinnis from *Ferrell, Judge*. Judgment entered 10 March 1977 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 6 December 1977.

Defendant Bridges pled not guilty to charges of, on 25 March 1976, (1) breaking or entering a motor vehicle of Kibby Daves and (2) larceny of property therefrom, (3) breaking or entering a motor vehicle of Henry T. Willis and (4) larceny of property therefrom. He was convicted as charged and appeals from judgments imposing consecutive prison terms. Codefendant Linda B. McGinnis was convicted of similar charges, but her motion to withdraw her appeal was allowed.

The State's evidence tended to show that the Daves' vehicle was broken into and entered and property stolen therefrom between 2:00 a.m. and 3:30 a.m. on 25 March 1976, and that the Willis vehicle was broken into and entered during the same night and property stolen therefrom. Both Daves and Willis lived outside Shelby in the Spring Acres development near the South Carolina line.

Brenda Hoyle, a neighbor of the vehicle owners, testified that she was awakened by barking dogs about 2:00 a.m.; she looked out and saw a man walking down the road carrying something; a light-colored station wagon drove up and he got in. She reported the incident by phone to the Sheriff's Department.

Deputy Sheriff Terry Lanier was dispatched to investigate the incident. In the area where Daves and Willis resided he stopped a white 1968 Chevrolet station wagon with South Carolina license plates; Linda McGinnis was driving and defendant was a passenger; he made a license check; in the back of the car he observed two fishing rods, a tool box and other property (at trial identified as property taken from the Daves and Willis vehicles). He let the vehicle go. After getting a radio report about 2:30 a.m., Deputy Skinner returned to Spring Acres about 3:15 a.m. and saw the white station wagon parked at a trailer home; it then left with defendant and McGinnis in it and circled the area for 15 minutes; on one circle the driver appeared to be alone; and on the next circle both were in the vehicle; that the station wagon left about 3:15 a.m., traveled south about 10 miles to a house near Grover, stayed there about 30 minutes, then proceeded across the State line; Deputy Skinner called his dispatcher and requested that he have the station wagon stopped in Blacksburg, South Carolina, and also requested that the Spring Acres area be checked for break-ins. Blacksburg police stopped the station wagon. Deputy Lanier looked and saw in plain view in the station wagon a CB radio, a "fuzzbuster" and a suitcase in addition to the same items he had observed when he first stopped the vehicle near Spring Acres; the vehicle was detained where stopped for about 10 minutes when Deputy Lanier received a radio report from his dispatcher that a truck in Spring Acres had been broken into and a CB radio and a "fuzzbuster" had been stolen. The Blacksburg law officers took defendant and McGinnis into custody and seized the articles in plain view.

The trial judge after *voir dire* found facts and concluded that the articles found in the station wagon were admissible in evidence.

Attorney General Edmisten by Assistant Attorney General James Peeler Smith for the State.

Jerry M. Trammell for defendant appellant Edward Bridges.

CLARK, Judge.

Detention, or "investigative custody," without probable cause to make a warrantless arrest, is restricted by the Fourth Amendment prohibition of unreasonable search and seizure. *Davis v.*

Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed. 2d 676 (1969). Nevertheless, the criminal who seeks sanctuary within this constitutional right has been exposed by both the federal and state courts in decisions which have recognized the need and the right of the police officer in the performance of his duties under proper circumstance to detain for investigation a person who is not subject to lawful arrest. The circumstances include those created by the mobile and vicious criminal, which circumstances require immediate police action short of arrest. Thus the courts have recognized the right, not dependent on probable cause, (1) to stop and detain for license and registration check and to determine if highway laws have been violated, G.S. 20-183(a); *State v. Dark*, 22 N.C. App. 566, 207 S.E. 2d 290 (1974); and (2) to "stop and frisk" where the circumstances are such that it can reasonably be inferred the individual was armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968); *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed. 2d 917 (1968); *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973); *State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201 (1975).

[1] Where the law officer is not aided by the "stop and frisk" doctrine or the right to stop a motorist, under what circumstance can he detain a suspect or take him into investigative custody? In *Terry v. Ohio*, *supra*, it is said that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." 392 U.S. at 22, 88 S.Ct. at 1880, 20 L.Ed. 2d at 906-907 (1968). In *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed. 2d 612 (1972), it was held that an officer, upon the basis of information furnished him by a reliable informant, could forcibly stop a suspect. We conclude from the two cases that a law officer, not aided by the "stop and frisk" or the motorist doctrines, may lawfully detain a person where there is a need for immediate action, if, upon personal observation or reliable information, he has an honest and reasonable suspicion that the suspect either has committed or is preparing to commit a crime. We find support for this conclusion in dicta from the following cases: *State v. McZorn*, *supra; State v. Streeter*, *supra; State v. Williams*, 32 N.C. App. 204, 231 S.E. 2d 282 (1977), *app. dis.* 292 N.C. 470, 233 S.E. 2d 924 (1977). However, the detention should be reasonable as to time and manner. 6A C.J.S., Arrest, §§ 39, 41.

[2] In the case before us the law officers in detaining the defendant in South Carolina did not have the benefit of either the "stop and frisk" doctrine because there was nothing to indicate that defendant was armed and dangerous, or right to stop and investigate for possible violation of motor vehicle laws because this had been done previously in North Carolina. And the law officers made no attempt to apply either in their detention. But from the totality of the circumstances, we conclude that the information obtained by the law officers by radio from their dispatcher, their observation of the activities of the defendant and his companion during the night in and near the Spring Acres development, and the property in plain view within the station wagon, were sufficient for the law officers to have an honest and reasonable suspicion that the codefendants had committed the crime of larceny. We hold therefore that the stopping of the defendant and his vehicle and the detention for a period of about ten minutes were lawful, that upon receiving the final report from the dispatcher relative to the breaking and entering of vehicles and larceny of property therefrom the law officers had probable cause justifying a warrantless arrest, and that the property in plain view within the vehicle was lawfully seized and properly admitted in evidence.

No error.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. BOBBY EARL DANIELS

No. 777SC638

(Filed 17 January 1978)

1. Criminal Law § 66.11— confrontation at crime scene—in-court identification not tainted

The trial court properly concluded that an in-court identification of defendant by an armed robbery victim was not tainted by a pretrial identification procedure in which defendant was shown singly to the victim where the evidence tended to show that the robbery took place in a well lit store; the victim was as close as five or six feet from defendant; defendant was in the store for eight to twelve minutes; the victim was positive in his identification of defendant as the robber because of defendant's irregular teeth and gold ear-

bob; and only three hours elapsed between the time of the robbery and the identification procedure.

2. **Criminal Law § 73— hearsay testimony—admissibility**

The trial court did not err in admitting corroborative hearsay evidence of a deputy sheriff concerning an armed robbery victim's description of the robber since there was evidence from which it could be inferred that the deputy talked to the victim.

3. **Criminal Law § 86.3— cross-examination of defendant—prior offenses—no bad faith of prosecutor**

Where the prosecutor cross-examined defendant with respect to past criminal acts, defendant stated that he had never been convicted of any criminal offense other than traffic offenses, the prosecutor asked if defendant had escaped from prison on a named date, and defendant's objection was sustained, defendant failed to show that he was prejudiced since he showed no bad faith on the part of the prosecutor.

APPEAL by defendant from *Donald Smith, Judge*. Judgment entered 16 March 1977, in Superior Court, WILSON County. Heard in the Court of Appeals 6 December 1977.

Defendant was charged in a proper bill of indictment with armed robbery, to which charge he entered a plea of not guilty. At trial the State put on evidence tending to show that on 15 December 1976 defendant entered a grocery store in Stantonsburg, drew a pistol on Carl Boswell, the operator of the store, and demanded all the money in the cash drawer. After giving defendant all the currency in the drawer Boswell managed to flee from the store. Boswell then observed the defendant leave the store, run down the road to Saratoga and then into the woods.

Boswell talked to several Wilson County deputies about defendant's description. He described the robber as a black male who was wearing a blue tam and a yellow coat. The main feature that Boswell remembered was the man's irregular teeth. Testimony by Boswell indicated that when defendant was brought to the grocery store by a deputy within three hours of the armed robbery he was not sure defendant was the man who had robbed him. Defendant's coat was brown, and only when Boswell saw the yellow buttons did he identify the coat as being the one worn by the person committing the armed robbery. Boswell stated that he was sure defendant was the one when he saw defendant's irregular teeth and defendant's gold earbob. Defendant's wallet

contained $56 which, according to Boswell, was the amount taken in the armed robbery.

Defendant took the witness stand and offered evidence tending to show that he was riding in an automobile with two other men on 15 December 1976; that he asked to be let out of the car because the driver was drinking alcoholic beverages; that he started walking toward his brother's home; and that he was picked up by a deputy sheriff. He went voluntarily to Boswell's grocery store. Defendant testified that he did not own a pistol and that he had not been in Boswell's grocery store on 15 December 1976. He explained that the money in his possession was money he had earned the previous week at a tobacco factory.

From a jury verdict of guilty of armed robbery and a sentence of not less than 20 years nor more than 25 years in prison, defendant appeals.

Attorney General Edmisten, by Associate Attorney Henry H. Burgwyn, for the State.

Farris, Thomas & Farris, by Robert A. Farris, for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the trial court committed reversible error by allowing the State's witness, Carl Boswell, to make an in-court identification of defendant. He argues that the pretrial identification procedure in which defendant was shown singly to Boswell was so suggestive as to lead to a tainted identification. We cannot agree.

Although the practice of showing suspects singly for identification purposes has been recognized as suggestive and has been widely condemned, whether such confrontation violates due process depends upon the totality of the circumstances. *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972); *State v. Lankford*, 28 N.C. App. 521, 221 S.E. 2d 913 (1976). In *Neil v. Biggers, supra*, the United States Supreme Court listed some factors which should be considered in determining whether the "totality of the circumstances" indicates the identification was reliable. These factors include the opportunity of the witness to view the criminal at the time of the crime, the witness's description of the

criminal, the amount of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

In the present case the record discloses that the armed robbery took place in a small grocery store lit by three naked, seventy-five watt light bulbs, and that witness Boswell was, at one point, as close as five or six feet from defendant. Boswell testified that the defendant was in the store for about eight, ten, or twelve minutes. Defendant points out that the witness failed to describe correctly the color of the jacket worn by the robber and that Boswell did not describe defendant as having a mustache. We do not believe, however, that a witness must be able to describe with perfect accuracy a person he observes in the process of committing a crime. The description given by Boswell, his apparently earnest and independent efforts to identify the proper person, his certainty once he saw defendant's teeth and defendant's earbob, and the short interval of time between the crime and the confrontation, are all factors tending to show that under the totality of the circumstances the identification was reliable. We, therefore, find no error in the trial court's conclusions and its admission of the in-court identification. *State v. Lankford, supra.*

[2] Defendant's second assignment of error is that the trial court erred in admitting corroborative hearsay evidence of State's witness T. M. Owens concerning Boswell's description of the armed robber. Defendant argues that there was no evidence that Boswell, whose testimony Owens was corroborating, ever talked to Owens. The record, however, shows that Boswell talked to four or five deputies concerning the description of the robber; he stated at one point that Owens arrived shortly after deputy sheriff Gay, that he did not believe Owens wrote down the description, but that Gay did. We think this was sufficient evidence from which to infer that Boswell talked to Owens. Hence, such evidence was corroborative and was properly admitted.

[3] The final assignment of error which we consider is defendant's argument that the trial court erred in denying defendant's motion for mistrial after the prosecutor cross-examined defendant concerning past criminal acts. According to the record, defendant denied, in response to the prosecutor's question, that he had ever been convicted of any criminal offense other than

traffic offenses. The prosecutor then asked defendant whether he had escaped from the North Carolina prison system on 21 May 1971. Defendant's objection was sustained, but defendant argues that the prosecutor acted in bad faith by asking the question, and that prejudicial error resulted.

Our courts have consistently held that once a defendant elects to testify in his own behalf he subjects himself to impeachment by questions relating to past criminal acts. *See, e.g. State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, vacated and remanded on other grounds *sub nom McKenna v. North Carolina*, --- U.S. ---, 50 L.Ed. 2d 278, 97 S.Ct. 301 (1976). Of course, the prosecutor who asks such questions must do so in good faith, but where the record shows no bad faith on the part of the prosecutor the judge's allowing such questions is presumed correct. *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970).

In the case at bar, the court sustained defendant's objection to the question. Defendant has shown no bad faith on the part of the prosecutor and we, therefore, find no error in the question prejudicial to defendant.

Defendant's other assignments of error have been reviewed by this Court and no error has been found.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES DOUGLAS JOYNER AND IN RE: JERRY PAUL

No. 777SC639

(Filed 17 January 1978)

Attorneys at Law § 5; Contempt of Court § 2.2— contempt of court—attorney's failure to file appeal or petition for certiorari—misrepresentations to court

An attorney was properly held in contempt of court for misbehavior of an officer of the court in an official transaction in violation of G.S. 5-1(8) where the court found upon supporting evidence that the attorney (1) gave notice of appeal for a criminal defendant, permitted the trial court to order that he be provided a transcript of the trial at the State's expense, and accepted the transcript when he had no intention of perfecting the appeal or using the

transcript in connection with an appeal; (2) deliberately caused defendant to lose his right of appeal by failing and refusing to obtain an extension of time within which to prepare and serve and file the record on appeal; (3) wilfully and intentionally failed and refused to file a petition for a writ of certiorari in the Court of Appeals to obtain appellate review of defendant's trial and misrepresented to the court that he had filed such a petition.

APPEAL by respondent from *Fountain, Judge.* Order entered 8 March 1977 in Superior Court, WILSON County. Heard in the Court of Appeals 6 December 1977.

On 30 December 1976 this Court entered an order directing the Superior Court of Wilson County to conduct a hearing for the purpose of determining whether attorney Jerry Paul had "breached his professional obligation to his client," James Douglas Joyner, and whether Joyner had been "denied a right of appellate review of his trial." This Court then directed the presiding judge to "take such action in the premises as he deems appropriate under his findings of fact." Pursuant to this order a hearing was scheduled for 17 January 1977, and Paul was ordered to appear for disposition of the following issues:

> "1. Whether Mr. Paul has breached his professional obligation to his client, James Douglas Joyner;
>
> "2. Whether the defendant has been denied a right of appellate review of his trial;
>
> "3. Whether Mr. Paul falsely and knowingly represented to the Honorable Walter W. Cohoon, Judge presiding in Wilson Superior Court on or about November 30, 1976, that he had filed a petition for a Writ of Certiorari to the Court of Appeals and that said matter was pending in the Court of Appeals and had not been acted on by that Court;
>
> "4. Whether Mr. Paul was and is in contempt of the Superior Court of Wilson County."

After a continuance, the hearing was conducted on 7 March 1977, and the parties, the petitioner James Joyner and the respondent Jerry Paul, presented evidence. At the completion of the hearing the trial judge made the following pertinent findings of fact:

> "James Douglas Joyner was found guilty in six different cases at the May 1976 Session of Wilson Superior Court; in

three of those cases he was found guilty of possession of a controlled substance with intent to deliver the same and in the other three cases he was found guilty of the actual sale of the controlled substances. In the possession cases he was sentenced to the Wilson County Jail for Five Years to be assigned to work under the supervision of the Department of Correction, and in the cases wherein he was convicted of the sale of controlled substances he was sentenced to the Wilson County Jail for a period of Five Years to be assigned to work under the supervision of the Department of Correction, this sentence to begin at the expiration of the preceding sentence. The defendant at that time was and had been since shortly after his arrest represented by Mr. Jerry Paul, who was privately employed to represent him.

"Upon the entry of the judgments as aforesaid, Mr. Paul as attorney for the then defendant, Joyner, gave notice of appeal to the Court of Appeals, which notice was given in open court and an entry to that effect was made on each commitment. On the same day, the Honorable Albert W. Cowper, Judge Presiding, entered an order providing that the court reporter should prepare the transcript of the trial and furnish the original to defendant's counsel and a copy to the district attorney of the Seventh Judicial District and that the State of North Carolina should pay for the transcript only. The transcript was delivered by mail to Mr. Paul on August 25, 1976, which was more than sixty days after the date of judgment and after the time for serving case on appeal had expired. There was no extension of time to prepare and serve case on appeal and there is no documentary evidence that any extension was ever requested. Mr. Paul testified that he mailed a request to Judge Cowper and received no reply. It does not appear, however, that any appearance was made before any judge requesting such extension.

"On July 30, 1976, an assistant district attorney for the Seventh Judicial District caused to be served upon Mr. Paul a notice that he would make a motion in the Superior Court for an order dismissing the appeal in the case because no case on appeal had been served on the State within the sixty days allowed. Honorable Walter W. Cohoon, Judge Presiding in Wilson Superior Court, on November 30, 1976, heard the

motion to dismiss the appeal in each case. Upon the hearing of the motion, Mr. Paul was present representing James Douglas Joyner and resisting the motion to dismiss, in that he represented to the Court that he had previously filed petition for certiorari in the Court of Appeals, and he further represented to the Court that the petition was then pending in the Court of Appeals and had not been acted upon by the Court of Appeals. Based upon such representation, the judge presiding at that time entered an order dismissing the appeal but ordered a delay of the commitment until Thursday, December 9, 1976, at 10:00 o'clock, said order providing that the defendant should surrender himself to the Sheriff of Wilson County at that time unless prior to that time the Clerk of Superior Court had been furnished a certified copy of an order for bond for the defendant by the Court of Appeals in connection with the aforesaid petition for certiorari. When Mr. Paul made those representations to Judge Cohoon, he did not know that a petition for certiorari had been filed, and does not know at this time if he ever made any application for bond with the Court of Appeals.

"The Court has before it a certificate from the Clerk of the Court of Appeals dated January 11, 1977, to the effect that on that date no petition for certiorari had been filed by Mr. Paul on behalf of James Joyner, and no application for appearance bond was filed.

"Mr. Paul now informs the Court that it was never his intention to perfect an appeal to the Court of Appeals and he did not wish to have a petition for certiorari allowed by the Court of Appeals, for that it was his intention to pursue such remedies as Joyner had in the Federal Courts with the hope of having the sentences imposed reduced from a total of Ten Years to Five Years. However, he accepted the transcript of the case as prepared by the court reporter with knowledge that the Trial Judge had ordered the State to pay for the transcript for him and copy for the district attorney for the purpose of appeal.

"When Mr. Paul was first employed there was an agreement that he should be paid $3500.00 to represent James Joyner and his wife, who was charged with violating the Controlled Substances Act, and Greg Bennett, a third defendant

who was also charged with violating the Controlled Substances Act. The cases of James D. Joyner have been tried; his wife's cases have not yet been tried. Before trial Mr. Paul was paid $1000.00, $500.00 of which was paid by Mr. Joyner and $500.00 by Mrs. Joyner. On June 7, 1976, nearly a month after the notice of appeal had been given, Mr. Paul was paid an additional $700.00 by check. There was some misunderstanding on the part of Mr. Paul and Mr. and Mrs. Joyner as to how the payments should be credited. Notwithstanding that, Mr. Paul undertook to represent the said James Douglas Joyner in the Superior Court and did represent him at his trial and represented him on appeal.

"Mr. Paul has presented a photocopy of a petition for certiorari in the case of James Douglas Joyner. It purports to be verified by him on November 16, 1976, and a certificate of service by him upon the Attorney General of North Carolina by mail on November 16, 1976. Notwithstanding the fact that Mr. Paul has had notice of this hearing since service upon him by the Sheriff of Durham County on January 18, 1977, he has offered nothing to show that a copy of such petition was ever received by the Court of Appeals. Furthermore, he has testified that neither was returned by the Post Office Department as being undelivered.

"At this time there has been no petition for certiorari filed with the Court of Appeals or any application for bond filed with the Court of Appeals or any petition for writ of habeas corpus or any other proceeding in the Federal Courts on behalf of James Douglas Joyner by his attorney, Mr. Paul."

On the basis of these findings the trial judge concluded that Paul's failure to perfect the appeal of his client or to petition this Court for a writ of certiorari and his false representations to the trial judge concerning a pending petition for certiorari constituted acts in contempt of court. From an order imposing a prison sentence of 5 days, suspended upon payment of a fine of $50.00, respondent appealed.

Attorney General Edmisten, by Associate Attorney Joan H. Byers, for the State.

Loflin & Loflin, by Thomas F. Loflin III, for respondent.

HEDRICK, Judge.

Respondent does not challenge any of the facts found by Judge Fountain. He contends that the findings of fact do not support the conclusions of law drawn by the trial judge from the findings, and that the conclusions do not support the order declaring him to be in contempt.

G.S. 5-1 in pertinent part provides: "Contempts enumerated; . . . — Any person guilty of any of the following acts may be punished for contempt: . . . (8) Misbehavior of any officer of the court in any official transaction."

"Misbehavior" is defined in Black's Law Dictionary 1150 (4th Ed. 1968), as "[i]ll conduct; improper or unlawful behavior." A synonym for this term, "misconduct in office," is defined as "[a]ny unlawful behavior by a public officer in relation to the duties of his office, willful in character." Black's Law Dictionary, *supra.*

In our opinion the uncontroverted findings of fact manifest the respondent's misbehavior within the meaning of G.S. 5-1(8) as an officer of the court in official transactions as follows: (1) By giving notice of appeal to the Court of Appeals and permitting the court to order that the respondent be provided a transcript of the defendant's trial at the State's expense, and respondent's acceptance of the transcript when the respondent has no intention whatsoever of perfecting the appeal or using the transcript in connection with the appeal; (2) By deliberately causing the defendant to lose his right of appeal by failing and refusing to obtain an extension of time within which to prepare and serve the record on appeal, and file the record on appeal in the appellate division; (3) By wilfully and intentionally failing and refusing to file a petition for a writ of certiorari in the Court of Appeals to obtain appellate review of defendant's trial, and by misrepresenting to the court the facts with respect to the filing of a petition for a writ of certiorari; (4) By breaching his professional duties to his client and to the public with respect to the administration of justice, and thereby deliberately prejudicing the rights of the defendant to obtain appellate review of his cases.

We hold that the findings of fact support the conclusions of law, and the record supports the order appealed from.

Affirmed.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. JEROME MITCHELL

No. 775SC606

(Filed 17 January 1978)

1. **Criminal Law § 34.7— prior conviction—evidence of punishment—inadmissibility to show intent**

The trial court did not err in excluding defendant's testimony on direct examination concerning the punishment imposed on him for a prior conviction, since such evidence was not relevant, as defendant contended, to show his intent or state of mind at the time of the commission of the crime charged.

2. **False Pretense § 3.2— jury instructions—burden of proof properly on State**

In a prosecution for attempting to obtain property by false pretenses where defendant allegedly attempted to obtain goods with a counterfeit $100 bill, the trial court's instructions that the State must prove "that defendants knew the bill was false or had no reason to believe that it was a good bill" properly placed upon the State the burden of proving one of the elements of the crime charged.

APPEAL by defendant from *Walker (Hal H.), Judge.* Judgment entered 2 March 1977 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 29 November 1977.

Defendant was indicted on two counts of attempting to obtain property by false pretenses.

State's evidence tended to show that defendant by the use of a $100 counterfeit bill attempted to obtain merchandise from Sears and Rose's Stores.

Defendant's evidence tended to show that a co-defendant Muldrow won the fake $100 bill gambling on 18 January and on 19 January the two men went shopping; that Muldrow handed the bill to defendant after he had twice tried unsuccessfully to get it changed; and that defendant did not examine the bill and did not know that it was false.

In rebuttal, State presented evidence to the effect that both defendant and Muldrow had claimed at the time of their arrest that defendant had won the fake bill in gambling.

Defendant was convicted by a jury of both charges and from a consolidated sentence of imprisonment for a term of two to four years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Charles M. Hensey, for the State.

Parker, Rice & Myles, by Charles E. Rice III, for defendant.

HEDRICK, Judge.

[1] Defendant assigns as error the trial court's exclusion of defendant's testimony on direct examination relative to the punishment imposed on him for a prior conviction. After testifying on direct examination to the time and place of a prior conviction, defendant was asked by his counsel, "and what sort of sentence did you receive?" The State's objection to this question was sustained. Defendant's counsel then asked, "Are you presently on parole or probation?" Again, the State objected and was sustained.

Defendant contends that the fact that he was on parole at the time of the alleged commission of the crime charged was relevant to his intent or state of mind at that time in that it tends to establish that defendant would not knowingly commit another crime and risk reactivation of a twenty-two (22) year prison term. In arguing that this evidence should have been admitted, defendant relies on the well-recognized rule that evidence tending to establish the requisite, specific intent of the accused is competent notwithstanding such evidence also discloses the commission of another offense, *see State v. Atkinson*, 275 N.C. 288, 161 S.E. 2d 241 (1969), and seeks to extend this rule to allow inquiry into the *punishment imposed* as a result of the former offense. We find no merit in this contention.

We find no controlling authority in North Carolina on this point. It is true that the rule permitting, for purposes of impeachment, cross-examination of witnesses with respect to their prior convictions has been extended to allow inquiry into the punishment imposed as a result of these convictions. *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977); *Ormond v. Crampton*, 16 N.C. App. 88, 191 S.E. 2d 405, *cert. denied*, 282 N.C. 304, 192 S.E. 2d 194 (1972). However, we do not think this rule lends support to

defendant's position in the instant case. The underlying purpose of the rule allowing a witness to be *cross-examined* with respect to prior convictions is separate and distinct from that allowing evidence to be elicited on *direct examination* which discloses the commission of another offense. *See State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). Under the former, evidence elicited goes to the credibility of the witness and is admitted for impeachment purposes only. *State v. Williams, supra*; 1 Stansbury's N.C. Evidence (Brandis Rev. 1973) § 112. However, under the latter rule—upon which defendant relies—the evidence is admissible, as substantive evidence, only if it tends to establish a material element of the crime charged. *State v. McClain, supra.*

Guided by these principles, we are of the opinion that any probative value the proffered testimony may have had was far outweighed by the distraction inherent in placing such details before the jury. Therefore, this evidence was irrelevant and properly excluded.

[2] Defendant further assigns as error the following portion of the court's charge:

> ". . . and third, that when the defendants presented that bill in payment for goods or in payments for any item worth any money from either of the stores they knew that it was false or *had no reason to believe that it was a good bill.*" (Emphasis added.)

Defendant contends that the emphasized portion of the instruction was erroneous in that it put the burden of proof on the defendant to show that he had reason to believe that the bill was good. He argues that the jury would be misled to think that, in order to acquit defendant, they must believe defendant's story as to how he got the bill. This contention is without merit.

The challenged instruction recited one of the elements which the court charged that the State must prove beyond a reasonable doubt before finding defendant guilty of attempting to obtain property by false pretense. It was the State, not the defendant, upon whom the court cast the burden. This burden, which the State was required to prove beyond a reasonable doubt, was "that defendants knew the bill was false or had no reason to believe that it was a good bill." We can see no burden resting on

the defendant as a result of the challenged instruction. This assignment of error is overruled.

We have carefully examined the remaining assignments of error and find them to be without merit.

In the trial we find no prejudicial error.

No error.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. SANDY DOUGLAS ROSS, JR.

No. 7726SC634

(Filed 17 January 1978)

1. **Criminal Law § 86.1— impeachment of defendant—scope of cross-examination**

Where the accused testifies in his own behalf he surrenders the privilege against self-incrimination, and he is subject to impeachment by questions concerning specific criminal acts and degrading conduct; cross-examination for impeachment purposes is not limited to criminal convictions but includes any conduct by defendant which tends to impeach his character.

2. **Criminal Law § 86.5— cross-examination of defendant—contraband in home—illegal search—questions proper**

The trial court did not err in allowing the district attorney to cross-examine defendant about drugs found in defendant's home pursuant to an allegedly illegal search, since the questions related to matters within defendant's own knowledge and not to accusations, arrests or indictments, and there was no evidence that the district attorney asked the questions in bad faith.

APPEAL by defendant from *Friday, Judge*. Judgment entered 11 March 1977, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 December 1977.

The defendant was charged with possession with intent to sell Methylenedioxy Amphetamine (MDA), a controlled substance, and with the sale and delivery of MDA on 27 February 1975. To both charges, defendant entered a plea of not guilty. The State's evidence tended to show that on the night of 27 February 1975, R. T. Guerette, an undercover police officer, went to defendant's home in Charlotte and made a previously arranged purchase from defendant of two plastic bags containing MDA.

Defendant put on evidence by family members and employees of Carolina Fire Equipment Sales & Service, Inc., the company by which defendant was employed. His evidence tended to show that on 26 February 1975 defendant was called by his father, the president of Carolina Fire Equipment Sales & Service, Inc., to come to Southport, North Carolina to wire and hook up a burglar alarm system under a contract involving a nuclear power generation station. Defendant testified that on 27 February he checked out of the Wilmington, North Carolina motel in which he had stayed on 26 February, and that he went to the Southport job site. He worked there all day. After completing his work he drove back to Charlotte, arriving there sometime after daybreak on the 28th of February.

The jury found defendant guilty of possession with intent to sell MDA and of selling and delivering MDA. For possession with intent to sell MDA defendant was sentenced to not less than five nor more than seven years imprisonment. Defendant received a suspended five-year sentence for sale and delivery of MDA. He appeals from both judgments.

Attorney General Edmisten, by Associate Attorney Jane Rankin Thompson, for the State.

Paul L. Whitfield and Rodney W. Seaford for defendant appellant.

ARNOLD, Judge.

Error is assigned to the trial court's allowing the State to cross-examine defendant about previous convictions. It is asserted that the North Carolina law allowing the State to cross-examine a defendant concerning prior criminal convictions should be reconsidered. Our Supreme Court has refused to change the rule as it is hereinafter stated, and this Court will not reconsider the rule as stated in *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, vacated and remanded on other grounds *sub nom McKenna v. North Carolina*, --- U.S. ---, 50 L.Ed. 2d 278, 97 S.Ct. 301 (1976); *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973).

[1] The rule is that where the accused testifies in his own behalf he surrenders the privilege against self-incrimination, and he is subject to impeachment by questions concerning specific criminal acts and degrading conduct. Cross-examination for impeachment

purposes is not limited to criminal convictions but includes any conduct by defendant which tends to impeach *his character. State v. McKenna, supra; State v. Poole*, 289 N.C. 47, 220 S.E. 2d 320 (1975); *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971); *State v. Clark*, 28 N.C. App. 585, 221 S.E. 2d 841 (1976). The reasoning for the rule is that the State should be able "to sift the witness and impeach, if it can, the credibility of a defendant's self-serving testimony." *State v. Foster, supra* at 275, 200 S.E. 2d at 794.

[2] Defendant further complains that even if the cross-examination concerning the commission of other crimes was proper, the trial court nevertheless erred in allowing the district attorney to cross-examine him about illegal drugs purportedly in his possession as of 3 January 1975. He contends that the district attorney was allowed to cross-examine him about drugs which were found in his home on 3 January 1975 pursuant to an illegal search.

According to the record defendant was asked whether on the 3rd day of January 1975, "you did not have in your possession in your house in your room a zip-locked bag containing . . . cocaine?" Defendant answered in the negative. There follow several pages of transcript wherein defendant indicated that he was not there when any contraband was found on that date; that if any were found it did not belong to him; and finally defendant concluded that he had "found out that something was found in my house. I didn't find out where it was." Defendant then went on to testify that he had been prosecuted in District Court, and that "the search was held to be unlawful."

The questions asked of defendant related to matters within defendant's own knowledge, and not to accusations, arrests or indictments. Cross-examination of a defendant is not limited to inquiry concerning previous convictions, but may include matters within the knowledge of defendant (*State v. Poole, supra; State v. Williams, supra*) and may encompass any act of defendant which tends to impeach his character. *State v. McKenna, supra.*

Defendant's further contention that by permitting the cross-examination the State was allowed to profit from its unlawful act in violation of Federal and State constitutional due process is also rejected. Obviously, evidence obtained by a search and seizure

which violates the Fourth Amendment will not be admissible, *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961). The record shows that defense counsel remained silent as to why the District Court may have disallowed the evidence, and there is no indication from the record that the district attorney's questions were asked in bad faith. There was no attempt by the State to make affirmative use of such evidence against defendant, and the State was not prohibited from cross-examining defendant about having the contraband in January 1975 in order to discredit defendant's voluntary testimony.

Defendant's remaining contentions have been reviewed and there is found no prejudicial error which would require a new trial.

No error.

Judges MORRIS and HEDRICK concur.

MERT L. MITCHELL, RECEIVER OF OFFICE SUPPLY COMPANY, INC. PLAINTIFF v. REPUBLIC BANK & TRUST COMPANY, DEFENDANT AND THIRD PARTY PLAINTIFF v. WEATHERS BROS. OFFICE EQUIPMENT CO., THIRD PARTY DEFENDANT

No. 7726SC148

(Filed 17 January 1978)

1. **Uniform Commercial Code § 42— bank's payment of check after stop payment order—burden of showing loss**

When a bank pleads non-loss by a bank customer in an action by the customer to recover damages caused by the bank's payment of a check contrary to a valid stop payment order, the customer must show some loss other than the mere debiting of his bank account in the amount of the check. G.S. 25-4-403(3).

2. **Uniform Commercial Code § 42— bank's payment of check after stop payment order—burden of showing loss**

A *prima facie* case of loss is established by a bank customer when he shows that the bank paid a check contrary to a valid stop payment order, and the bank, exercising its subrogation rights created by G.S. 25-4-407, then has the burden of coming forward and presenting evidence of actual loss sustained by the customer. When the bank meets this burden of coming forward, the customer must sustain the ultimate burden of proving loss.

3. Uniform Commercial Code § 42— bank's payment of check after stop payment order—summary judgment—issue as to loss

The trial court erred in granting summary judgment for plaintiff customer in an action to recover damages allegedly caused by defendant bank's payment of a check contrary to plaintiff's stop payment order where the bank denied plaintiff's allegation that he had been damaged by the face amount of the check, and plaintiff offered only his verified complaint to establish his loss and thus did not carry the burden of showing that no genuine issue of material fact existed as to the loss.

APPEAL by defendant from *Griffin, Judge*. Judgment entered 6 January 1977, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 December 1977.

On 19 August 1976 plaintiff was appointed receiver of Office Supply Company, Inc. Plaintiff instituted this action under G.S. 25-4-403 alleging that defendant bank paid a check for which a valid stop payment order had been entered.

The check was drawn on 9 August 1976 by Office Supply in favor of Weathers Bros. Office Equipment Co. On 12 August 1976 the bank was instructed not to pay the check. On 18 August 1976 the bank allowed payment of the check and deducted the amount of the check from the account of Office Supply Company, Inc.

Defendant answered and admitted payment of the check contrary to the stop payment order but denied that plaintiff had suffered any loss by the payment. Pursuant to G.S. 25-4-407(b), the bank claimed subrogation to the rights of Weathers Brothers Office Equipment Company, the payee of the check. Later, defendant filed, pursuant to G.S. 25-4-407(c), a third party complaint against Weathers Brothers claiming its subrogation to the rights of plaintiff depositors. Plaintiff filed a motion for summary judgment after which defendant served upon plaintiff interrogatories to determine the facts underlying the transaction between plaintiff and third party defendant. As far as the record reveals, defendant's interrogatories had not been answered when the trial court granted plaintiff's motion for summary judgment. Defendant appeals from that judgment.

Joseph L. Barrier for plaintiff appellee.

Tucker, Moon and Hodge, by John E. Hodge, Jr., for defendant appellant.

ARNOLD, Judge.

The sole question presented by this appeal is whether the trial court erred in granting plaintiff's motion for summary judgment. Summary judgment, of course, is appropriate when there is no genuine issue as to any material fact in the claim for relief. G.S. 1A-1, Rule 56. Defendant argues that there was a genuine issue as to plaintiff's actual loss in the transaction and that, until plaintiff established such loss, summary judgment was not proper. Plaintiff's counter-argument is that the amount of loss was the amount of the check, and that that amount was clearly established.

G.S. 25-4-403(1) clearly gives a bank customer the right to stop payment on a check:

> "(1) A customer may by order to his bank stop payment of any item payable for his account but the order must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it prior to any action by the bank with respect to the item described in § 25-4-303."

In the present case there is no question raised as to the fact that plaintiff made a binding stop payment order. G.S. 25-4-403(3) places the burden of proof of loss on the bank customer, here the plaintiff:

> "(3) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a binding stop payment order is on the customer."

[1] There is no case law in this State, and nothing in the Official or North Carolina Comments, which defines "loss" as used in this section. We conclude that, where the bank pleads non-loss by the bank customer, a bank customer, in order to recover for damages caused by the bank's payment of a check contrary to a valid stop payment order, must show some loss other than the mere debiting of his bank account in the amount of the check. Otherwise there would appear to be no reason for the enactment of G.S. 25-4-403(3). *See, e.g., Thomas v. Marine Midland Tinkers Nat. Bank*, 86 Misc. 2d 284, 381 N.Y.S. 2d 797 (1976).

G.S. 25-4-407 gives to a payor bank, that has improperly paid a check contrary to a stop payment order, subrogation rights of various parties to the transaction:

"If a payor bank has paid an item over the stop payment order of the drawer or maker or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank shall be subrogated to the rights

(a) of any holder in due course on the item against the drawer or maker; and

(b) of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose; and

(c) of the drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose."

Under this section the defendant bank is subrogated to the rights of the payee (here Weathers Brothers) against the drawer (the plaintiff), to prevent any unjust enrichment of the drawer. It, therefore, makes little sense to define the term "loss" as found in G.S. 25-4-403(3) to mean the amount of the check, when G.S. 25-4-407 gives the bank possible subrogation claims against the drawer plaintiff which would reduce the amount for which the bank might be liable.

[2] We are aware that the two sections, G.S. 25-4-403(3) and G.S. 25-4-407 may present a question as to who has the ultimate burden of proof. The better rule, we believe, is to place the ultimate burden of proof as to loss on the customer. A *prima facie* case is established by the customer when he shows that the bank paid a check contrary to a valid stop payment order. Then the bank, exercising its subrogation rights created by G.S. 25-4-407, has the burden of coming forward and presenting evidence of an absence of actual loss sustained by the customer. When the bank meets the burden of coming forward, the customer must sustain the ultimate burden of proof. *Thomas v. Marine Midland Tinkers Nat. Bank, supra.*

[3] Of course, no matter who has the burden of proof at trial upon the issues raised, the party moving for summary judgment has the burden of showing that there exists no genuine issue of

material fact. *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972). Based upon this record it was error to grant summary judgment for plaintiff. Plaintiff alleged that it had been damaged by the face amount of the check $2,364.21. The bank denied this allegation. Thus an issue of fact material to plaintiff's cause of action was presented by the pleadings, and since plaintiff offered only his verified complaint to establish his loss he did not carry the burden of showing that no genuine issue of material fact existed.

Vacated and remanded.

Judge MORRIS and HEDRICK concur.

LUTHER L. SMITH, EMPLOYEE v. BURLINGTON INDUSTRIES, INC., EMPLOYER; LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 7727IC105

(Filed 17 January 1978)

Master and Servant § 65.2— lifting spray bars—back injury—no accident

The Industrial Commission properly concluded that plaintiff's back injury did not result from an accident within the meaning of the Workmen's Compensation Act where the evidence tended to show that plaintiff was changing cold spray bars, his customary work, in the usual way when he suffered low back pain which resulted from a ruptured disc.

APPEAL by plaintiff from an order of the North Carolina Industrial Commission entered 29 December 1976. Heard in the Court of Appeals 29 November 1977.

This is a claim for benefits under the Workmen's Compensation Act for injury suffered by plaintiff while in the employ of defendant Burlington Industries, Inc.

The facts surrounding plaintiff's injury are undisputed and were contained in an Option and Award filed by Deputy Commissioner J. C. Rush on 5 October 1976. These facts can be summarized, briefly, as follows: Since June, 1973, plaintiff had been a training instructor for defendant Burlington Industries, Inc. His duties involved training other employees to operate sanforizer machines. On occasion this involved the changing of cold spray

bars, a part of these machines. These cold spray bars are made of solid brass, weigh about fifteen pounds, and have dimensions of approximately five inches by eight inches, by two and one-half inches. On 12 Januray 1976, plaintiff was working the third shift, and at about 2:00 a.m. had occasion to change a set of two cold spray bars. After installing new or clean bars, plaintiff picked up the dirty bars, one in each hand, and while lifting them turned or twisted to place them on a bench to his left. While executing this turning or twisting movement, plaintiff felt a pain in his lower back and dropped the two bars. Plaintiff's condition was ultimately diagnosed as a ruptured disc, which was surgically removed. Plaintiff sustained a fifteen percent permanent partial disability of the back as a result of this injury.

The Deputy Commissioner also found as facts that at the time in question, plaintiff was performing his customary work in the usual way, and that the injury did not result from an "accident" as defined in the Workmen's Compensation Act, G.S. 97-2(6). Thus the Deputy Commissioner concluded that plaintiff was not entitled to benefits under the Act, and denied his claim.

Plaintiff appealed to the full Commission, and following a hearing, the Commission adopted as its own the Opinion and Award of the Deputy Commissioner in its entirety, and affirmed the results reached therein.

From the decision of the Industrial Commission, plaintiff appealed.

Roberts, Caldwell and Planer, by Joseph B. Roberts III, for plaintiff.

Mullen, Holland & Harrell, by Graham C. Mullen, for defendants.

BROCK, Chief Judge.

The sole question on this appeal is whether plaintiff's injury resulted from an accident within the meaning of the Workmen's Compensation Act. The Industrial Commission answered the question in the negative, and we are constrained to affirm its decision.

Findings of fact by the Industrial Commission are conclusive and binding on appeal if supported by competent evidence, even though the record contains evidence that would support contrary

findings. *Blalock v. Roberts Co.*, 12 N.C. App. 499, 183 S.E. 2d 827 (1971). In the instant case the Commission adopted the Deputy Commissioner's findings that, *inter alia*,

> "4. At the time in question, the plaintiff was performing his customary work in the usual way at the time he felt a pain in his low back.
>
> * * *
>
> 9. . . . The injury did not result from an accident as the word 'accident' is defined with reference to the Workmen's Compensation Act, as there was no interruption of the plaintiff's work routine, and he was merely performing his usual and normal duties in the customary manner."

There was competent evidence before the Commission that it was not unusual for plaintiff to handle cold spray bars and that at the time of his injury he was doing nothing different or unusual from that which he was accustomed to doing. In cases of this sort involving back injury, "the elements constituting accident are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Pardue v. Tire Co.*, 260 N.C. 413, 415, 132 S.E. 2d 747, 748 (1963). The findings by the Commission that these elements were absent at the time of plaintiff's injury are supported by the evidence.

Plaintiff relies on a line of cases allowing recovery where the employee suffered back injury or hernia while lifting or performing his duties in an unusual position or from confining or otherwise exceptional surroundings. *See, Keller v. Wiring Co.*, 259 N.C. 222, 130 S.E. 2d 342 (1963); *Rhinehart v. Market*, 271 N.C. 586, 157 S.E. 2d 1 (1967) (dicta); *Dunton v. Construction Co.*, 19 N.C. App. 51, 198 S.E. 2d 8 (1973). However, to the extent that the results in those cases differ from that of the instant case they are factually distinguishable in that the employee was performing an unusual task or was in an unusually twisted, cramped, or awkward position. *See, Pulley v. Association*, 30 N.C. App. 94, 226 S.E. 2d 227 (1976). Plaintiff argues that he was in a confined area approximately twenty-one inches wide. We cannot say that this circumstance constituted an unusual or exceptional circumstance so as to rebut the Commission's finding based upon

competent evidence that plaintiff was performing his customary work in the usual manner.

The decision of the Industrial Commission denying plaintiff's claim is

Affirmed.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. THEODORE ROOSEVELT MARTIN

No. 7714SC657

(Filed 17 January 1978)

Homicide § 28.8— failure to instruct on accident

The trial court in a homicide prosecution erred in failing to instruct the jury on the defense of accident where defendant testified that he and a third person were struggling over a gun which the third person pointed at him and that the gun discharged and killed the decedent.

ON certiorari to review defendant's trial before *Braswell, Judge.* Judgment entered 18 December 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 7 December 1977.

Defendant was charged in a proper bill of indictment with the murder of Felicia Garner. Upon defendant's plea of not guilty, the State offered evidence tending to show the following:

On the night of 16 June 1975 several persons were gathered at the residence of Paulette Jones in Durham, North Carolina, to celebrate a birthday. At approximately nine o'clock p.m. the defendant stopped at the house and asked for some liquor. Informed by Jones that she had no liquor, defendant departed. However, defendant and some companions returned to the house at approximately one o'clock a.m. An argument was precipitated when the intruders were told to leave provoking the defendant to knock Felicia Garner from the stool on which she had been sitting. During the ensuing scuffle, defendant was hit on the head with a wine bottle causing some facial wounds. Defendant left the house but returned soon thereafter brandishing a shotgun. In the meantime some of the group had left, and the others had gone to the

bedroom. Felicia Garner was in the bathroom and Sandra Barrett was standing in the hall outside the bathroom when the defendant came running down the hall asking, "Where is the bitch?" At this time Garner opened the door and stepped out of the bathroom. Defendant aimed the gun and fired it at Garner causing a fatal wound in the left side of her chest. Sandra Barrett then grabbed the barrel of the gun in an effort to wrest it from the defendant. The police who had arrived on the scene quickly intervened and took possession of the gun.

The defendant presented evidence tending to show the following: When the defendant and his companions returned for a second visit to the Jones residence they asked to see Paulette Jones. They were pushed out the door by one of the group and told to leave. When the defendant resisted he was hit on the head with a wine bottle and knocked to the floor. A short time later the defendant saw Sandra Barrett standing in the foyer near the kitchen pointing a shotgun at him. He grabbed the barrel of the gun and began wrestling with Barrett at which time the gun discharged. The defendant did not see the deceased, Felicia Garner, at this time, nor did he at anytime go down the hall toward the bedroom and bathroom. Soon after the shot was fired the police arrived and took the gun.

The jury found the defendant guilty of second degree murder. From a judgment imposing a sentence of 30 years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the State.

Pearson, Malone, Johnson, DeJarmon and Spaulding, by George W. Brown, for the defendant appellant.

HEDRICK, Judge.

The one assignment of error brought forward and discussed in defendant's brief is set out in the record as follows: "For that the trial Court committed prejudicial and reversible error in failing to charge the jury upon the lesser offenses of mansalughter [sic] in its varying degrees, self-defense or accident."

According to G.S. 1-180 the trial judge is required to "declare and explain the law arising on the evidence given in the case."

The statute comprehends instructions by the trial judge "on all substantial features of the case arising on the evidence without special request therefor. [Citations omitted.] And all defenses presented by defendant's evidence are substantial features of the case. [Citations omitted.]" *State v. Dooley*, 285 N.C. 158, 163, 203 S.E. 2d 815, 818 (1974). Specifically, the rule is applicable to the defense of accident. *State v. Moore*, 26 N.C. App. 193, 215 S.E. 2d 171, *cert. denied*, 288 N.C. 249, 217 S.E. 2d 673 (1975); *State v. Douglas*, 16 N.C. App. 597, 192 S.E. 2d 643 (1972), *cert. denied*, 282 N.C. 583, 193 S.E. 2d 746 (1973).

The pertinent portion of defendant's testimony on direct examination reads in the record as follows:

> "[A]ll I could remember was the shotgun business. The lady, Ms. Barrett, had the shotgun pointed at me. I grabbed the shotgun by the barrel and when I grabbed the shotgun I twisted it around and the gun went off and when the gun went off, that is when the gun went off and I got up and tried to scuffle and take the shotgun from her.
>
> "That at no time during the night had he been down the hallway towards the bathroom. That when the gun went off he was somewhere around the kitchen in the foyer."

On cross-examination the defendant testified as follows:

> "That when the gun went off, Sandra Barrett was standing directly in front of him. That Sandra Barrett had the gun and she pointed it at him. That while the gun was in Sandra Barrett's hands he pulled the gun around and the scuffle began. That at the time Sandra Barrett had the gun she had both hands on it. That he did not know whether Sandra Barrett's hands were on the trigger or not. That as Sandra Barrett came towards him with the gun he grabbed it and started wrestling with her over the gun. That the gun went off during the time they were wrestling with it. That after the gun went off, maybe a minute or two, the police came in. That the only thing he was doing was holding onto the gun during the time of the struggle, while Sandra Barrett was trying to snatch the gun away from him. That he is somewhat familiar with guns.

"That he did not know where Felicia Garner or Marion Garner were standing when the gun went off. That he can only recall one shot being fired."

While the State's evidence is in direct conflict with defendant's evidence in many respects, and the State's evidence raises no inference whatsoever of an accidental shooting, we must agree with the defendant that he was entitled to an instruction on the defense of accident. The defendant's evidence tends to show that he was fighting with Sandra Barrett when the gun discharged and killed Felicia Garner. Clearly, this evidence was sufficient to raise an inference that the death of Felicia Garner was the result of an accidental shooting.

Since there must be a new trial we find it unnecessary to discuss other aspects of the one assignment of error brought forward and argued in the defendant's brief.

New trial.

Judges MORRIS and ARNOLD concur.

LUCILLE HELSABECK DAVIS v. GROVER WORTH DAVIS

No. 7721DC149

(Filed 17 January 1978)

Divorce and Alimony § 18.11— alimony pendente lite—insufficient means whereon to subsist—savings account

Although the court found that plaintiff wife had a savings account of $21,000, the trial court properly concluded that she did not have sufficient funds whereon to subsist during the pendency of an action for alimony and properly awarded her alimony *pendente lite* and counsel fees where the court also found that the wife had an income of only $104 per month, the husband had a savings account of $18,000 and an income of $417 per month, and each party had reasonable living expenses of $250 per month.

APPEAL by defendant from *Harrill, Judge.* Judgment entered 28 December 1976 in District Court, FORSYTH County. Heard in the Court of Appeals 8 December 1977.

Civil action wherein plaintiff seeks alimony, possession of the homeplace and attorney's fees. A hearing was scheduled pursuant

to G.S. 50-16.8(f) to determine whether plaintiff was entitled to alimony *pendente lite*. Prior to the hearing the parties stipulated that the only issues to be determined at the hearing were "[w]hether . . . plaintiff is a dependent spouse" and "[i]f plaintiff is determined to be a dependent spouse, whether . . . she has sufficient means wherein [sic] to subside [sic] during the prosecution of this suit and to defray the necessary expenses thereof . . . ." At the conclusion of the hearing the trial court made findings of fact which are summarized as follows:

The plaintiff and defendant, who are residents of Forsyth County, were married on 28 September 1932. There were four children born of this marriage, all of whom are now emancipated. The plaintiff is 62 years of age and has never been employed. She receives social security income of $104 per month and has assets of $21,000 in savings which she inherited from her father. Plaintiff and defendant lived in their homeplace in Tobaccoville for 20 years. At this time defendant occupies the homeplace while plaintiff lives with two of their daughters. The defendant is 65 years of age. He is now retired from a position in the North Carolina Highway Department and receives social security income and state retirement benefits totaling $417.00 per month. He also has savings of $18,000. The reasonable living expenses of each party is $250 per month.

On the basis of these findings, the trial court concluded that plaintiff was a dependent spouse and that defendant was a supporting spouse; and "[t]hat the plaintiff does not have sufficient means wherein [sic] to subsist during the pendency of this action and to defray the necessary expenses thereof . . . ." The court then ordered the defendant to pay alimony *pendente lite* to plaintiff of $100 per month; to vacate the premises of the homeplace and "to make said premises available to the plaintiff"; and "to pay to John F. Morrow, Attorney for the plaintiff, $200.00 . . . ." Defendant appealed.

Wilson and Morrow, by John F. Morrow, for the plaintiff appellee.

White and Crumpler, by Fred G. Crumpler, Jr., G. Edgar Parker and Michael J. Lewis, for the defendant appellant.

HEDRICK, Judge.

The single contention brought forward and argued in defendant's brief is that the court erred in concluding that plaintiff, the dependent spouse, did not have "sufficient means wherein [sic] to subsist during the pendency of this action and to defray the necessary expenses thereof . . . ."

The controlling statute, G.S. 50-16.3(a), provides in pertinent part as follows:

> "A dependent spouse who is a party to an action for . . . alimony without divorce, shall be entitled to an order for alimony pendente lite when:
>
> (1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pentente lite is made, and
>
> (2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof."

Once the plaintiff is initially determined to be a "dependent spouse," as defined in G.S. 50-16.1(3), then the conditions in subsections (1) and (2) of the above statute must be met. *Cannon v. Cannon*, 14 N.C. App. 716, 189 S.E. 2d 538 (1972). In this case the parties have stipulated as to the condition imposed by subsection (1). Similarly, the defendant in his brief does not challenge the conclusion of the trial judge that the plaintiff is a "dependent spouse" within the definition of G.S. 50-16.1(3). Indeed, this conclusion is compelled by the findings of fact. Thus, the only issue for this Court to resolve is whether the trial judge has properly concluded that the second condition above has been satisfied by plaintiff.

Defendant argues that the plaintiff's savings account of $21,000 demonstrates that she does in fact have sufficient funds upon which to subsist during the pendency of this action. It has never been held by the courts of this State that the separate estate of a dependent spouse precludes an award of alimony *pendente lite*. Indeed, our courts have held that it is not

necessary that a dependent spouse "be impoverished" before she is entitled to an award of alimony *pendente lite*. *Peeler v. Peeler*, 7 N.C. App. 456, 462, 172 S.E. 2d 915, 919 (1970). *See also Mercer v. Mercer*, 253 N.C. 164, 116 S.E. 2d 443 (1960); *Cannon v. Cannon*, *supra*.

In the present case the defendant's income is approximately four times that of the plaintiff. Surely, we cannot say that under these circumstances the dependent spouse must use her meager savings during the pendency of this action while the defendant enjoys an income of four times that of his wife, and a savings account practically equal to that of his wife. We conclude that the findings of fact support the conclusions of law which in turn support the order for alimony *pendente lite* and counsel fees.

Affirmed.

Judges MORRIS and ARNOLD concur.

BEATRICE E. CONRAD v. WOODROW W. CONRAD

No. 7721DC140

(Filed 17 January 1978)

1. **Divorce and Alimony § 21.3— noncompliance with alimony order—insufficient findings concerning wilfulness**

The trial court's sole finding of fact that defendant had $101.39 in his checking account was insufficient to support the court's conclusion that defendant's noncompliance with an alimony order was not wilful.

2. **Divorce and Alimony § 21.1— hearing on noncompliance with alimony and support order—suspension of support payments—error**

In a hearing for defendant to show cause why he should not be held in contempt for wilful failure to comply with a court order to pay alimony and support, the trial court's suspension of the support payments without proper motion and without notice deprived plaintiff of her property rights without due process.

APPEAL by plaintiff from *Alexander (Abner), Judge*. Order entered 27 December 1976, in District Court, FORSYTH County. Heard in the Court of Appeals 7 December 1977.

Plaintiff filed this action 23 June 1959 seeking alimony without divorce. On 12 August 1960, an order was entered directing defendant to pay $300 per month to plaintiff. The record reflects that, on occasions since the August 1960 order, defendant has been ordered to show cause why he should not be held in contempt for violation of that order and that defendant has been unsuccessful in attempting to have the court decrease his payments.

In October 1976, plaintiff initiated the present proceeding by alleging that defendant had failed to make payments for August and September of that year. A show cause order was issued, and at the hearing defendant offered evidence the pertinent parts of which are found in this opinion.

On 28 December 1976, the court entered an order finding that on 15 August 1976 defendant had the means to comply with the 1960 order but that he thereafter lacked the means to comply. Defendant was given until 20 March 1977 to pay the August 1976 payment, and further monthly payments were suspended until further ordered by the court. Plaintiff appeals.

Hudson, Petree, Stockton, Stockton & Robinson, by George L. Little, Jr. and Steven E. Philo, for plaintiff appellant.

Sapp and Mast, by Robert H. Sapp, for defendant appellee.

ARNOLD, Judge.

Two questions are raised by plaintiff's appeal. The first question, whether the trial court erred in failing to find defendant in contempt for wilful refusal to make alimony payments, will not be discussed since we find that the findings of fact by the trial court do not support the conclusion and the matter must be remanded. Upon remand if the court finds that defendant had the present means to comply with the August 1960 order but deliberately refused to comply, then defendant may be found in contempt. (*See* G.S. 50-16.7(j); *Bennett v. Bennett*, 21 N.C. App. 390, 204 S.E. 2d 554 (1974).)

[1] From this record there is evidence that defendant had no savings account and only $109 in his checking account. He owns a house valued (for tax purposes) at $50,000, and he has spent approximately $20,000 during the past five years remodeling the house. Defendant also possessed, at the time of the hearing, a one

year old Cadillac. While his insurance business has declined, defendant received a salary of $1200 per month from January through October 1976, and in August 1976, he received a $4000 bonus, none of which was received by plaintiff.

Despite all this evidence the only finding of fact by the trial court was that defendant had a bank balance of $101.39. There should be findings of fact supported by competent evidence concerning defendant's property and earning capacity to enable appellate review of the trial court's conclusion that defendant's noncompliance was not wilful.

[2] Plaintiff also contends that the trial court erred in suspending defendant's obligation to make alimony payments due after the 15 August 1976 payment. She is correct. The court, on its own motion and without notice to plaintiff, cannot transform a hearing for defendant to show cause why he should not be held in contempt for wilful failure to comply with a court order to pay alimony and support into a hearing for modification of such order.

The hearing in this cause was held pursuant to an order for defendant to show cause why he should not be held in contempt for violation of the 12 August 1960 order requiring defendant to pay alimony. Defendant filed no motion in the cause to modify the order. G.S. 50-16.9. Yet the trial court in its 28 December 1976 order suspended all alimony payments beginning with the payment due 15 September 1976 until further orders by the court. Suspension of the support payments without proper motion and without notice deprived plaintiff of her property rights (*Hinkle v. Hinkle*, 266 N.C. 189, 146 S.E. 2d 73 (1966)) without due process as required by the Fourteenth Amendment to the United States Constitution and Article I, Sec. 19 of the North Carolina Constitution.

Order of the trial court is reversed and this cause is remanded for further proceedings.

Reversed and remanded.

Judges MORRIS and HEDRICK concur.

H. GLENN WHITE, FLEETA D. WHITE, H. GLENN WHITE, JR. AND JOYCE D. WHITE v. LEMON TREE INN OF RALEIGH, INC., JAMES E. BRIDGMAN, INDIVIDUALLY, THOMAS R. JACKSON, INDIVIDUALLY, L. BRUCE McDANIEL AND SHELDON L. FOGEL, D/B/A/ McDANIEL & FOGEL, ATTORNEYS AT LAW, AND WILLIAM E. ROUSE, JR. (RELATING SOLELY TO THE DEFENDANT ROUSE)

No. 7710SC123

(Filed 17 January 1978)

Mortgages and Deeds of Trust §§ 29, 33— foreclosure sale—trustee's failure to require cash deposit—crediting indebtedness with amount bid

A trustee in a deed of trust did not breach his duty by failing to require the successful bidder at a foreclosure sale to make a cash deposit on its bid where the deed of trust, as permitted by G.S. 45-21.10, gave the trustee discretion as to whether he would require a cash deposit; nor did the trustee breach his duty by crediting the indebtedness with the amount of the bid rather than requiring the successful bidder, who was also the holder of the note secured by the deed of trust, to pay the bid in cash.

APPEAL by plaintiff from *Donald Smith, Judge.* Judgment entered 15 December 1976, in Superior Court, WAKE County. Heard in the Court of Appeals 1 December 1977.

Defendant Rouse was the substitute trustee in the foreclosure of a deed of trust on property leased by plaintiffs to Lemon Tree Inn of Charlotte, Inc. which in turn had transferred and assigned its lease to Lemon Tree Inn of Raleigh, Inc. Among other things, the lease provided for subordination by the plaintiffs to construction financing and permanent financing. A construction loan for $1,750,000 was made by the Central National Bank of Richmond which was to sell the loan to Niagara Permanent Savings and Loan Association (Niagara). Niagara, however, refused to purchase the note and deed of trust and, under the terms of the note, the refusal of Niagara to purchase made the note due and payable "upon demand." The deed of trust was later foreclosed by order of Judge James H. Pou Bailey, and defendant Rouse acted as substitute trustee.

At the foreclosure sale, the holder of the note, the Central National Bank, was the last and highest bidder. No deposit by the bank was required by defendant Rouse. The indebtedness was credited by Central National Bank with One million Nine hundred and Twelve thousand Seven hundred and Eighty dollars and

10/100 ($1,912,780.10), and the deed of trust was foreclosed. Plaintiffs, who alleged the value of their property to be $500,000, received no proceeds.

Plaintiffs' complaint against defendant Rouse alleged that he failed to comply with the law in the foreclosure. From summary judgment for defendant Rouse, plaintiffs appeal.

Vaughan S. Winborne for plaintiff appellants.

Kimzey & Smith, by James M. Kimzey, for defendant appellee.

ARNOLD, Judge.

We reject plaintiffs' contention that the trial court erred in granting defendant's motion for summary judgment.

One of the two types of cases in which summary judgment is said to be appropriate is one "where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial." *McNair v. Boyette*, 282 N.C. 230, 235, 192 S.E. 2d 457, 460 (1972). We believe that the present case is of this type, and that the trial court correctly granted defendant's motion for summary judgment.

Plaintiffs argue that the action by the trustee, defendant Rouse, was illegal. Their primary complaint is that the trustee failed to require a deposit from the highest bidder, Central National Bank, and that he also failed to require cash payment of the purchase price. Defendant admitted that Central National Bank made no deposit on its bid, and that no cash was received from the sale.

The law as to the requirement of a cash deposit is spelled out in G.S. 45-21.10:

> "(a) If a mortgage or deed of trust contains provisions with respect to a cash deposit at the sale, the terms of the instrument shall be complied with.
>
> "(b) If the instrument contains no provision with respect to a cash deposit at the sale, the mortgagee or trustee holding the sale of real property MAY require the highest bidder immediately to make a cash deposit not to exceed ten percent (10%) of the amount of the bid up to and including

one thousand dollars ($1,000), plus five percent (5%) of any excess over one thousand dollars ($1,000)." [Emphasis added.]

The deed of trust in the instant case provided:

"The trustee MAY require the successful bidder at any sale to deposit immediately with the trustee cash or certified check in an amount not to exceed ten percent (10%) of his bid, provided notice of such requirement is contained in the advertisement of sale." [Emphasis added.]

Obviously, by the instrument itself, the trustee had discretion as to whether he would require a deposit from the successful bidder. The trustee's advertisement for the sale which stated that the "highest bidder will be required to make a cash deposit . . ." did not eliminate the trustee's exercise of discretion as to whether he would require the cash deposit.

No authority is presented in support of plaintiffs' other contention that the trustee's closing of the sale with a credit instead of cash amounted to a breach of the trustee's duty. We find no support for this position and reject it.

Having determined that summary judgment for defendant was properly entered we see no need for further discussion of plaintiffs' assignments of error. Summary judgment in favor of defendant Rouse is

Affirmed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOE THOMAS GRIER, JR.

No. 7726SC615

(Filed 17 January 1978)

1. False Pretense § 3.1— obtaining money by false pretense—cooperation of store employee—sufficiency of evidence of crime

Defendant's falsification of invoices for the purpose of obtaining payment from a convenience store for more cases of beer than he actually delivered amounted to a false pretense within the meaning of G.S. 14-100(a), notwithstanding cooperation by an employee of the store in defendant's deception for the purpose of discovering his crime.

2. False Pretense § 3.2— attempting to obtain property by false pretense—jury instructions proper

In a prosecution for obtaining property by false pretense, the trial court did not err in instructing the jury on attempting to obtain property by false pretense, since G.S. 14-100(a) provides that either obtaining or attempting to obtain property in such a manner is a felony.

APPEAL by defendant from *Barbee, Judge.* Judgment entered 15 March 1977, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 30 November 1977.

Defendant was charged upon a bill of indictment with violating G.S. 14-100, obtaining property by false pretenses. At trial the State's evidence tended to show the following: Stop and Save, a convenience store owned by Charles Brown and William King, was losing money. Mr. King suspected defendant, a beer deliveryman, of falsifying invoices, and King instructed the cashier, Mrs. Belton, to cooperate with defendant. On 13 August 1976 Mrs. Belton saw defendant deliver four cases of beer. Defendant then asked Mrs. Belton if she would like to make some money and, if she did, not to ask questions. She replied "yes." Defendant then made out an invoice which indicated the delivery of 39 cases of beer. Mrs. Belton signed the invoice although she knew it to be incorrect. Defendant then presented the invoice to the secretary of Stop and Save, Mrs. Hardy, who was authorized to write checks. Mrs. Hardy knew nothing about King's instructions to Belton or about the incorrect invoice. Relying on Mrs. Belton's signature on the invoice, Mrs. Hardy issued defendant a check for $245.35.

Defendant gave Mrs. Belton $25 in cash which she gave to Mr. King. King then checked the cooler and found that defendant had delivered 14 cases of beer instead of 39 for which Stop and Save had paid. Defendant offered no evidence. A jury returned a verdict of guilty and defendant was sentenced to imprisonment. He appeals.

Attorney General Edmisten, by Associate Attorney George W. Lennon, for the State.

Michael S. Scofield, Public Defender, by Assistant Public Defender Richard D. Boner, for defendant appellant.

ARNOLD, Judge.

G.S. 14-100(a) provides that

> "[i]f any person shall knowingly and designedly by means of any kind of false pretense whatsoever . . . obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony. . . ."

[1] Defendant contends that an agent of Stop and Save, Anna Belton, knew that the invoice ticket was inaccurate. Since Mr. King, an owner of Stop and Save, told the agent to cooperate with defendant, it is defendant's contention that the agent was acting within the scope of her authority and that, therefore, her knowledge was imputed to Stop and Save. As a result, defendant asserts, it cannot be said that Stop and Save was deceived by defendant's actions.

Defendant's contention is unrealistic and it is rejected. Evidence was uncontradicted that the invoice which defendant gave to the secretary was a misrepresentation. This misrepresentation amounted to a false pretense within the meaning of the statute, and based upon this false pretense defendant obtained something of value, a check in the amount of $245.35. Moreover, the evidence was sufficient for the jury to infer that defendant intended to defraud Stop and Save of such check.

[2] Error is assigned to the jury instructions and it is asserted that the court erred by instructing that defendant would be guilty if the jury found that "by this intended deception, the defendant *attempted* to obtain" the money from Stop and Save. (Emphasis added.) Defendant argues not that there was a variance between the charge and the verdict, but that more than a mere attempt is required to prove violation of G.S. 14-100. Defendant's argument, however, ignores G.S. 14-100(a), as amended in 1975. The amendment expanded the violation to include an attempt to obtain property by false pretenses. Defendant's argument is, therefore, without merit.

In our opinion defendant received a fair trial, free of prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

ANDREX INDUSTRIES CORPORATION v. WESTERN CAROLINA WAREHOUSING COMPANY v. WILLIAM B. DILLARD CONSTRUCTION COMPANY, INC., THIRD PARTY DEFENDANT

No. 7728SC137

(Filed 17 January 1978)

Pleadings § 34— substitution of plaintiff

In an action to recover for damage to yarn stored in defendant's warehouse, the trial court did not err in permitting the complaint to be amended to substitute as plaintiff a subsidiary of the original corporate plaintiff where the motion to amend alleged that the subsidiary was the actual owner of the yarn involved in the action and contracted with defendant for the storage thereof, since the real controversy involved the damage to the yarn, and defendant's liability, if any, for damage to the yarn was not changed by the substitution of the subsidiary as the party plaintiff.

APPEAL by defendant Western Carolina Warehousing Company from *Lewis, Judge.* Order entered 24 November 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 6 December 1977.

Duplan Corporation instituted this action as plaintiff alleging that certain yarn, owned by Duplan and received and stored by defendant Western Carolina Warehousing Company, was damaged as a result of defendant Warehousing Company's negligence.

Defendant duly filed answer on 10 September 1975 denying liability and setting forth certain further defenses not pertinent to this decision. Various discovery proceedings and related hearings transpired between that date and 9 February 1976.

On 10 November 1976, Andrex Industries Corporation filed a motion requesting that it be substituted as plaintiff in this cause and that the complaint be so amended. In support of this motion, Andrex alleged that it was a wholly owned subsidiary of Duplan, that it owned the yarn involved in this action and contracted with defendant for storage thereof, and that this action had been instituted in the name of Duplan through "inadvertance and

mistake arising out of business and structural connections between Duplan and Andrex." In conclusion, Andrex alleged that it was the real party in interest and through this motion, ratified commencement of this action.

On 24 November 1976, the trial court entered an order allowing substitution of Andrex Industries Corporation as plaintiff in this cause and requiring the complaint to be so amended. Defendant appealed to this Court.

Morris, Golding, Blue and Phillips, by Steve Kropelnicki, Jr., for the plaintiff.

Uzzell and DuMont, by Larry Leake, for the defendant.

MARTIN, Judge.

Defendant contends that the substitution of Andrex Industries Corporation as plaintiff in this cause creates a new and independent cause of action and in effect, is an attempt to change the liability sought to be enforced against defendant. With this conclusion, we cannot agree.

In *Exterminating Co. v. O'Hanlon*, 243 N.C. 457, 91 S.E. 2d 222 (1956), our Supreme Court held that a trial court is without authority to permit substitution of parties plaintiff where to do so would create a new cause of action. However, in that same case, the Court also recognized the rule that "one plaintiff may be substituted for another plaintiff, working an entire change of plaintiffs, by amendment, *where no substantial change in the nature of the claim demanded in the complaint was involved.*" (Emphasis added.) In *Gibbs v. Mills*, 198 N.C. 417, 151 S.E. 864 (1930), cited in the *Exterminating Co.* case as authority for the latter rule, the Court allowed the substitution as plaintiff of the actual owner of real property where the suit had been instituted by a nonowner for damages to the real property. The Court in *Gibbs* held that since the real controversy involved damage done to the property, the cause of action had not been changed and the defendant had not been prejudiced by allowing the true owner —the real party in interest—voluntarily to be substituted as plaintiff.

In the instant case, the real controversy involved the damage done to the yarn. Defendant's liability, if any, for this damage was

not changed by the substitution of the parties plaintiff. We can perceive of no prejudice to defendant arising therefrom. The trial court's order allowing substitution of Andrex Industries Corporation as plaintiff and amendment of the complaint to reflect such substitution was proper.

In addition, we note that plaintiff has relied on Rule 17(a) of the Rules of Civil Procedure in support of the trial court's ruling. Rule 17(a) provides:

> "No action shall be dismissed on the grounds that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

Though defendant has not sought dismissal in the instant case, we are of the opinion that the spirit and intent of Rule 17(a) is consistent with and would dictate the result reached herein. *See* 1 McIntosh § 591 (Phillips Supp. 1970).

Affirmed.

Chief Judge BROCK and Judge CLARK concur.

R. D. HOUSE, JR. AND EUGENE M. HOUSE PETITIONERS v. SIDNEY R. WHITE, JR., JAMES L. WHITE, LYDIA BOB WHITE MOORE, LIZZIE JOHNSON WHITE PARTIN, WILLIAM WALTER ROBERTSON, RUTH ROBERTSON SAVAGE TILLER, NAOMI ROBERTSON McKINNEY, SALLIE DELL ROBERTSON WALSTON, AND LUCILLE ROBERTSON ANDERSON RESPONDENTS

No. 776SC96

(Filed 17 January 1978)

Descent and Distribution §§ 7, 13— per stirpes division of property—effect of advancement

Property which reverted to testator's estate upon the death of one of his sons without a descendant was properly divided half to the children of another son who had been a life tenant, and the other half per stirpes to testator's re-

maining grandchildren, since, under the rules of descent and distribution in effect at the time of testator's death in 1926, his heirs took per stirpes and not per capita; moreover, children of a daughter who had received her full share of testator's estate by reason of advancements made to her were nevertheless entitled to a per stirpes share of the property, since advancements are to be accounted for only in case of total intestacy.

APPEAL by respondent, Sidney R. White, Jr., from *James, Judge*. Judgments entered 27 September 1976 in Superior Court, HALIFAX County. Heard in the Court of Appeals 17 November 1977.

The appeal arises from a special proceeding to divide funds held by the Clerk of Superior Court of Halifax County. For the purpose of the questions raised on appeal, the facts may be stated as follows. T. L. House died in 1926 and left a will in which he devised his real estate to his sons, Richard D. House and W. Lawrence House, for their lives with remainder after their life estates to their children. He recited in his will that he had advanced to his daughter, Lydia B. Allsbrook, her full share of his real and personal property. In 1952, the life tenants sold timber from the land. The remaindermen's share of the proceeds from the sale was deposited with the clerk in a trust fund. Richard D. House died in 1963 and left two children. W. Lawrence House died in 1970 without ever having had any children. Lydia B. Allsbrook died in 1971 leaving a last will and testament. The trial judge concluded that one-half of the funds should go to the two children of Richard D. House. He concluded that the heirs of T. L. House inherited, *per stirpes*, the other one-half interest.

Respondent, a son of a deceased daughter of T. L. House, appealed.

Dickens and Dickens, by Wade H. Dickens, Jr.; Allsbrook, Benton, Knott, Allsbrook & Cranford, by Dwight L. Cranford, for petitioner appellees.

Dunn & Dunn, by Raymond E. Dunn, for respondent appellant.

VAUGHN, Judge.

Appellant concedes that the children of one of the life tenants are entitled to one-half of the trust fund. He contends,

however, that all of those who are entitled to take as heirs of T. L. House are of one class, his grandchildren, and that there should be a *per capita* distribution to the members of that class. He relies on G.S. 29-16. We must point out, however, that the current Intestate Succession Act was enacted in 1959. It specifically applies only to "estates of persons dying on or after July 1, 1960." Chapter 879, § 15, 1959 Session Laws. "It is well settled that 'an estate must be distributed among heirs and distributees according to the law as it exists at the time of the death of the ancestor.' 23 Am. Jur. 2d, Descent and Distribution § 21 . . . ." *Vinson v. Chappell*, 275 N.C. 234, 241, 166 S.E. 2d 686, 692 (1969); *Johnson v. Blackwelder*, 267 N.C. 209, 211, 148 S.E. 2d 30, 32 (1966). Under the rules of descent and distribution in effect at the time of the death of T. L. House in 1926, his heirs took *per stirpes* and not *per capita*. C.S. § 1654, Rule 3 (1919 and 1935); *Crump v. Faucett*, 70 N.C. 345 (1874).

Appellant contends that Lydia Allsbrook did not inherit any share of the trust funds. He contends that she had received her full share of the estate of T. L. House by reasons of the advancements made to her. We note, however, that advancements are to be accounted for only in case of total intestacy. "Under the English statute of distributions, as well as under our act on that subject, it has always been held that no advancements were to be accounted for except in cases of total intestacy." *Jerkins v. Mitchell*, 57 N.C. 207, 209-10 (1858). Here the deceased died testate as to all of his property except the property that reverted to his estate upon the death of his son, W. Lawrence House, without a descendant.

The judgment is affirmed.

Affirmed.

Judges BRITT and PARKER concur.

Burkhimer v. Coble, Comr. of Revenue

WALTON PETER BURKHIMER v. J. HOWARD COBLE, N. C. COMMISSIONER OF REVENUE; B. W. BROWN, DIRECTOR OF INDIVIDUAL INCOME TAX DIVISION OF N.C. DEPT. OF REVENUE; FRED T. TEAGUE, AND LOUIS C. WILSON, FIELD AUDITORS FOR N. C. DEPT. OF REVENUE; AND HARRY C. HEAVNER, REVENUE COLLECTOR FOR N. C. DEPT. OF REVENUE

No. 7725SC120

(Filed 17 January 1978)

Appeal and Error §§ 41, 45— appellate rules mandatory

Plaintiff's appeal is dismissed for failure to comply with Appellate Rules 11(e) and 28(b)(3) which are mandatory.

APPEAL by plaintiff from *Smith (Donald L.), Judge.* Orders entered 14 September 1976 in Superior Court, CALDWELL County. Heard in the Court of Appeals 30 November 1977.

This appeal involves a suit filed by plaintiff seeking, *inter alia*, refund of taxes, damages under 42 USCA § 1983, and damages for alleged illegal acts of defendants in collecting taxes. Plaintiff has appealed from orders granting partial summary judgment in favor of defendants, granting defendants' request for admission of the genuineness of certain documents, and striking certain of plaintiff's interrogatories.

L. H. Wall, for the plaintiff.

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for the defendants.

BROCK, Chief Judge.

The record on appeal in this case was settled on 8 December 1976. The transcript of the record on appeal was certified to this Court by the Clerk of Superior Court, Caldwell County, on 11 February 1977, 65 days after settlement of the record on appeal. Appellate Rule 11(e) requires: "Within 10 days after the record on appeal has been settled . . . the appellant shall present the items constituting the record on appeal to the clerk of superior court for certification."

Plaintiff has failed to refer us to the pertinent assignments of error and exceptions immediately following each question presented in his brief as required by Appellate Rule 28(b)(3).

The North Carolina Rules of Appellate Procedure are mandatory. *White v. Lawrence*, 33 N.C. App. 631, 236 S.E. 2d 30 (1977). Furthermore, from a cursory reading of the arguments presented in plaintiff's brief, it appears that this appeal has no merit. However, for failure to comply with the Rules of Appellate Procedure, this appeal is dismissed.

Appeal dismissed.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. HARVEY BERRY

No. 7725SC681

(Filed 24 January 1978)

1. **Homicide § 28.1— self-defense—no evidence requiring instruction**

The trial court did not err in failing to instruct the jury on self-defense where there was testimony by defendant and his wife that the victim threatened to cut defendant and that the victim had a knife in his hand after he was shot, but there was no evidence that defendant had any apprehension that the victim would kill him or do him serious bodily harm, and defendant never contended that he acted in self-defense.

2. **Indictment and Warrant § 14— second indictment returned—no grounds for quashal**

The trial court did not err in denying defendant's motion to quash the bill of indictment upon which he was arraigned when another indictment charging the same offense was pending since such denial in no way prejudiced defendant.

3. **Criminal Law § 86.2— defendant's past record—questions not asked in bad faith—curative instruction**

The trial court did not err in denying defendant's motion for mistrial based on a question pertaining to his past record asked defendant by the district attorney on cross-examination, since there was no showing that the district attorney did not ask the question in good faith, and any error was cured by the strong instruction given by the judge to the jury charging them not to consider for any purpose any inference from the question asked and to dismiss the same from their minds.

4. **Jury § 7.1— motion to challenge array—denial proper**

The trial court did not err in denying defendant's motion "to challenge the array and quash the venire after it was discovered that the array of jurors

chosen for the November session was switched and summoned to the October session, then switched back and resummoned to the November session."

5. Jury § 3.1— jury service—disqualification to serve for two succeeding years

It is actual service as a juror rather than a mere summons for jury duty which disqualifies a person for service for the next two years. G.S. 9-3.

ON writ of certiorari to review judgment of *Briggs, Judge*, entered 20 November 1975 in Superior Court, BURKE County. Heard in the Court of Appeals 9 January 1978.

By indictment proper in form defendant was charged with the murder of Ronald Whittson on 25 October 1974. He was placed on trial for second-degree murder and pled not guilty.

Evidence presented by the State is summarized in pertinent part as follows:

On the evening in question defendant, Whittson (defendant's brother-in-law), Tommy Crafton and several others gathered at defendant's mobile home where they proceeded to drink whiskey and play musical instruments until about 11:30 p.m. At that time Whittson broke a drumstick after which Crafton jokingly suggested that he and Whittson "fall outside" and settle the matter. Defendant then remarked that he would "fall outside" with Whittson after he went to the bathroom. Defendant and Whittson went outside where defendant hit Whittson twice, knocking him down. Whittson reached around defendant to keep him from swinging anymore. Defendant then told Whittson to "stand here until I get back and I will shoot you".

Defendant went into the trailer, returned with a gun in his hand and told Whittson again that he would shoot him. Whittson replied, "You'll have to", after which defendant stepped to within two feet of him and fired one shot. Defendant's wife told defendant he had shot her baby brother after which defendant said, "Let the son-of-a-bitch die".

Whittson was carried to the hospital where he died from a gunshot wound in his chest. As he was being removed from the car to be carried into the hospital a small knife fell from his pocket.

Defendant's evidence tended to show: After the drumstick incident, he and Whittson went outside and scuffled in a playful

manner. Whittson became "serious" and threatened to cut defendant. Defendant went into the trailer, got his gun and returned outside "to make them all leave". As defendant confronted Whittson, defendant was holding the gun by his side, and Whittson struck at the gun with his left hand, causing it to go off. Defendant did not see any object in Whittson's hand and did not intend to shoot him. Defendant denied making any statement about letting the s.o.b. die.

Other evidence is set forth in the opinion.

The court submitted the case on second-degree murder, voluntary manslaughter, involuntary manslaughter or not guilty. The jury found defendant guilty of involuntary manslaughter and from judgment imposing prison sentence of not less than seven nor more than ten years, defendant appealed.

Attorney General Edmisten, by Associate Attorney Thomas H. Davis, Jr., for the State.

Simpson, Baker & Aycock, by Samuel E. Aycock, for defendant appellant.

BRITT, Judge.

[1] Defendant contends first that the trial court erred in failing to instruct the jury on self-defense. We find no merit in this contention.

We recognize the principle that the trial court must instruct the jury on self-defense when that question is raised by the evidence, even in the absence of a request to do so. *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974). However, we do not think the evidence in this case raised the question of self-defense.

In his opening statement to the jury, before any evidence was introduced, defendant's counsel stated that defendant contended that the shooting was an accident—"a pure accident and misadventure". His statement included no contention that defendant acted in self-defense.

A careful review of the testimony of witnesses for the State, including their cross-examinations, discloses no suggestion of self-defense. A careful review of the testimony of defendant's witnesses, with the possible exception of himself and his wife, discloses no suggestion of self-defense.

In his testimony defendant stated, among other things, that he, Whittson, Crafton and Arney got together around lunchtime; that Whittson and Crafton helped him move a C.B. antenna and some radio equipment; that before dinner they had two or three drinks of whiskey together; that they ate dinner at Whittson's mother's house after which they returned to defendant's trailer; that they proceeded to drink whiskey and play musical instruments for several hours; that he and Whittson went into the yard and began wrestling—"just playing mostly"; that Whittson got mad and stated that although he liked defendant he was going to cut him; that he had never had any trouble with Whittson before; that he went into the house, got the loaded gun and returned to the yard, holding the gun by his side; that the reason he went into the trailer and got the gun was to "make them all leave and get rid of all the mess going on"; that he then went toward the corner of the trailer where Whittson was standing; that he did not point the gun at anybody; that when he confronted Whittson, Whittson struck at the gun with his left hand, hitting defendant's wrist; that "when he hit my wrist it felt like the gun was going to go out of my hand and I squeezed it tight to hold onto it and the gun went off"; that he was very drunk and did not see anything in Whittson's hand, did not intend to pull the trigger and did not intend to shoot Whittson; and that he thought Whittson was playing when he fell after the gun fired.

On cross-examination defendant stated that Whittson had a knife in his hand when they scuffled; that he brought the gun out of the house to see if he could scare *them* off; that he was very drunk at the time. He then stated that he was not sure that Whittson had a knife when they were scuffling; that he (defendant) was so drunk; that Whittson swung, hit the gun and knocked it up.

In her testimony defendant's wife stated that after Whittson and defendant scuffled defendant told Whittson he would not let him cut him; that Whittson said, "You'll have to blow my brains out because I will do it"; that defendant then went into the house and Whittson went around the trailer supposedly to use the bathroom; that defendant came out of the house with the gun in his hand; that Whittson had nothing in his hand at that time; that after Whittson was shot, she helped put him in an automobile to

go to the hospital; and at that time he had an opened knife in his right hand.

A person may kill in self-defense if he is without fault in bringing on the affray and it is necessary, or appears to him to be necessary, to kill his adversary to save himself from death or great bodily harm, the reasonableness of his apprehension being for the jury to determine from circumstances as they appear to him. *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974); *State v. Shelton*, 25 N.C. App. 207, 212 S.E. 2d 545 (1975). But, where there is no evidence that defendant was in apprehension, real or apparent, that the decedent was going to kill him or do him serious bodily harm, the court is not required to charge on the law of self-defense. *State v. Rawley*, 237 N.C. 233, 74 S.E. 2d 620 (1953); *State v. Battle*, 4 N.C. App. 588, 167 S.E. 2d 476 (1969).

While there was testimony by defendant and his wife in the case at hand that Whittson threatened to cut defendant, and that he had a knife in his hand after he was shot, there was no evidence that defendant had any apprehension that Whittson would kill him or do him serious bodily harm. At no time in his testimony did defendant state that he was afraid of Whittson or that he got his gun to protect himself from Whittson. To the contrary, he testified that he got his gun for the purpose of making Whittson and the others leave, that he did not intentionally point it at anyone and that the gun fired accidentally. "Mere language is not sufficient to support the plea of self-defense, since it is required that defendant be put in fear of death or great bodily harm by an actual or threatened assault. The question of self-defense does not arise when there is no evidence that defendant acted in apprehension of such danger, real or apparent. . . ." 6 Strong's N.C. Index 3d, Homicide § 9.1, p. 544.

Furthermore, it will be noted that defendant was convicted of involuntary manslaughter. One of the elements of that offense is that the act was *unintentional. Ibid* § 6.1. *See also State v. Walker*, 34 N.C. App. 485, 238 S.E. 2d 666 (1977).

We hold that the trial court did not err in failing to charge the jury on self-defense.

[2] Defendant contends next that the trial court erred in denying his motion to quash the bill of indictment upon which he was

arraigned when another indictment charging the same offense was pending. This contention has no merit.

The record reveals that a bill of indictment charging defendant with murder was returned at the February 1975 session of the court; that a second indictment charging murder was returned at the April 1975 session of the court; and that the only difference in the bills is that on the first one the grand jury foreman certified "this bill found True A True Bill" and on the other one "this bill found yes A True Bill."

Defendant was arraigned on the second bill after which defendant moved to quash it "on the grounds that it was improperly taken to the grand jury; that there was a prior bill of indictment returned during the February term of the grand jury and that the second bill of indictment on which the defendant has been arraigned is not valid for that reason".

For the reasons stated in *State v. Moffitt*, 9 N.C. App. 694, 177 S.E. 2d 324 (1970), *cert. denied* 281 N.C. 626, 190 S.E. 2d 472 (1972), we find no validity in the grounds given by defendant at trial.

On appeal, defendant argues that while he probably made a mistake at trial in asking that the second bill rather than the first one be quashed, that G.S. 15A-646 provides that in such cases the first instrument charging the offense *must* be dismissed by the judge. We can perceive no prejudice to defendant by the failure of the court to dismiss the first indictment. Furthermore, a motion by defendant to have the first bill dismissed would have come within the purview of G.S. 15A-952(a) and (b)(6), therefore, was subject to the procedure set forth in G.S. 15A-952(c). We hold that the court did not err in failing to dismiss the first indictment.

[3] Defendant contends next that the trial court erred in denying his motion for a mistrial based on a question pertaining to his past record asked defendant by the district attorney on cross-examination. This contention has no merit. In the first place, there is no showing that the district attorney did not ask the question in good faith. *See State v. Campbell*, 20 N.C. App. 281, 201 S.E. 2d 33 (1973). In the second place, we think any error was cured by the strong instruction given by His Honor to the jury

charging them not to consider for any purpose any inference from the question asked and to dismiss the same from their minds.

[4] Finally, defendant contends the court erred in denying his motion "to challenge the array and quash the venire after it was discovered that the array of jurors chosen for the November session was switched and summoned to the October session, then switched back and resummoned to the November session". We find no merit in this contention.

The record discloses that defendant's case was calendared for trial on 17 November 1975; that sometime prior to 6 October 1975 the panel of jurors for the 17 November session was drawn; that pursuant to an order from Judge Ervin entered on 6 October, the jurors drawn for 17 November were notified to report instead for the 21 October session; that on 20 October these jurors were notified by radio, newspaper and other means that they would not be needed on 21 October; that several jurors who did not get the message appeared on 21 October but were told to leave and report back on 17 November; and that the entire panel of jurors was subsequently summoned to appear for the 17 November session.

Defendant argues (1) that once a juror is chosen and summoned for a specific week of court, that juror is qualified to serve only for that week; and (2) that the jurors having first been summoned for the October session are deemed to have served during that session and are not qualified to serve again for a period of two years.

[5] Assuming, *arguendo*, that defendant's first argument is valid, the jurors did serve for the week that they were drawn, namely, the 17 November 1975 session. With respect to defendant's second argument, it is actual *service* as a juror rather than a mere summons for jury duty which disqualifies him for service for the next two years. G.S. 9-3.

In defendant's trial and the judgment appealed from, we find

No error.

Judges HEDRICK and WEBB concur.

BEECH MOUNTAIN PROPERTY OWNERS' ASSOCIATION v. RICHARD N. CURRENT AND ROSE B. CURRENT

BEECH MOUNTAIN PROPERTY OWNERS' ASSOCIATION v. THOMAS MOORE, JR., AND GEORGE K. CUTTER

No. 7724DC101

(Filed 24 January 1978)

Deeds § 20.6— restrictive covenants— no enforcement by property owners' association

An association of property owners which was a corporate entity not owning any property in a resort development did not have the right to enforce restrictive covenants in deeds to owners of lots in the development requiring the lot owners to pay dues and assessments to the association where the developer granted the right of enforcement of restrictions to owners of lots in the development but did not authorize the association to enforce the restrictions as an agent of the lot owners.

APPEAL by plaintiff from *Braswell, Judge*. Judgment entered 16 November 1976 in District Court, WATAUGA County. Heard in the Court of Appeals 17 November 1977.

Civil actions wherein plaintiff, Beech Mountain Property Owners' Association (hereinafter "POA"), instituted separate actions against defendants Richard and Rose Current (hereinafter "defendants Current"), and defendants Thomas Moore, Jr., and George K. Cutter (hereinafter "defendants Moore/Cutter"), for dues and assessments allegedly owed pursuant to restrictive covenants. The cases were consolidated for trial.

The following facts established by the record are not controverted: Beech Mountain is a resort complex located in the mountains of North Carolina which was developed in the late sixties by Carolina Caribbean Corporation. The development now comprises ski slopes, a swimming pool, a golf course, tennis courts, hiking trails, hotels, shops, and residential lots. All lots were sold subject to one of four sets of restrictions incorporated in the deeds and recorded in the Public Registry of Watauga County. Among the restrictions applicable to the lots purchased by the defendants Current and defendants Moore/Cutter were provisions for the formation of a Property Owners' Association and the establishment of annual assessments by its membership.

Pursuant to these provisions the Beech Mountain POA was formed by some of the property owners of Beech Mountain. Dues and assessments paid by its members currently enable the POA to maintain and operate 58 miles of roads, a golf course, a swimming pool, tennis courts, hiking trails, ski slopes, a security system, and a fire department.

In 1968 defendants Current executed an agreement with Carolina Caribbean Corporation to purchase a lot at a later time. Defendants Moore/Cutter signed a similar agreement in the same year. The defendants later selected their respective lots and received deeds from Carolina Caribbean Corporation. None of the defendants joined the POA or paid any dues or assessments in the period following the purchases. The Carolina Caribbean Corporation eventually filed for bankruptcy, and its assets were assumed by a receivership.

The trial court entertained motions for summary judgment by both parties. From a judgment granting defendants' motion, plaintiff appealed.

Finger, Watson and di Santi, by C. Banks Finger and Anthony S. di Santi, for the plaintiff appellant.

Smith, Moore, Smith, Schell and Hunter, by David M. Moore II; Hudson, Petree, Stockton, Stockton and Robinson, by James H. Kelly, Jr.; Thomas F. Moore, Jr.; and Charles E. Clement and Paul E. Miller, Jr., for the defendant appellees.

HEDRICK, Judge.

The substantive question raised on this appeal is whether the restrictions referred to above are enforceable. However, it is elementary that the substantive issues cannot be considered unless the party raising them has the capacity to do so. *Bailey v. Light Co.*, 212 N.C. 768, 195 S.E. 64 (1938). Thus, the defendants' challenge to the plaintiff's standing to assert the claims herein demands our immediate attention.

Our Supreme Court has recognized on numerous occasions the general rule that "[a] restriction which is merely a personal covenant with the grantor does not run with the land and can be enforced by him only." *Stegall v. Housing Authority*, 278 N.C. 95, 100, 178 S.E. 2d 824, 827 (1971). *See also* Webster, Real Estate

Law in North Carolina, § 346(c) (1971). It is equally well-established that where an owner subdivides his land and sells it to various grantees, " 'imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, ...' " *Sedberry v. Parsons*, 232 N.C. 707, 710, 62 S.E. 2d 88, 90 (1950), *quoting* 26 C.J.S., *Deeds*, § 167(2). The party claiming the benefit of a restriction assumes the burden of showing that the restriction is not personal, but is a covenant running with the land and thus enforceable by another grantee. *Stegall v. Housing Authority, supra.* The defendants contend that since different sets of restrictions were imposed on different parcels of land there was no uniformity in the plan of development and thus the restrictions imposed were personal and enforceable only by the grantor, Carolina Caribbean Corporation.

The defendants' contention need not be examined if the principle set forth in *Lamica v. Gerdes*, 270 N.C. 85, 153 S.E. 2d 814 (1967), is applicable to the facts of the present case. In *Lamica* the court observed that the dispositive factor in determining whether a restriction was enforceable only by the grantor or by other grantees is "whether the grantor *intended* to create a negative easement benefiting all the property, or whether he imposed the restrictions for his personal benefit, ..." *Lamica v. Gerdes*, *supra* at 88, 153 S.E. 2d at 816. If the grantor's intent is clearly reflected in an express provision conferring to other property owners the right to enforce the restrictions, then the other owners are third party beneficiaries and may sue to enforce the contract between the grantor and grantee. *Lamica v. Gerdes*, *supra; Reed v. Elmore*, 246 N.C. 221, 98 S.E. 2d 360 (1957).

Plaintiff asserts as its authority to enforce the restrictions the following provisions which appear in the Declaration of Restrictions applicable to each defendant's deed:

> "[A]ll covenants, restrictions and affirmative obligations set forth in this Declaration shall run with the land and shall be binding on all parties and persons claiming under them . . . .
>
> "In the event of a violation or breach of any of these restrictions by any property owner, or agent, or agent of such owner, the owners of lots in the neighborhood or subdivision, or any of them jointly or severally, shall have the

right to proceed at law or in equity to compel a compliance to the terms hereof or to prevent the violation or breach in any event."

The grantor, Carolina Caribbean Corporation, clearly and expressly conferred on "the owners of lots in the neighborhood or subdivision, or any of them jointly or severally" the status of third party beneficiaries with the right to sue to enforce the restrictions. *Lamica v. Gerdes, supra.* The question which emerges from the foregoing analysis is whether the grantor intended this right of enforcement to extend to the POA, an association of property owners. The defendants argue that since plaintiff is a corporate entity owning no property at Beech Mountain, it cannot claim the benefit of the provisions above. The plaintiff contends, on the other hand, that it was at least implicit in the pertinent provisions that the grantor considered the POA to be an agent possessing the owners' right to enforce the restrictions. In support of its contention plaintiff points to language immediately preceding the quoted provisions which allegedly require every property owner to join the POA.

Restrictive covenants are "in derogation of the free and unfettered use of land [and] are to be strictly construed so as not to broaden the limitation on the use." *Reed v. Elmore, supra* at 224, 98 S.E. 2d at 363. This rule of strict construction also guides us in the determination of whether a party seeking to enforce the restriction has sufficient interest to do so. *Sleepy Creek Club, Inc. v. Lawrence*, 29 N.C. App. 547, 225 S.E. 2d 167 (1976). Plaintiff relies on *Neponsit Property Owners' Ass'n v. Bank*, 278 N.Y. 248, 15 N.E. 2d 793 (1938), to buttress its argument that the grantor clearly expressed its intent in the provisions quoted above that the POA act as the agent for the owners in enforcing the restrictions. The contrast between the applicable provisions in *Neponsit* and those upon which the plaintiff relies in the present case would seem to compel the opposite conclusion. In *Neponsit*, as in this case, there were provisions for the payment of assessments which were to be applied to the maintenance of roads and other public purposes. The covenant also provided that "[t]he assigns of the party of the first part [the grantor] may include a Property Owners' Association which may hereafter be organized . . . ." *Neponsit Property Owners' Ass'n v. Bank, supra* at ---, 15 N.E. 2d at 794. The enforcement provision followed:

> "And the party of the second part by the acceptance of this deed hereby expressly vests in the party of the first part, its successors and *assigns*, the right and power to bring all actions against the owner of the premises hereby conveyed or any part thereof for the collection of such charge and to enforce the aforesaid lien therefor."

Neponsit Property Owners' Ass'n v. Bank, *supra* at ---, 15 N.E. 2d at 794-5. The court stated that the only reasonable interpretation of the covenants was that the grantor "intended that the covenant should run with the land and should be enforceable by a property owners association against every owner . . . ." *Neponsit Property Owners' Ass'n v. Bank*, *supra* at ---, 15 N.E. 2d at 795. The court then concluded that the plaintiff was empowered to bring the action as an assignee of the grantor. *See also Merrionette Manor Homes Improvement Ass'n v. Heda*, 11 Ill. App. 2d 186, 136 N.E. 2d 556 (1956); Annot., 51 A.L.R. 3d 556 (1973). The covenant in the *Neponsit* deeds expressly conferred a right of action on the grantor's "assigns," which expressly included the property owners' association. Those provisions are a model of clarity in comparison with the provisions in the Beech Mountain deeds. The case affords the plaintiff no support.

We are of the opinion that a strict construction of the provisions in the present case compels the conclusion that the plaintiff lacks the capacity to raise the issues in this suit. The plaintiff is a corporation and, as such, must be viewed as an entity distinct from its individual members. *Troy Lumber Co. v. Hunt*, 251 N.C. 624, 112 S.E. 2d 132 (1960). Since that entity owns no property at Beech Mountain it cannot claim the benefit of the provision in the Declaration of Restrictions granting the right of enforcement of the restrictions to "the owners of lots . . . or any of them jointly or severally . . . ." And we must assume that if the grantor had intended to authorize the plaintiff to enforce the provisions as an agent of the property owners, it would have expressed such intent.

Since the plaintiff lacks the capacity to assert its claims, we do not reach the substantive issues in this suit. Accordingly, summary judgment for the defendants was proper.

Affirmed.

Judges MORRIS and ARNOLD concur.

State v. Reagan

STATE OF NORTH CAROLINA v. WILLIAM CLYDE REAGAN NOS. 75CR10737 AND 75CR12498 AND TIMOTHY WADE REAGAN NOS. 75CR12499 (CONSPIRACY) AND 75CR12500 (BREAKING AND ENTERING AND LARCENY)

No. 7717SC433

(Filed 24 January 1978)

1. **Searches and Seizures § 1— search by private individual**

Defendants' fourth amendment rights were not violated when the owner of stolen tobacco discovered the tobacco by looking into one defendant's locked barn through a hole in the wall, since the security against unreasonable searches and seizures is not invaded by acts of individuals in which the government has no part.

2. **Searches and Seizures § 2— consent by tenant**

A warrantless search of defendant's barn for stolen tobacco was lawful where a tenant in possession of the barn consented to a search of the barn by officers, since the owner's temporary use of the barn to store the stolen tobacco did not extinguish the tenant's interest which the landlord recognized by seeking the tenant's permission to use the barn and by giving the tenant a key to the barn after the tobacco had been placed in it.

3. **Conspiracy § 6; Burglary and Unlawful Breakings § 5.7— conspiracy—breaking and entering—larceny—absence of conspirator from crime scene**

The testimony of a coconspirator was sufficient to require submission to the jury of issues of guilt by two defendants of conspiracy to break and enter a tobacco packhouse with intent to steal tobacco therefrom, breaking and entering the tobacco packhouse, and larceny of tobacco therefrom. The fact that one defendant was not present when the breaking and entering and larceny were committed did not require nonsuit of those charges against such defendant where there was no evidence that he ever withdrew from the conspiracy, since each conspirator is responsible until he withdraws from the conspiracy for all acts committed by others in the execution of the common purpose.

4. **Burglary and Unlawful Breakings § 6.4— charge of breaking and entering—proof of breaking or entering**

In prosecutions under G.S. 14-54 in which the indictment charges defendant with breaking *and* entering, proof by the State of either a breaking *or* an entering is sufficient, and instructions allowing juries to convict on the alternative propositions are proper.

APPEAL by defendants from *Seay, Judge*. Judgments entered 28 January 1977 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 18 October 1977.

The defendants, William and Timothy Reagan, were indicted for (1) conspiring with each other and with Herbert Somers to

break and enter a tobacco packhouse with intent to steal tobacco therefrom, (2) breaking and entering the tobacco packhouse, and (3) larceny therefrom after such breaking and entering of eleven piles of tobacco. They pled not guilty to all charges.

The State's evidence tended to show: On 14 September 1975 Grady Jones discovered that the lock on his packhouse had been broken and eleven piles of tobacco were missing. He had last seen the tobacco on the preceding day, at which time it was in his packhouse. The missing tobacco piles had been tied in a distinctive manner so that he could recognize them. On 5 October 1975 he went to a farm owned by defendant William Reagan and saw his tobacco by looking into a locked barn through a hole in the wall. On the following day, officers from the sheriff's department came to the farm and entered the barn after Irvin Smith, who rented the farm from William Reagan, unlocked the door for them. Inside the barn were nine piles of tobacco which Grady Jones identified as his.

Herbert Somers, an indicted co-conspirator, testified for the State that he and defendant Timothy Reagan broke into Grady Jones's packhouse on the night of 13 September 1975 and stole the tobacco after planning with defendant William Reagan that they should do so; that William Reagan told them he could sell the tobacco for them if they could get it; that they put the stolen tobacco in William Reagan's barn at his suggestion; and that they were supposed to split the proceeds of the tobacco three ways.

Defendant Timothy Reagan did not testify but presented evidence tending to establish an alibi. Defendant William Reagan testified that he acquired the tobacco on 14 September 1975 from two men who were introduced to him by Somers; that Somers told him these men owned the tobacco and needed money; that he loaned the men $1,000.00 and took the tobacco as security; that he had the tobacco placed in his barn after checking with his tenant, Smith, and being told that Smith had no use for the barn; and that he told Smith the tobacco belonged to his uncle because he did not want Smith to think he was entitled to a share of it.

The jury found each defendant guilty of all charges. From judgments imposing prison sentences, defendants appealed.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Rebecca R. Bevacqua, for the State.

Robert S. Cahoon for defendant appellant William C. Reagan.

Jess S. Moore for defendant appellant Timothy Reagan.

PARKER, Judge.

[1] Defendants contend that the search of the barn where the stolen tobacco was found was unlawful and violated their fourth amendment constitutional rights. The initial discovery of the stolen tobacco was made by Jones, the victim of the larceny, when he looked into the locked barn through a hole in the wall. Since no officer participated in any way at that time, defendants' fourth amendment rights were not then violated. The security against unreasonable searches and seizures afforded by the fourth amendment applies solely to governmental action and is not invaded by acts of individuals in which the government has no part. *State v. Peele*, 16 N.C. App. 227, 192 S.E. 2d 67 (1972).

[2] Before admitting testimony concerning the subsequent warrantless search made by the officers, the court conducted a voir dire examination from which it found facts and determined that the search was valid by reason of the consent given by Irvin Smith, the tenant who rented the farm from defendant William Reagan. In this ruling we find no error. A law enforcement officer may conduct a valid search without a warrant if consent to the search is given "[b]y a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of premises." G.S. 15A-222(3). A tenant in possession of the premises is such a person. *In re Dwelling of Properties, Inc.*, 24 N.C. App. 17, 210 S.E. 2d 73 (1974). The evidence in this case shows that Smith was a tenant in possession of the barn owned by defendant William Reagan at the time the stolen tobacco was placed therein and at the time of the search. Smith's testimony on the voir dire examination clearly shows that, although he was not then using the barn, his possessory interest as tenant of the farm extended to and included the barn. He testified:

> The barn was in my custody and control. I had the keys to it. The barn was located on the farm that I had possession of . . . . I voluntarily opened the barn for [the officers]. I had

nothing to do with putting the tobacco in there. I knew nothing about it. Bill told me that this was his uncle's tobacco.

The landlord's temporary use of the barn at the time of the search did not extinguish the tenant's interest which the landlord recognized by seeking the tenant's permission to use the barn. The evidence shows that after the stolen tobacco was placed in the barn the landlord locked it and gave the tenant a key, thereby recognizing his continuing interest in the barn. The record fully supports the court's determination on voir dire that the entry and search of the barn were valid by reason of the consent given by the tenant.

[3] There was no error in denial of defendants' motions for nonsuit. The testimony of Somers, a co-conspirator, showed both defendants were guilty of the conspiracy with which they were charged. Although such testimony should be acted upon by the jury with caution, the unsupported testimony of a co-conspirator is sufficient to sustain a verdict. *State v. Carey*, 285 N.C. 497, 206 S.E. 2d 213 (1974). The co-conspirator's testimony was sufficient in this case to establish the guilt of both defendants not only of the conspiracy charged but of the crimes contemplated by the conspiracy. It makes no difference that the defendant William Reagan was not present when the breaking and entering and the larceny were committed, for once a conspiracy is shown, each conspirator is responsible until he withdraws from the conspiracy for all acts committed by the others in the execution of the common purpose and is equally guilty as a principal with the other participants in the commission of the crimes contemplated by the conspiracy, even though not personally present when those crimes are committed. *State v. Carey*, 288 N.C. 254, 218 S.E. 2d 387 (1975) *death penalty vacated*, 428 U.S. 904, 96 S.Ct. 3209, 49 L.Ed. 2d 1209 (1976); *State v. Grier*, 30 N.C. App. 281, 227 S.E. 2d 126 (1976). There was no evidence in this case that William Reagan ever withdrew from the conspiracy.

[4] The indictments charged that each defendant "did feloniously break and enter" the Jones packhouse. Defendants assign error to various portions of the court's charge to the jury in which reference was made to breaking *or* entering. We find no error. "It has long been the law in this State in prosecutions under this

statute [G.S. 14-54] and its similar predecessors that where the indictment charges the defendant with breaking *and* entering, proof by the State of either a breaking *or* an entering is sufficient; and instructions allowing juries to convict on the alternative propositions are proper." *State v. Boyd*, 287 N.C. 131, 145, 214 S.E. 2d 14, 22 (1975). *See also State v. Vines*, 262 N.C. 747, 138 S.E. 2d 630 (1964).

We have carefully examined all of defendants' remaining assignments of error. None disclose prejudicial error or merit detailed discussion.

No error.

Chief Judge BROCK and Judge ARNOLD concur.

STANDARD EQUIPMENT COMPANY, INC. v. BASIL E. ALBERTSON, JR. AND WIFE, GAIL ALBERTSON

No. 7721SC159

(Filed 24 January 1978)

1. **Rules of Civil Procedure § 60— judgment of dismissal—no excusable neglect**

Evidence was insufficient to show excusable neglect as a matter of law and to justify relief under G.S. 1A-1, Rule 60(b)(1), where it tended to show that plaintiff did not keep himself informed as to the date set for trial of his action; plaintiff changed his address and failed to notify the court so that the court was unable to contact him; and plaintiff failed to retain counsel promptly.

2. **Rules of Civil Procedure § 60— judgment of dismissal—plaintiff's inattention as cause—judgment not vacated**

Plaintiff was not entitled to have the judgment of dismissal by the trial court vacated pursuant to G.S. 1A-1, Rule 60(b)(6), since judgments should not be vacated under that rule except in extraordinary circumstances and after a showing that justice demands it, and the facts of this case do not show that the judicial system or the defendant prevented movant from presenting his claim but rather that his own inattention to his affairs caused the dismissal to be entered.

APPEAL by defendants from *Collier, Judge*. Judgment entered 16 December 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 10 January 1978.

The undisputed facts are as follows. The complaint was filed on 1 May 1973 for a deficiency judgment after repossession of a piece of construction machinery. On 29 May 1973, defendants answered and counterclaimed. On 9 July 1974, defendants amended the answer and counterclaim. Discovery was had by both parties. Plaintiff discharged its attorney of record and took possession of its counsel's case file. On 2 September 1975, plaintiff's attorney was allowed to withdraw and was relieved of further responsibility in the case.

Plaintiff had no attorney of record after 2 September 1975. Letters and calendars sent to plaintiff by the Clerk of Superior Court were returned undelivered because plaintiff no longer rented that post office box and had not advised the court of its current address.

The case was calendared for trial at the 6 July 1976 Civil Session of Superior Court in Forsyth County. Plaintiff did not appear. Defendants appeared and submitted to a voluntary dismissal of their counterclaim with prejudice. The court then ordered that plaintiff's action be dismissed with prejudice for plaintiff's failure to appear to prosecute.

On 18 November 1976, present counsel for plaintiff moved that the July judgment be vacated and set aside and that the case be placed upon the calendar for trial. The motion contained allegations by counsel that, among other things, plaintiff had no knowledge of the date that the case was set for trial, that "some time" after the July judgment present counsel was employed to prosecute the claim and that in October of 1976, while preparing the case for trial, present counsel learned that the action had been dismissed for failure to prosecute.

After the motion came on to be heard, the judge made the following "conclusions of law".

> "1. The plaintiff had no knowledge as to the date set for trial of this action in Superior Court and was diligent throughout in attempting to prosecute its claim.
>
> 2. Plaintiff was not negligent in the handling of its case and any delay in substituting counsel did not amount to inexcusable neglect.

3. Plaintiff has not manifested an intention to thwart the progress of this action to its conclusion nor has it used delaying tactics to impede the progress of this action.

4. Plaintiff's failure to proceed at the July 5, 1976, term of Court did not arise out of a deliberate attempt to delay, but out of a misunderstanding and confusion.

5. The Judgment of the Court entered previously herein should be modified and amended."

The judge then ordered that the July judgment dismissing the action be "amended and modified to the extent that plaintiff's claim and defendants' counterclaim are dismissed without prejudice and the plaintiff has the right to commence said action again within one year as provided by law . . . ."

Green and Leonard, by Robert K. Leonard, for plaintiff appellee.

Randolph and Randolph, by Clyde C. Randolph, Jr., for defendant appellants.

VAUGHN, Judge.

[1] Defendant presents a single assignment of error by which he contends that the facts as found in this case do not justify relief under Rule 60(b). Plaintiff's motion for relief from the judgment did not specify the statutory language upon which it relied, however, it seems clear that the facts alleged relate to Rule 60(b)(1) and relief due to excusable neglect. Thus our inquiry must be whether the facts as found show excusable neglect as a matter of law. *Mason v. Mason*, 22 N.C. App. 494, 206 S.E. 2d 764 (1974). We hold that they do not. A party has a duty "to keep himself advised as to the time and date his cause is calendared for trial for hearing; and when a case is listed on the court calendar, he has notice of the time and date of the hearing." *Thompson v. Thompson*, 21 N.C. App. 215, 217, 203 S.E. 2d 663, 665 (1974), *cert. den.*, 285 N.C. 596, 205 S.E. 2d 727; *accord, Craver v. Spaugh*, 226 N.C. 450, 38 S.E. 2d 525 (1946). Plaintiff obviously failed to keep himself informed. Moreover, the court was unable to contact the plaintiff for the simple reason that plaintiff neglected to inform the court of its current address. Parties to suits are expected to give them the attention which a person of ordinary prudence

gives his important business. *Gregg v. Steele*, 24 N.C. App. 310, 210 S.E. 2d 434 (1974). Plaintiff was out of contact with the court for a period of ten months. Failure to retain counsel promptly or otherwise to maintain contact with the court should not be classified as excusable neglect of one's own lawsuit. Having invoked the jurisdiction of the court, a party should not be heard to complain when required to attend to the business he placed before it.

[2] Plaintiff contends that the court had authority to vacate the judgment pursuant to Rule 60(b)(6) even if the facts do not show excusable neglect. "While Rule 60(b)(6) has been described as 'a grand reservoir of equitable power to do justice in a particular case,' 7 Moore's Federal Practice, § 60.27 [2] at 375 (2d ed. 1975), it should not be a 'catch-all' rule." *Norton v. Sawyer*, 30 N.C. App. 420, 426, 227 S.E. 2d 148, 153 (1976). Courts have the power to vacate judgments when such action is appropriate, yet they should not do so under Rule 60(b)(6) except in extraordinary circumstances and after a showing that justice demands it. Thus the federal courts, in considering similar questions, have identified as relevant factors (1) the general desirability that a final judgment not be lightly disturbed, (2) where relief is sought from a judgment of dismissal or default, the relative interest of deciding cases on the merits and the interest in orderly procedure, (3) the opportunity the movant had to present his claim or defense, and (4) any intervening equities. *See* 7 Moore's Federal Practice § 60.19 at 237-38 (2d ed. 1975) and the cases cited therein; *see also* 15 A.L.R. Fed. 193. The facts of this case do not show that the judicial system or the defendant prevented movant from presenting his claim but rather that his own inattention to his affairs caused the dismissal to be entered. The interest of deciding cases on the merits cannot outweigh all other considerations and entitle plaintiff to extraordinary relief under Rule 60(b)(6).

We conclude that the judgment from which defendant appealed was entered in error. The same should be and is hereby vacated.

Judgment vacated.

Chief Judge BROCK and Judge ERWIN concur.

ALFRED K. SAMPSON AND WIFE, VOUTLINE P. SAMPSON v. CITY OF GREENSBORO

No. 7718SC107

(Filed 24 January 1978)

1. **Dedication § 2— subdivision plat—approval by city—dedication of sewer easement**

No question of material fact existed as to the approval of a subdivision and the proper dedication of a sewer easement shown on the subdivision plat, notwithstanding plaintiff developers denied any knowledge of how the plat got on record, where it was uncontradicted that plaintiffs employed engineers to prepare the plat, plaintiffs petitioned defendant city to approve the subdivision as shown on the plat, and it was accepted and approved by defendant, and where plaintiffs did not deny that they signed the plat which stated that they thereby dedicated to public use all easements shown on the plat.

2. **Dedication § 5; Easements § 8.3— sewer easement—dedication for other public purposes**

There is no merit in plaintiffs' contention that a sewer easement shown on a subdivision plat was dedicated for storm sewer purposes only and that defendant city cannot use the area for a sanitary sewer where a municipal ordinance provided that all property shown on a plat as dedicated for a public use shall be deemed to be dedicated for any other public use approved by the city council in the public interest, since the ordinance provided a valid condition that defendant city could lawfully impose before approving the proposed subdivision.

APPEAL by plaintiffs from *Rousseau, Judge.* Judgment entered 10 November 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 29 November 1977.

Plaintiffs own a tract of land known as Guilford Industrial Park. On 21 February 1975, they filed this suit against defendant to remove a cloud from their title. The alleged "cloud" is an easement that appears on the recorded plat of the property. Defendant is about to install a sanitary sewer along the easement. Plaintiffs contend that the property was never properly dedicated. They further contend that if there was a dedication, the easement was intended to be for a storm sewer and not a sanitary sewer.

Defendant moved for summary judgment. The court considered the verified pleadings, plaintiffs' answers to interrogatories, and the stipulations of facts, in addition to affidavits offered by defendant. These documents disclosed that plaintiffs

hired an engineer to map the subdivision in accordance with Greensboro City ordinances. Plaintiffs submitted the plat to the Greensboro Planning Board for consideration. The Board approved the plat, and it was recorded in proper form with the Guilford County Register of Deeds on 20 September 1971. The plat contains the following certificate:

> "The undersigned hereby acknowledge this plat and allotment to be _____ free act and deed and hereby dedicate to public use as streets, playgrounds, parks, open spaces, and easements forever all areas so shown or indicated on said plat. Signed, s/Alfred K. Sampson
> s/Voutline P. Sampson."

Plaintiffs appealed from the entry of summary judgment in favor of defendant.

Turner, Rollins, Rollins & Clark, by Clyde T. Rollins, for plaintiff appellants.

Jesse L. Warren and Dale Shepherd, for defendant appellee.

VAUGHN, Judge.

[1] Plaintiffs argue that a question of fact exists as to whether "they" authorized the plat to be placed on record. They rest their argument upon the bald denial in their complaint of any knowledge of how it got on record. It is uncontradicted that they employed engineers to prepare the plat of the subdivision, that they petitioned defendant to approve the subdivision as shown on the plat, and that it was accepted and approved by defendant. They do not deny that they signed the plat and thereby ". . . dedicate to public use as streets, playgrounds, parks, open spaces, and easements forever all areas so shown or indicated on said plat." The trial judge correctly concluded that no question of material fact existed as to the approval of the subdivision and the proper dedication of the easement shown on the plat. In one breath, plaintiffs claim all the benefits that are afforded by the defendant's approval of their subdivision and, at the same time, seek to withdraw the burdens on the land that defendant required to be imposed thereon before it would approve the subdivision. The easement appearing on plaintiffs' own map of their subdivision is not a "cloud" on their title.

[2] Plaintiffs next contend that the easement shown on the plat was dedicated for storm sewer purposes only and that defendant cannot use the area for a sanitary sewer. The argument is without merit. Section 19-12(g) of the Greensboro City Code of Ordinances is, in part, as follows:

> "All property shown on the plat as dedicated for a public use shall be deemed to be dedicated for any other public use authorized by the city charter or any general, local, or special law pertaining to the city when such other use is approved by the city council in the public interest."

The ordinance provides a valid condition that defendant may lawfully impose before granting approval for the proposed subdivision.

There were no genuine issues of material fact for trial. The court, consequently, properly entered summary judgment in favor of defendant.

Affirmed.

Judges BRITT and PARKER concur.

HERMAN L. TAYLOR AND WILLIAM L. HAND, JR. v. ROYAL GLOBE INSURANCE COMPANY

No. 773DC144

(Filed 24 January 1978)

1. Insurance § 147— aircraft policy—noncompliance with notice requirements

In an action to recover damages to an airplane where the policy under which plaintiffs claimed required that notice of any accident be given to the insurer by the insured as soon as was practicable, the trial court properly held that plaintiffs had not complied with a condition precedent to any suit against defendant since plaintiffs first gave defendant notice of loss eight months and twenty-one days after the accident occurred; there was no evidence that either plaintiff was under any disability; and there was no evidence showing that plaintiffs could not contact defendant due to any fault of defendant.

2. Insurance § 147— aircraft policy—noncompliance with notice requirements—liability denied on other grounds—defense of noncompliance not abandoned

Plaintiffs' contention that defendant waived the notice requirement of the insurance policy when it denied liability on other grounds, the contract exclu-

sion clause, is without merit, since defendant at no time abandoned the defense of failure to provide notice in favor of reliance on the exclusion clause but instead presented its two grounds for denial together in a letter to plaintiffs denying coverage and continued to present them as alternatives throughout the action.

3. Insurance § 147— aircraft policy—investigation of loss—noncompliance with notice requirements—no waiver

Investigation of plaintiffs' loss by an adjuster employed by defendant did not operate as a waiver of plaintiffs' noncompliance with the notice provisions of the insurance policy, since there was no evidence that defendant at any time promised coverage or caused plaintiffs to believe that they were in compliance with the policy.

APPEAL by plaintiffs and defendant from *Wheeler, Judge.* Judgment entered 4 November 1976 in District Court, CRAVEN County. Heard in the Court of Appeals 7 December 1977.

Plaintiffs, co-owners of a Cessna airplane, brought this action against defendant as their insurer under a Combined Aircraft Policy asking for $5,000.00 in payment for damages suffered to the instrumentation and electrical system of the plane. Evidence at trial showed that on 2 April 1974, plaintiff Hand accidentally recharged the airplane's battery in such a manner as to reverse its polarity. When the battery was installed and placed in use, the electrical system and instrumentation of the plane were so severely damaged that some parts had to be replaced after attempts to repair failed. On 23 December 1974, plaintiffs informally notified their insurance agent of the accident. On 2 February 1975, an insurance adjuster employed by defendant investigated the accident on its behalf, and on 14 March 1975, defendant notified plaintiffs by letter that the loss was denied because of failure to comply with the terms and conditions of the policy and because of policy exclusions.

There is a condition in the insurance policy under which plaintiffs claim that "[w]hen loss occurs, the Named Insured shall . . . give notice thereof as soon as practicable to the Company . . . ." The policy further states that full compliance with its terms is a condition precedent to any action against the company. In addition, it excludes coverage for loss "due and confined to . . . electrical breakdown . . . ."

After making appropriate findings of facts from the evidence, the court concluded that the loss was covered by the policy but

that plaintiff had failed to comply with the terms of the policy. He also found that defendant did not waive full compliance with the terms of the policy.

Lee, Hancock & Lasitter, by Moses D. Lasitter, for plaintiff appellants and plaintiff appellees.

Sumrell, Sugg & Carmichael, by James R. Sugg, for defendant appellant and defendant appellee.

VAUGHN, Judge.

[1] Plaintiffs claim against defendant under an insurance policy which requires that notice of any accident shall be given to the insurer by the insured as soon as is practicable. This is an enforceable provision of the contract and has been interpreted to mean that notice should be given as soon as the insured is capable of doing so. *See* the concurring opinion of Parker, J. in *Muncie v. Travelers Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474 (1960). The court, sitting without jury, found from competent evidence that plaintiffs first gave defendant notice of loss eight months and twenty-one days after the accident occurred. There was no evidence that either plaintiff was under any disability nor was there any evidence to show that plaintiffs could not contact defendant due to any fault of defendant. The court, therefore, correctly held that plaintiffs had not complied with a condition precedent to any suit against defendant.

[2] Plaintiffs contend that the facts show waiver of the notice requirement by defendant both when it denied liability on other grounds, the contract exclusion clause, and when it investigated the accident by sending in its adjuster. The essential elements of a waiver are (1) the existence of a right, advantage or benefit; (2) knowledge of its existence; and (3) an intention to relinquish it. *Davenport v. Travelers Indemnity Co.*, 283 N.C. 234, 195 S.E. 2d 529 (1973). The rule in North Carolina is that the denial of liability on another ground operates as waiver of the notice requirements, being regarded as a statement that payment would not be made even though policy provisions had been complied with. *Davenport v. Travelers Indemnity Co., supra.* However, defendant in this case presented its two grounds for denial together in the letter to plaintiffs denying coverage and continued to present them as alternatives throughout the action. At no time can defendant be

said to abandon the defense of failure to fulfill the conditions precedent in favor of reliance on the exclusion clause.

[3] Generally, the mere investigation of a loss by the insurer will not operate as a waiver of noncompliance with the notice provisions of a liability insurance policy. Only where circumstances lead the insured to believe that he has fulfilled his duties will he be allowed to press his claim without having complied with the policy. *See* 18 A.L.R. 2d 443, §§ 30-35. There was no evidence that defendant at any time promised coverage or caused plaintiffs to believe that they were in compliance with the policy. Cases of waiver under this rule generally involve situations where notice of the accident was properly given and the insured was lulled into not giving proper notice of an action against him. *See* 18 A.L.R. 2d, *supra.*

Defendant clearly made the investigation under reservation of rights, and plaintiffs were not relieved thereby from their failure to give proper notice.

Since the judgment is affirmed, it is not necessary to consider the questions raised by defendant's appeal.

Affirmed.

Judges BRITT and PARKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 JANUARY 1978

MEDDER v. MEDDER No. 7718DC102	Guilford (76CVD3911)	Modified and Affirmed
RICKS v. COMR. OF MOTOR VEHICLES No. 776SC58	Northampton (75CVS101)	Reversed and Remanded
STATE v. PAYNE No. 778SC611	Lenoir (76CR4756) (76CR4758)	No Error
STATE v. SCALES No. 7721SC636	Forsyth (76CR48819)	No Error
STATE v. TUCKER No. 7715SC624	Chatham (75CR2322)	No Error

FILED 17 JANUARY 1978

BEIGHTOL v. INSURANCE CORP. No. 7721DC170	Forsyth (75CVD1795)	Dismissed
CLARK v. DOMESTIC LOANS No. 7721DC125	Forsyth (76CVD1498)	Reversed and Remanded
CUNNINGHAM v. CUNNINGHAM No. 7719DC88	Rowan (74CVD1121)	Affirmed
DAVIS v. DAVIS No. 773DC171	Carteret (76CVD141)	Affirmed
IN RE EDWARDS No. 7716DC153	Scotland (77SP1)	Reversed
MILLER v. BLACK No. 7718DC110	Guilford (75CVD6587)	Reversed and Remanded
SAWYER v. SAWYER No. 7726DC176	Mecklenburg (73CVD4434)	Affirmed
STATE v. BOYD No. 774SC608	Onslow (76CR18286)	No Error
STATE v. CAISON No. 778SC620	Wayne (76CR6169) (76CR6169A)	No Error
STATE v. GRIFFIN No. 772SC617	Washington (77CRS126) (77CRS49)	No Error
STATE v. GRINDSTAFF No. 7725SC680	Burke (76CRS9042)	No Error

STATE v. LEDFORD No. 7729SC650	Rutherford (76CR6073)	No Error
STATE v. MALNEE No. 7726SC706	Mecklenburg (77CR8645)	No Error
STATE v. MELTON No. 7720SC323	Union (76CR4296)	No Error
STATE v. PARRIS No. 7726SC703	Mecklenburg (76CR61196)	No Error
STATE v. PETERSON No. 774SC437	Onslow (76CR13747)	No Error

FILED 24 JANUARY 1978

SMITH v. SMITH No. 7727DC75	Gaston (76CVD397)	Affirmed
STATE v. BAGGETT No. 774SC711	Sampson (77CRS1305) (77CRS1306) (77CRS1307)	No Error
STATE v. BROUNSON No. 7712SC746	Cumberland (77CRS344)	No Error
STATE v. HARRIS No. 7720SC683	Stanly (77CRS1169)	No Error
STATE v. HUNTLEY No. 7720SC684	Stanly (76CR4325)	No Error
STATE v. LEE No. 7712SC725	Cumberland (76CRS32445)	No Error
STATE v. WRAY No. 7727SC712	Cleveland (76CR3053)	No Error

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION AND RUFUS L. EDMISTEN, ATTORNEY GENERAL v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC.

No. 7710UC83

(Filed 7 February 1978)

1. **Gas § 1— natural gas company—volume variation adjustment factor—notice of hearing**

A natural gas company was on notice that its volume variation adjustment factor was the subject of a hearing before the Utilities Commission and cannot complain of lack of notice that the Commission might require a calculation less favorable than the one sought by the company.

2. **Gas § 1; Utilities Commission § 6— natural gas—volume variation adjustment factor—true-up adjustment**

There was competent, material and substantial evidence in the record to support an order of the Utilities Commission basing the volume variation adjustment factor for the rates of a natural gas company on both historical and future entitlement periods and requiring a true-up adjustment for past periods based upon the difference between the volume variation adjustment factor actually in effect and the true factor determined by using the actual curtailment of gas supplies for the past periods.

3. **Gas § 1; Utilities Commission § 6— natural gas—volume variation adjustment factor—order for refunds**

The Utilities Commission acted within its authority and did not engage in retroactive rate making when it ordered a natural gas company to refund the difference between a proposed volume variation adjustment factor collected pursuant to an undertaking for refund and the factor thereafter approved by the Commission, or when it required the company to refund the difference between the volume variation adjustment factor actually in effect for past periods and the "true" factor for such periods based upon actual curtailment experience during those periods.

APPEAL by defendant from an order of the North Carolina Utilities Commission issued 22 September 1976 in Docket No. G-5, Sub 102C. Heard in the Court of Appeals 15 November 1977.

Pursuant to a general rate case in Docket No. G-5, Sub 102, the Utilities Commission (Commission) entered its Order Establishing Rates for Public Service Company of North Carolina, Inc. (Public Service or Appellant), on 13 February 1975. Contained within this order as part of the approved rate structure was authorization for the use of a formula known as the Volume Variation Adjustment Factor (VVAF). The VVAF is a rate set for the

future and is based on projected volumes of gas. Its use was necessitated by the curtailment of natural gas supplies flowing to North Carolina distributors, including Public Service, from Transcontinental Gas Pipeline Corporation (Transco). Curtailment levels had fluctuated from month to month and from season to season, making it impossible to accurately forecast future revenues and expenses for Public Service. The VVAF was designed to track the revenue effects of increased or decreased curtailment and to maintain a base period "margin" or difference between gross revenues and cost of purchased gas, thereby avoiding the necessity for a general rate case each time curtailment levels might change. The order of 13 February 1975 provided for the filing of future rate schedules and revisions every six months to reflect further changes in curtailment levels.

Evidence before the Commission in the instant proceeding reveals that Public Service initially filed its VVAF on 19 February 1975 at a rate of $.1338 per mcf. Effective 6 October 1975, Public Service reduced its VVAF increment to $.0842 per mcf to adjust for overcollections due to increased supplies. On 20 May 1976, Public Service proposed a third VVAF filing, reducing the increment to $.0770 per mcf. A revision to this third filing was filed on 8 June 1976, increasing the VVAF to $.2835 per mcf. By letter dated 14 June 1976, the Commission authorized the increase reflected in the third (revised) VVAF filing.

The testimony of C. M. Dickey, Vice President of Gas Supply Services for Public Service, indicates the reason for the difference in the 20 May and 8 June VVAF filings. The 20 May filing reflected a curtailment forecast based upon 5½ months actual or historical supply volumes (1 November 1975 through 15 April 1976), and 6½ months of estimated future supplies (16 April through 31 October 1976). This method of forecasting curtailment was based upon paragraph 6 of the Commission's order issued 8 April 1976 in Docket No. G-5, Subs 102, 112, 113 and 114. After a conference between Public Service, the Commission Staff, and another of the utilities, the 8 June revised filing was submitted. In this revised filing the VVAF was calculated on the basis of supply levels obtained by annualizing the upcoming summer period curtailment level. This method of forecasting curtailment was consistent with Public Service's assumption as to the Commission's interpretation of the above paragraph 6.

On 24 June 1976, the Attorney General of North Carolina gave notice of intervention on behalf of the using and consuming public, and filed a motion to rescind approval of the rate increases and set the matter for hearing. By order dated 25 June 1976, the Commission recognized the Attorney General's intervention; by order dated 29 June 1976, the Commission concluded that its approval of the VVAF increase should be rescinded and the matter set for hearing, and concluded that the proceeding was not a general rate case. The Commission ordered the suspension of the proposed rate schedules and the refund of any amounts collected thereunder; providing, however, for a stay of its order of suspension and refund pending a hearing, should Public Service file an undertaking to refund any amounts later found to be unjust and unreasonable. Public Service filed such an undertaking on 2 July 1976.

The matter came on for hearing before the Commission on 20 July 1976, at which time the parties presented evidence. In its order issued 22 September 1976, the Commission made findings of fact, and concluded, *inter alia*, "that the use of both historical and future Transco entitlement periods provides the best estimate of volumes at the time of filing and should serve as the basis for the VVAF calculation . . . ." The Commission further concluded "that the amounts heretofore collected by Public Service under the $.2835 per mcf VVAF rate, to the extent they exceed such amounts as would have been collected by Public Service had the VVAF been calculated in accordance with Appendix A to this Order, are unjust and unreasonable and should be refunded pursuant to Public Service's Undertaking filed with the Commission." Finally, the Commission concluded "that the adjustments to the VVAF approved herein are just and reasonable."

Based upon its findings and conclusions, the Commission denied Public Service's application to increase the VVAF to $.2835 per mcf, and ordered Public Service to file revised tariffs in accord with the aforementioned Appendix A.

Appendix A first required the use of the 5½ months historical/6½ months estimated future volumes for purposes of calculating the VVAF rate to be effective 18 June 1976 (as per the 20 May filing). Also, it required that Public Service calculate the "true" VVAF rate based upon actual curtailment for the period 20 February 1975 through 19 February 1976, and make an

adjustment for the period based upon the difference between the VVAF rate actually in effect and the pro forma "true" VVAF rate. A "true" VVAF calculation was also required for the period 16 April 1975 through 15 April 1976 in order to adjust for the period 20 February 1976 through 15 April 1976. A final adjustment was required for the period 16 April 1976 through 18 June 1976 due to lag time in implementing rates.

Appendix A further required that the difference between the $.2835 rate subject to undertaking, and the new rate (to be calculated using historical and projected future curtailments) be flowed back to the customers who paid the $.2835 rate by credits to their bills, or by refund check. Over-collections reflected by the various adjustments were also to be refunded by credit or check.

Public Service Company appealed.

Boyce, Mitchell, Burns & Smith, by F. Kent Burns, for appellant Public Service Company of North Carolina, Inc.

Commission Attorney Edward B. Hipp and Associate Commission Attorney Antoinette R. Wike, for the North Carolina Utilities Commission.

Attorney General Edmisten, by Associate Attorney Jerry B. Fruitt and Assistant Attorney General Jessie C. Brake, intervenors.

BROCK, Chief Judge.

[1] By its first assignment of error, appellant contends that the Commission erred in adopting and ordering the implementation of Appendix A without affording Public Service an opportunity to be heard, in that the hearing and the evidence related only to the 8 June filing, and the procedures mandated by Appendix A were not presented in any way at the hearing. We find no merit in this contention.

Public Service was clearly on notice that the Commission's approval of the 8 June filing had been rescinded and that the VVAF would be the subject of the 20 July hearing. Public Service was on notice that it would have to justify its proposed VVAF calculation and cannot be heard to complain of lack of notice that the Commission might require a calculation less favorable than the one sought. It is worthy of note that the historical/future cur-

tailment forecasting method required by Appendix A is the same as that utilized by Public Service in its 20 May filing, and that mandated by the 8 April 1976 order in Docket No. G-5, Subs 102, 112, 113 and 114, which was made part of the record in this proceeding.

As to the true-up adjustments in Appendix A, the record reveals that even the 8 June filing contained a true-up component and Public Service cannot challenge these provisions on the grounds of lack of notice and opportunity to be heard.

Appellant's assignment of error No. 1 is overruled.

[2] In its second assignment of error, Public Service argues that there is no competent, material or substantial evidence to support the adoption of Appendix A, since all of the evidence supported the 8 June filing. We disagree.

We perceive this case as little more than a dispute over accounting procedures, insofar as it relates to the calculation of the VVAF and the true-ups. Considering the entire record as submitted, G.S. 62-94(b)(5), we find, as noted *supra*, that the historical/future curtailment forecasting method was mandated by the 8 April Commission order, and was proposed by Public Service in its 20 May filing. These facts constitute competent, material and substantial evidence to support the Commission's order requiring computation of the VVAF in the prescribed manner. As to the true-up provisions of Appendix A, again, the method of calculation of the adjustments are virtually identical to those contained in the 20 May filings, and even the 8 June filing contained a true-up component. The Commission's order is, by statute, deemed *prima facie* just and reasonable. G.S. 62-94(e). Public Service has failed to carry its burden of proving otherwise with respect to the procedures for determining the VVAF and the true-up adjustments mandated by Appendix A.

Appellant's assignment of error No. 2 is overruled.

[3] Public Service argues, in its third assignment of error, that the refund provisions of Appendix A exceeded the authority of the Commission and constituted retroactive rate making. Public Service contends that the VVAF is an existing rate established by the Commission, which can only be changed prospectively, whereas the refund provisions of Appendix A require refunds

back to 20 February 1975. Appellant's argument thus is premised upon the assumption that the VVAF is itself an established rate. Clearly, retroactive changes in existing rates by the Commission are not allowed. However, we do not agree with appellant's assumption regarding the nature of the VVAF.

On 2 July 1976, Public Service filed its undertaking to refund to its customers who paid them, the excess of payments charged at the $.2835 VVAF over amounts which the Commission might approve. We have determined *supra* that the Commission did not err in its order relating to the calculation of the VVAF; therefore Public Service is bound by its undertaking, and the Commission had authority to order a refund. The $.2835 VVAF collected by Public Service pending the outcome of this proceeding was in the nature of a "permitted or allowed" rate as discussed by Justice Exum in *Utilities Commission v. Edmisten, Attorney General,* 291 N.C. 327, 352, 230 S.E. 2d 651, 666 (1976), which is subject to refund upon determination by the Commission that it is unjust and unreasonable. G.S. 62-132. The Commission determined that the $.2835 VVAF was unjust and unreasonable to the extent it exceeded the VVAF as calculated in accordance with Appendix A.

Appellant's exceptions to the order requiring true-up adjustments and refunds dating back to 20 February 1975 appears aimed at the requirement of specific refunds rather than at the authority of the Commission to require a true-up. The Intervenors, in their brief, assert that the VVAF tariff contains a provision for true-ups. The VVAF tariff is not part of the record in this case. However, as evidenced by the testimony of witnesses Dickey and Flanagan, Public Service recognizes the necessity of true-ups to account for over-collections which resulted when curtailment levels actually experienced turned out to be lower than projected at the time the VVAF was previously calculated. Public Service proposed to true-up by means of an offset to the new VVAF. As established at the hearing, under this proposal, only those who remained customers of Public Service would receive any refund for over-collections. The Commission's order requires that customers who are no longer served by Public Service, and cannot benefit from the offset to the VVAF, but who paid the overcollections from 20 February 1975, are to receive specific refunds by check.

The "true" VVAF rate is based upon *actual* curtailment experience. The "true" VVAF is the incremental rate necessary to allow Public Service to maintain its base period margin. Since the VVAF actually charged is based upon projected curtailment levels, it must be trued-up periodically to reconcile it with actual experience. Public Service does not challenge the authority of the Commission to require a true-up, and we believe that the VVAF true-up and refund provisions are distinguishable from the retrospective and prospective rate making condemned in *Utilities Commission v. Edmisten, Attorney General*, 291 N.C. 451, 232 S.E. 2d 184 (1977). We construe the *pro forma* "true" VVAF as the just and reasonable rate set by the Commission which enables Public Service to maintain its base-period margin. The estimated VVAF is more akin to the "permitted or allowed" rates mentioned *supra*.

Public Service excepts to the Commission's conclusion that the VVAF has never been subject to an absolute true-up. There is nothing in the record or appellant's brief to indicate that the Commission's conclusion was erroneous. Without some such showing by appellant, we cannot find error in this finding by the Commission.

Appellant's assignment of error No. 3 is overruled.

By its fourth assignment of error, Public Service argues that Appendix A is arbitrary and capricious on its face because it requires overlapping true rate calculations. This argument is meritless. Appendix A does indeed order the calculation of overlapping true rates, one for the period 20 February 1975 through 19 February 1976, and another for the period 16 April 1975 through 15 April 1976. However, the adjustments are applied to separate periods for purposes of determining overcollections (the latter true rate being applied only to the period 20 February 1976 through 15 April 1976). We find nothing arbitrary and capricious about this aspect of Appendix A. This assignment of error is overruled.

The decision of the North Carolina Utilities Commission is

Affirmed.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. LINDA KING LIVINGSTON

No. 7720SC648

(Filed 7 February 1978)

1. **Embezzlement § 6— bookkeeper's embezzlement from drugstore—motion for directed verdict properly denied**

The trial court properly denied defendant's motion for directed verdict in a prosecution for embezzlement where the evidence tended to show that defendant was bookkeeper for a drugstore; receipts and other documentation were missing from the store's bookkeeping files; defendant admitted to the store owner and pharmacist that she might have misappropriated some money; and the store owner questioned defendant about some missing documentation shortly after she had made an unsupported entry in the store's records, this confrontation occurring at a time when defendant could reasonably have been expected to remember the source of the entry, but defendant could not account for the expenditure.

2. **Criminal Law § 89.3— meeting between employer and defendant—memorandum prepared by employer—admission into evidence proper**

In a prosecution of defendant for embezzlement from a drugstore, the trial court did not err in allowing into evidence a memorandum of a meeting between the drugstore owner, the pharmacist, defendant and defendant's husband at which defendant's possible misappropriation of funds was discussed, since the memorandum was admitted only for the purpose of corroborating the testimony of the store owner, and the person who drafted the memorandum and the persons who signed it authenticated the document and were available for cross-examination.

3. **Embezzlement § 6.1— fradulent misapplication of money—jury instructions proper**

Where the indictment charged that defendant "did embezzle and convert to her own use" a specified sum, it was not error for the court to charge the jury that it could return a verdict of guilty upon a finding, inter alia, that defendant "used any amount of money for some purpose other than that for which she received it," since the indictment properly charged defendant with embezzlement, and fraudulent misapplication of the money amounts to embezzlement even if defendant did not apply the money to her own use.

4. **Criminal Law § 142.3— embezzlement—restitution as condition of probation—no error**

The trial court in an embezzlement case did not err in ordering defendant to pay over $4000 in restitution as a condition of probation, since such restitution is authorized by G.S. 15-199(10), and the amount is supported in the record by the testimony of defendant's employer, who stated that the total amount of discrepancies he discovered was over $4000.

5. **Criminal Law § 142.2— embezzlement—active sentence and probation exceeding five years—error**

The trial court in an embezzlement case erred in imposing an active sentence for six months and then placing defendant on probation for five years, since G.S. 15-197.1(b) provides that the period of probation, together with the period of active sentence, may not exceed five years.

APPEAL by defendant from *Wood, Judge*. Judgment entered 31 March 1977 in Superior Court, STANLY County. Heard in the Court of Appeals 6 December 1977.

Defendant was tried on her plea of not guilty to an indictment charging her with embezzlement of the sum of $4,922.55, belonging to Phillips Drug Company.

The State's evidence consisted principally of the testimony of Thomas Yost, the sole owner of Phillips Drug Company. Yost testified that he hired defendant in late May or early June of 1975 as a bookkeeper, and in September of 1975 her duties were enlarged to include handling money for the store. She periodically emptied money and receipts from the cash register, prepared daily check sheets and bank deposits, and kept other records of the business. The cash registers contained invoices and receipts representing cash which had been paid out. Certain vendors were paid in cash directly out of the cash register, and the drug store's bookkeeping procedure required the employee who paid the vendor to initial the invoice or receipt and to place the documentation in the cash register. In arriving at the amount of sales made through a cash register, the amount shown on the invoices and receipts was added to the amount of cash, and this figure was entered on the daily check sheet as the total amount of cash in that cash register. The cash register also contained error slips and refund receipts. The error slips accounted for mistakes made by employees in operating the cash registers, and the refund receipts showed the amount of refunds made for merchandise returned by customers.

As a bookkeeping procedure, it was the duty of the bookkeeper to include in each bank deposit a check drawn on Phillips Drug Company's account and made payable to Phillips Drug Company. The amount of the check was equal to the total amount of expenditures for various purchases as documented by the invoices and receipts in the cash registers. Defendant was instructed to re-

tain the invoices and receipts. The expenditures which the check represented were itemized on the check stub. Except during periods of absence from work due to illness totaling four weeks, defendant was the only person who tallied the items from the cash register from September 1975 until the termination of her employment on 8 March 1976.

Yost testified that he checked the store's records for the months October 1975 through February 1976. He checked the amounts entered for cash expenditures on the daily check sheets and on the check stubs against the invoices and receipts which documented those expenditures. He discovered that there were insufficient invoices and receipts to account for the amounts entered on the check sheets and check stubs. He also checked the amounts entered for errors and refunds against the error slips and refund receipts, and he again found insufficient documentation for those sums. Yost testified later that this audit he conducted revealed that the records and files contained no documentation to support the authenticity of various expenditures, errors, and refunds amounting to a total of $4,652.88.

On 8 March 1976, defendant was scheduled to return to work after an absence of approximately one week. At this time, Yost was aware of the discrepancies in the company's records, and on the night before defendant's return, he cleared and checked the cash registers. Defendant returned to work on 8 March and performed her bookkeeping duties as usual. After she completed the daily check sheet and bank deposit that day, Yost checked her work and discovered that there were no invoices or receipts to account for $85 in expenditures entered by defendant on the records for that day. Yost confronted defendant with this discrepancy, and she was unable to account for the missing documentation.

On 9 March, at defendant's request, Yost and his pharmacist, Henry Leach, met with defendant and her husband. Yost testified that defendant told them that she might have misappropriated $200 but that she would make restitution. Defendant's husband offered to let defendant work for no pay until the discrepancies were taken care of. Immediately after the meeting, Yost typed a dated memorandum of the meeting, and he and Leach signed it.

On cross-examination Yost testified that when defendant came to work, he had been without a bookkeeper for about six months and the bookkeeping operation was in disarray. Yost and defendant had worked together to get the bookkeeping work caught up and in order.

When Yost conducted the audit of the bookkeeping records, he searched all his files for invoices, receipts, and other documentation to support the entries made by defendant, but he did not check with any of the vendors to determine whether they had actually been paid. Yost also testified that invoices were not always kept with the checkbooks and daily check sheets. The invoices were sometimes used for pricing goods before placing them on the shelves, and the invoices were then placed in a file under the distributor's name. However, he searched all the files before concluding that the necessary receipts could not be found.

On 8 March, when Yost could not find a receipt to support an expenditure of $85, defendant gave him an invoice from a supplier in the amount of $87.70. Yost did not call the supplier to determine if the invoice had actually been paid, but he concluded that it had not because it was not marked paid.

Yost summarized his testimony as follows:

> "What I am saying is that there are some entries on the daily report sheets which are not backed up by a receipt somewhere. My testimony is that I just could not find evidence to support her entries on the daily report sheets."

Henry Leach, the drug store's pharmacist, also testified for the State regarding the 9 March meeting with defendant and her husband. He testified that defendant told them that there might have been a discrepancy of $200 in the store's records. After proper authentication, the memorandum made after the meeting by Yost and signed by Yost and Leach was admitted into evidence only for the purpose of corroboration. The memorandum stated that defendant admitted that she might be guilty of some misappropriations. When asked whether she used the word "discrepancies" or "misappropriations", Leach indicated that he was unsure which word she used but that the two words meant the same thing.

The State rested its case, and defendant took the stand. She testified that when she came to work, she first had to face the difficult task of getting the company's books in order. She stated that she made no fictitious entries and took no money from the store. She explained that some discrepancies occurred because invoices were taken out of the cash register to be used in pricing merchandise and were then filed under the name of the supplier. She also testified that money was sometimes taken from the cash register without a receipt to account for the money. On other occasions, the receipts consisted of torn pieces of paper with no initials, and she was not instructed to retain those torn pieces of paper. Regarding the meeting of 9 March, she told Yost and Leach that there might have been a mistaken entry, and she offered to go through the books. However, she denied making an offer to repay $200.

Defendant's husband, a minister, also took the stand. He testified that at the 9 March meeting he only told Yost and Leach that there might have been an error and that he would see that the mistake was rectified. However, neither he nor defendant was permitted to search for the missing receipts.

Defendant also presented ten character witnesses.

The jury found defendant guilty as charged. The judgment imposed a prison sentence of five years. Pursuant to G.S. 15-197.1, the court imposed an active sentence of six months, and the remainder of the sentence was suspended, with defendant to be on probation for a period of five years after completing the active portion of the sentence. Defendant appealed.

Attorney General Edmisten, by Associate Attorney Patricia B. Hodulik, for the State.

Burke, Donaldson and Holshouser, by John L. Holshouser and A. Michael Barker, for defendant appellant.

MORRIS, Judge.

[1] By her first assignment of error, defendant contends that the trial court should have granted her motion for a directed verdict. This motion has the same legal effect as a motion to dismiss the action or a motion for judgment as in case of nonsuit, and it challenges the sufficiency of the State's evidence to take the case

to the jury. *State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975). Defendant presented evidence in this case, and we, therefore, consider only her motion for a directed verdict made at the close of all the evidence. *State v. Chavis*, 30 N.C. App. 75, 226 S.E. 2d 389 (1976).

Viewing the evidence in the present case in the light most favorable to the State and giving the State the benefit of all legitimate inferences to be drawn therefrom, we conclude that the trial court properly denied defendant's motion for a directed verdict. Defendant's principal argument on this point is that while the evidence shows that receipts and other documentation were missing from the store's bookkeeping files, there was no showing that any money was missing. The missing documentation, standing alone, shows either that the documentation had been lost or destroyed or that false entries had been made to account for sums of money which were periodically taken from the cash register. There was evidence that defendant admitted that she might have misappropriated some money. Furthermore, on 8 March 1976, Yost questioned defendant about some missing documentation shortly after she had made an unsupported entry in the store's records. This confrontation occurred at a time when defendant could reasonably have been expected to remember the source of the entry, but she could not account for the expenditure. The absence of supporting documentation occurring only while defendant was performing the duties of bookkeeper, coupled with the other evidence, permits an inference of a consistent pattern of misappropriation by defendant of sums of money received by her in the course of her employment and by the terms of her employment. The fraudulent intent necessary to establish the crime of embezzlement can rarely be shown by direct proof, but the facts and circumstances presented to the jury were sufficient to support an inference of the requisite fraudulent intent. *See State v. Helsabeck*, 258 N.C. 107, 128 S.E. 2d 205 (1962); *State v. Smithey*, 15 N.C. App. 427, 190 S.E. 2d 369 (1972).

[2] The second assignment of error is directed to the court's admission into evidence, over defendant's objection, of the memorandum of the 9 March meeting between Yost, Leach, defendant, and defendant's husband. The memorandum was admitted only for the purpose of corroborating the testimony of the State's witness. The North Carolina rule regarding the ad-

missibility of prior consistent statements for corroboration is quite liberal, 1 Stansbury, N.C. Evidence (Brandis Rev.), § 52, and we find no error in the admission of this memorandum. Evidence of prior consistent statements is particularly persuasive where, as here, the time gap between the event in issue and the prior statement is short.

In her brief, defendant relies on the case of *State v. Austin*, 285 N.C. 364, 204 S.E. 2d 675 (1974). However, in that case there was no authentication of the signature on the document in question, thereby raising substantial questions as to its genuineness. In the present case, the person who drafted the memorandum and the persons who signed it authenticated the document and were available for cross-examination. The lack of authenticity condemned in *Austin* is not present here. This assignment of error is overruled.

[3] Defendant next assigns error to a portion of the court's instructions to the jury. The indictment charged in part that defendant "did embezzle and convert to her own use" a specified sum, and the court charged the jury that it could return a verdict of guilty upon a finding, *inter alia*, that the defendant "used any amount of money for some purpose other than that for which she received it." Defendant argues that the charge in the indictment permits a verdict of guilty only if the jury finds that defendant converted the money "to her own use." We disagree. The indictment properly charged defendant with embezzlement, and fraudulent misapplication of the money amounts to embezzlement even if defendant did not apply the money to her own use. *State v. Foust*, 114 N.C. 842, 19 S.E. 275 (1894).

[4] As a special condition of probation, the court ordered defendant to pay the sum of $4,652.88 in restitution to Phillips Drug Company. Defendant assigns error to this condition of probation. Making restitution a condition of probation is authorized by G.S. 15-199(10), and the amount is supported in the record by the testimony of Mr. Yost, who stated that the total amount of discrepancies he discovered was $4,652.88. Therefore, this assignment of error is overruled.

[5] Defendant's final assignment of error is directed to the length of her sentence. The court imposed a split sentence as authorized by G.S. 15-197.1. The court imposed an active sentence

of six months. The remainder of defendant's five-year sentence was suspended with defendant placed on probation for a period of five years. As the State concedes in its brief, this sentence exceeds that permitted by G.S. 15-197.1(b), which provides that the period of probation, together with the period of active sentence, may not exceed five years. The case must, therefore, be remanded for proper sentencing.

Remanded for sentencing.

Judges HEDRICK and ARNOLD concur.

SEBY B. JONES AND ROBERT D. GORHAM v. ANDY GRIFFITH PRODUCTS, INC. AND SILVER'S ENTERPRISES, INC.

No. 7710SC134

(Filed 7 February 1978)

Landlord and Tenant § 11— proposed sublease—withholding of consent by landlord—reasonable grounds

In an action to recover for unpaid rent and taxes due pursuant to a written lease agreement which also permitted subletting with approval by the lessor, the trial court did not err in holding that plaintiffs' refusal to consent to a proposed sublease was reasonable where the evidence tended to show that plaintiffs originally rented the premises to defendant for use as a restaurant; defendant sought to sublet them to an electronics company which already rented space in the shopping center in which the premises in question were located; and plaintiffs objected to the proposed sublease because they desired to maintain a restaurant operation in the subject premises in light of the nature of the building and the desire for percentage rental.

APPEAL by defendants from *McLelland, Judge*. Judgment entered 15 October 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 6 December 1977.

This action was instituted by plaintiffs seeking judgment against defendants for unpaid rent and taxes due under the terms of a written Lease Agreement executed on 15 April 1970. By the terms of said Lease Agreement, defendant Andy Griffith Products, Inc. (Andy Griffith) leased from plaintiffs certain premises owned by plaintiffs and located at 2110 North Boulevard, Raleigh, North Carolina. The subject premises were adjacent to and in

front of Gateway Plaza Shopping Center. The Gateway Plaza Shopping Center proper was separately owned by plaintiff Seby B. Jones and wife, Christina B. Jones, although both the subject premises and the Gateway Shopping Center proper were managed by Regional Properties, Inc., whose major stockholder was plaintiff Jones.

The Lease Agreement between plaintiffs and Andy Griffith was for a term of twenty years at a monthly rental of $1,488.50 ($17,862.00 annually), or 6½ per cent of annual gross sales should that percentage exceed $17,862.00. The Lease Agreement also required plaintiffs, at their own expense, to construct a building and other improvements on the premises in accordance with certain plans and specifications which were not included in the record or with the exhibits on this appeal. Section 1.08 of the Lease Agreement provided that the premises "may be used for restaurant purposes." The Lease Agreement also contained a Section 1.16, which read as follows:

> "SUBLETTING. The parties to this Lease Agreement shall have the right to sublet the whole or any parts of the leased premises. No subletting and no acceptance by Lessor of any rent or other sum of money from any assignee or sublessee shall release Lessee from any of its obligations under this Lease Agreement. Any subletting by Lessee shall be subject to the approval of Lessor, which approval shall not be unreasonably withheld. The withholding of approval of any proposed subletting to use the leased premises to conduct any business substantially duplicating any other business conducted in Gateway Plaza Shopping Center at the time of such proposed subletting shall not be deemed unreasonable."

On 1 September 1972, all of the parties herein executed an Assignment, Consent and Amendment to Lease, assigning the leasehold to defendant Silver's Enterprises, Inc. (Silver's). By this agreement Andy Griffith was released from any percentage rental obligation, but otherwise was not released from its obligations under the lease, with the exception of certain amendments to the lease not pertinent to this appeal. Silver's (assignee) agreed to indemnify and save Andy Griffith (assignor) harmless from all claims under the lease from and after the time that possession of the leased premises passed to Silver's; and to perform all

covenants and obligations under the Lease Agreement, again with certain exceptions not pertinent to this appeal.

Subsequent to the assignment, Silver's commenced the operation of a Long John Silver's restaurant, having converted the premises from the Andy Griffith Barbecue restaurant previously operated by Andy Griffith.

Plaintiffs filed their complaint in this action on 20 January 1975, alleging that Silver's had abandoned the premises in question, had failed to pay monthly rentals from and after August 1974, and had failed to pay ad valorem property taxes. Defendant Andy Griffith answered, and cross-claimed against defendant Silver's, pleading the terms of the aforementioned Assignment, Consent and Amendment to Lease. Defendant Silver's answered and pled as an affirmative defense that they (Silver's) had procured a sub-tenant willing to rent the premises and that plaintiffs had unreasonably withheld approval of said sub-tenant in breach of the Lease Agreement.

At trial before Judge McLelland sitting without a jury, the plaintiffs presented evidence through their leasing agent, John C. Ralph, President of Regional Properties, Inc., which tended to show, *inter alia*, that unpaid rentals and taxes owed by Silver's under the Lease Agreement amounted to $27,203.21 and $1,867.92, respectively; that after Silver's had vacated the subject premises but while still paying rent, an inquiry was communicated through Ralph to plaintiffs as to whether a sublease of the premises to Mr. Wayne DeLisse, operator of Lafayette Radio, Inc. would be approved; that said inquiry was answered in the negative; that at the time in question, DeLisse was engaged in the sale and repair of radio, television and other electronic equipment, was a tenant of plaintiff Jones in Gateway Plaza Shopping Center, and had over one year remaining on his lease; that one reason that consent to such a sublease was withheld was that the building constructed by plaintiffs on the premises was originally built for a restaurant and plaintiffs desired to maintain a restaurant therein; that another reason for plaintiffs' refusal to approve the proposed sublease was the fact that DeLisse was then a tenant in another building in the shopping center.

Defendants' evidence related basically to Silver's attempts to sublet the premises to Lafayette.

Further facts pertinent to the resolution of this appeal will be brought out in the opinion.

Following the trial of this case, the court below made findings of fact and conclusions of law holding that plaintiffs' refusal to consent to a sublease to Lafayette was not unreasonable and thus did not constitute a breach by plaintiffs of the Lease Agreement, and entered judgment against defendants, jointly and severally, for the sum of $29,071.13. The court also held that defendant Andy Griffith was entitled to be indemnified and held harmless by defendant Silver's for any amount it (Andy Griffith) might be required to pay to plaintiffs under the judgment. From this judgment, defendant Silver's has appealed. Defendant Andy Griffith has appealed from so much of the judgment as is adverse to it.

Poyner, Geraghty, Hartsfield & Townsend, by David W. Long and Lacy H. Reaves, for plaintiffs.

Kimzey & Smith, by James M. Kimzey, for defendant Silver's Enterprises, Inc.

Sanford, Cannon, Adams & McCullough, by H. Hugh Stevens, Jr., for defendant Andy Griffith Products, Inc.

BROCK, Chief Judge.

The sole question presented for review in this case is whether the trial court erred in holding that plaintiffs' refusal to consent to the proposed sublease to DeLisse was reasonable. If plaintiffs' refusal were found to be unreasonable, such would constitute a breach of that part of Section 1.16 of the Lease Agreement providing that approval by plaintiffs of a proposed sublease "shall not be unreasonably withheld."

The trial court made the following finding of fact:

> "18. Plaintiffs' refusal to consent to a sublease of the 2110 North Boulevard premises to DeLisse was not unreasonable."

A threshold question arises as to the scope of appellate review of such a finding. As a general rule, findings of fact by the trial court are conclusive on appeal if supported by any competent evidence. However, when an item designated as a "finding of

fact" is in reality a mixture of findings of fact and conclusions of law, such a finding is itself reviewable by the appellate courts. *Brown v. Board of Education*, 269 N.C. 667, 153 S.E. 2d 335 (1967). The above finding by the court is just such a mixed finding. It involves "an application of principles of law to the determination of facts." *Id.* 269 N.C. at 270, 153 S.E. 2d at 338. In reviewing this mixed question of law and fact, we must determine whether facts otherwise found by the trial court are legally sufficient to support the conclusion that plaintiffs' refusal to consent to the sublease was not unreasonable. We hold that they are.

The trial court made the following finding of fact:

> "16. Plaintiffs' decision to disapprove a sublease to DeLisse was reasonably based upon the nature of the building at 2110 North Boulevard. Such building was constructed and designed for use as a restaurant. Because of factors such as the cost of heating, ventilating and air conditioning and electrical service, the cost of construction of a building designed for use as a restaurant is substantially greater than the cost of construction of a comparably sized building designed for general merchandising purposes, such as that occupied by DeLisse in Gateway Plaza Shopping Center. The occupancy of the 2110 North Boulevard premises by a non-restaurant tenant such as DeLisse could not reasonably have been expected to yield as great a return on plaintiffs' investment as could be expected from the operation of a restaurant thereon."

There is uncontroverted evidence in the record that one of plaintiffs' reasons for withholding consent to a sublease to DeLisse was their desire to maintain a restaurant operation in the subject premises due to the higher costs of the construction of the building, and due to demographic factors in the area, including tenant mix in the shopping center. Unquestionably, their motive was to enhance the potential for the percentage rentals contemplated in the Lease Agreement. There is no suggestion of bad faith in plaintiffs' refusal to accept a subtenant. Rather, the record indicates that plaintiffs or their agents actively contacted some thirty-six potential tenants for the building, eventually locating one who started paying rent on 8 February 1976.

Thus we come, in our analysis, to the question of whether plaintiffs' desire to maintain a restaurant operation in the subject premises in light of the nature of the building and the desire for percentage rental constituted reasonable grounds for withholding consent to the proposed sublease to Lafayette. We are unable to find any guidance on this question in the case law of this jurisdiction. Other states have, however, faced similar problems in interpreting consent to sublease clauses in leases. Much of the existing case law is summarized in Annot., 54 A.L.R. 3d 679 (1973).

The court in *Broad & Branford Place Corp. v. J. J. Hockenjos Co.*, 132 N.J.L. 229, 39 A. 2d 80 (1944) discussed the standard for judging the reasonableness of a landlord's action in withholding consent to a sublease, as follows:

> "Arbitrary considerations of personal taste, sensibility, or convenience do not constitute the criteria of the landlord's duty under an agreement such as this [not to unreasonably withhold consent to a sublease]. Personal satisfaction is not the sole determining factor. Mere whim or caprice, however honest the judgment, will not suffice. (citations omitted) *The standard is the action of a reasonable man in the landlord's position.* . . . The term 'reasonable' is relative and not readily definable. As here used, it connotes action according to the dictates of reason—such as is just, fair and suitable in the circumstances." (Emphasis added.) 39 A. 2d at 82.

In *American Book Co. v. Yeshiva University Development Foundation, Inc.*, 59 Misc. 2d 31, 297 N.Y.S. 2d 156 (Sup. Ct. 1969), the court held that a lessor associated with a religious university acted unreasonably in withholding consent to a proposed sublease on grounds of philosophical and idealogical differences and the controversial nature of the proposed subtenant, a planned parenthood organization, which intended to use the space for the same type of functions as the prime tenant. In the course of the opinion, the court set out certain objective criteria which might form a basis upon which to predicate a reasonable refusal of a subtenant. These are (1) financial responsibility of the proposed subtenant; (2) identity or business character of the subtenant—his suitability for the particular building; (3) legality of the proposed use of the premises; and (4) nature of the occupancy, such as office, factory, clinic, etc. 297 N.Y.S. 2d at 160.

Obviously, plaintiffs' refusal to consent to the proposed DeLisse subtenancy was grounded upon considerations such as those embodied in (2) and (4) above, which if reasonable in and of themselves, constituted an objective business judgment as opposed to an arbitrary or whimsical and thus unreasonable decision. Based upon competent evidence, the trial court found that plaintiffs' preference for a restaurant operation was reasonable due to the nature of the building and the expectations of a higher return on investment. This finding is conclusive on appeal even though defendants presented evidence from which the court might have found plaintiffs' expectations unreasonable.

We hold therefore, that plaintiffs' decision to withhold consent to the proposed sublease was based upon legally sufficient, "reasonable" grounds. We are not saying that in all cases such as this, a withholding of consent by a landlord will be adjudged reasonable where the proposed subtenant is in a different type of business from the prime tenant. Each case must be determined upon its own peculiar facts. However, the burden of proving the unreasonableness of the landlord's conduct rests upon the party challenging such conduct. *Broad & Branford Place Corp. v. J. J. Hockenjos Co., supra; Arrington v. Heller International Corp.*, 30 Ill. App. 3d 631, 333 N.E. 2d 50 (1975).

In light of our decision, we find it unnecessary to consider any questions raised by the trial court's finding of fact No. 17, to the effect that plaintiffs' withholding of consent was reasonably based upon the fact that DeLisse was already a tenant of plaintiff Jones in Gateway Plaza Shopping Center.

For the reasons set out above, the judgment of the trial court is

Affirmed.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. HOMER RAY FRUITT

No. 7719SC625

(Filed 7 February 1978)

1. **Searches and Seizures § 41— execution of warrant—notice of identity and purpose at dwelling—absence of second notice at outbuilding**

Where an officer, in executing a warrant to search a dwelling and an outbuilding to the rear thereof, complied with the provisions of G.S. 15A-249 by giving notice of his identity and purpose at the dwelling house where people might reasonably be expected to be, the officer did not commit a substantial violation of that statute by failing to give a second notice at the outbuilding, which was padlocked on the outside in a manner making it highly improbable that anyone was inside. Therefore, suppression of marijuana seized from the outbuilding was not required by G.S. 15A-974(2) because of the officer's failure to give the second notice.

2. **Searches and Seizures § 42— search of unoccupied premises—failure to leave warrant and inventory—no substantial violation of statutes—suppression of seized evidence not required**

An officer's violation of G.S. 15A-252 by carrying seized marijuana from unoccupied premises without leaving a copy of the search warrant affixed to the premises, and his violation of G.S. 15A-254 by failing to leave in the premises an itemized receipt of the items taken, did not constitute a "substantial" violation of G.S. Ch. 15A so as to require suppression of the marijuana under G.S. 15A-974(2) where the officer returned to the premises within four hours and delivered to defendant personally a copy of the inventory of the items taken, the officer was "pretty sure" he gave defendant a copy of the warrant at that time and defendant offered no evidence that he did not then receive it, the violations occurred after the search was completed, and nothing in the record indicates the officer's violations were willful.

APPEAL by the State from *McConnell, Judge.* Order entered 10 March 1977 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 1 December 1977.

Defendant was indicted for felonious possession of marijuana. The court granted his pretrial motion to suppress evidence of marijuana found on his premises. The State filed the certificate called for in G.S. 15A-979(c) and appealed.

Attorney General Edmisten by Associate Attorney Christopher P. Brewer for the State, appellant.

William H. Heafner and Deane F. Bell for defendant appellee.

PARKER, Judge.

Marijuana was found on defendant's premises after a search made under authority of a search warrant. As one ground for his motion to suppress, defendant asserted in the trial court that the warrant was invalid because it shows on its face that the informant was not reliable. We find the warrant valid on its face and turn our attention to the principal question presented by this appeal, whether the evidence was obtained as a result of a substantial violation of the provisions of G.S. Ch. 15A such that it must be suppressed under G.S. 15A-974(2). We find no such substantial violation and accordingly reverse.

Prior to ruling on defendant's motion, the trial court held a hearing at which uncontradicted evidence was presented by the State to show the following: The search warrant, which was issued on the sworn application of a deputy sheriff based on information given him by a confidential and reliable informant, authorized search for marijuana of defendant's dwelling and of a small frame outbuilding located 50 feet to the rear thereof. The warrant was issued at 2:00 p.m. on 12 April 1976. Taking the warrant with him, the deputy arrived at defendant's dwelling between 2:45 and 3:00 p.m. He knocked several times and waited. When satisfied no one was home, he read the warrant out loud so that anyone present would have heard him. He then went to the outbuilding, where he had been informed the marijuana was located. He found the outbuilding locked with a padlock. He did not again read the search warrant. Using a screwdriver to remove the latch, he opened the door and went in. Inside, he found a quantity of marijuana and plastic bags in a blue cloth bag. Taking these items with him, he left defendant's premises after having been there about 20 minutes. He did not leave a copy of the search warrant affixed to the premises nor did he leave a receipt itemizing the items taken. At 3:45 p.m. he returned the search warrant to the magistrate, reporting on the return that he had made the search commanded in the warrant but failing to check the blank space to indicate that he had seized the items listed on the attached inventory. He did check the inventory form to indicate that he was "leaving a copy of this inventory with the owner of the place searched, Homer Ray Fruitt." After obtaining a warrant for defendant's arrest on a charge of felonious possession of four pounds of marijuana with intent to sell, the deputy

returned to defendant's residence at 7:00 p.m. on the same evening. Finding defendant at home, he placed him under arrest and gave him, at that time, a copy of the inventory of the property he had seized earlier. The deputy testified that he was "pretty sure" that he also gave defendant a copy of the search warrant at that time.

The defendant did not offer evidence at the hearing on his motion to suppress. At the conclusion of the hearing, the court entered an order finding facts substantially as shown by the State's evidence. On these facts, the court concluded as a matter of law that the evidence was obtained as a result of a substantial violation of the provisions of Chapter 15A and granted defendant's motion to suppress. We find the trial court's conclusion to be error and reverse.

G.S. 15A-974, which is entitled "Exclusion or suppression of unlawfully obtained evidence," is as follows:

> Upon timely motion, evidence must be suppressed if:
>
> (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or
>
> (2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:
>
> (a) The importance of the particular interest violated;
>
> (b) The extent of the deviation from lawful conduct;
>
> (c) The extent to which the violation was willful;
>
> (d) The extent to which exclusion will tend to deter future violations of this Chapter.

The search having been conducted under authority of a valid search warrant, suppression of the evidence obtained by the search is not required by the Constitution of the United States or the Constitution of the State of North Carolina. Neither the Fourth Amendment to the Constitution of the United States nor our own State Constitution specifically directs the manner of execution of a search warrant, and the execution of the warrant will

withstand attack on constitutional grounds provided it does not amount to a breach of the constitutional mandate that people be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. No unreasonable search or seizure is disclosed by the record in this case. Therefore, G.S. 15A-974(1) is not here applicable, and the question presented by this appeal is whether suppression is required by G.S. 15A-974(2). On the facts disclosed by the record in this case we find that the evidence was not "obtained as a result of a substantial violation of the provisions" of G.S. Ch. 15A and that the evidence should not have been suppressed.

[1, 2] Upon arriving at the premises to be searched, the officer knocked at the door of defendant's dwelling but got no response. Even though it seemed clear to him that no one was present, he nevertheless read the search warrant out loud in a manner likely to be heard by anyone present. In doing so, the officer fully complied with the requirements of G.S. 15A-249 as to giving notice of his identity and purpose. Still receiving no response at the defendant's dwelling, the officer proceeded to the small frame outbuilding in the rear. Since the outbuilding was found padlocked on the outside in a manner which made it highly improbable that anyone was locked up inside, we hold that the officer, who had already complied with the provisions of G.S. 15A-249 by giving notice of his identity and purpose at the dwelling house where people might be reasonably expected to be, did not commit a substantial violation of that statute by failing to give a second notice at a part of the premises where no one could be reasonably expected to be. The officer's subsequent forcible entry into the outbuilding by removing the latch with a screwdriver was fully authorized by G.S. 15A-251(1). Thus, up to the time the marijuana was found and seized, no substantial violation of G.S. Ch. 15A had occurred. In carrying the marijuana from the premises without leaving a copy of the search warrant affixed to the premises, as required by G.S. 15A-252, and without leaving in the premises a receipt itemizing the items taken, as required by G.S. 15A-254, the officer did violate provisions of G.S. Ch. 15A. Since these violations occurred only after the marijuana had been lawfully seized, it can be logically contended that the evidence concerning the marijuana was not "obtained as a result" of these violations and that therefore G.S. 15A-974(2) has no application in the present case. Quite apart from that contention, however, we hold that,

under all of the circumstances of this case, the failure of the officer to comply strictly with the provisions of G.S. 15A-252 and 15A-254 did not amount to a "substantial" violation of G.S. Ch. 15A within the meaning of G.S. 15A-974(2). The officer did return to the premises within approximately four hours and at that time delivered to defendant personally a copy of the inventory of items he had taken. He is "pretty sure" that he also gave defendant a copy of the search warrant at that time, and the defendant offered no evidence to show that he did not then receive it. The primary interest protected by the prohibition against unreasonable searches and seizures is the individual's reasonable expectation of privacy. Such violations of statutorily prescribed procedures as occurred in this case had no adverse impact whatever on that primary interest, since all of them occurred after the search was completed. The extent of the officer's deviation from strict compliance with the statute was minimal, and nothing in the record indicates that his violations were willful. It is questionable whether exclusion of the evidence in this case would have any appreciable tendency to deter future non-willful minimal violations of the provisions of G.S. Ch. 15A of the nature of those shown by this record. Considering all of the circumstances, including those listed in G.S. 15A-974(2) a., b., c., and d., we hold that the violations of provisions of G.S. Ch. 15A were not substantial, and that defendant's motion to suppress should not have been granted.

We do not condone the failure of law enforcement officers to comply strictly with all provisions of G.S. Ch. 15A. We hold only that under all of the circumstances of this case such violations as occurred were not so substantial as to require application of the exclusionary rule embodied in G.S. 15A-974. The order appealed from is

Reversed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. RUSH M. WALKER, SR.

No. 7717SC598

(Filed 7 February 1978)

1. **Abduction § 1— taking of child by parent—no crime of abduction**

In the absence of an order giving custody of a child to his mother, the father of the child taken cannot be guilty of the crime of child abduction; moreover, the father's consent to the taking of a child is a defense, the burden of which is upon the defendant.

2. **Abduction § 1— grandfather's abduction of grandson—father's consent—nonsuit required**

In a prosecution of defendant for abduction of his grandson, the trial court erred in failing to grant his motion for nonsuit where all of the evidence tended to show that defendant and the child's father acted in concert in taking the child from his school bus, placing him in defendant's automobile, and leaving the school, and the only inference reasonably deducible is that the defendant was acting with the consent of the child's father.

3. **Abduction § 1— abduction of child—mistaken belief concerning child's identity—failure to instruct—error**

In a prosecution of defendant for abduction of his grandson and a female child, the trial court erred in failing to instruct the jury on the defense of mistake of fact, since the evidence tended to show that defendant and his son were operating under the mistaken belief that the female child whom they allegedly abducted was defendant's granddaughter.

APPEAL by defendant from *Seay, Judge*. Judgment entered 24 February 1977 in Superior Court, CASWELL County. Heard in the Court of Appeals 17 November 1977.

Defendant was charged in proper bills of indictment with the abduction of Rush M. Walker III (Case Number 76CR2134) and Vickie Irby (Case Number 76CR2133). Upon a plea of not guilty to each charge, the State offered evidence tending to show the following:

Norma Irby (formerly Norma Walker) was married to Rush M. Walker, Jr., in the Phillipine Islands in 1969. There were two children born of this union: Rush Walker III and Joy Walker. Norma Irby returned to the United States in 1973, and for a brief period she and the two children lived with the defendant, her father-in-law, while her husband remained overseas. She later moved from the defendant's home in Danville, Virginia, but continued to make frequent visits to see the defendant until she was

divorced from Walker and married to Acie Irby in 1975, at which time all contacts ceased. Norma Irby has not seen her former husband for three years and has not seen her son, Rush Walker III since the morning of 11 May 1976 when she sent him to school.

On 11 May 1976, the day of the alleged abduction, Rush Walker III, who was 7 years of age, and Vickie Irby, who was 5 years of age, along with Leroy Matherly boarded the school bus in Mebane, North Carolina. While en route to the school the children noticed a blue automobile following the bus. Rush informed Leroy Matherly that the occupants of the automobile were his father (Rush Walker, Jr.) and his grandfather (the defendant). When the bus arrived at the school the children began filing off. The two men in the blue automobile parked behind the bus and jumped out. As Rush Walker III descended the steps of the bus the defendant grabbed him and carried him to the car, explaining to an inquiring teacher that "these are our children." The younger man picked up Vickie Irby exclaiming to the bus driver that he was her parent, and carried her to the car. The two men then left with the children. Approximately five minutes later Vickie Irby was found walking back to the school. Rush Walker III has not been seen since the day of the alleged abduction.

The defendant offered evidence tending to show the following: On 11 May 1976 the defendant left his home in Danville, Virginia, travelling south in search of employment. As he was driving through Mebane, North Carolina, his son drove up behind him. His son joined him in his automobile, and the two men drove to a point near the school which Rush Walker III attended. When the bus carrying Rush Walker III, passed, the two men followed it. Upon their arrival at the school they ran to the door of the bus. The defendant's son grabbed Rush Walker III and handed him to defendant, who carried him to the car. The defendant waited while his son carried a little girl whom the defendant believed to be his granddaughter. The two men left in the automobile with the two children in their custody. When they reached the highway one-half mile from the school, they realized that the little girl was not Joy Walker, the defendant's granddaughter. They immediately turned around, drove back to the school and let Vickie Irby out of the car. After driving to the location of the other automobile, the defendant's son and grandson departed. The defendant resumed his trip south in pursuit of

employment. He has not seen Rush Walker, Jr., or Rush Walker III since the day of the occurrence.

The jury returned a verdict of guilty as to each charge. From a judgment imposing a prison sentence of three to five years, defendant appealed.

Attorney General Edmisten by Associate Attorney Christopher P. Brewer for the State.

Ramsey, Hubbard & Galloway by James E. Ramsey and Joel H. Brewer for the defendant appellant.

HEDRICK, Judge.

In North Carolina the criminal offense of child abduction is set out in G.S. 14-41 as follows:

> § 14-41. *Abduction of children.* — If anyone shall abduct or by any means induce any child under the age of fourteen years, who shall reside with its father, mother, . . . to leave such person or school, he shall be guilty of a felony, ...

A provision found in the companion statute proscribing conspiracy to abduct children, G.S. 14-42, must be read in harmony with the preceding section: "Provided, that no one who may be a nearer blood relation to the child than the persons named in § 14-41 shall be indicted for either of said offenses."

[1] It is clear, then, that at least in the absence of a custody order in favor of the mother, the father of the child taken cannot be guilty of the crime of child abduction. This rule was logically extended in *State v. Burnett*, 142 N.C. 577, 581, 55 S.E. 72, 74 (1906), where the Supreme Court stated that the "father's consent is a defense, the burden of which is upon the defendant." *See also* Annot., 77 A.L.R. 317 (1932).

[2] Defendant first challenges his conviction for the abduction of his grandson, Rush Walker III. In his fifth and twelfth assignments of error defendant contends that the trial court erred in failing to grant his motion for nonsuit at the close of all the evidence. He argues that the uncontradicted evidence of the State and the defendant establishes the consent of the father of Rush Walker III.

The appropriateness of a nonsuit can be determined pursuant to well-established law in this State. The State is entitled to all inferences which can reasonably be drawn from the evidence considered in a light most favorable to the State. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). When the State's evidence is conflicting and tends to inculpate and exculpate at the same time, then the case should be submitted to the jury and a nonsuit is improper. *State v. Robinson*, 229 N.C. 647, 50 S.E. 2d 740 (1948). "When, however, the State's case is made to rest entirely on testimony favorable to the defendant, and there is no evidence *contra* which does more than suggest a possibility of guilt or raise a conjecture," a nonsuit is proper. *State v. Robinson, supra* at 649, 50 S.E. 2d at 741. The question for determination in this Court, then, is whether a jury could reasonably infer the defendant's guilt from all evidence presented by the State and the uncontroverted evidence of the defendant.

All of the evidence in the case before us tends to show that the defendant and the father of Rush Walker III acted in concert in taking the child from the school bus, placing him in the automobile, and leaving the school. The only inference reasonably deducible is that the defendant was acting with the consent of the child's father. Under these circumstances, we are of the opinion that the court erred in denying the defendant's motion for judgment as of nonsuit.

Defendant also challenges his conviction in Case Number 76CR2133 for the abduction of Vickie Irby. He first assigns as error the denial of his timely motions for judgment as of nonsuit. He supports these assignments of error with substantially the same arguments as advanced in the case involving the abduction of Rush Walker III. Suffice it to say that the evidence when considered in the light most favorable to the State is sufficient to require submission of this case to the jury and to support the verdict.

[3] By his ninth assignment of error defendant contends that the trial judge erred in failing to instruct the jury on the defense of mistake of fact. In support of this argument defendant cites evidence tending to show that defendant and his son were operating under the mistaken belief that the female child whom they allegedly abducted was Joy Walker, the granddaughter of defendant.

It is an elementary principle that general criminal intent is an essential component of every *malum in se* criminal offense. W. Lefave and A. Scott, Criminal Law § 28, 201 (1972); *State v. Welch*, 232 N.C. 77, 59 S.E. 2d 199 (1950). Where *specific intent* is not an element of the offense charged, "[a] person is presumed to intend the natural consequences of his act . . . ." *State v. Ferguson*, 261 N.C. 558, 561, 135 S.E. 2d 626, 628 (1964). Thus, an inference of general criminal intent is raised by evidence tending to show that the defendant committed the acts comprising the elements of the offense charged. *State v. Ferguson, supra; State v. Chester*, 30 N.C. App. 224, 226 S.E. 2d 524 (1976). The presumption of intent establishes a *prima facie* case for the State, and if no opposing inferences are raised by the evidence, the trial judge is not required to instruct on general criminal intent. *State v. Gleason*, 24 N.C. App. 732, 212 S.E. 2d 213 (1975). On the other hand, if an inference that the defendant committed the act without criminal intent is raised by the evidence then the presumption dissolves and the law with respect to intent "becomes a part of the law of the case which should be explained and applied by the court to the evidence in the cause." *State v. Elliott*, 232 N.C. 377, 378-9, 61 S.E. 2d 93, 95 (1950).

An examination of the evidence presented by the defendant reveals that the general principles recited above are applicable to the present case. The defendant testified that when he took the little girl, Vickie Irby, he believed that she was his granddaughter, Joy Walker; that he discerned the true identity of the child after he and his son had driven one-half mile from the school; that upon realizing that the child was not his granddaughter, he returned to the school and let the child out of the automobile. According to this evidence, if the facts had been as the defendant supposed, he would have committed no crime in taking Joy Walker since he was acting under the authority and with the consent of her father. *State v. Burnett*, 142 N.C. 577, 55 S.E. 72 (1906). The evidence viewed in this light obviously permits the inference that defendant in taking Vickie Irby was laboring under a mistake as to the identity of the little girl which could negate any criminal intent. *Dominguez v. State*, 90 Tex. Cr. R. 92, 234 S.W. 79 (1921). In appropriate cases, culpable negligence has been considered the equivalent of criminal intent. *State v. Colson*, 262 N.C. 506, 138 S.E. 2d 121 (1964). Accordingly, in order to

negate criminal intent, the mistake under which the defendant was acting must have been made in good faith and with due care. *State v. Powell*, 141 N.C. 780, 53 S.E. 515 (1906).

In accordance with the principles set forth, we hold that the trial judge erred in not declaring and explaining the law on a substantial feature of the case arising from the evidence that the defendant believed that he and his son were taking the latter's daughter, Joy Walker, when they were in fact taking Vickie Irby. *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974).

The result is: in Case Number 76CR2134 wherein the defendant was charged with abducting Rush Walker III, reversed; in Case Number 76CR2133 wherein the defendant was charged with abducting Vickie Irby, new trial.

Reversed in Case Number 76CR2134.

New trial in Case Number 76CR2133.

Judges MORRIS and ARNOLD concur.

BOARD OF TRANSPORTATION v. RODNEY C. GREENE, SAM TATE, DENNARD McGUIRE, AND LEE TRIPLETT, AS TRUSTEES OF MIDDLE FORK BAPTIST CHURCH; LaVERNE PREVATTE AND HUSBAND, HORACE PREVATTE

No. 7724SC633

(Filed 7 February 1978)

1. **Evidence §§ 31.1, 33.1— statements in affidavit—hearsay—best evidence rule**

Statements in an affidavit by the former Secretary of the Board of Transportation explaining the reason the Board decided to locate a proposed highway on certain property were not inadmissible as hearsay where they related to action taken by the Board and included only matters which were within the affiant's personal knowledge; nor did the statements violate the best evidence rule on the ground that the original transcript of the Board of Transportation's decision was the best evidence, since there was no dispute as to the contents of the Board's decision, and the affiant's statements related to facts other than the contents of the Board's ruling.

2. **Eminent Domain § 16— highway condemnation—disbursement of funds deposited—dispute as to title**

The trial court properly ruled that it could not under G.S. 136-105 disburse funds paid into court in an action to condemn church property for a

highway because there was a dispute as to title to the realty between the owners of a determinable fee (the church trustees) and the owners of the reversionary interest in the realty; nor could the court disburse to the church trustees that portion of the deposited money which represents damage to the church building, since an adjudication that the reversioners are entitled to the realty would present a second question as to whether the church building is a real fixture which passes to the reversioners with title to the real estate or whether it is a personal fixture for which the church trustees are entitled to compensation.

APPEAL by defendants, Trustees of Middle Fork Baptist Church, from *Gaines, Judge.* Judgment entered 13 April 1977 in Superior Court, AVERY County. Heard in the Court of Appeals 17 November 1977.

On 13 September 1976, plaintiff, North Carolina Department of Transportation instituted this proceeding to condemn, for use in a highway project, a .75 acre tract of land in Blowing Rock Township title to which is held by the trustees of Middle Fork Baptist Church. Defendants Prevatte were joined as defendants because they retained a reversionary interest in the land. In 1967 the Prevattes conveyed the land to the church trustees "so long as the property herein described shall be used as a Missionary Baptist Church and in the event said property is not used as a Missionary Baptist Church, the title to said property shall revert to [the Prevattes or their successors] . . . ." There was a dispute as to the value of the land and the Board of Transportation, pursuant to G.S. 136-103, deposited $66,775 as its estimate of just compensation for the taking.

A dispute also arose between the church trustees and the Prevattes as to who was entitled to compensation for the loss of the property. On 2 February 1977, defendant church trustees filed a motion pursuant to G.S. 136-105 requesting that the deposited money be paid to them on the grounds that the church held title to the condemned property by deed from defendants Prevatte to defendant church trustees dated 28 October 1967, and recorded in Book 100, at page 516, in the office of the Register of Deeds of Watauga County. On 14 February 1977, defendants Prevatte filed a similar motion requestiong that the money be paid to them on the grounds that the reversionary clause had been activated by the church's allegedly instigating the involuntary condemnation proceedings in order to defeat the reversionary rights of the defendants Prevatte.

On 14 April 1977, the court denied both motions for disbursement of funds on the grounds that under G.S. 136-105 a judge may not disburse funds which have been deposited as payment for condemned property when a dispute exists as to title, and that in the present case, a dispute as to title existed. The church trustees appealed from the judge's denial of their motion for disbursement.

John H. Bingham and Stacy C. Eggers, Jr., for defendant appellees, LaVerne Prevatte and husband, Horace Prevatte.

Charles E. Clement and Paul E. Miller, Jr., for defendant appellants, Trustees of Middle Fork Baptist Church.

MORRIS, Judge.

[1] Appellants' first assignment of error is directed to the admission into evidence of that portion of the affidavit of G. Perry Greene, former Secretary of the Board of Transportation, which purports to state the reasons that the plaintiff, Board of Transportation, decided to locate the state highway on the Middle Fork Missionary Baptist Church property. Appellants argue that the third and fifth paragraphs of the affidavit which explain the reason the Board of Transportation decided to locate the proposed highway on the church property are inadmissible because the statements are hearsay and allegedly violate the parol evidence rule preventing the admission of any evidence which seeks to "explain, extend or supplement the Board's decision." We find no merit in this contention.

The statements made by the affiant Greene in the third and fifth paragraphs related to action taken by the Board of Transportation of which he was serving as Secretary. The statements only included matters which were within the personal knowledge of the affiant Greene. Since the truth of the matters asserted in the affidavit were not dependent upon one other than the declarant, the statements could not be considered hearsay and were admissible. 1 Stansbury, N.C. Evidence, (Brandis Rev.), § 138; *see also State v. Robbins*, 275 N.C. 537, 169 S.E. 2d 858 (1969).

Appellants also contend that the statements sought to be excluded violate the parol evidence rule, the original transcript of the Board of Transportation's decision being the only evidence admissible. Appellants rely on *George v. Town of Edenton*, 31 N.C. App. 648, 230 S.E. 2d 695 (1976), *cert. allowed* 292 N.C. 264, 233

S.E. 2d 391 (1977), and the discussion of the best evidence rule in § 190 of Stansbury, N.C. Evidence. However, § 190 refers to a situation such as obtained in *George*; *i.e.*, a dispute over the contents of the document which will result in the court's considering the actual document itself to be the definitive evidence which will not be subject to collateral attack by parol evidence. This principle is concisely stated in 2 Stansbury, N.C. Evidence, (Brandis Rev.), § 191, pp. 103-104:

> "The best evidence rule applies only when the *contents* or *terms* of a document are in question. It does not require the production of a writing, in preference to other species of evidence, as proof of any particular fact, nor does it insist upon the writing being produced where the only question relates to some fact about it other than contents."

In the present situation, appellants do not dispute the truth of the matters contained in the third and fifth paragraphs. They allege that the original transcript of the Board of Transportation's decision is the best and only evidence that should be considered. However, there is no dispute as to the contents or terms of the Board of Transportation's decision to locate the highway on the church property, and affiant Greene's statements relate to facts other that the contents of the official Board of Transportation ruling.

Even assuming *arguendo* that the statements in the affidavit were hearsay or in violation of the parol evidence rule cited by appellants, the fact that evidence was erroneously admitted will not ordinarily be held prejudicial, since it will be presumed that the court did not consider the incompetent evidence in making his decision. *Cogdill v. Highway Comm.*, and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971). *See also* 1 Strong, N.C. Evidence 3d, Appeal and Error, § 48, p. 306. In the present case, competent evidence was introduced showing that there was a dispute as to the title of the church property. Therefore, Judge Gaines's finding with respect to the title dispute is binding on appeal even though incompetent evidence may have been admitted in G. Perry Greene's affidavit. *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, *supra.*

[2] Appellants next four assignments of error are directed to the court's order denying the two G.S. 136-105 motions for disburse-

ment of funds. Appellants excepted to the court's finding of fact that there was a bona fide dispute as to title to the property, to the court's conclusion of law that the funds could not be disbursed because of the title dispute, to the court's denial of their motion to disburse the funds, and to the court's order that the funds remain on deposit. Each of these assignments of error related to the court's finding that there was a title dispute with reference to the condemned property and to the court's interpretation of G.S. 136-105.

Appellants contend that there is only a dispute with respect to the disbursement of funds, not as to title; that under the decision in *Charlotte v. Recreation Comm.*, 278 N.C. 26, 178 S.E. 2d 601 (1971), the fee determinable and possibility of reverter were both acquired simultaneously by the Board of Transportation through the condemnation proceeding; that the simultaneous acquisition creates a fee simple in the Board of Transportation by the doctrine of merger; that since the possibility of reverter had not been activated by the date of the taking, it was valueless and the church trustees are now entitled to the total amount on deposit; and that if the church trustees are not entitled to the total amount on deposit, they are entitled to that amount of money which represents damage to the church building. We find no merit in these contentions.

With respect to appellants' argument that there is no dispute with respect to the title, we conclude that Judge Gaines heard competent evidence during the hearing on the G.S. 136-105 motions indicating that there was a title dispute and that Judge Gaines made a finding of fact to that effect which is binding on this Court. *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm., supra.* Having found a dispute as to title existed, the trial court was unable to disburse the funds as the defendants had requested because the applicable provision of G.S. 136-105 provides:

> ". . . Upon such application, the judge shall, *unless there is a dispute as to title*, order that the money deposited be paid forthwith to the person entitled thereto in accordance with the application." (Emphasis supplied.)

Any disbursement of the disputed funds would be improper until the title issue is properly adjudicated in a trial on the merits.

Such a forum would be the proper place for the appellants to raise the issues presented by the *Charlotte* case.

Finally, appellants' contention that this Court should award them that portion of the deposited money which represents damage to the church building is also without merit. If the trial court determines after an adjudication on the title issue that the reversioners are entitled to the realty, a second question arises as to whether the church building is a real fixture which passes to the reversioners with title to the real estate or whether it is a personal fixture for which the church trustees are entitled to compensation. *See* J. Webster, Real Estate Law in North Carolina, Real Fixtures, §§ 12-21 (1971). This is an issue which must be determined upon a trial on the merits.

The trial court's order refusing to distribute the funds deposited on the grounds that a dispute as to title exists is

Affirmed.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. RONNIE CLEMMONS

No. 7711SC674

(Filed 7 February 1978)

1. Robbery § 4.4— armed robbery—identification of defendant as robber—sufficiency of evidence

The State's evidence was sufficient for the jury on the issue of defendant's guilt of armed robbery of a grocery store where it tended to show that defendant and a companion borrowed a car from a friend at 6:00 p.m.; defendant had a pistol in his possession at that time; the grocery store was robbed at 6:30 by two persons; one robber had a shotgun and one had a pistol; defendant's companion was positively identified as one of the robbers; defendant and the companion were seen together in the borrowed car minutes before 6:30 at a service station a few miles from the grocery store, and they were again seen together in the car shortly after 6:30 at another service station a few miles from the grocery store; the unidentified robber wore black gloves and dropped one of them at the robbery scene; and a black glove was found in the borrowed car on the day following the robbery.

2. Robbery § 4.1— taking from victim's "presence"— no fatal variance between indictment and proof

There was no fatal variance between indictment and proof where the indictment alleged that money was taken "from the presence, person, place of business of Elizabeth Ann McCormick" and the evidence showed that both Mrs. McCormick and her husband were present in a store operated by Mrs. McCormick when the robbers entered and announced that it was a holdup, Mrs. McCormick walked from the store area to an adjoining room and was shot by one of the robbers, and Mr. McCormick gave the robbers money from the cash register, since there was a completed crime under G.S. 14-87 when Mrs. McCormick was intimidated by firearms for the purpose of obtaining money and before money was actually given to the robbers by Mr. McCormick.

3. Robbery § 1.1— taking from victim's presence

A taking is from the "presence" of the victim within the purview of the armed robbery statute if the force or intimidation by the use of firearms for the purpose of taking personal property has been used and caused the victim in possession or control to flee the premises and this is followed by the taking of the property in a continuous course of conduct.

4. Criminal Law § 101— misconduct affecting jurors— remark of sheriff— conversation between juror and deputy— denial of mistrial

The trial court in an armed robbery case did not err in the denial of defendant's motion for mistrial because of misconduct affecting the jury based on (1) the sheriff's remark to defense counsel when a juror was nearby that "I understand your boys are about to enter guilty pleas in this case," where the juror testified, and the court found, that he did not hear the sheriff's statement, and (2) a conversation during the trial between a juror and a deputy sheriff concerning a gospel group in which the deputy sang, since defendant could not have been prejudiced by the conversation.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 21 March 1977 in Superior Court, HARNETT County. Heard in the Court of Appeals 8 December 1977.

Defendant was charged with armed robbery, found guilty as charged, and appeals from judgment imposing a prison term of 25 years.

The evidence for the State tends to show that about 5:00 p.m. on 12 January 1977, defendant and Dale Ray went to the trailer home of a friend, Jesse Miller, and his girl friend, Gwendolyn McCauley. While there, defendant pulled a pistol from his pocket and playfully said, "This is a stick-up." Miller let them borrow his automobile, and they left about 6:00 p.m.

They were seen in Miller's car about 6:20 or 6:30 p.m. at a service station near Ann's Grocery.

About 6:30 p.m. two men wearing stocking masks, one identified as Dale Ray, entered Ann's Grocery, operated by Ann McCormick, who was present with her husband. Ray had a pistol, the other man a sawed-off shotgun. They said, "This is a holdup." Mrs. McCormick told them to leave and walked to the door leading to a kitchen. As she was closing the door, the shotgun fired, and she was struck in the forehead by pellets. Mr. McCormick, at the request of the two men, opened the cash register, removed $25 and gave it to them. The man with the shotgun was wearing black gloves. He dropped a glove, picked it up and put it in his pocket. The two men left on foot. Mr. McCormick found a black glove near the doorway of the store. He called the sheriff.

Defendant and Dale were seen together in Miller's car about 6:50 or 6:55 p.m. at a service station about two miles from Ann's Grocery. While they were there several vehicles of the sheriff's department passed the service station.

Defendant alone returned the car to Miller about 10:00 p.m. About 5:00 p.m. on the following day, Gwendolyn McCauley, Miller's girl friend, found a single black glove on the floor of Miller's car.

Defendant testified that he was not with Dale Ray at the time of the robbery but was with others watching the news on television. His testimony was corroborated by others. His mother testified that the pistol in her son's possession was a plastic toy pistol which she found and gave to him.

Attorney General Edmisten, by Assistant Attorney General Joan H. Byers, for the State.

Morgan, Bryan, Jones, Johnson, Hunter & Greene, by C. M. Hunter, for defendant appellant.

MORRIS, Judge.

Defendant assigns as error the denial of his motion for nonsuit and bases his argument on two grounds: (1) the insufficiency of the evidence, and (2) variance in the charge (the indictment alleging that the money was taken "from the presence, person, place of business of Elizabeth Ann McCormick") and the proof (evidence that the money was taken from the person and presence of Mr. McCormick).

[1] Turning first to the sufficiency of the evidence, it is established that Dale Ray and another acted in concert in committing the armed robbery. Dale and defendant were together at 5:30 p.m. when they left the Miller home in the car Miller had loaned to defendant. The time of the commission of the crime was fixed at about 6:30 p.m. by testimony of the victims that the perpetrators entered Ann's Grocery a few minutes after the local newscast on television. Dale and defendant were seen together in Miller's car minutes before 6:30 at a service station a few miles from Ann's Grocery, and they were seen together again a few minutes after 6:30 at another service station a few miles from Ann's Grocery. Black gloves were worn by the unidentified perpetrator, and he dropped one of the gloves at the scene of the crime. On the following day a similar black glove was found on the floor of Miller's car. This evidence, together with the other evidence considered in the light most favorable to the State, reasonably conduces to the conclusion as a fairly logical and legitimate deduction that defendant was the unidentified person with Dale and that they committed the armed robbery in concert. *See State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956). The State's evidence on the issue of identity is circumstantial, but the test of the sufficiency of the evidence to withstand a motion for nonsuit is the same whether the evidence is circumstantial, direct, or both. *State v. McKnight*, 279 N.C. 148, 181 S.E. 2d 415 (1971); *State v. McCuien*, 15 N.C. App. 296, 190 S.E. 2d 386 (1972). The defendant's motion for nonsuit on grounds of insufficiency of the evidence was properly denied.

[2] The variance between the charge and the proof is not fatal. The armed robbery was a single, continuous course of conduct that lasted only a few minutes from the entry, when both Mr. and Mrs. McCormick were present, until the perpetrators left. Mrs. McCormick walked from the store to an adjoining room and was shot by the unidentified robber as she closed the door. It is not clear whether she was in the adjoining room or outside seeking help when the money was taken. The main element of the offense of armed robbery is the force or intimidation occasioned by the use or threatened use of firearms. *State v. Lynch*, 266 N.C. 584, 146 S.E. 2d 677 (1966); *State v. Black*, 286 N.C. 191, 209 S.E. 2d 458 (1974); *State v. Johnson*, 20 N.C. App. 53, 200 S.E. 2d 395 (1973).

Mrs. Ann McCormick left the store area and went to an adjoining room immediately after the perpetrators intimidated her by the threatened use of firearms and announced that it was a holdup. At that stage, before taking the money from Mr. McCormick, there was a completed crime under G.S. 14-87. The offense is complete if there is either a taking or an attempt to take the personal property of another by the means and in the manner prescribed by G.S. 14-87. *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971).

[3] In the case *sub judice* the indictment alleges "from the presence, person, place of business, of Elizabeth Ann McCormick." We note that G.S. 14-87 provides "from . . . any other place where there is a person or persons in attendance. . . ." The statutory language is much broader than the indictment language, and the district attorney may find it advisable to use the statutory language in indictments for armed robbery to avoid problems of proof that may arise if the more restrictive common law language is used. The word "presence" must be interpreted broadly and with due consideration to the main element of the crime—intimidation or force by the use or threatened use of firearms. "Presence" here means a possession or control by a person so immediate that force or intimidation is essential to the taking of the property. And if the force or intimidation by the use of firearms for the purpose of taking personal property has been used and caused the victim in possession or control to flee the premises and this is followed by the taking of the property in a continuous course of conduct, the taking is from the "presence" of the victim. *See State v. Dunn*, 26 N.C. App. 475, 216 S.E. 2d 412 (1975); *State v. Reaves*, 9 N.C. App. 315, 176 S.E. 2d 13 (1970).

The variance in the case *sub judice* could not subject the defendant to double jeopardy. The "same evidence" rule would protect him from prosecution for armed robbery in the "presence" of Mr. McCormick. Only one crime of armed robbery was committed, even though two persons were forced or intimidated by the use of firearms. *State v. Potter*, 285 N.C. 238, 204 S.E. 2d 649 (1974); *State v. Ballard*, 280 N.C. 479, 186 S.E. 2d 372 (1972). We find no fatal variance, and this assignment of error is overruled.

[4] Defendant moved for mistrial for jury misconduct in that (1) the sheriff remarked to defense counsel when a juror was nearby

that "I understand your boys are about to enter guilty pleas in this case.", and (2) during trial Deputy Sheriff Rosser, a State's witness, was approached by a juror and asked the name of his singing group and how to get in contact with the manager. Deputy Rosser gave him a calling card.

The trial court conducted a voir dire hearing. We agree with the observation of the trial judge made during *voir dire* that the statement of the sheriff might influence the juror and corrupt a verdict, but the juror testified that he did not hear the statement, and the court so found. The trial court further found that the conversation between the juror and Deputy Rosser was short and related solely to the gospel group in which the deputy sang. The findings are amply supported by the evidence and are conclusive on review by this Court. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972).

The finding by the trial court that the juror did not hear the statement made by the sheriff is determinative of that situation. The short conversation between the deputy and the juror about a subject foreign to the case being tried, though not approved, does not constitute misconduct prejudicial to the defendants that would require a new trial. A conversation between a juror and a third party is not grounds for a new trial unless it is of such character as is calculated to impress the case upon the mind of the juror in a different aspect than was presented at trial, or is of such a nature as is calculated to result in harm to a party on trial. *State v. Waddell*, 279 N.C. 442, 183 S.E. 2d 644 (1971).

We have carefully considered the other assignments of error and find them to be without merit.

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOHN FRANKLIN THOMAS, JR.

No. 7716SC747

(Filed 7 February 1978)

1. **Criminal Law § 73.2— information heard by witness on radio—no hearsay testimony**

In a prosecution for armed robbery and assault with a deadly weapon, the trial court did not err in allowing a witness to testify that she heard on her police scanner radio that the grocery store in question had been robbed, since the testimony was not offered to prove that the store was robbed but was offered instead to explain why the witness remembered having seen a man at the grocery store; moreover, there was ample, uncontradicted evidence to show that the grocery store was robbed, and defendant never contended to the contrary.

2. **Criminal Law § 66.18— in-court identification of defendant—failure to hold voir dire—no error**

Failure of the trial court to conduct a hearing in the absence of the jury, find facts, and thereupon determine the admissibility of the victim's in-court identification testimony was harmless since there was no suggestion that the witness's in-court identification might have been tainted by any pre-trial identification procedures made under constitutionally impermissible circumstances, and there was clear and convincing evidence that the witness's in-court identification of defendant originated with and was based on his observations of defendant at the crime scene.

3. **Criminal Law § 88.4— attempt to obtain false testimony—cross-examination of defendant proper**

The questions asked defendant by the district attorney by which the district attorney attempted to show an attempt by defendant to induce a witness to testify falsely in his favor were properly allowed by the trial court.

APPEAL by defendant from *Canaday, Judge.* Judgments entered 11 November 1976 in Superior Court, ROBESON County. Heard in the Court of Appeals 17 January 1978.

Defendant was tried on his plea of not guilty to indictments charging him with armed robbery and assault with a deadly weapon with intent to kill inflicting serious injuries. The jury found defendant guilty as charged. From judgments imposing prison sentences, defendant appeals.

Attorney General Edmisten by Associate Attorney George W. Lennon for the State.

L. J. Britt and Son by Bruce W. Huggins for defendant appellant.

PARKER, Judge.

[1] The crimes for which defendant was tried occurred in the early afternoon of 6 August 1976 at the Center Grocery, operated by Henry Prevatte. Pearl Kinlaw Stanley, testifying for the State, stated that she was driving home on 6 August and drove past Mr. Prevatte's grocery store on the way. She noticed a dark red car beside the store, and a black man was standing to the right of the car, wiping the hood. She attached no particular significance to these observations until she arrived at her home and heard on her police scanner radio that the grocery store had been robbed.

Defendant unsuccessfully objected to Pearl Kinlaw Stanley's testimony regarding what she heard on the police scanner radio, and for his first assignment of error he now contends that his objection should have been sustained because the testimony was hearsay. "Hearsay evidence consists of the offering into evidence of a statement, oral or written, made by a person other than the witness for the purpose of establishing the truth of the matter so stated." *Wilson v. Indemnity Co.*, 272 N.C. 183, 188, 158 S.E. 2d 1, 5 (1967). The testimony regarding what was heard on the police scanner radio was not offered for the purpose of establishing the truth of the matter stated, i.e., that the grocery store had been robbed. Instead, the facts sought to be established were that the statement was made and that the witness heard the statement, thereby explaining why she remembered seeing the man at the grocery store. Hence, the testimony was not hearsay. Moreover, the admission of the statement that the grocery store had been robbed could not have been prejudicial to defendant. There was ample, uncontradicted evidence to show that Mr. Prevatte's grocery store was robbed that afternoon, and defendant never contended to the contrary; his defense was an alibi. Consequently, defendant's first assignment of error is overruled.

[2] Defendant's second assignment of error is "[t]hat the Court erred in allowing testimony by Henry Prevatte identifying the defendant, without first properly allowing defendant's counsel an opportunity to examine the witness as to the basis of his identification." Henry Prevatte testified for the State that defendant was the person who robbed his store and assaulted him. Citing *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974), *State v. McVay*, 277 N.C. 410, 177 S.E. 2d 874 (1970), and *State v. Collins*, 22 N.C. App. 590, 207 S.E. 2d 278 (1974), defendant contends that

the trial court should have conducted a voir dire hearing to determine the admissibility of Mr. Prevatte's testimony identifying him as the robber. The cases cited by defendant, however, require the trial judge to conduct a voir dire hearing only when the admissibility of in-court identification testimony is challenged on the ground that it is tainted by constitutionally impermissible out-of-court identification procedures. Defendant made no such challenge in this case. He made only a general objection to Mr. Prevatte's in-court identification testimony, and at no point in the trial did he request a voir dire examination.

We recognize that, even upon a general objection only, the better procedure is for the trial judge to conduct a hearing in the absence of the jury, find facts, and thereupon determine the admissibility of in-court identification testimony. "Failure to conduct the voir dire, however, does not necessarily render such evidence incompetent." *State v. Stepney*, 280 N.C. 306, 314, 185 S.E. 2d 844, 850 (1972). In the present case there is nothing which even suggests that Mr. Prevatte's in-court identification testimony might have been tainted by any pre-trial identification procedures made under constitutionally impermissible circumstances. There was no pre-trial identification by use of photographs, and the only time Mr. Prevatte saw and identified defendant after the robbery and prior to trial was at the preliminary hearing. Viewing of a defendant at a preliminary hearing by a witness who is offered to testify to the identification of defendant is not, of itself, such a confrontation as will taint the witness's in-court identification unless other circumstances are shown which are so unnecessarily suggestive and conducive to irreparable mistaken identification as would deprive the defendant of due process. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). No such circumstances were shown in the present case. Moreover, there was clear and convincing evidence that Mr. Prevatte's in-court identification of the defendant originated with and was based on his observations of the defendant at the time of the crimes and upon his acquaintance with the defendant prior to that time. He testified that defendant "had worked in that area putting in tobacco, and had come in and out of the store," and that he "knew his [defendant's] name before that day, but [he] couldn't remember it that day." All of the evidence shows that the assault and robbery occurred in daylight and that Mr. Prevatte had ample opportunity to observe the man

who assailed and robbed him. Under these circumstances the failure of the trial court to conduct a voir dire hearing and to find facts was clearly harmless. *See State v. Stepney, supra; State v. Sharratt*, 29 N.C. App. 199 223 S.E. 2d 906 (1976). Defendant's second assignment of error is overruled.

[3] The only remaining assignment of error brought forward in defendant's brief on this appeal is directed to the following exchange between the district attorney and defendant on cross-examination:

> Q. You went out to Ray Moore to try to get him to come in here to swear to an alibi that he and his whole family were with you at 2:00 o'clock on the 6th day of August, 1976, didn't you?
>
> A. No, did not.
>
> Q. You subpoenaed them up here for it and the man had to go to the lawyer and tell him, "Look I weren't with that fellow on Friday at 2:00 o'clock," didn't he?
>
> MR. HUGGINS: Object
>
> WITNESS: I did not know anything about it.
>
> COURT: Overruled.

Defendant contends that the questions asked by the district attorney were improper. We do not agree.

"It is permissible for the prosecutor to draw the jury's attention to the failure of the defendant to produce exculpatory testimony from witnesses available to defendant." *State v. Thompson*, 293 N.C. 713, 717, 239 S.E. 2d 465, 469 (1977). It is true, of course, that the district attorney may not place before the jury, by insinuating questions or otherwise, incompetent and prejudicial matters not legally admissible in evidence, *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954), and he may not place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence. *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975). However, we conlcude that the district attorney's questions in this case violated none of the above rules and were within the range of permissible cross-examination. When a criminal defendant testifies, his credibility may be challenged by

evidence of bad character, and when cross-examining the person whose character is in issue, it is proper to ask about specific acts of misconduct. Stansbury's North Carolina Evidence (Brandis Rev.) §§ 108, 111. A broad range of misconduct is subject to such inquiry. In this case, the district attorney sought to show an attempt by defendant to induce a witness to testify falsely in his favor. Such conduct by a defendant may be shown against him. *State v. Minton*, 234 N.C. 716, 68 S.E. 2d 844 (1952). The scope of cross-examination regarding such misconduct may be limited in the discretion of the trial judge, and such questions must be asked in good faith based on information acquired by the district attorney. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971); *State v. Bell*, 249 N.C. 379, 106 S.E. 2d 495 (1959). Defendant does not contend that the questions were asked in bad faith or that the trial judge permitted the questioning to get out of hand. The questions were not phrased in the suggestive manner condemned in *State v. Phillips*, *supra*. Consequently, this assignment of error is overruled.

Defendant cited no authority and presented no argument in his brief in support of his remaining assignments of error. These are deemed abandoned. Rule 28 (a), N.C. Rules of Appellate Procedure.

Defendant received a fair trial free from prejudicial error.

No error.

Judges VAUGHN and ERWIN concur.

STATE OF NORTH CAROLINA v. ROSCOE ROAN COUCH, JR.

No. 7721SC689

(Filed 7 February 1978)

1. Criminal Law § 35— evidence showing possibility of another's guilt

The trial court in a homicide prosecution properly excluded defendant's evidence that a neighbor of deceased was a member of a motorcycle gang involved in a shooting, a member of the rival gang was in the vicinity on the night of the shooting inquiring about the neighbor's residence, and the neighbor thought the man who shot deceased intended to kill him instead, since the evidence did not point directly to the guilt of another and was thus not relevant on the question of guilt.

2. Criminal Law § 89.4— prior statement not inconsistent

In this homicide prosecution, a detective's prior statements in a newspaper article which speculated that the murder may have resulted from motorcycle gang warfare were not admissible as prior inconsistent statements since the detective's testimony at trial based on personal observations was not inconsistent with the possibility that after the shooting and before defendant's confession he had other possible theories.

3. Homicide § 30.2— murder trial—failure to charge on manslaughter

Evidence in a murder case that defendant was upset when deceased unexpectedly returned to his home and interrupted defendant's tryst with deceased's wife, causing defendant to jump out of a window nine feet above the ground, did not require the court to charge on the lesser offense of manslaughter in view of defendant's confession that he went to his car and got a shotgun, went to a neighbor's yard, and shot deceased when he walked out on a porch.

4. Homicide § 8— drunkenness as defense

Voluntary drunkenness is a defense to a charge of first degree murder to the extent that it precludes the mental process of premeditation and deliberation, but it is no defense to second degree murder.

APPEAL by defendant from *Lupton, Judge.* Judgment entered 21 March 1977, in Superior Court, FORSYTH County. Heard in the Court of Appeals 10 January 1978.

Defendant was convicted of second-degree murder and appeals from judgment imposing a sentence of 60 years.

On 13 October 1975, James Cecil (deceased), his wife, Hannah, and their six children occupied a house in Winston-Salem. The adjoining house on one side was occupied by the Corams. The house on the other side was rented. On that day about 11:20 p.m. Mr. Coram heard shots outside and went out to investigate; he saw an old car with loud mufflers twice pass in front of the house. Mrs. Cecil came out and said her husband had been shot. She wore a loose fitting dress which was unzipped. She wore nothing under the dress. Coram went next door and found James Cecil face down in the yard near the front porch. There were wounds about his body, and he was dead.

On 16 September 1976, defendant was a prisoner in the State Prison Camp at Mocksville, serving a term for bad checks and assault by pointing a gun. About 10:00 p.m. he asked a prison guard to call the Sheriff of Forsyth County so that he could confess to a murder. The call was made, and Detective McGee arrived at the prison camp about midnight. He advised defendant of

his *Miranda* rights. Defendant stated that he understood and signed a written waiver. Defendant made an oral confession, which was then reduced to writing, and signed it. The signed statement was as follows:

> "I, Roscoe Couch, give the following statement: On the night of James Cecil's death I was sitting beside Hannah's bed talking when we both heard someone come up out front. She thought it might be James so she wanted me to leave. I went out the back of the house to my car. I think it was a 1962 or '67 Chevy, blue in color. It was parked in front of Grant Koontz' house at the time. I picked up the shotgun, I think it was a Remington Automatic shotgun. I went from my car back to Grant's house. There was no one home at his home. I turned around to leave when James came out of the front of the house. I thought he had a gun in his hand at the time so I pulled the trigger of the shotgun. I think I shot two times. I fired the gun without even thinking. I guess I got scared and ran. I had known Hannah for about thirty days. I met her at the Frosty Mug. We had been seeing each other for a period of time. I thought they were separated. She had shown me pictures of James but I had never seen him in person."

Detective Grindstaff, Forsyth County Sheriff's Department, who had been in charge of investigating the James Cecil murder, arrived at the prison camp about 3:30 a.m., advised defendant of his rights, and defendant again confessed, relating to Grindstaff substantially what he had told Detective McGee, adding that he was in a drunken condition and remembered vaguely what happened after the shooting. Grindstaff further testified that defendant was a suspect in the James Cecil murder and that he had talked with him 6 or 7 times. Once he talked with defendant in the McLeansville Prison Unit, and defendant told him he was afraid that someone was going to kill him.

Defendant had married Hannah Cecil, wife of deceased, on 31 December 1975. She was killed in a traffic accident in January 1976.

Loretta Cecil, age 11, daughter of deceased and Hannah testified that she heard defendant say to her mother, "Honey, I'm sorry for killing James."

Defendant testified that on the date of the shooting he did not know James and Hannah Cecil. On that date he spent the entire night at the trailer home of William Crouse. He met Hannah Cecil a few weeks after the shooting and married her in late December, 1975. While in prison he was threatened by an inmate named Rothrock. He was so afraid that Rothrock would kill him that he confessed to the murder in order to get out of the Mocksville Prison Unit.

Defendant's alibi testimony was supported by several witnesses.

Attorney General Edmisten by Associate Attorney Ben G. Irons II for the State.

Pettyjohn & Molitoris by H. Glenn Pettyjohn and Theodore M. Molitoris for defendant appellant.

CLARK, Judge.

[1] Was defendant's evidence that someone else committed the crime admissible? The defendant attempted to offer evidence, particularly in cross-examination of Detective Grindstaff, that there had been a shootout between rival motorcycle gangs, that Grant Koontz (neighbor of James Cecil) was a member of one of the gangs, that on the night of the shooting a red-headed man named Sam was in the vicinity inquiring about the residence of Grant Koontz, and that Koontz thought that the man who shot James intended to kill him (Koontz).

The admissibility of evidence which tends to prove that another committed the crime for which the accused is being tried is governed by relevancy—whether it proves or disproves, or tends to prove or disprove the crime charged or any fact material to the issue. 1 Stansbury's N.C. Evidence (Brandis Rev.) § 93.

An examination of the cases in North Carolina reveals that the defendant has had little success in offering evidence tending to incriminate others. The courts have ruled that the evidence was inadmissible because it did not point directly to the guilt of a third party, but only raised an inference or conjecture of another's guilt. *State v. Shinn*, 238 N.C. 535, 78 S.E. 2d 388 (1953) (evidence that others in the community were known to deal in liquor where defendant was charged with illegal possession); *State*

v. Smith, 211 N.C. 93, 189 S.E. 175 (1937) (evidence that another was near the scene of the crime when the burglary was perpetrated); *State v. Stewart*, 189 N.C. 340, 127 S.E. 260 (1925) (evidence that officers had a warrant for someone other than defendants charged with murder; *State v. Ashburn*, 187 N.C. 717, 122 S.E. 833 (1924) (evidence that another had been seen frequently with the mother, a codefendant charged with the murder of her infant); *State v. Wiggins*, 171 N.C. 813, 89 S.E. 58 (1916) (evidence that two other men were seen the evening before near the spot where deceased was shot); *State v. Lane*, 166 N.C. 333, 81 S.E. 620 (1914) (evidence of statements made by another person that he had killed the deceased). But in *State v. Mitchell*, 209 N.C. 1, 182 S.E. 695 (1935) and *State v. Blackwell*, 193 N.C. 313, 136 S.E. 868 (1927), it was held error to exclude the dying declaration that another person did the killing.

In the case *sub judice* we find the evidence offered by the defendant, to the effect that deceased's neighbor was a member of a motorcycle gang which was at war with another gang, was speculative, did not point directly to others, and was thus not relevant to the issue of guilt. The trial court did not err in excluding this evidence.

[2] The defendant assigns as error the exclusion of evidence during cross-examination of Detective Grindstaff about alleged prior inconsistent statements appearing in a newspaper article which speculated about the murder resulting from motorcycle gang warfare. The evidence was entirely speculative and not relevant on the issue of defendant's guilt. Nor was it admissible as a prior inconsistent statement. The testimony of the witness at trial based on personal observation was not inconsistent with the possibility that after the shooting and before defendant's confession, a period of 11 months, he had other possible theories. Since the witness had not given testimony with which the purported statements were inconsistent, the court properly excluded the purported statements. See *State v. Pearce*, 268 N.C. 707, 151 S.E. 2d 571 (1966).

[3] The defendant contends that the trial court erred in failing to charge on manslaughter and also drunkenness as a defense. The State's case was based on defendant's confession, which included defendant's statement that he was upset when the husband (deceased) returned. It is understandable that the unex-

pected return of the husband, which interrupted defendant's tryst with deceased's wife and forced him to jump out of a window nine feet above the ground, would upset the defendant, but this alone was not sufficient to require a charge on manslaughter in view of defendant's statement that he went to his car and got a shotgun, returned to a neighbor's yard, and shot deceased when he walked out on the porch. The trial court is not required to charge the jury upon the question of defendant's guilt of lesser degrees of the crime charged in the indictment where there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees. 4 Strong's N.C. Index, 3rd ed., Criminal Law, § 115.

[4] The only evidence of drunkenness was defendant's statement in his confession to Detective Grindstaff to the effect that he was in a drunken condition and did not remember what happened after the shooting. Defendant was convicted of second-degree murder. Voluntary drunkenness is no defense to murder in the second degree. It is a defense to the charge of first-degree murder to the extent that it precludes the mental processes of premeditation and deliberation. *State v. Wilson*, 280 N.C. 674, 187 S.E. 2d 22 (1972).

We have examined defendant's other assignments of error but find them to be without merit.

No error.

Judges MORRIS and MITCHELL concur.

LENORA HUSKETH, PLAINTIFF v. CONVENIENT SYSTEMS, INC., D/B/A MAYBERRY ICE CREAM SHOPPE, DEFENDANT AND THIRD PARTY PLAINTIFF v. FOODCRAFT EQUIPMENT COMPANY, INC., THIRD PARTY DEFENDANT AND FOURTH PARTY PLAINTIFF v. L & B PRODUCTS CORPORATION, FOURTH PARTY DEFENDANT

No. 7714SC157

(Filed 7 February 1978)

Negligence § 57.2— fall from barstool—insufficient evidence of negligence

In an action to recover for personal injuries allegedly sustained by plaintiff when she fell from a barstool in defendant's establishment, the trial court properly directed a verdict for defendant since plaintiff's evidence that an acci-

dent occurred and that the top of the stool was at an angle to the pedestal after the accident was not sufficient to show the nature of a defect, if any, in the stool prior to plaintiff's sitting upon it; plaintiff's evidence raised no inference that a reasonable inspection by defendant would have disclosed any defect; and the doctrine of *res ipsa loquitur* was inapplicable.

Judge WEBB dissenting.

APPEAL by plaintiff from *Barbee, Judge.* Judgment entered 29 September 1976 in Superior Court, DURHAM County. Heard in the Court of Appeals on 9 January 1978.

Civil action wherein plaintiff seeks damages of $50,000 for personal injuries allegedly sustained when she fell from a barstool in defendant's establishment. In its answer defendant, Convenient Systems, Inc., denied any negligence on its part and alleged the plaintiff's contributory negligence as a defense. Defendant also filed a third party complaint alleging that the installation of the stools by Foodcraft Equipment Co., Inc., was the source of any negligence found. The third party defendant filed a complaint against the manufacturer, L & B Products Corp., alleging its liability for any negligence found.

At trial the plaintiff offered evidence tending to show the following: Defendant is the owner and operator of the Mayberry Ice Cream Shoppe in Durham, North Carolina. In 1971 Emma Clinard was employed as the manager of the establishment. During the summer of 1971 while Clinard and some of her employees were cleaning the premises, they discovered that two of the counter stools were loose. They immediately removed the tops of the stools from the pedestals which were secured to the floor, and had them repaired. Clinard had received complaints of children spinning the tops of the stools at various times, and on each such occasion, she made them cease. At approximately 1:00 p.m. on the afternoon of 2 September 1971, the plaintiff and a companion went to the Mayberry Ice Cream Shoppe to eat lunch. They waited for a table, but when none appeared vacant they decided to sit on stools at the counter. The plaintiff approached the counter, and as she sat on her stool, the top of the seat "flipped" her onto the floor. She landed on her back and buttocks. While she was on the floor she observed that the seat was hanging at an angle from the pedestal of the stool. Clinard, who was informed of the accident, inquired of the plaintiff as to any injuries and in-

structed her that if she required any medical attention that the defendant would assume the costs. Plaintiff and her friend moved to other stools, and finished their lunch. The following day the plaintiff felt pain in her back and legs. She left her job and went to the emergency room of the hospital where she was examined by a doctor. She then returned to the store and gave the hospital bill to Clinard. On this occasion, according to plaintiff's testimony Clinard and the plaintiff had a conversation. The plaintiff's recollection of the conversation, which was admitted for impeachment purposes only, is as follows:

> Mrs. Clinard told me that she was sorry that I got hurt, that they had been having problems with the stools, and that the children came in and turned the tops. They had been having problems and she asked the company to fix them, and that they hadn't done anything about them up until that time.

From a judgment directing a verdict for the defendant, Convenient Systems, Inc., plaintiff appealed.

Powe, Porter, Alphin & Whichard, by Charles R. Holton, for the plaintiff appellant.

Haywood, Denny & Miller, by George W. Miller, Jr., for the defendant appellee.

HEDRICK, Judge.

Plaintiff contends that the trial court erred in directing a verdict for defendant. When all plaintiff's evidence, including that excluded by the court as being corroborative only, is considered in the light most favorable to plaintiff, it is insufficient in our opinion to raise an inference of actionable negligence on the part of defendant.

The plaintiff argues that the defendant was negligent in failing to inspect the stool from which she fell, and in failing to correct or warn of an alleged defect which caused the accident. While the evidence discloses that two of the stools were loose on their pedestals at an earlier time, there is no evidence whatsoever of any defect existing prior to the accident in the stool from which the plaintiff fell. Plaintiff's testimony that when she sat upon the stool "it flipped me backwards onto the floor" and

that "[a]fter I landed on the floor, the top of the seat hung at an angle on the pedestal," without more, is not sufficient to raise an inference as to the nature of a defect, if any, in the stool prior to plaintiff's sitting upon it; and thus, no inference is raised that a reasonable inspection by the defendant would have disclosed any defect. Accordingly, there is no evidence in this record from which a jury could find that the defendant was negligent in failing to inspect the stool or in failing to correct or warn of an alleged defect which caused the accident.

Plaintiff urges that the doctrine of *res ipsa loquitur* is applicable to the facts of this case. In order to invoke the aid of this doctrine, the plaintiff must show "(1) that there was an injury, (2) that the occurrence causing the injury is one which ordinarily doesn't happen without negligence on someone's part, (3) that the instrumentality which caused the injury was under the exclusive control and management of the defendant." *Jackson v. Gin Co.*, 255 N.C. 194, 197, 120 S.E. 2d 540, 542 (1961). Plaintiff relies upon *Schueler v. Good Friend Corp.*, 231 N.C. 416, 57 S.E. 2d 324 (1950), to support this contention. In *Schueler* a tier of chairs overturned causing the plaintiff's injuries. There was evidence that the chairs were uniquely constructed in that the tops were larger than the bases causing them to be top-heavy and requiring that they be bolted to the floor in order to remain upright. Furthermore, the plaintiff's evidence in *Schueler* disclosed that a week before the occurrence the tier of seats had been secured to the floor. Thus, there was evidence available from which an inference could be drawn as to why the seat fell when plaintiff sat upon it. From this evidence the court concluded that " 'the accident presumably would not have happened if due care had been exercised.' " *Schueler v. Good Friend Corp., supra* at 418, 57 S.E. 2d at 325. We cannot come to the same conclusion in the present case.

The case of *Smith v. McClung*, 201 N.C. 648, 161 S.E. 91 (1931), provides a more fitting analogy in terms of the quantum of evidence presented. In that case while the defendant dentist was injecting novocaine into the gum of the plaintiff, the point of the needle broke off causing injury to plaintiff. The case was submitted to the jury which found the defendant negligent. On appeal the Supreme Court reversed the trial court's denial of defendant's motion for nonsuit. In holding that the doctrine of *res ipsa loquitur* was inapplicable the Court reasoned: "There is nothing

tending to indicate there was any defect in the needle or that if any defect existed the same could have been discovered by the most rigid inspection." *Smith v. McClung, supra* at 652, 161 S.E. at 93. The Court's observation in *Smith* is equally applicable to the present case. The plaintiff's case is devoid of any evidence that there was any defect in the stool or that, if any defect existed, it could have been discovered by a reasonable inspection.

In *Springs v. Doll*, 197 N.C. 240, 242, 148 S.E. 251, 253 (1929), the Supreme Court stated that the doctrine would not apply "where the existence of negligent default is not the more reasonable probability, and where the proof of the occurrence, without more, leaves the matter resting only in conjecture . . . ." *See also Lane v. Dorney*, 250 N.C. 15, 108 S.E. 2d 55 (1959), rev'd on other grounds on rehearing, 252 N.C. 90, 113 S.E. 2d 33 (1960). The only evidence furnished by the plaintiff tends to show that an accident occurred and that the top of the stool was at an angle to the pedestal after the accident. From this evidence we cannot say that the defendant's negligence was the more probable cause of plaintiff's fall from the stool. The doctrine of *res ipsa loquitur* is inapplicable to the facts of this case.

The judgment directing a verdict for the defendant is affirmed.

Affirmed.

Judge BRITT concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority opinion and vote to reverse. I differ with the majority in that I believe there was sufficient evidence from which the jury could conclude that there was a defect in the stool from which the plaintiff fell and that this defect was known to the defendant. The testimony of the plaintiff as quoted in the majority opinion is that the defendant had been having problems with the stools, and that Mrs. Clinard had reported this to the company. I believe that this evidence of trouble with the stools is such that the jury could infer that it included the stool from which the plaintiff fell.

STATE OF NORTH CAROLINA v. DANNY BEDDARD

No. 772SC736

(Filed 7 February 1978)

1. **Searches and Seizures § 24— confidential informant—affidavit—illegal activity**

An affidavit for a search warrant based upon an informant's tip contained sufficient facts from which the issuing official could determine that there were reasonable grounds to believe that illegal activity was being carried on or that contraband was present at the place to be searched where it contained a statement that an informant had advised the affiant "that on Jan. 8, 1976 on Sat. night that he and another person went to this trailer and purchased a five dollar bag of marijuana from a person called 'Jesus,'" and a detailed description of the trailer to be searched was contained in the paragraph preceding the affidavit.

2. **Searches and Seizures § 20— wrong year date in affidavit—correction by trial court**

There is no merit in defendant's contention that no probable cause existed for the issuance of a warrant to search for marijuana because the affidavit stated on its face that a sale to an informant occurred on "Jan. 8, 1976," more than a year before the warrant was issued on 11 January 1977, where the trial court found that the year date was a typographical error and ordered the date changed to read correctly "Jan. 8, 1977."

3. **Searches and Seizures § 24— affidavit—credibility of confidential informant**

An affidavit for a warrant to search for marijuana based on a confidential informant's tip set forth sufficient underlying facts and circumstances which showed that the informant was credible or that the information was reliable where it contained (1) a statement by the informant that he had gone to defendant's trailer and purchased marijuana, since the statement was against the informant's penal interest, and (2) a statement that the informant, a minor, "has never given me information before but his mother has and he gave me this information along with his mother because he was caught with the marihuana," since the presence of his mother would improve the credibility of the minor informant.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 31 May 1977 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 17 January 1978.

Defendant was tried for misdemeanor possession of a controlled substance, to wit: marijuana. During the trial, defendant moved to suppress evidence obtained under the search warrant on the grounds that the affidavit supporting the application for a search warrant was insufficient to show probable cause for issuance of the warrant. The text of the affidavit reads as follows:

"The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: I received information from a confidential informer that Danny Beddard (alias Jesus) had marijuana for sale. This informer advised me that on Jan. 8, 1976 on Sat. night that he and another person went to this trailer and purchased a five dollar bag of marihuana from a person called 'Jesus.' This informer has never given me information before but his mother has and he gave me this information along with his mother because he was caught with the marihuana. This informer also carried me and showed me the house trailer. Upon investigating this I found that 'Jesus' is Danny Beddard."

Defendant's motion was denied and evidence obtained under the warrant was admitted into evidence.

From a verdict of guilty and sentence of six months imprisonment, defendant appeals.

Attorney General Edmisten, by Associate Attorney Lucien Capone, III, for the State.

Wilkinson and Vosburgh, by James R. Vosburgh, for defendant appellant.

WEBB, Judge.

Defendant contends it was error to admit evidence obtained under the search warrant. The question presented by this appeal is whether the affidavit supplied sufficient facts and circumstances from which a magistrate could find probable cause to issue a search warrant.

In making a review of the magistrate's determination of probable cause, the scope of our examination on appeal is limited by G.S. 15A-245(a). We are unable to find any evidence in the record of other facts being contemporaneously recorded with the warrant. Therefore, we will determine from the affidavit alone if there are facts from which a finding of probable cause could have been made by the magistrate.

Generally, when applying for a search warrant, the affidavit is deemed sufficient "if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the

described premises of the objects sought and that they will aid in the apprehension or conviction of the offender." *State v. Vestal*, 278 N.C. 561, 576, 180 S.E. 2d 755, 765 (1971). At issue in this case is a search warrant based upon an informant's tip which brings special considerations into play. Defendant correctly asserts that there is a two prong test for determining if probable cause exists to issue a search warrant based upon information from an informant. *State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969).

[1] The first requirement is that the affidavit must contain facts from which the issuing official could determine that there are reasonable grounds to believe that illegal activity is being carried on or that contraband is present in the place to be searched. We believe the first test is met. The key statement reads: "This informer advised me that on Jan. 8, 1976 on Sat. night that he and another person went to this trailer and purchased a five dollar bag of marihuana from a person called 'Jesus.' " An illegal activity, sale of marijuana, is alleged to be taking place at "this trailer," the place to be searched. Although the language "this trailer," if viewed in the abstract, would not supply a sufficient description to merit issuance of a search warrant, a detailed description of the trailer to be searched was contained in the paragraph preceding the affidavit and we think the language clearly refers to the detailed description.

[2] We do not find any merit in defendant's contention that no probable cause exists because the affidavit states on its face that the alleged illegal sale occurred in 1976, more than a year before the warrant was issued. The search warrant application was made on 11 January 1977. At trial, at the conclusion of *voir dire* hearings on the motion to suppress, Judge Thornburg found as a fact that the year date was a typographical error and ordered the date changed to correctly read "Jan. 8, 1977." Albeit G.S. 15A-245(a) places restrictions upon what information can be used by the magistrate in finding probable cause, we do not think the trial judge went beyond the permissible scope of inquiry when he heard evidence on the issue of a typographical error in the year date. In view of the fact that the year had recently changed, we

do not consider a typographical error in the year date fatal to the sufficiency of the affidavit.

[3] The second prong of the test relates to the credibility of the informant. It requires that if an unidentified informant has supplied all or a part of the information contained in the affidavit, some of the underlying facts and circumstances which show that the informant is credible or that the information is reliable must be set forth before the issuing officer. We believe facts and circumstances showing that the informant is credible or that his information is reliable are present in the affidavit. First, the statement by the informer that he had gone to the defendant's trailer and purchased marijuana was a statement against the informant's penal interest. The Supreme Court has indicated in *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed. 2d 723 (1971) that statements against penal interest have their own indicia of reliability.

> "People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interest, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search."
>
> 403 U.S., at 583

We hold that the informant's statement against penal interest was a circumstance showing the information was reliable. Secondly, the portion of the affidavit that states "[t]his informer has never given me information before but his mother has and he gave me this information along with his mother because he was caught with the marihuana" presents another circumstance supporting the informant's reliability. The informant, a minor, was relating his information to the officer in his mother's presence. In response to defendant's argument, we believe the presence of the mother would act as a sobering effect and thereby improve the credibility of the information rather than, as defendant contends, act as a force of duress which could open the doors of fantasy.

We hold that the affidavit was sufficient on its face to show probable cause for issuance of a search warrant. We find no error in admitting into evidence property seized under the search warrant and testimony concerning the seized property.

During the pendency of this appeal, the General Assembly eliminated imprisonment as a punishment under G.S. 90-95(d)(4), the statute under which the defendant was convicted and sentenced. When the punishment for a crime is reduced during the pendency of an appeal, the Appellate Court must give effect to the changed law. *State v. Pardon*, 272 N.C. 72, 157 S.E. 2d 698 (1967). Defendant is entitled to mitigation of sentence in conformity with the new law. Therefore, we affirm the conviction below, but vacate the judgment and remand the cause for resentencing in conformity with the amended G.S. 90-95(d)(4).

Judgment vacated and cause remanded.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. LEE ROBERT WILLIAMS

No. 7710SC717

(Filed 7 February 1978)

1. **Criminal Law § 62— polygraph test results—time of admission—stipulation controlling**

Defendant's contention that the admission of polygraph evidence as a part of the State's evidence before defendant was given the opportunity to present evidence was in violation of his Fifth Amendment right against self-incrimination is without merit, since, in a pre-trial stipulation concerning the polygraph test and use of the results, defendant waived "any and all rights to object to the admission of the results" of the test in return for the State's agreement to dismiss all charges should "the defendant prove truthful and the prosecutrix deceptive."

2. **Criminal Law § 62— polygraph test results—admission only pursuant to stipulation**

In N.C. evidence relating to the results of polygraph tests is admissible only when there is a stipulation providing for its admission.

3. **Rape § 5— second degree rape—force—sufficiency of evidence**

Evidence of force was sufficient to support a second degree rape charge where it tended to show that defendant was twenty-eight and the victim was fourteen; the victim had spent the evening in defendant's company; defendant told the victim that he would drive her home; instead, defendant drove to a dirt road and parked; the victim attempted to escape but defendant caught her, threw her into the backseat of the car and raped her; and the victim

testified that she tried to fight back the defendant, but he threatened to leave her there to freeze to death if she did not cooperate.

4. **Criminal Law § 113— principles of law from other cases—no instruction on facts of other cases—no error**

The trial court properly instructed the jury where it stated only the applicable principles of law from various N.C. Supreme Court cases, and it would have been error for the court to present the jury with the facts in the cases from which the principles of law were taken.

5. **Criminal Law § 113— jury instructions—principle of law paraphrased—no error**

In a prosecution of defendant for rape of a fourteen-year-old girl, the trial court did not commit prejudicial error when, in quoting an applicable principle of law from another case, the court inserted the word "female" in place of "child" when referring to the amount of force necessary to constitute rape when a victim is confronted by a strong man.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 14 April 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 12 January 1978.

Defendant was indicted for rape of a female over twelve years old. He pled not guilty and the case was submitted to the jury on the charge of second-degree rape.

Prior to trial, the defendant and the State entered into the following stipulation:

> It is hereby stipulated by and among the undersigned defendant, his attorney, and the District Attorney for the Tenth Prosecutorial District that the State shall provide and the prosecutrix and defendant shall submit to polygraph tests in connection with the charge(s) now pending against him, and each of the undersigned hereby voluntarily and understandingly waive any and all rights to object to the admission of the results of the said polygraph tests. It is further stipulated that the results of the polygraph tests shall be admissible into evidence at the trial of the defendant and that such admissible results shall include but not be limited to the conference and pre-testing, total chart minutes, and interrogation by a qualified polygraph examiner usually made in connection with such tests.

This the 3rd day of February, 1977.

s/ LEE ROBERT WILLIAMS
Defendant

s/ BEN F. CLIFTON
Attorney for the Defendant

s/ RANDOLPH RILEY
Assistant District Attorney

Should the defendant prove truthful and the prosecutrix deceptive, charges shall be dismissed.

Evidence presented by the State tended to show:

On 25 January 1977 fourteen-year-old Sherita Ann Brooks, the prosecutrix, went riding with the twenty-eight-year-old defendant and several girl friends. The prosecutrix had been acquainted with defendant approximately four months. At about 9:00 p.m. that evening, defendant took the other girls home and told the prosecutrix that he would drive her home. Instead, he drove to a dirt road and parked. The prosecutrix attempted to escape but defendant caught her, threw her into the backseat of the car and raped her. She testified that she "[tried] to fight him back", but that defendant told her that if "I ain't do what he said, he going to leave me out there to freeze till I die." Defendant took the prosecutrix home about midnight. She told her mother about the rape; her mother immediately took her to the police station to report the incident and then to the hospital for an examination which revealed that she had recently had sexual relations.

S.B.I. Agent Davenport testified pursuant to the pretrial stipulation that he administered a polygraph examination to the prosecutrix on 17 February 1977, and that in his opinion she was truthful when she stated defendant forced her to have sexual relations with him. He further testified that on 18 February 1977, he administered a polygraph examination to defendant and that in his opinion defendant had shown deception when he stated that the prosecutrix had been a willing participant. In both instances the judge instructed the jury that evidence of the polygraph results was to relate only to the credibility of the prosecutrix and the defendant.

Defendant presented evidence tending to show that he had gone out with the prosecutrix and her girl friends on the evening in question; that they were all drinking beer and vodka and smoking pot; that he danced with the prosecutrix during the evening; and that while he was driving the prosecutrix home, she voluntarily consented to have sexual relations with him.

The jury returned a verdict of guilty of second-degree rape, and from judgment imposing a prison sentence of forty years, defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General Robert P. Gruber, for the State.

Crisp, Bolch, Smith, Clifton & Davis, by Benjamin F. Clifton, Jr., for defendant appellant.

BRITT, Judge.

[1] Defendant contends first that the trial court erred in allowing the introduction of the results of his polygraph examination during the presentation of the State's evidence. He argues that such evidence introduced before he testified was in violation of his fifth amendment right against self-incrimination because it forced him to take the stand and that such evidence should have been admitted only as rebuttal evidence after he had testified. We find no merit in this contention.

This court in *State v. Steele*, 27 N.C. App. 496, 219 S.E. 2d 540 (1975), set forth the criteria for admission of evidence pertaining to the results of a polygraph test. In the case at hand, the able trial judge meticulously followed the *Steele* opinion. Defendant seems to concede this and limits his attack on the evidence to the time at which it was admitted—as a part of the State's evidence before defendant was given the opportunity to present evidence.

[2] It appears that in this jurisdiction evidence relating to the results of polygraph tests is admissible only when there is a stipulation providing for its admission. A stipulation is a judicial admission which is ordinarily binding on the parties who made it. *State v. Murchinson*, 18 N.C. App. 194, 196 S.E. 2d 540 (1973). In the stipulation set forth above, defendant waived "any and all rights to object to the admission of the results" of the tests in

return for the State's agreement to dismiss all charges should "the defendant prove truthful and the prosecutrix deceptive". The stipulation, signed by defendant and his counsel, contains no provision limiting the time at trial at which evidence of the results of the tests might be presented against defendant. We hold that the trial court did not err in admitting the evidence when it did.

[3] Defendant contends next that the trial court erred in not dismissing the charges against him and directing a verdict of not guilty on the grounds that there was insufficient evidence of force to support the rape charge. We find no merit in this contention. The evidence of force as set forth in the statement of facts, taken in the light most favorable to the State as is required on a motion for nonsuit, was amply sufficient to support the second-degree rape charge. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971).

[4] In his third contention defendant asserts that the trial court committed prejudicial error in instructing the jury "by reading excerpts of law from various North Carolina Supreme Court cases without first apprising the jury of the facts in the cases out of which that law arose". We find no merit in this novel contention.

In *State v. Street*, 241 N.C. 689, 692, 86 S.E. 2d 277, 279 (1955), the trial court used a hypothetical illustration in the jury charge to explain the difference between real and apparent danger; the Supreme Court found the instruction to be erroneous because ". . . it was predicated upon a factual situation wholly unrelated to the facts in the instant case." The court stated that G.S. 1-180 ". . . requires the court, in . . . criminal . . . actions, to declare and explain the law arising on the evidence in the particular case and not upon a set of hypothetical facts . . ." because the hypothetical facts might mislead the jury. *See also Ross v. Greyhound Corp.*, 223 N.C. 239, 25 S.E. 2d 852 (1943); *Terrell v. Chevrolet Company, Inc.*, 11 N.C. App. 310, 181 S.E. 2d 124 (1971); 7 Strong's N.C. Index 2d, Trial §§ 32, 33; 4 Strong's N.C. Index 3d, Criminal Law § 113.

Based on the principle enunciated in the *Street* case, we conclude that the trial court in the present case correctly instructed the jury by stating only the applicable principles of law. The court would have committed error if it had presented the jury with the facts in the cases from which the principles of law were

taken. Such extraneous facts would have been irrelevant to the present case and may have misled the jury in their deliberations.

[5] Finally, defendant contends that the trial court erred by misquoting the language from *State v. Carter*, 265 N.C. 626, 144 S.E. 2d 826 (1965), defining the force necessary to constitute rape. Defendant contends that the court inappropriately inserted the word "female" in place of "child" when referring to the amount of force necessary to constitute rape when a victim is confronted by a strong man. We find no merit in this contention.

In charging a jury, "[t]he judge . . . should segregate the material facts of the case, array the facts on both sides, and apply the pertinent principles of law to each . . . ." 4 Strong's N.C. Index 3d, Criminal Law § 111, p. 564. Defendant cites no authority and we find none which requires a judge to give verbatim quotes from other cases on the applicable principles of law. On the contrary, the court is required to apply the principles of law to the fact situation which the jury is to consider. 4 Strong's N.C. Index 3d, Criminal Law § 113. When the court's charge concerning the force necessary to constitute rape is viewed contextually, and in light of the factual situation under consideration, *State v. Butler*, 185 N.C. 625, 115 S.E. 889 (1923), 4 Strong's N.C. Index 3d, Criminal Law § 168, we conclude that the court did not commit prejudicial error in the paraphrase of the applicable principle of law from the *Carter* case.

For the reasons stated, we conclude that defendant received a fair trial free from prejudicial error.

No error.

Judges HEDRICK and WEBB concur.

STATE OF NORTH CAROLINA v. RUFUS HARRILL

No. 7727SC724

(Filed 7 February 1978)

1. **Criminal Law § 87; Witnesses § 1— failure to state basis for objection—competency of witness—failure to hold voir dire**

Where a party seeking to challenge the competency of a witness makes objection but fails to state any basis therefor, the trial court does not abuse its discretion in refusing to allow a *voir dire* to determine the competency of the witness.

2. **Criminal Law § 99.5— admonishment of defense counsel—no expression of opinion**

The trial judge did not express an opinion in violation of G.S. 1-180 when on two occasions he interrupted defense counsel and admonished him not to interrupt the State's witnesses.

3. **Criminal Law § 34.7— evidence showing other crimes—admissibility to show aggressive attitude**

In this prosecution for a felonious assault by beating the victim with fists and kicking him with heavy boots, evidence of statements made by defendant on the morning after the crime to the effect that he had "whipped" other persons and could do so again was relevant to show defendant's overly aggressive attitude and was admissible even though it may have shown defendant guilty of other crimes.

4. **Assault and Battery § 16.1— felonious assault—failure to charge on simple assault—serious injuries**

In this felonious assault prosecution in which defendant was convicted of assault inflicting serious bodily injury, the trial court did not err in failing to instruct the jury on simple assault since all of the evidence tended to show that the victim received serious injuries in that he was bleeding from numerous cuts and from his mouth and ears, was missing a tooth, had multiple bruises about the face and back, and was hospitalized in intensive care for two days.

APPEAL by defendant from *Thornburg, Judge*. Judgment entered 5 May 1977 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 13 January 1978.

Defendant was charged in a bill of indictment with assault with a deadly weapon with intent to kill inflicting serious injury. He pleaded not guilty.

The State presented evidence tending to show the following: On 11 February 1977, Robert Barrett was living in an apartment with defendant and had given defendant money to pay for the

rent and gas bill. Shirley Cornelius was also staying there. During the night of 11 February defendant hit Barrett with his fists and kicked him with heavy, leather boots. Defendant beat Barrett all night and at one point threatened to kill Barrett. Barrett did not provoke the beating and being in poor physical condition, was unable to fight back or protect himself. As a result of this beating, Barrett was hospitalized in intensive care for two days.

Officer Preston Cherka of the Shelby Police Department went to the apartment around 11:00 a.m. the next morning. Defendant, Barrett and Cornelius were all present at this time. Officer Cherka observed blood and multiple bruises on the person of Barrett. Officer Dale Ledbetter also arrived at the residence that day; later, at his office, Officer Ledbetter observed that Barrett was bleeding from numerous cuts, was missing a tooth and was badly bruised about the face and back. Officer Ledbetter also observed defendant, whom he described as a heavily built individual with good muscle tone appearing to be in good health.

While in Officer Ledbetter's office, defendant and Cornelius got into an argument during which defendant made statements to the effect that he had "whipped" several persons in the past and was confident of his ability to do so again.

Defendant's evidence tended to show that on 11 February 1977, he was the sole resident of the apartment and that Barrett and Cornelius were just visiting him. Barrett came to stay with defendant in late January and defendant told Barrett that Barrett could stay in the apartment for some thirty days while defendant went to the hospital. During the next several weeks, defendant supported Barrett and Barrett's drinking habit, though Barrett did receive a small disability check on one occasion.

On the evening of the incident, Barrett showed up at the apartment "pretty boozed up." Barrett and defendant had discussions about Barrett's trying to pawn off defendant's watch and vacuum cleaner. Shirley Cornelius arrived later, and she and Barrett got into an argument. During this argument Barrett attempted to use the telephone, but defendant refused to allow him. Barrett proceeded to use it anyway and defendant shoved Barrett over the end of the couch onto the floor. Barrett continued to try to use the telephone and in the process kicked defendant in the leg where defendant had recently suffered third degree burns. At

this point, defendant had to get rough with Barrett and slapped or hit him several times. A broken bottle, with which Barrett had hit defendant on the hand, might have caused Barrett to bleed.

From a jury verdict of guilty of assault inflicting serious bodily injury, defendant was sentenced to eighteen (18) months in the Department of Correction. He appealed to this Court.

Attorney General Edmisten, by Associate Attorney Donald W. Grimes, for the State.

Assistant Public Defender F. Douglas Canty, for the defendant.

MARTIN, Judge.

[1] Defendant contends that the trial court erred in denying defendant's motion for a *voir dire* to determine the competency of witness Barrett. At the time Barrett was called to testify, defendant objected and made a motion for a *voir dire* as to the witness's competency. The trial court denied the motion and allowed Barrett to testify. Defendant argues that he is entitled as a matter of right to a preliminary examination of a witness whose competency is challenged.

It is well settled law that the competency of a witness to testify is to be determined at the time the witness is called to testify; and such determination rests mainly, if not entirely, in the sound discretion of the trial judge in light of his examination and observation of the particular witness. *State v. Wetmore*, 287 N.C. 344, 215 S.E. 2d 51 (1975); *State v. Cooke*, 278 N.C. 288, 179 S.E. 2d 365 (1971). Defendant's contention thus presents the question whether a party making timely objection to the competency of a witness is entitled as a matter of right to a *voir dire* determination of such competency.

We are of the opinion and so hold that where, as in the case at bar, a party seeking to challenge the competency of a witness makes objection but *fails to state any basis therefor*, the trial court does not abuse its discretion by refusing to allow a *voir dire* determination of the witness's competency. Defendant stated no grounds for his objection which appear of record and has failed to allege any grounds in his brief.

This assignment of error is overruled.

[2] Defendant next contends that the trial judge committed prejudicial error, in violation of G.S. 1-180, by his comments to defense counsel. On two occasions the trial judge interrupted defense counsel and admonished him not to interrupt the State's witness. Defendant argues that the trial judge's admonition tended to belittle defense counsel in the eyes of the jury and conveyed the impression that the judge favored the prosecution. This contention is without merit.

It is clear that the trial judge was merely exercising his duty and inherent authority to control the court proceedings and to assist the jury in hearing and comprehending the evidence. Moreover, this Court has held that the remarks of a judge during the trial will not entitle a defendant to a new trial unless the defendant can establish prejudice arising therefrom; a bare possibility that they were prejudicial is insufficient. *State v. Walsh*, 19 N.C. App. 420, 199 S.E. 2d 38 (1973). In the instant case, defendant has failed to show prejudice.

[3] Defendant further contends that the admission into evidence of certain statements allegedly made by defendant was prejudicial error. A State's witness was allowed to testify on direct examination that during the argument with Cornelius in Officer Ledbetter's office, defendant stated, among other things, that he "whipped Jack Bell over Snake" Barrett; that he "will whip John Davis . . . when he meets him"; that when he hits a man, "he's hit"; and that if Officer Ledbetter would meet him on the street, "the first time I hit you, I'll lay you out." Defendant argues that these statements constitute evidence of other crimes, and cites the rule that evidence of other crimes is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused, or his disposition to commit an offense in the nature of the one with which he is charged. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

In our opinion the evidence of the statements made by defendant on the morning after the assault was relevant to show his extremely bellicose and overly aggressive attitude at that time and thus was relevant on the issue of his guilt of the offense for which he was tried. It was not rendered incompetent because it may have incidentally shown him guilty of other offenses. 1 Stansbury's N.C. Evidence (Brandis Revision), § 91. This assignment is overruled.

[4] Finally, defendant contends that the trial court erred in failing to submit to the jury the lesser offense of simple assault.

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises only when there is evidence from which the jury could find that such lesser included offense was committed. "The presence of such evidence is the determinative factor." *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Williams*, 31 N.C. App. 111, 228 S.E. 2d 668 (1976).

In the instant case, there can be no doubt from the evidence adduced at trial that if an assault occurred, it was an assault inflicting serious injury. State's witnesses testified that Barrett was bleeding from numerous cuts and from his mouth and ears, was missing a tooth, and had multiple bruises about his face and back. As a result of these injuries, Barrett was hospitalized in intensive care for two days. Thus, defendant was not entitled to an instruction on simple assault and no error arises from the failure of the court to so instruct. This assignment is overruled.

In the trial we find no prejudicial error.

No error.

Judges PARKER and ARNOLD concur.

BRACEY ADVERTISING COMPANY, INC. v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND THE BOARD OF TRANSPORTATION

No. 7710SC223

(Filed 7 February 1978)

Highways and Cartways § 2.1; Statutes § 1— effectiveness of statute contingent upon future event—notice that event occurred—order to remove advertising proper

G.S. 136-126 *et seq.* gave notice that, upon the happening of certain future events contained in G.S. 136-140, outdoor advertising on specified highways in N.C. would be under the regulation and control of respondents, and the ordinance adopted by respondent on 5 October 1972 declaring 15 October 1972 as the effective date of enforcement constituted notice to those engaged in outdoor advertising on federal-aid primary highways that the contingencies of G.S. 136-140 had occurred; therefore, petitioner who erected outdoor advertis-

ing signs in October 1972 without complying with the standards established by respondents and who filed application for permits for the signs on 14 November 1972 was properly required to remove the signs.

APPEAL by respondents from *Herring, Judge.* Judgment entered 6 December 1976, in Superior Court, WAKE County. Heard in the Court of Appeals 18 January 1978.

In November 1973, Bracey Advertising Company, Inc., petitioner, filed a petition in Wake County Superior Court, seeking judicial review of a 4 October 1973 administrative decision by respondents, the North Carolina Department of Transportation and the Board of Transportation. That decision was composed of (1) a resolution that the provisions of the Outdoor Advertising Control Act became operative on 17 July 1972 and that nineteen outdoor advertising signs of petitioner were unlawful and constituted a nuisance, and (2) an order for petitioner to remove the signs within thirty days.

The trial court, in its judgment, found that a North Carolina Court of Appeals decision, *Days Inn v. Board of Transportation*, 24 N.C. App. 636, 211 S.E. 2d 864, *cert. denied* 287 N.C. 258, 214 S.E. 2d 429 (1975), had held that the Outdoor Advertising Control Act did not become effective on 17 July 1972. It concluded that respondents' resolution and order of 4 October 1973, were, consequently, invalid.

Respondents appeal.

McLean, Stacy, Henry & McLean, by H. E. Stacy, Jr., and L. J. Britt & Son, by L. J. Britt, Jr., for petitioner appellee.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders, for the State.

ARNOLD, Judge.

Petitioner asserts that the trial court correctly found that the decision of this Court in *Days Inn* held that the Outdoor Advertising Control Act did not become effective on 17 July 1972 and that we should affirm the court's conclusion that respondents' resolution and order of 4 October 1973 are invalid. Indeed, we do not differ with the trial court's interpretation of *Days Inn* or its conclusion.

However, we do not feel precluded from examining the question of when the Act did become effective. This is the second appeal to reach this Court concerning the effective date of the Outdoor Advertising Control Act, and the record on appeal *sub judice* presents facts which were not reflected in the record of *Days Inn.*

The purpose of the Act is to control the erection and maintenance of outdoor advertising devices in order to promote the safety, convenience and enjoyment of travel and to protect public investment in interstate and primary highways within the State. G.S. 136-127. By its own terms, Article 11 provisions were to have no force or effect "until federal funds are made available to the State for the purpose of carrying out the provisions of this Article, and the Board of Transportation has entered into an agreement with the Secretary of Transportation . . . ." G.S. 136-140.

On 7 January 1972, the State Highway Commission, now the North Carolina Department of Transportation, and the Secretary of Transportation entered into an agreement contemplated by G.S. 136-140. On 17 July 1972, a letter from T. J. Morawski, Division Engineer for the Federal Highway Administration, advised the State Highway Administrator that federal funds had been made available for control of outdoor advertising.

Meanwhile, on 2 March 1972, the State Highway Commission had promulgated an ordinance setting forth standards for the control of outdoor advertising on interstate and federal-aid primary highways. On 5 October 1972, the State Highway Commission revised the 2 March ordinance by changing the effective date for enforcement of the standards to 15 October 1972. This ordinance, along with all others herein pertinent, was filed in the office of the Secretary of State pursuant to Article 18, Chapter 143 of the General Statutes.

On 13 October 1972 petitioner obtained approval from the Robeson County Building Inspector for sign building permits at nineteen locations along an unopened segment of Interstate 95 and erected poles at some of these locations. In two inventories, one conducted on Friday, 13 October 1972, and the second on 16 October 1972, Department of Transportation personnel revealed that there were numerous poles in place at the Interstate 95 loca-

tions. Subsequently, respondents discovered that petitioner had placed three sign facings on poles at three of the locations along Interstate 95. Petitioner filed application for permits, G.S. 136-133, for the nineteen signs on 14 November 1972. In the latter part of November 1972, respondents sent petitioner a formal notification that the three outdoor advertising structures were illegal and that petitioner had thirty days from receipt of notice to remove them.

Petitioner received this notice 1 December 1972, and on 29 December, petitioner filed a petition in Superior Court of Wake County seeking a stay of execution and for judicial review of the administrative decision. On 5 June 1973, judgment was entered, remanding the cause to respondents for proceedings as required by law and holding that respondents' notice to petitioner was null and void.

On 4 October 1973, respondents passed a resolution determining that the provisions of the Act became operative and in full force and effect on 17 July 1972, and that petitioner's nineteen outdoor advertising signs were unlawful and constituted a nuisance. Respondents ordered petitioner to remove the signs within thirty days.

Petitioner then filed the petition in this action seeking judicial review of the 4 October 1973 administrative decision.

This Court pointed out in *Days Inn* that the legislature may enact a statute complete in all respects but which becomes effective upon the happening of future contingencies. It was further pointed out, however, that in order for the State to charge a person with having knowledge of the occurrence of the contingencies, and thus to subject him to the statute, such person must be able to determine by the exercise of reasonable diligence that the contingency has occurred. A party could be charged with notice that the contingency in G.S. 136-140 occurred, according to *Days Inn*, if the respondents adopted an ordinance or resolution declaring that the contingency had occurred and that the statute was in effect.

Here, unlike *Days Inn*, the record reveals that respondents in fact did adopt just such an ordinance on 5 October 1972, declaring that 15 October 1972 would be the effective date of enforcement. Respondents contend that the standards authorized by the Act became effective at such time as petitioner had knowledge of the

happening of the contingencies set out in G.S. 136-140, or on 15 October 1972, whichever occurred first.

Since the ordinance adopted on 5 October 1972, revising the 2 March 1972 ordinance, by its specific terms set 15 October 1972 as the effective date of enforcement respondents cannot maintain an earlier date for enforcement against petitioner, regardless of when petitioner acquired knowledge that the contingencies occurred. However, we agree with respondents' position that as of 15 October 1972 the Act became effective as to petitioner and others.

G.S. 136-126 *et seq.*, gave notice that, upon the happening of certain future events contained in G.S. 136-140, outdoor advertising on specified highways in North Carolina would be under the regulation and control of respondents. The ordinance adopted on 5 October 1972 declaring 15 October 1972 as the effective date of enforcement constituted notice to those engaged in outdoor advertising on federal-aid primary highways that the contingencies of G.S. 136-140 had occurred. Once the ordinance was adopted knowledge of the happening of the statutory contingencies could be determined by reasonable diligence.

Those persons or parties, including petitioner, who erected outdoor advertising devices on or after 15 October 1972 without complying with the established standards did so at their peril. Any billboards or advertising devices so erected are subject to order of removal by respondents.

Accordingly, judgment of the trial court is vacated and the cause remanded for entry of judgment holding that 15 October 1972 is the effective date for enforcement of the Outdoor Advertising Control Act.

Vacated and remanded.

Judges PARKER and MARTIN concur.

LLOYD HUDSPETH v. ROBERT S. BUNZEY AND ELIZABETH O. BUNZEY

No. 7726SC169

(Filed 7 February 1978)

1. **Appeal and Error § 6.7— denial of motion to amend—compulsory counterclaim—immediate appeal**

The denial of a motion to amend the answer to allege a compulsory counterclaim affects a substantial right and is immediately appealable. G.S. 7A-27(d).

2. **Pleadings § 33.3; Rules of Civil Procedure § 15— denial of amendment to allege defense and counterclaim**

In an action for breach of a construction contract, the trial court did not abuse its discretion in denying defendants' motion to amend their answer to allege a defense that plaintiff's license as a general contractor limited his recovery for the construction of a dwelling to $75,000 and a counterclaim for the sum which defendants had paid to plaintiff over that amount, where the court considered all attendant circumstances and concluded that justice did not require the amendment, and where the case had been calendared for trial on previous occasions and defendants waited 16 months after plaintiff's reply to file the motion to amend. G.S. 1A-1, Rule 51(a).

APPEAL by defendants from *Friday, Judge*. Order entered 6 January 1977, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 January 1978.

This is a contract action commenced by plaintiff, a general contractor, against defendants for failure to perform their part of a contract under which plaintiff constructed a home for defendants. There are two contracts in dispute; both require plaintiff to construct the home for defendants, but one calls for defendants to pay some $81,000.00, and the other requires defendants to pay cost plus ten percent. Plaintiff alleged that the cost plus ten percent figure amounted to $99,100.70, that defendants paid plaintiff only $81,200.00 and that defendants, therefore, owed plaintiff $17,900.70.

Defendants answered, denying a breach of their agreement with plaintiff and alleging the affirmative defenses of accord and satisfaction, estoppel, and waiver. Additionally, defendants counterclaimed for damages of $15,000.00 which, defendants asserted, resulted from plaintiff's failure to complete the house in a workmanlike manner, with the specified materials, and without defects.

Approximately sixteen months after plaintiff's reply, which in substance denied defendants' allegations as contained in their counterclaim, and following a mistrial of this case, defendants filed a motion, pursuant to G.S. 1A-1, Rule 15, to amend their pleadings. Their proposed amendment asserted a fourth affirmative defense, namely that plaintiff was a general contractor licensed to construct dwellings of a cost limited to $75,000.00 as provided by G.S. 87-1 *et seq.* as it was in force at the time, and that that license limited plaintiff's recovery from defendants to $75,000.00. Defendants further sought, in another counterclaim, to recover from the plaintiff the sum of $6,200.00 which defendants had paid plaintiff over and beyond the $75,000.00 limit.

In denying defendants' motion the trial court entered the following order:

> "THIS CAUSE coming on for hearing upon defendants' motion to amend their answer as set forth in the same, and the court having heard the arguments of counsel and having reviewed the pleadings and other matters presented in the cause; and the court being of the opinion that the motion should be denied for the reason that there appears to be substantial compliance with the construction statute (11 N.C. App. 285), especially in view of the fact that 'the purpose of the . . . statute is to protect the public from incompetent builders,' 11 N.C. App. 281, and there seems to be no question that before the statutory amendment the plaintiff was licensed to the extent of $75,000.00; that the statutory pronouncements, at the time of contract, were equally available to the defendants and that they should now, that is, at this late hour, come with clean hands to present their cause.
>
> "IT FURTHER APPEARING TO THE COURT that the concept of defense would be materially changed by allowing the amendment and that the court under said circumstances should not permit the same, 28 N.C. App. 532; 27 N.C. App. 240; that the case ought to be tried on the merits.
>
> "Accordingly, defendants' motion to amend is hereby denied."

From this order, defendants appealed.

William H. Booe for plaintiff appellee.

Echols, Purser & Adams, P.A., by W. Thad Adams III, for defendant appellants.

ARNOLD, Judge.

[1] We first consider the appellee's argument that appellants' appeal from the denial of a motion to amend the pleadings is premature. Appellee correctly points out that the trial court's denial of appellants' motion to amend the pleadings is an interlocutory order. G.S. 7A-27(d) provides for appeals from interlocutory orders:

> "From any interlocutory order or judgment of 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 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."

See also G.S. 1-277.

In reviewing North Carolina cases dealing with appeals from interlocutory orders we find no case directly concerned with an appeal from a denial of a motion to amend the pleadings. Orders allowing amendments of pleadings are, as a rule, not appealable. *See, e.g. Order of Masons v. Order of Masons*, 225 N.C. 561, 35 S.E. 2d 613 (1945). A case closer to the one before us, however, is *Bank v. Easton*, 3 N.C. App. 414, 165 S.E. 2d 252 (1969), where this Court held that a trial court's striking of an entire further answer or defense was in substance a demurrer and immediately appealable.

By their motion to amend defendants are attempting to assert a second counterclaim which arises out of the same transaction and which is compulsory under G.S. 1A-1, Rule 13(a). Affirmative defenses must be specifically pleaded, G.S. 1A-1, Rule 8, and failure to assert a compulsory counterclaim will ordinarily bar future action on the claim. (*See* Comment, G.S. 1A-1, Rule 13.)

We therefore conclude that the denial of a motion to amend the answer to allege a compulsory counterclaim affects a substantial right and is immediately appealable. Accordingly, we will review defendants' appeal from the trial court's denial of their motion to amend their answer to allege an affirmative defense and a compulsory counterclaim.

[2] The question presented by this appeal is whether the trial court abused its discretion in denying defendants' motion to amend the pleadings. G.S. 1A-1, Rule 15(a) states:

> "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . ."

It is clear from the facts of the present case that defendants' amendment is possible only by leave of court. Our courts have consistently held that, in a motion to amend addressed to the sound discretion of the trial judge, the trial court has broad discretion in permitting or denying amendments. *See, e.g., Markham v. Johnson*, 15 N.C. App. 139, 189 S.E. 2d 588, *cert. denied*, 281 N.C. 758, 191 S.E. 2d 356 (1972).

While the order of the trial court is circuitously written we agree with plaintiff's argument that the court considered all attendant circumstances and concluded that justice did not require the amendment. The court found that plaintiff was in compliance with the licensing requirements of the statute; that the statutory requirements were available to both parties; and that defendants had waited too long to assert their defense and counterclaim. In view of the record in this case, which reflects that this action had been calendared for trial on previous occasions and that defendants waited sixteen months before attempting to amend their answer, we find no abuse of discretion.

The order denying defendants' motion to amend is

Affirmed.

Judges PARKER and MARTIN concur.

GINNY SIDES v. ROBERT REID

No. 7718DC227

(Filed 7 February 1978)

Rules of Civil Procedure § 60— default judgment set aside—error—no compelling reason justifying relief

In an action to recover a certain sum for bookkeeping and other financial services rendered by plaintiff to defendant, the trial court erred in concluding, as a matter of law, that defendant was entitled to have a default judgment against him set aside, since defendant presented no evidence of any unusual or extraordinary circumstances which might explain his failure to file answer, nor was there any finding of the same by the trial court; the court found only that defendant had mailed a handwritten note to the court denying liability and claiming that plaintiff's own affidavit established this lack of liability and thus constituted a meritorious defense, but defendant was able to offer no proof of, and the court's records were devoid of evidence of, the existence of the handwritten note; and defendant took no action, other than the handwritten note for which he could not account, until thirteen months after he was personally served with process.

APPEAL by plaintiff from *Fowler, Judge.* Order entered 16 November 1976 in District Court, GUILFORD County. Heard in the Court of Appeals 18 January 1978.

Plaintiff instituted this action on 3 September 1975 to recover from defendant $2,437.25 for bookkeeping and other financial services rendered pursuant to contract allegedly entered into between plaintiff and defendant.

Defendant failed to file answer.

On 24 June 1976, plaintiff moved for entry of default against defendant. In support of her motion, plaintiff filed affidavit stating that defendant had been personally served with a copy of the summons and complaint, and some eight months after such service, had failed to file responsive pleading or motion. In addition, the affidavit stated that the services rendered by plaintiff

were for defendant on behalf of Hot Rod Barn of Asheboro, Inc., M & K Enterprises, Inc. and Scott, Inc. as evidenced by statements of account attached to the affidavit. The Clerk of Superior Court entered default against defendant on 24 June 1976.

On the same date, plaintiff filed a motion for default judgment supported by the same facts as detailed above. The Clerk of Superior Court granted the motion and entered judgment by default against defendant. Execution was issued against defendant's property on 9 October 1976 and again on 12 October 1976 after supplemental proceeding was had to discover the extent and location of defendant's property.

On 12 October 1976, defendant moved to set aside the default judgment on the grounds that (1) plaintiff had established no claim against defendant individually as plaintiff's own affidavit showed that plaintiff contracted with and rendered services to various corporations with whom defendant was employed; and (2) defendant had set out this defense in a written document which he mailed to the court before expiration of his time for filing answer. In addition, defendant moved for a stay of the execution proceedings.

The trial court allowed the motion to stay the execution proceedings and a hearing was held on defendant's motion to set aside the default judgment against him. At the hearing defendant testified that he owned a substantial amount of stock in the three corporations involved and managed all of their business activities; that plaintiff rendered bookkeeping services for these corporations; that summons and complaint were personally served on him and he read and understood what they were about; and that he mailed a handwritten note to the court which he thought would be sufficient answer, but does not remember when or to what court he mailed it.

Finding facts substantially as detailed in defendant's testimony and motion to set aside the judgment, the trial court entered an order on 16 November 1976 setting aside the default judgment against defendant. Plaintiff appealed to this Court.

Morgan, Byerly, Post, Herring & Keziah, by Charles L. Cromer, for the plaintiff.

No counsel *contra.*

MARTIN, Judge.

The only question posed by this appeal is whether there was sufficient evidence from which the trial court could find that defendant was entitled as a matter of law to have the default judgment set aside.

Motions to set aside a final judgment are governed by Rule 60(b) of the Rules of Civil Procedure. This rule provides, in pertinent part, 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, inadvertence, surprise, or excusable neglect;
>
> * * *
>
> "(6) Any other reason justifying relief from the operation of the judgment."

If a movant is uncertain whether to proceed under clause (1) or (6) of Rule 60(b), he need not specify if his motion is timely and the reason justifies relief. *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E. 2d 446 (1971). Under either clause the movant must show that he has a meritorious defense. *Doxol Gas v. Barefoot*, 10 N.C. App. 703, 179 S.E. 2d 890 (1971).

In the instant case, defendant alleged in his motion and the trial court found as fact a *meritorious defense*. This finding of fact is supported by competent evidence and thus, binding on appeal. *Moore v. Deal*, 239 N.C. 224, 79 S.E. 2d 507 (1954). However, defendant did not assert *excusable neglect* as grounds for relief nor did the trial court find the same as fact in its order setting aside the judgment. Therefore, we must presume that the trial court based its authority to set aside the judgment upon clause (6) of Rule 60(b).

Allowing a trial court to set aside a final judgment for "any other reason" justifying such relief, Rule 60(b)(6) has been described as "a grand reservoir of equitable power to do justice in a particular case." 7 Moore's Federal Practice § 60.27(2) (2d ed. 1970). Our Supreme Court has stated that the "broad language of clause (6) 'gives the court ample power to vacate judgments

whenever such action is appropriate to accomplish justice.'" *Brady v. Town of Chapel Hill, supra.* In light of these principles, we must determine whether, based upon the evidence presented, a compelling reason has been shown which warrants the exercise of such broad equitable power. *See Standard Equipment Co., Inc. v. Albertson*, 35 N.C. App. 144, 240 S.E. 2d 499 (filed 24 January 1978). We find no such reason in the evidence presented by defendant in support of his motion.

Defendant presented no evidence of any unusual or extraordinary circumstances which might explain his failure to file answer; nor was there any finding of the same by the trial court. The trial court found only that defendant had mailed a handwritten note to the court denying liability and that plaintiff's own affidavit established this lack of liability and thus, constituted a meritorious defense. We note that defendant was able to offer no proof of, and the court's records were devoid of evidence of, the existence of the handwritten note. Moreover, this is not a case where the movant employed and relied upon an attorney who failed to take action. In the instant case, although defendant owned and managed three corporations and admitted reading and generally understanding the summons and complaint, he made no effort to consult an attorney until after the supplemental proceeding. In fact, defendant took no action—other than the handwritten note for which he cannot account—until this time, some thirteen months after he was personally served with process.

In view of defendant's failure to use proper diligence in the case at bar, we cannot say that equity should act to relieve him from the judgment by default. *See Brady v. Town of Chapel Hill, supra.* Notwithstanding the broad equitable power of a trial court to vacate judgments pursuant to Rule 60(b)(6), it should not grant such relief absent a showing based on competent evidence that justice requires it. *Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E. 2d 148, *cert. denied*, 291 N.C. 176 (1976). This showing simply does not appear from the evidence presented in the instant case.

Accordingly, the trial court erred in concluding, as a matter of law, that defendant was entitled to have the default judgment set aside. The order vacating said judgment is reversed.

Reversed.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOHN HARVEY PASCHAL

No. 7725SC759

(Filed 7 February 1978)

Searches and Seizures § 18— officer's threat to impound vehicle—no duress—search pursuant to defendant's consent

Where an officer, upon observing a strong odor of marijuana coming from defendant's car and a roach clip, roller papers and a marijuana cigarette in the ashtray, had probable cause to search defendant's car, the officer's threat to impound the car was a threat to take action fully authorized by law; therefore, the officer's threat to impound defendant's car did not constitute duress and negate the voluntary character of defendant's consent to search.

APPEAL by defendant from *Snepp, Judge*. Order entered 14 March 1977 in Superior Court, CATAWBA County. Heard in the Court of Appeals 19 January 1978.

Defendant was indicted for felonious possession of marijuana and felonious possession with intent to sell and deliver marijuana. Prior to trial, defendant moved to suppress evidence obtained as a result of a warrantless search.

At the hearing on the motion to suppress, evidence for the State tended to show that Officer Charles W. Costner of the Hickory Police Department stopped defendant for driving with a burned-out taillight. Upon approaching the vehicle and talking to the defendant, Officer Costner noticed a strong odor of marijuana coming from the car. He also observed a roach clip, roller paper and a portion of what was, in his opinion, a burned marijuana cigarette. He then asked the defendant to step from the car and asked the defendant if he could search the vehicle. Officer Costner informed the defendant that he could refuse to consent to the search, limit the search, or withdraw his consent to search at anytime. He also informed the defendant that if he did not consent to a search, that he would impound his vehicle while he went before the magistrate to obtain a search warrant. Defendant then gave his consent to search. Before Officer Costner began the search, the passenger got out and handed the officer a bag containing marijuana and was put under arrest. By this time, a second officer had arrived at the scene and the passenger was placed in the other officer's car. Officer Costner repeated his request to search in the presence of the other officer and also advis-

ed the defendant of his rights. Defendant again consented to the search. Officer Costner told defendant he would have to pat down his person for possible weapons and because he did not want any evidence destroyed. The pat down search resulted in the seizure of a plastic bag containing four tablets. Officer Costner searched the interior and trunk of the stopped vehicle and found a large plastic bag containing 11 smaller plastic bags of marijuana. He then placed defendant under arrest.

Defendant's evidence at the hearing tended to show that he did not have an ashtray in the front section of his car and that the interior light was burned out. His evidence also tended to show that the officer stated that he did not have a search warrant, but he did have a right to impound defendant's car and if defendant refused to consent to the search, that he would hold the car until he obtained a warrant.

The Court found "that the search of the vehicle was made pursuant to permission given by the defendant and that the pat down of defendant's person was reasonable under the circumstances." Defendant's motion to suppress evidence obtained by the search was denied.

Defendant tendered pleas of no contest to the felony charges and was sentenced to 18 months imprisonment. Defendant entered notice of appeal pursuant to G.S. 15A-979(b).

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis, for the State.

J. Bryan Elliott, for the defendant appellant.

WEBB, Judge.

Defendant by this appeal questions the legality of the search of his automobile and the search of his person. We will not discuss or decide whether the "frisk" search of defendant's person violated any of his rights since the defendant was not charged with illegal possession of the materials found on his person.

The sole question before this Court is whether the consent to search was voluntary or coerced. Defendant does not dispute that "a law enforcement officer may conduct a search and make seizures, without a search warrant or other authorization, if consent to the search is given." G.S. 15A-221(a). Defendant contends,

however, that the consent given was not "freely and intelligently given, without coercion, duress, or fraud . . . ." *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971).

In support of his contention, defendant argues that the threat by Officer Costner to impound his vehicle constituted duress and negated the free and voluntary requirement of a valid consent. We do not believe that a threat to do what the officer had a legal right to do can constitute duress in the setting of this case. "As a general rule, it is not duress to threaten to do what one has a legal right to do. Nor is it duress to threaten to take any measure authorized by law and the circumstances of the case." 25 Am. Jur. 2d, Duress and Undue Influence, § 18, p. 375. The United States Supreme Court has held that impoundment of a vehicle while a law enforcement officer obtains a warrant is a legal alternative to a warrantless search. *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970), *see also State v. Ratliff*, 281 N.C. 397, 189 S.E. 2d 179 (1972). As stated by the Court in *Chambers v. Maroney, supra:*

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."
>
> 399 U.S., at 52

Under the facts of this case, Officer Costner had probable cause to search defendant's car after he observed a strong odor of marijuana coming from the car and a roach clip, roller papers and a marijuana cigarette in the ashtray. Since Officer Costner had probable cause to search defendant's car, his threat to impound the car was a threat to take action fully authorized by law. Therefore, we hold that Officer Costner's threat to impound defendant's car did not constitute duress and negate the voluntary character of defendant's consent to search.

Defendant's second contention that the second consent was given only after the passenger in the vehicle had been arrested and a second police officer had arrived on the scene, and was therefore a product of duress does not merit discussion.

We find no error in denying defendant's motion to suppress the evidence obtained by this search.

Affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. LAWRENCE FREDRICK COLLINS, JR.

No. 7719SC760

(Filed 7 February 1978)

1. Homicide § 30.3— involuntary manslaughter—sufficiency of evidence

The evidence was sufficient to raise an inference that decedent's death resulted from defendant's reckless or wanton use of a firearm and to support defendant's conviction of involuntary manslaughter where there was evidence tending to show that decedent refused to leave a tavern owned by defendant when requested to do so; while decedent engaged in an argument with a co-owner, defendant obtained a gun from beneath the bar; when decedent jumped up from his chair, defendant raised his hand in which he held the gun; decedent grabbed defendant's hand and the gun discharged; and defendant did not know a shell had been chambered in the gun and intended only to strike decedent with the gun.

2. Homicide § 15— involuntary manslaughter—evidence bolstering defense of accident

In a prosecution for the involuntary manslaughter of a customer in defendant's tavern, the trial court erred in the exclusion of testimony by defendant's witness that, approximately two months before the shooting, he chambered a round in the gun used by defendant, which was kept under the tavern bar, and left the gun half-cocked, since the excluded testimony tended to bolster defendant's claim that he was unaware that the gun had a shell "chambered," tended to explain why the gun would discharge in view of defendant's testimony that he did not have his finger on the trigger and intended only to strike deceased with the gun and not to fire it, and was thus relevant on the issue of whether defendant's use of the gun under the circumstances was reckless and wanton.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 5 May 1977 in Superior Court, ROWAN County. Heard in the Court of Appeals 19 January 1978.

The defendant was charged in a proper bill of indictment with the murder of Robert V. Honeycutt, Jr. Upon the defend-

ant's plea of not guilty, the State offered evidence tending to show the following:

The defendant, Lawrence Fredrick Collins, Jr., is the co-owner of "The Tavern," a bar located in Spencer, North Carolina. On the evening of 27 November 1976 the deceased, Robert Honeycutt, accompanied by a friend, went to defendant's bar to drink beer. The waitress at the bar informed them that because of a previous disturbance caused by Honeycutt, she would not sell them any beer. The two men became loud and boisterous and walked over and sat at a table with three girls. The waitress telephoned Hugh Sloop, the defendant's co-owner, and, at her insistance, Sloop and the defendant came to the bar. Immediately upon their arrival at the bar, Sloop walked over to the table where Honeycutt was sitting and told him that he would have to leave. The defendant walked behind the bar and then joined Sloop at Honeycutt's table. Honeycutt, refusing to leave the bar, jumped up from his chair. At this time the defendant raised his hand in which he held a gun, and the gun discharged, wounding Honeycutt in the head. Honeycutt died eleven hours later.

The defendant offered evidence tending to show the following: When the defendant arrived at "The Tavern" responding to the waitress' plea for assistance, he walked across the room to the bar to get a gun which was maintained by the cash register. The defendant had directed on previous occasions that the gun was never to be loaded and was to be used only to scare disruptive patrons. Without examining the gun to determine if it was loaded, the defendant placed it in his hip pocket and joined Sloop at Honeycutt's table. As the defendant got to the table, Honeycutt, who was arguing with Sloop stood up and pushed Sloop. He then grabbed the defendant on the left arm. The defendant reached into his pocked with his right hand and pulled the gun out intending to hit Honeycutt on the head. Honeycutt grabbed the defendant's hand and the gun; a struggle ensued, and the gun discharged, fatally wounding Honeycutt.

The jury found the defendant guilty of involuntary manslaughter. From a judgment imposing a sentence of 6 to 8 years imprisonment, defendant appealed.

Attorney General Edmisten, by Associate Attorney Henry H. Burgwyn, for the State.

Gray and Whitley, by J. Stephen Gray; Weeks, Muse & Surles, by Cameron S. Weeks and T. Chandler Muse, for the defendant appellant.

HEDRICK, Judge.

[1] Defendant first assigns as error the trial court's denial of his motion for judgment as of nonsuit. The defendant was convicted of involuntary manslaughter. Involuntary manslaughter is the unintentional killing of a human being caused by the defendant's culpable negligence. *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969). Our Supreme Court has recognized that

> with few exceptions . . . every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter. [Citations omitted.]

State v. Foust, 258 N.C. 453, 459, 128 S.E. 2d 889, 893 (1963). *See also Quick v. Insurance Co.*, 287 N.C. 47, 213 S.E. 2d 563 (1975); *State v. Crews*, 284 N.C. 427, 201 S.E. 2d 840 (1974). When the evidence is viewed most favorably to the State, it is sufficient to raise an inference that Honeycutt's death proximately resulted from the defendant's reckless or wanton use of a firearm. The case was properly submitted to the jury on the lesser-included offense of involuntary manslaughter. *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971).

[2] The defendant also contends that the trial court committed prejudicial error in its exclusion of a portion of the testimony of defense witness Bill Yates. On direct examination Yates testified that he knew both the defendant and the deceased, and that he had seen the pistol which fired the shot killing Honeycutt in September of 1976. Yates was then asked the following question: "What was the occasion for seeing the weapon at that time?" The State objected to the question and its objection was sustained. If the witness had been allowed to answer the question, he would have responded as follows:

That the 32 caliber pistol was kept under the bar at the cash register, and that at the latter part of August or the first part of September, 1976, I was going to be an employee of "The Tavern". I was with Miss Denton when she showed me the place. She told me about the pistol. I examined it, and chambered a round. Several days later, the same week, first night I worked at "The Tavern", I asked Miss Denton, if she knew how to use the gun. We were in the place by ourselves, and she told me she didn't know how to use it, as she was afraid to use it. I then told her that I would show her how to use the weapon, as she might need it sometime. I took the clip out first, ejected the cartridge that was in the chamber, and unloaded the clip. There were four shells in the gun. I took three out of the clip and laid them on the counter. I put the clip back on the gun, and gave it to Miss Denton to see if she could chamber a round. She could not. I put the four cartridges back into the clip, and put the clip back into the gun, then I chambered a round. I left the hammer cocked, and I eased off on the trigger, so that all Miss Denton would have to do would be to pick up the gun, pull the hammer back, and pull the trigger, and it was ready to fire. I subsequently saw the gun the following night, and didn't see it again until today. I figured that the pistol had been left the way I left it, because she was afraid of the gun. She and Miss Owen were the only two employees working at "The Tavern" at that time.

The defendant argues that the excluded testimony was relevant and material to his defense that his conduct under the circumstances was justified and was not reckless or wanton.

We agree that the excluded testimony of Yates was relevant and material to defendant's defense. This testimony tends to bolster defendant's claim that he was unaware that the gun had a shell "chambered." Furthermore, Yates' testimony that he left the gun half-cocked tends to explain why the gun would discharge in view of defendant's testimony that he did not have his finger on the trigger and intended only to strike the deceased with the gun and not to fire it. The excluded testimony is relevant to the issue of whether defendant's use of the gun under the circumstances was reckless and wanton.

The State argues that the testimony was too remote to be of probative value. We do not agree. Under the circumstances the interval between the time Yates chambered the shell and left the gun half-cocked and the time of the shooting goes to the weight to be given the testimony and not to its competency. *State v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506 (1965).

We hold that the court erred to defendant's prejudice by excluding Yates' testimony. Defendant has additional assignments of error which we need not discuss since they are not likely to occur again.

New trial.

Judges BRITT and WEBB concur.

DOUGLAS B. GRANT v. EMMCO INSURANCE COMPANY

No. 7711SC231

(Filed 7 February 1978)

Insurance § 72— collision insurance—replacement vehicle—insufficiency of complaint

Plaintiff's complaint was insufficient to show that a leased International tractor was a "replacement" vehicle within the purview of a collision insurance policy covering a Ford tractor owned by plaintiff and newly acquired vehicles "replacing" the covered vehicle where it alleged that while plaintiff was operating his Ford tractor it malfunctioned, and that as a result of the malfunction plaintiff leased the International tractor, but there was no allegation that the malfunction was sufficient to keep the Ford off the highway or to render it incapable of suffering damage from collision.

Judge WEBB dissents.

APPEAL by plaintiff from *Gavin, Judge*. Judgment entered 24 January 1977 in Superior Court, HARNETT County. Heard in the Court of Appeals 19 January 1978.

In his complaint plaintiff alleges that on 2 April 1975 he entered into an insurance contract with defendant through its agent, Ed Cox of Plaza Insurance Agency; that the contract (policy) covered collision damages to a 1973 Ford tractor owned by plaintiff and any substitute vehicle; that a malfunction oc-

curred in the Ford tractor on 9 June 1975 after which plaintiff leased a 1974 International tractor from Wilson Truck Rentals, Inc. (Wilson), to provide him with a substitute vehicle; that plaintiff advised Wilson that the International tractor was covered by plaintiff's collision policy with defendant; that on 16 June 1975 a collision occurred causing damages in the amount of $10,478.97 to the International tractor; that plaintiff is obligated to Wilson for that amount; and that plaintiff has demanded that amount from defendant who refuses to pay.

In its answer defendant admitted issuance of the policy but asserted as a further defense that the International tractor was not covered by the policy; defendant further asserted that the complaint fails to set forth a cause of action against defendant for which relief can be granted.

Several months later defendant renewed its motion to dismiss the complaint for failure to state a claim. Following a hearing the motion was allowed and the action was dismissed.

Plaintiff appealed.

Morgan, Bryan, Jones, Johnson, Hunter & Greene, by K. Edward Greene, for plaintiff appellant.

McLean, Stacy, Henry & McLean, by Everett L. Henry, for defendant appellee.

BRITT, Judge.

Plaintiff assigns as error the allowance of defendant's motion to dismiss his action. We find no merit in the assignment.

Plaintiff argues first that the allegation in his complaint that there was an agreement between him and an agent of defendant that the insurance would cover a substitute vehicle is sufficient to survive a motion to dismiss. Assuming this argument would be valid in any case, we do not think it is valid under the allegations of the complaint in this case.

Paragraphs 3 and 4 of the complaint are as follows:

> 3. That on or about April 2, 1975, the plaintiff entered into a contract with the defendant, through its authorized agent, Ed Cox of Plaza Insurance Agency, Rockingham, North Carolina, wherein and whereby it was agreed between

the parties that a policy of insurance would be issued protecting the plaintiff from collision damage caused to a 1973 Ford Tractor owned by the plaintiff and any substitute vehicle.

4. That the policy number of the policy hereinabove referred to was 166-52-1569, a copy of the contract being attached hereto and marked "Exhibit A".

In view of said paragraphs, plaintiff's claim is limited to the provisions of the policy referred to in Paragraph 4. Said policy defines "covered automobile" as:

"a land motor vehicle, trailer or semitrailer including its equipment and other equipment permanently attached thereto (but not including robes, wearing apparel or personal effects), which is either

(a) designated in the declarations, by description, as a covered automobile to which this insurance applies and is owned by the named insured; or

(b) if not so designated, such vehicle is newly acquired by the named insured during the policy period provided, however, that:

(i) it replaces a described covered automobile, or as of the date of its delivery this insurance applies to all covered automobiles, and

(ii) the named insured notifies the company within 30 days following such delivery date."

It is clear from the complaint that plaintiff's 1973 Ford tractor was the vehicle specifically covered under the policy since it was designated by description in the declarations of the policy. For the International tractor to be covered, it would have to comply with policy provisions (b)(i) quoted above and be a vehicle "newly acquired" by plaintiff and a vehicle *replacing* the Ford tractor.

Plaintiff alleges that he *leased* the International tractor. We do not reach the question whether a *leased* vehicle is a *newly acquired* vehicle within the meaning of the policy for the reason that we do not think that the complaint sufficiently alleges that the International *replaced* the Ford.

In Paragraph 5, plaintiff alleges that while he was operating his Ford tractor a malfunction occurred in said Ford, and as a result of the malfunction he leased the International tractor. There is no allegation that the malfunction was sufficient to keep the Ford off the highway or to render it incapable of suffering damage from collision. Clearly, the intent of the policy is that only one vehicle would be insured at any given time.

In his brief plaintiff alludes to "his understanding" with Ed Cox, defendant's alleged agent, but there is no *allegation* of any representation by defendant or its agent except as set forth in the policy.

Plaintiff argues next that the language in the policy relating to a substitute vehicle is ambiguous, therefore, judgment on the pleadings was not warranted. We find this argument unpersuasive. Plaintiff's argument on this point is directed primarily at the newly acquired provision of the policy. As stated above, we do not reach the point of interpreting "newly acquired" as we do not think the complaint sufficiently alleges that the International *replaced* the Ford.

We hold that the court did not err in allowing defendant's Rule 12(b) motion to dismiss the action on the pleadings.

Affirmed.

Judge HEDRICK concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority opinion. I believe that the terms of the insurance policy are sufficiently ambiguous so that the action should not have been dismissed under Rule 12(b).

As I read the policy, the International tractor leased by the plaintiff might have been a "newly acquired" vehicle which "replaced" the Ford tractor which had been damaged. For this reason, I vote to reverse the judgment of the superior court.

STATE OF NORTH CAROLINA v. EDDIE COLLINS ALIAS DANNY K. McGREW

No. 7712SC739

(Filed 7 February 1978)

1. **Robbery § 3.2— defendant's clothing—competency to show identity**

In a prosecution for armed robbery, the trial court did not err in allowing evidence relating to the clothing defendant was wearing at the time of his arrest, since the evidence was relevant in identifying defendant, and it was not necessary that the victim give testimony positively identifying the clothing as that worn by the robber, only that it was similar.

2. **Criminal Law §§ 34.4, 46.1— defendant's flight—shoot out with officer—admissibility of evidence**

The trial court in an armed robbery case did not err in admitting evidence of a "shoot out" between defendant and a deputy sheriff which occurred when defendant attempted to flee, since such evidence was competent as tending to show guilt, and was admissible to show identity of the defendant.

3. **Robbery § 4.3— armed robbery—sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for armed robbery where it tended to show that a grocery store employee was robbed; the victim identified items of clothing worn by defendant at the time of his arrest as similar to those worn by one of the robbers; and defendant fled from officers and fired on them when they pursued him shortly after the robbery.

APPEAL by defendant from *Herring, Judge.* Judgment entered 6 April 1977 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 17 January 1978.

In a bill of indictment proper in form, defendant was charged with (1) the armed robbery of Janet Koonce on 10 September 1976 and (2) on the same date, assaulting Deputy Sheriff Jerry D. Maxwell with a firearm.

Prior to the trial defendant moved to suppress as evidence certain clothing belonging to him and the State moved to join the two offenses for trial. On 10 February 1977 Judge Godwin entered an order dismissing defendant's motion to suppress the evidence and thereafter he denied the State's motion for a joint trial of the offenses.

Defendant pled not guilty.

Evidence presented by the State tended to show:

At 11:20 a.m. on 10 September 1976, while Janet Koonce was working alone at Koonce's grocery, two white men entered the store carrying guns. One of the men was short and stocky, was wearing a dark blue windbreaker, blue pants, dark brown gloves with an index finger cut out, and a dark colored ski mask with designs of different colors and with the eyes cut out. The other man was tall and slender and was wearing a dark shirt, blue jeans and sunglasses. At gunpoint the men took money from the cash register, a gray money box and a pack of Salem cigarettes. Ms. Koonce went back into the stock room and heard the men leaving the store. She looked out the window and saw a green 1972 Chevrolet Nova parked on the side of the road. She then saw the two robbers run to the car, get in and ride off with a third man. Ms. Koonce immediately telephoned the sheriff's department and reported the incident, giving a description of the men and the automobile and identifying the road on which they were traveling.

Soon thereafter Officer Semel drove up behind the green Nova, turned on his blue lights and sirens and followed the vehicle. Other officers joined the chase. While Officer Maxwell was attempting to stop the Nova he observed a pair of brown gloves thrown from the car. Before the Nova stopped, the right passenger door opened and defendant, a short, stocky individual wearing a dark colored windbreaker and Levis, got out of the car carrying a shotgun and metal box and ran away. After chasing defendant the officers found him on a porch with a bullet wound in his leg and they later found a .12 gauge shotgun with two live rounds in it. One of the officers found a ski mask in the area of the arrest and another found a gray metal money box.

When defendant jumped out of the automobile and ran, he dropped a brown paper bag containing money. While Maxwell was chasing defendant, they exchanged shots. Maxwell recovered the money from the brown paper bag and the gloves which were thrown from the vehicle. Another officer removed a pair of sunglasses from the automobile and also a pack of Salem cigarettes and a pair of gloves with one of the index fingers cut out.

Ms. Koonce identified, among other things, the shotgun recovered by the officers as being "just like the one the masked man was carrying"; the ski mask they recovered as being the same type as that worn by the short robber; the brown gloves with one of the index fingers cut out and found in the automobile

as being just like the ones worn by the short robber; and the gray metal box and contents recovered by the officers as being property of Koonce's grocery taken by the robbers.

Defendant offered no evidence.

The jury found defendant guilty of armed robbery as charged and from judgment imposing prison sentence of not less than 40 nor more than 50 years, he appealed.

Attorney General Edmisten, by Associate Attorney Marilyn R. Rich, for the State.

Ammons & Flora, by Fred L. Flora, Jr., for defendant appellant.

BRITT, Judge.

[1] Defendant contends first that the court erred in denying his motion to suppress evidence relating to the clothing he was wearing at the time of his arrest. There is no merit in this contention.

Clothing worn by a person while in custody under a valid arrest may be taken from him for examination, and, when otherwise competent, the clothing may be introduced into evidence at the trial. *State v. Dickens*, 278 N.C. 537, 180 S.E. 2d 844 (1971). The evidence was competent in this case if it was relevant. Evidence is relevant if it has any logical tendency to prove the fact in issue. 1 Stansbury's N.C. Evidence § 77 (Brandis Rev. 1973). In this case the evidence was relevant in identifying defendant. Under the facts in this case it was not necessary that the victim give testimony positively identifying the clothing as that worn by the robber, only that it was similar. We hold that the evidence was properly admitted.

[2] Defendant contends next that the trial court erred in admitting evidence of a "shoot out" between him and Deputy Sheriff Maxwell. He argues that evidence of the altercation with Maxwell was not relevant to the issues in this case and that the sole effect of the evidence was to inflame the jury to his prejudice. We find no merit in this contention.

It is well settled that evidence of flight by a defendant after a crime has been committed is competent as tending to show guilt. 4 Strong's N.C. Index 3d, Criminal Law § 46. For a defend-

ant, while fleeing from police, to turn and shoot at them, we think is a stronger indication of guilt than the flight itself. We also think the evidence was admissible to show identity of the defendant. *See Ibid* § 34.5. If the evidence tending to show the commission of another offense by the defendant reasonably tends to prove a material fact in issue in the case being tried, the evidence will not be rejected merely because it incidentally shows that defendant is guilty of another crime. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). We hold that the evidence complained of was admissible.

We find no merit in defendant's contention that the court erred in admitting into evidence State's Exhibits 1 through 10. These exhibits, consisting of defendant's clothing, a gun, ski mask, metal box, etc., were sufficiently identified and were relevant to the issues being tried. *State v. Patterson*, 284 N.C. 190, 200 S.E. 2d 16 (1973).

[3] Defendant's contention that the court erred in denying his motion for nonsuit is without merit. His argument on this contention is based primarily on the premise that the court erred in admitting the evidence hereinabove discussed and that without that evidence the State did not make out a case. Having held that the challenged evidence was properly admitted, we now hold that the evidence presented was more than sufficient to survive the motion for nonsuit.

Defendant contends next that the court erred in certain of its instructions to the jury. We note first that defendant did not comply with Rule 10 of the Rules of Appellate Procedure (287 N.C. 671, 698, 699) in noting exceptions to the portions of the charge he challenges. Nevertheless, we have reviewed the charge, with particular regard to the portions complained of, and conclude that the charge is free from prejudicial error.

We have considered the other contentions argued in defendant's brief but conclude that they too are without merit.

In defendant's trial and the judgment appealed from, we find

No error.

Judges HEDRICK and WEBB concur.

SARA COZART AND T. MORRIS COZART v. MARVIN E. CHAPIN, D.D.S.

No. 7710SC200

(Filed 7 February 1978)

Husband and Wife § 9— action for loss of consortium

A married man cannot maintain an action for loss of consortium when his wife is negligently injured by another; nor does he have a right of action for loss of consortium when injuries to the wife are intentionally inflicted unless the wrongful conduct directly and intentionally deprived the husband of the consortium of the wife.

APPEAL by plaintiff T. Morris Cozart from *Braswell, Judge.* Order entered 17 January 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 16 January 1978.

The *feme* plaintiff instituted this action against defendant, a practicing dentist in Raleigh, for injuries sustained as a result of the negligence of defendant in his diagnosis and treatment of the *feme* plaintiff. As an alternative theory of action, the *feme* plaintiff sought to recover for injuries resulting from an assault and battery upon her person arising out of defendant's treatment.

In conjunction with the *feme* plaintiff's action, the male plaintiff T. Morris Cozart, husband of the *feme* plaintiff, filed a claim for loss of *consortium* flowing from the injuries sustained by the *feme* plaintiff as a result of the alleged, tortious conduct of defendant.

Defendant filed answer denying liability, and moved to dismiss the complaint of plaintiff husband pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. The trial court granted the motion. Plaintiff husband appeals from the trial court's ruling dismissing his claim.

Crisp, Bolch, Smith, Clifton & Davis, by Joyce L. Davis, for the plaintiff.

Smith, Anderson, Blount & Mitchell, by James D. Blount, Jr., for the defendant.

MARTIN, Judge.

The question posed by this appeal is whether a married man can maintain an action to recover damages for loss of *consortium*

when his wife is negligently injured by the tortious conduct of another.

In the instant case, facts alleged in the pleadings show that the *feme* plaintiff engaged the professional services of defendant for the removal of an impacted wisdom tooth on the lower right side of her mouth. Defendant injected anesthesia in the lower left side of the mouth and upon making an incision on the left side, realized that there was no impacted wisdom tooth on that side. He subsequently anesthesized the lower right side of the *feme* plaintiff's mouth and extracted the tooth. As a result of the injection on the left side, which allegedly struck and damaged a nerve, the *feme* plaintiff now suffers severe paralysis in her lower lip and experiences a numbing and tingling sensation in her lower lip upon any contact therewith.

The trial court dismissed plaintiff husband's action as a matter of law for failure to state a claim upon which relief could be granted. We are constrained to agree with the trial court's ruling.

In *Helmstetler v. Power Co.*, 224 N.C. 821, 32 S.E. 2d 611 (1945), our Supreme Court confronted the precise question before this Court in the instant case and held that when a married woman is negligently injured by the tort of another, her husband cannot maintain an action to recover damages for loss of *consortium*. That Court relied on *Hinnant v. Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925)—a decision denying a married woman's cause of action for loss of *consortium* due to her husband's negligent injury—in which the Court held that no cause of action for loss of *consortium* survived the transfer effected by the Married Woman's Act of a husband's common law right of action to recover for his wife's services. In the face of this mandatory authority—upon which the trial court presumably relied—plaintiff husband vigorously contends that this Court should recognize his right of action. This we cannot do. However compelling the reasons may be to re-examine the accepted law of this State, it is not the province of this Court to overrule decisions of the Court of last resort deliberately rendered after ample consideration.

In the alternative, plaintiff husband contends that our courts have recognized a spouse's right of action for loss of *consortium* where the injuries to his spouse were *intentionally* inflicted. Thus, plaintiff husband argues that his claim is allowable as flow-

ing from the *feme* plaintiff's alternative allegation of assault and battery. We do not believe plaintiff husband's position is supported by the *Hinnant* case upon which he relies. Speaking to the right of action for loss of *consortium* where injuries have been intentionally inflicted, the Court in *Hinnant* held that such right of action existed only when the wrongful conduct directly and intentionally deprived the husband or wife of the *consortium* of the other spouse. The wrongful conduct in the instant case does not satisfy this requirement. In support of this interpretation of the holding in *Hinnant*, we cite language appearing therein upon which that Court relied:

> " 'No case has been brought to our attention, and after an extended examination we have found none, in which an action for a loss of consortium alone has been maintained merely because of an injury to the person of the other spouse, for which the other has recovered, or is entitled to recover, full compensation in his own name, when the only effect upon the plaintiff's right of consortium is that, through the physical or mental disability of the other, the companionship is less satisfactory and valuable than before the injury.' "

Accordingly, we hold that under the existing law of this State, plaintiff husband has failed to state a claim for which relief can be granted.

The ruling of the trial court dismissing plaintiff husband's claim is

Affirmed.

Judges PARKER and ARNOLD concur.

E. L. BROWN v. PROVIDENT LIFE & CASUALTY INSURANCE COMPANY, A CORPORATION

No. 7725SC202

(Filed 7 February 1978)

1. Insurance § 43.1— hospitalization policy—exclusion of work related injury

Plaintiff was not entitled to coverage under an insurance policy which excluded coverage for "treatment of bodily injuries arising from or in the course

of any employment" where the evidence tended to show that plaintiff was self-employed; his accident occurred when he was standing near a truck containing boards used in plaintiff's business enterprise; though plaintiff had not moved the truck or the boards, he was standing beside the truck to determine where he would move it to unload the boards; and at the time of the accident, plaintiff had left his home and had begun another day's work.

2. **Insurance § 6.3— policy construed favorably to insured—limitation—unambiguous language**

The rules requiring an insurance policy to be construed favorably to the insured and against the insurer apply only where the language of the policy is ambiguous or reasonably susceptible to two interpretations.

3. **Insurance § 43.1— hospitalization policy—exclusion of work related injury—strict construction**

An exclusion in an insurance policy which denied recovery for injuries arising "from or in the course of any employment" should not be construed to deny benefits under the policy only where there was other insurance coverage, including Workmen's Compensation.

APPEAL by plaintiff from *Snepp, Judge.* Order entered 25 January 1977 in Superior Court, CALDWELL County. Heard in the Court of Appeals 16 January 1978.

Plaintiff, who was insured under a hospitalization policy issued by defendant, instituted this civil action to recover benefits under the policy for medical and hospital costs incurred as a result of an accident.

The case was decided by the court on the parties' joint motion for summary judgment. In their motion, the parties stipulated to the following facts: Plaintiff, who was self-employed, was in the business of making and selling wooden skids. Plaintiff's procedure for making the skids was to cut his own timber, operate his own sawmill to convert the timber into boards, and then take the boards to Pine Mountain Lumber Company where the boards were cut into various lengths.

On 24 March 1976, plaintiff took a load of boards in his brother's truck to Pine Mountain Lumber Company, and he returned home the same evening with various lengths of boards arranged into bundles, each bundle being wrapped with two metal bands. The loaded truck was parked overnight outside plaintiff's residence. The following morning at approximately 8:15 a.m., the accident occurred:

6. . . . [P]laintiff left his residence and came to stand beside this truck to determine where he would move the truck to unload the boards, not yet having made any effort to unload those boards.

7. His brother, Ken Brown, also came to stand directly behind the truck also not having made any effort to unload the boards on the truck.

8. Ken Brown then yelled to his brother, the plaintiff, "look out" as the bands on a bundle of the 36-inch boards broke and fell onto plaintiff, causing serious injury from which he was hospitalized and received medical treatment.

The court concluded that plaintiff was not entitled to recover benefits under the insurance policy and granted summary judgment in favor of defendant, thereby dismissing the action. Plaintiff appeals.

Bryce O. Thomas, Jr., for plaintiff appellant.

Townsend, Todd and Vanderbloemen by William S. Respass, Jr., for defendant appellee.

PARKER, Judge.

[1] Plaintiff's insurance policy contained a clause excluding coverage "for treatment of bodily injuries arising from or in the course of any employment." The sole question presented by this appeal is whether plaintiff's injuries arose "from or in the course of" his employment.

Plaintiff was self-employed, and the stipulated facts clearly show that he had begun the performance of the duties of his job. The boards were plaintiff's stock in trade, and the borrowed truck was being used as an essential part of his business enterprise. At the time of the accident, plaintiff had left his home and had begun another day's work. Although he had not actually moved the truck or the boards, plaintiff was "stand[ing] beside this truck to determine where he would move the truck to unload the boards" when the accident occurred.

[2, 3] In his brief, plaintiff does not contend that he was not engaged in the performance of the duties of his job at the time of the accident. Instead, relying on cases holding that insurance

policies should be construed favorably to the insured, plaintiff argues that the purpose of the exclusion was to avoid double coverage with the North Carolina Workmen's Compensation Act and that the exclusion should therefore be construed to deny benefits under the policy only where the employer is required to provide coverage under the Workmen's Compensation Act. However, the rules requiring an insurance policy to be construed favorably to the insured and against the insurer apply only where the language of the policy is ambiguous or reasonably susceptible to two interpretations. An insurance policy is subject to the same rules of interpretation applicable to contracts generally, and where unambiguous terms are used, "they will be interpreted according to their usual, ordinary, and commonly accepted meaning." *Motor Co. v. Insurance Co.*, 233 N.C. 251, 254, 63 S.E. 2d 538, 541 (1951). The meaning of the exclusion is clear. It denies recovery for injuries arising "from or in the course of any employment." The application of this exclusion does not depend upon the existence of any other form of insurance coverage, including Workmen's Compensation, and the trial court correctly ruled that plaintiff was not entitled to recover on the policy.

Affirmed.

Judges MARTIN and ARNOLD concur.

GERTRUDE JEFFERS HARRISON v. BETTY BURNETT HERBIN

No. 7718DC91

(Filed 7 February 1978)

Attorneys at Law § 7.5— denial of attorney's fees

The trial court did not abuse its discretion in refusing to award attorney's fees pursuant to G.S. 6-21.1 to the successful plaintiff in an action to recover for damages to plaintiff's automobile where the jury awarded plaintiff $250 and defendant's insurance carrier had offered to settle plaintiff's claim for $200.

APPEAL by plaintiff from *Washington, Judge.* Judgment entered 8 September 1976 in District Court, GUILFORD County. Heard in the Court of Appeals 16 November 1977.

The appeal in this case arises from the trial judge's denial of the plaintiff's motion for attorney fees pursuant to G.S. 6-21.1 after the jury had returned a verdict in favor of the plaintiff in the amount of $250.00. The lawsuit which resulted in said verdict arose from an automobile collision between plaintiff and defendant. Plaintiff contended that defendant backed her car into the front of plaintiff's car while the two were waiting for a train to pass, thus causing $500.00 damage to plaintiff's vehicle. Defendant claimed that plaintiff was at fault and counterclaimed for $650.00. The accident occurred on 3 May 1973.

Evidence gleaned from the exhibits submitted on appeal and from testimony at the hearing on the attorney's fee motion tends to show the following: On 17 July 1974, plaintiff's attorney, Max D. Ballinger, wrote defendant's liability carrier regarding the accident, and received no response prior to the filing of the complaint in this action on 28 May 1975. Thereafter, on 3 June 1975, defendant's liability carrier wrote to Mr. Ballinger disclaiming liability but offering a compromise settlement in the amount of 50% of the property damage, or $200.00, which offer was forwarded to plaintiff without any recommendation on the part of Mr. Ballinger. Defendant answered and counterclaimed. Mr. Ballinger filed numerous motions on behalf of plaintiff, and attended several pretrial conferences. After several postponements, the matter finally came on for trial before a jury at the 23 August 1976 session of Guilford District Court. The trial lasted three days, or portions thereof.

After the return of the jury with its verdict in favor of the plaintiff, Mr. Ballinger moved for an award of attorney's fees and presented evidence that, based upon the usual rate at which he charges clients, his bill to plaintiff would have been $1,864.00. However, under the fee arrangement between plaintiff and Mr. Ballinger (one-third contingent fee), plaintiff was not responsible to Mr. Ballinger for the above sum.

After hearing the testimony and arguments of counsel, the trial court denied plaintiff's motion for an award of attorney's fees. From this ruling, plaintiff appeals.

Max D. Ballinger, for plaintiff.

Henson & Donahue, by Daniel W. Donahue and Kenneth R. Keller, for defendant.

BROCK, Chief Judge.

Plaintiff contends that the trial judge abused his discretion in denying plaintiff's motion that attorney's fees be taxed against defendant in this action. Plaintiff argues that, as illustrated by questions asked by the trial judge during argument on the motion, the judge by denying the motion, apparently intended to penalize plaintiff for bringing her action in district court rather than in magistrate's court, for requesting a jury trial, for refusing to seek damages from her own insurance carrier, for refusing defendant's offer of settlement, and as being, in general, responsible for this litigation. We find no merit in plaintiff's arguments.

G.S. 6-21.1 authorizes the presiding judge, *in his discretion*, to allow a reasonable attorney fee for the successful party in a personal injury or property damage suit where the damage recovery is $2,000.00 or less. The rationale behind the statute was stated by our Supreme Court in *Hicks v. Albertson*, 284 N.C. 236, 239, 200 S.E. 2d 40, 42 (1973).

> "The obvious purpose of this statute is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim. In such a situation the Legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations."

It remains a fact, however, as set out in the express language of the statute, that the allowance of fees is in the discretion of the presiding judge. Upon examining the record in this case, we cannot say that the judge abused his discretion in denying the award of fees. Defendant's insurance carrier communicated an offer of settlement to plaintiff in the amount of $200.00, just $50.00 less than the ultimate damage award at trial. We perceive of no exercise of any unjustly superior bargaining power on the part of the defendant. While the statute is aimed at encouraging injured parties to press their meritorious but pecuniarily small claims, we do not believe that it was intended to encourage parties to refuse reasonable settlement offers and give rise to needless litigation by guaranteeing that counsel will, in all cases, be compensated.

Therefore we hold that plaintiff has shown no abuse of discretion by the trial judge. The judgment denying plaintiff's motion for an award of attorney fees is

Affirmed.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. DONALD LEE WILLIAMS

No. 7714SC781

(Filed 7 February 1978)

1. **Criminal Law § 143.5— probation revocation hearing—adjudication of guilt—challenge not permitted**

Defendant's contention that probation revocation proceedings should have been dismissed because the conviction upon which the probation judgment was based was "null and void" in that there was no showing that defendant's guilty pleas were voluntarily, understandingly and knowingly entered is without merit, since a defendant on appeal from an order revoking probation may not challenge his adjudication of guilt.

2. **Criminal Law § 143.10— probation revocation hearing—failure to pay fine and costs—sufficiency of evidence**

Where there was evidence that defendant failed to pay his fine and court costs which was a condition of his probation, and there was no evidence of defendant's inability to pay, the trial court's finding that defendant wilfully and without just excuse violated the conditions of the probation judgment is supported by the record.

APPEAL by defendant from *McKinnon, Judge*. Judgment entered 28 April 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 20 January 1978.

On 5 March 1976, defendant pleaded guilty to charges of driving while his license was revoked and driving while under the influence of alcohol. He was represented by court appointed counsel. A sentence of six months was suspended and defendant was placed on probation.

On 10 January 1977, the District Court found that defendant had violated the terms upon which the sentence was suspended and ordered that it be placed in effect. Defendant appealed to the Superior Court where the court found:

"1. That according to the records of the Clerk of Superior Court, Wake County, the defendant has paid only $50.00 into the office and is in arrears by the amount of $400.00. This is in violation of the special condition of probation which states that 'fine and costs payable at the direction of the probation officer.'

The Court finds that the defendant was during most of the period from March 5th, 1976 to the time of being arrested for probation violation gainfully employed and capable of paying more than $50.00 on the fine and costs ordered.

3. That on November 24, 1976 in the District Court, County, the defendant pled not guilty to driving while license permanently revoked (Case #76CR21490) and was represented by counsel. He received a twenty-four (24) months active sentence, suspended for five years and placed on probation for five years with a $500.00 fine and $27.00 court cost. This is in violation of the condition of probation which states that he shall 'violate no penal law of any state or the Federal Government and be of general good behavior.' "

The court then ordered that the suspension of the sentence be revoked and ordered the enforcement of the judgment of the District Court.

Attorney General Edmisten, by Associate Attorney George W. Lennon and Assistant Attorney General James Peeler Smith, for the State.

Loflin & Loflin, by Thomas F. Loflin III, for defendant appellant.

VAUGHN, Judge.

[1] Defendant's principal argument appears to be that the probation revocation proceedings should have been dismissed because the conviction upon which the probation judgment was based was "null and void" in that there is no showing that defendant's pleas of guilty were voluntarily, understandingly, and knowingly entered. The argument is without merit. The identical argument was made and answered in *State v. Noles*, 12 N.C. App. 676, 678, 184 S.E. 2d 409, 410 (1971), where the Court held that "[w]hen appealing from an order activating a suspended sentence, inquiries

are permissible only to determine whether there is evidence to support a finding of a breach of the conditions of the suspension, or whether the condition which has been broken is invalid." A similar argument was made in *State v. Cordon*, 21 N.C. App. 394, 397, 204 S.E. 2d 715, 717 (1974), *cert. den.*, 285 N.C. 592, 206 S.E. 2d 864, where this Court said that "[a] defendant on appeal from an order revoking probation may not challenge his adjudication of guilt."

[2] Defendant also contends that the Court erred in finding that he had violated one of the conditions of his suspended sentence by failing to pay his fine and costs as he was ordered to do. Defendant primarily argues that there was no factual finding that defendant has had the ability to comply with the judgment, and that there was no evidence that would have permitted such a finding. Although defendant testified at the hearing, he did not suggest to the court any reason for having failed to pay as required by the order.

> "If, upon a proceeding to revoke probation or a suspended sentence, a defendant wishes to rely upon his inability to make payments as required by its terms, he should offer evidence of his inability for consideration by the judge. Otherwise, evidence establishing that defendant has failed to make payments as required by the judgment may justify a finding by the judge that defendant's failure to comply was willful or was without lawful excuse." *State v. Young*, 21 N.C. App. 316, 320-21, 204 S.E. 2d 185, 187 (1974).

It should be noted that this Court in *Young* disapproved earlier statements found in *State v. Foust*, 13 N.C. App. 382, 185 S.E. 2d 718 (1972), which were relied upon and quoted by defendant in the present appeal. Since there was evidence that defendant had failed to pay as required by the judgment and no evidence of defendant's inability to pay, the finding that defendant wilfully and without just excuse violated the conditions of the probation judgment is supported by the record and must be affirmed.

We have considered defendant's other arguments and conclude that no error has been disclosed that requires us to disturb the judgment from which defendant appealed. It is, therefore, affirmed.

Affirmed.

Judges BRITT and ERWIN concur.

WILLIS B. ERVIN, AND ERVIN SPECIALTY CONTRACTING, INC., A NORTH CAROLINA CORPORATION v. BAXTER E. TURNER AND WIFE, BETH M. TURNER

No. 7719DC234

(Filed 7 February 1978)

Laborers' and Materialmen's Liens § 2— liability of wife on contract—issue of material fact

There was a genuine issue of material fact as to whether the feme defendant was a party to a contract between the plaintiffs and defendant husband for the construction of a house by plaintiffs on a lot owned by defendants as tenants by the entirety, and the trial court erred in entering summary judgment for the feme defendant in an action on the contract and in ordering that plaintiffs' notice of a claim of lien for labor and materials be stricken from the record, where feme defendant's affidavit stated that she was not a party to the contract, and plaintiffs' affidavits and exhibits were to the effect that the feme defendant participated in the negotiations culminating in an oral agreement that plaintiffs would build a house for defendants in accordance with a written "Detail Estimate," which included the services to be rendered and the cost allocated to each service, all phases of the construction were agreed upon, including materials, costs and workmanship, and the feme defendant participated in supervision of the construction.

APPEAL by plaintiffs from *Hammond, Judge.* Judgment entered 20 December 1976 in District Court, ROWAN County. Heard in the Court of Appeals 19 January 1978.

Civil action wherein plaintiffs seek to recover $3,039.29 allegedly owed on a building contract and to perfect a lien of that amount on real property owned by defendants Baxter E. Turner and Beth M. Turner as tenants by the entirety.

In their complaint the plaintiffs allege that the defendants "agreed orally" that the plaintiffs would build a house on the defendants' lot in accordance with the terms of a "Detail Estimate" furnished by the plaintiffs. The defendants filed an answer, after which the feme defendant filed a motion for summary judgment. In support of her motion the feme defendant submitted an affidavit which stated that she was not a party to the

contract between her husband and the plaintiffs. In opposition to the feme defendant's motion, plaintiffs filed affidavits setting out specific facts with respect to the feme defendant's participation in the negotiations culminating in an agreement that the plaintiffs would build a house for defendants on the latters' lot, and the feme defendant's participation in the supervision of the construction. The trial court entered summary judgment for the feme defendant and ordered that the plaintiffs' notice of claim of lien be stricken from the record. Plaintiffs appealed.

Ketner and Snider, by Glenn E. Ketner, Jr., and Robert S. Rankin, Jr., for plaintiff appellants.

Carlton, Rhodes & Thurston, by Gary C. Rhodes, for defendant appellee.

HEDRICK, Judge.

The plaintiffs contend that summary judgment for the feme defendant was improper because plaintiffs raised a genuine issue of material fact in their pleadings and affidavits in opposition to the feme defendant's motion.

It is elementary that for a valid contract to exist it is required that there be a meeting of the minds of the parties as to all essential terms, which " 'must be definite and certain or capable of being made so.' " *Horton v. Refining Co.*, 255 N.C. 675, 679, 122 S.E. 2d 716, 719 (1961). In the present case the pleadings and affidavits in support of and in opposition to the feme defendant's motion for summary judgment clearly reflect a genuine issue as to whether the defendant, Beth M. Turner, was a party to the contract between the plaintiffs and Baxter E. Turner for the construction of a house on the lot owned by defendants as tenants by the entirety. In support of her argument the feme defendant rests primarily upon our decision in *Leffew v. Orrell*, 7 N.C. App. 333, 172 S.E. 2d 243 (1970). In *Leffew*, this Court affirmed a judgment of involuntary nonsuit reasoning that "[n]o testimony was provided as to any agreement regarding the contract price of the house, when the house would be paid for, etc." The present case is clearly distinguishable since the essential terms to which the feme defendant allegedly agreed, including the services to be rendered and the cost allocated to each service, were included in the "Detail Estimate," which was drawn during

the negotiations and appended to the pleadings. Furthermore, the affidavits in opposition to feme defendant's motion state that all phases of the construction were discussed and agreed upon including the materials to be used, costs and workmanship.

We hold that the trial court erred in striking the notice of claim of lien filed by the plaintiffs and in entering summary judgment for feme defendant. The judgment is reversed, and the cause remanded to District Court for further proceedings.

Reversed and remanded.

Judges BRITT and WEBB concur.

BUELL THOMAS ALLEN v. WACHOVIA BANK AND TRUST COMPANY, N.A., ROBERT WALLACE HOWARD AND J. REID HOOPER

No. 773SC199

(Filed 7 February 1978)

1. **Appeal and Error § 6.2— order refusing to dismiss action—interlocutory order—no appeal**

   Order of the trial court refusing to dismiss plaintiff's action is an interlocutory order from which no right of immediate appeal lies.

2. **Abatement and Revival § 3; Rules of Civil Procedure § 52— motion to stay—failure to find facts—no request for findings—motion properly granted**

   The trial court did not abuse its discretion in allowing plaintiff's motion to stay the proceedings, though the trial court did not find that it would work a substantial injustice for the action to be tried by the court and that some other jurisdiction provided a convenient, reasonable and fair place of trial, since, absent a request for findings of fact to support his decision on a motion, the judge is not required to find facts, G.S. 1A-1, Rule 52(a)(2), and it is presumed that the judge, upon proper evidence, found facts to support the judgment.

APPEAL by defendants from *Ervin, Judge*. Order entered 28 January 1977, in Superior Court, PITT County. Heard in the Court of Appeals 16 January 1978.

On 16 July 1976, plaintiff, a former employee of defendant Wachovia Bank and Trust Company, N.A. (hereinafter Wachovia), brought suit in United States District Court for the Eastern

District of North Carolina against Wachovia and two of its officers, Robert Wallace Howard and J. Reid Hooper. He alleged that he was wrongfully discharged from employment with Wachovia and he set forth three claims for relief: (1) slander and libel; (2) violation of the Federal Employee Retirement Income Security Act of 1974 (ERISA), and (3) malicious prosecution and false imprisonment. On 10 August 1976, plaintiff brought a similar action against the same defendants in Superior Court of Pitt County.

In the State action, defendants filed alternative motions: (1) to dismiss plaintiff's action pursuant to G.S. 1A-1, Rule 12(b)(6) on grounds that plaintiff's prior action in federal district court abated the state court action; (2) to dismiss, pursuant to G.S. 1A-1, Rule 12(b)(1), plaintiff's second claim on grounds that the federal district courts have exclusive original jurisdiction over actions arising under ERISA; (3) to dismiss, pursuant to G.S. 1A-1, Rule 12(b)(6), plaintiff's second and third claims. Plaintiff, pursuant to G.S. 1-75.12, made a motion to stay the proceedings in Pitt Superior Court and noted that these proceedings were brought in order to protect plaintiff from the running of the statute of limitations in the event the federal action should be dismissed for lack of jurisdiction.

In its order of 28 January 1977, the trial court denied defendants' motions for dismissal, allowed plaintiff's motion to stay the proceeding, and ordered that defendants' motions pursuant to G.S. 1A-1, Rule 12(b)(1) and (6) be reserved until time of trial. Defendants excepted and appealed.

Howard, Vincent & Duffus, by Malcolm J. Howard, for plaintiff appellee.

Smith, Anderson, Blount & Mitchell, by James D. Blount, Jr. and Michael E. Weddington, for defendant appellants.

ARNOLD, Judge.

[1] Defendants' first and third assignments of error, that the court erred by failing to dismiss this action on grounds of a prior pending action and by failing to rule on defendants' alternative motions to dismiss, are subject to dismissal by this Court. The order of the trial court refusing to dismiss is an interlocutory order from which no right of immediate appeal lies. *See Acorn v.*

Knitting Corp., 12 N.C. App. 266, 182 S.E. 2d 862, *cert. denied* 279 N.C. 511, 183 S.E. 2d 686 (1971), which, while interpreting the prior Court of Appeals Rule No. 4, is still good law and is followed by this Court.

[2] Defendants' other argument, that it was improper and erroneous for the trial court to grant plaintiff's motion for a stay of the proceedings, is not well taken. G.S. 1-75.12(a) states:

> "If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial."

Defendants argue that the trial court abused its discretion in staying the proceedings without finding (1) that it would work substantial injustice and (2) that some other jurisdiction provides "a convenient, reasonable and fair place of trial." However, absent a request for findings of fact to support his decision on a motion, the judge is not required to find facts, G.S. 1A-1, Rule 52(a)(2), and it is "presumed that the Judge, upon proper evidence, found facts to support this judgment." *Haiduven v. Cooper*, 23 N.C. App. 67, 208 S.E. 2d 223 (1974). *See also Williams v. Bray*, 273 N.C. 198, 159 S.E. 2d 556 (1968). We can, therefore, find no abuse of the trial court's discretion.

Dismissed in part and affirmed in part.

Judges PARKER and MARTIN concur.

RICHARD PITTS v. VILLAGE INN PIZZA, INC.

No. 778SC194

(Filed 7 February 1978)

1. **Malicious Prosecution § 1— elements of malicious prosecution**

To establish a case of malicious prosecution a plaintiff must show (1) malice, (2) want of probable cause, and (3) a favorable termination of the proceedings upon which his action is based.

2. **Malicious Prosecution § 4— probable cause—finding in preliminary hearing—return of indictment—summary judgment**

In this action for malicious prosecution of an embezzlement case against plaintiff, defendant's presentation of the judgment of the district court finding probable cause and a true bill of indictment returned against plaintiff for embezzlement constituted *prima facie* evidence that probable cause did exist, and summary judgment was properly entered for defendant where plaintiff failed to respond by showing specific facts establishing that there was a genuine issue as to probable cause.

APPEAL by plaintiff from *Tillery, Judge*. Judgment entered 9 November 1976, in Superior Court, WAYNE County. Heard in the Court of Appeals 13 January 1978.

Plaintiff brought suit against defendant alleging that defendant had maliciously initiated a criminal prosecution for embezzlement against plaintiff. The defendant filed a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, and, from the granting of that motion, plaintiff appeals.

Barnes, Braswell & Haithcock, P.A., by Michael A. Ellis and Gene Braswell, for plaintiff appellant.

Taylor, Warren, Kerr & Walker, by Robert D. Walker, Jr., for defendant appellee.

ARNOLD, Judge.

[1] To establish a case of malicious prosecution a plaintiff must show (1) malice, (2) want of probable cause, and (3) a favorable termination of the proceedings upon which his action is based. *Taylor v. Hodge*, 229 N.C. 558, 50 S.E. 2d 307 (1948). Plaintiff argues on this appeal that there were questions of fact as to whether defendant had probable cause to initiate the criminal proceeding and, consequently, as to whether defendant had acted

maliciously in initiating that proceeding. Plaintiff appears to have relied upon a finding of lack of probable cause to establish malice since under our law malice may be inferred from a want of probable cause. Hence, his argument comes down to a question of whether there was a genuine issue as to probable cause.

In support of his motion for summary judgment defendant offered a number of exhibits, including the complaint for plaintiff's arrest, the judgment of the district court finding probable cause, and a true bill of indictment against plaintiff. The plaintiff offered no evidence in response to defendant's motion.

G.S. 1A-1, Rule 56(e) provides, *inter alia*:

> "When a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.*" [Emphasis added.]

[2] We believe that the district court's finding of probable cause and the true bill of indictment against plaintiff constitute *prima facie* evidence that probable cause did exist. Defendant's motion and exhibits required plaintiff to respond to set forth specific facts establishing that there was a genuine issue as to the existence of probable cause. G.S. 1A-1, Rule 56(e).

Because plaintiff failed to offer any responsive pleadings, the trial court properly concluded that there was no genuine issue of material fact and that summary judgment to prevent an unnecessary trial was appropriate. *See Arnold v. Howard*, 29 N.C. App. 570, 225 S.E. 2d 149 (1976).

Affirmed.

Judges PARKER and MARTIN concur.

STEEL CREEK DEVELOPMENT CORPORATION AND R. S. SMITH AND WIFE, EVELYN L. SMITH ADDITIONAL PARTIES v. EARL TERRY JAMES AND WIFE, MARTHA S. JAMES D/B/A TERRY'S MARINA

No. 7726SC235

(Filed 7 February 1978)

Pleadings § 10— scope of order allowing "responsive pleadings"

An order allowing defendants to file "responsive pleadings" within 30 days after additional parties plaintiff filed an amendment to the complaint did not permit defendants to respond only to the new matter alleged in the amendment but permitted them to respond in any proper way they deemed appropriate, including further answers and defenses and a counterclaim.

Judge BRITT dissents.

APPEAL by defendants from *Graham, Judge.* Order entered 14 January 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 January 1978.

This appeal brings to the Court the propriety of an order signed by Judge Graham in Mecklenburg County striking an answer by the defendants. The Steel Creek Development Corporation brought this action as plaintiff and on 16 July 1976, Judge Thornburg signed an order permitting R. S. Smith and wife, Evelyn L. Smith to be made additional parties plaintiff. The order provided that said additional parties plaintiff were granted 30 days to file an amendment to the complaint or to adopt the prior pleadings. The order further provided that "the defendants are granted 30 days from the date of service upon an Amendment to complaint or adoption of pleadings upon them within which to file responsive pleadings." The additional parties plaintiff filed an amendment to the complaint on 13 August 1976. The defendants filed an answer to the amended complaint on 9 September 1976 in which they set up several further answers and defenses and a counterclaim. The plaintiffs filed a motion to strike the answer to the amended complaint and on 14 January 1977, Judge Graham signed an order striking the answer to the amended complaint on the ground that the order entered by Judge Thornburg required and permitted the defendants to respond only to the new matter alleged by the plaintiffs in the amendment to the complaint. This appeal followed.

Fairly, Hamrick, Monteith & Cobb, by Laurence A. Cobb, for plaintiffs appellees.

Richard A. Cohan, for defendants appellants.

WEBB, Judge.

We note at the outset that the appellants did not comply with the rules in that the record does not contain all the pleadings filed in the Superior Court of Mecklenburg County. Rule 9(b)(1), Court of Appeals Rules. We have, nevertheless, decided to overlook this violation and decide the matter on its merits.

We believe that Judge Graham was in error in allowing the motion of the plaintiffs. The order of Judge Thornburg provided that the defendants were granted 30 days after the filing of an amendment to the complaint to file responsive pleadings. We do not believe that the word "responsive" should be given such a limited definition as to require that the defendants could only answer pleadings filed by the plaintiffs. We interpret the order allowing the defendants to file responsive pleadings to give them the right to respond in any proper way they deem appropriate to the amended complaint. This would include further answers or counterclaims.

For this reason, we order that the case be reversed.

Reversed.

Judge HEDRICK concurs.

Judge BRITT dissents.

STATE OF NORTH CAROLINA v. ROY LEE BURKS, JR.

No. 7718SC713

(Filed 7 February 1978)

Criminal Law § 122.1— corroborative evidence—jury request for instructions

Where the jury, after it had begun its deliberations, asked the court a question which indicated that the jury did know the difference between substantive and corroborative evidence, it was not error for the court to fail to

instruct on corroborative evidence but to instruct the jury to rely on its own recollection as to whether the testimony of the witnesses was corroborative.

APPEAL by the defendant from *Kivett, Judge.* Judgment entered 1 April 1977, in Superior Court, GUILFORD County. Heard in the Court of Appeals 12 January 1978.

Defendant was tried for a crime against nature and taking indecent liberties with a minor. During the trial the State offered three witnesses who testified in corroboration of Sheila Jones, the prosecuting witness. Judge Kivett instructed the jury as to corroborating evidence when the testimony was offered but did not mention corroborating evidence in his charge.

After beginning its deliberation the jury returned to the courtroom and the foreman asked:

> "Some of the witnesses who gave so-called corroborative testimony mentioned some things, and we simply wanted to check whether Sheila testified to the same things or whether it was really corroborative or whether it was something new."

Judge Kivett replied:

> "You will have to rely on your own recollection. If you can from your own recollection, determine that some things were said by other witnesses in the corroborative testimony, and you can't remember they were said in the first instance, then you'd have to disregard what the corroborating witness said they said because it would not in fact corroborate her."

From a conviction on both charges, the defendant has appealed.

Attorney General Edmisten, by Assistant Attorney General James Wallace, Jr., for the State.

Frank A. Campbell, Assistant Public Defender, Eighteenth Judicial District, for defendant appellant.

WEBB, Judge.

Defendant has brought forward only one assignment of error, that relating to the charge as to corroborating evidence.

The defendant concedes that no charge on corroboration is required without a request for it. *State v. Lee*, 248 N.C. 327, 103 S.E. 2d 295 (1958). The defendant contends the question by the jury foreman was a proper request that the jury be instructed on corroboration and that in its answer the Court failed to distinguish properly between substantive and corroborative evidence.

As we read the question, the jury did understand the difference between substantive and corroborating evidence. We read it to mean that the jury could not recall whether Sheila Jones had testified to the things to which the other witnesses testified or whether the other witnesses had testified to something new. Judge Kivett properly told the jury they would have to rely on their own recollections as to the testimony of the witnesses.

No error.

Judges BRITT and HEDRICK concur.

WILLIAM A. PARKER, ADMINISTRATOR OF THE ESTATE OF KATHY DENISE CRAWFORD v. JAMES EARL WILLIAMS, JAMES WEAVER WILLIAMS, MAXINE MARIE HALL AND BRENDA COLE HALL AND MARIE MAXINE HALL AND GLENDAL COLE HALL v. JAMES WEAVER WILLIAMS AND JAMES EARL WILLIAMS

No. 7728SC7

(Filed 7 February 1978)

APPEAL by plaintiffs from *Judge Harry C. Martin.* Judgment entered 11 February 1976 in Superior Court, BUNCOMBE County. Heard in Court of Appeals 27 September 1977.

Gudger, McLean, Leake, Talman & Stevenson, by Joel B. Stevenson and William A. Parker, for plaintiff appellant William A. Parker, Administrator of the Estate of Kathy Denise Crawford, Deceased.

Robert S. Swain for plaintiff appellant Marie Maxine Hall.

Uzzell & Dumont, by Harry Dumont and Larry Leake, for defendant appellees James Weaver Williams and James Earl Williams.

MORRIS, Judge.

In the opinion of this Court filed in this case on 7 December 1977, *Parker v. Williams*, 34 N.C. App. 563 (1977), the result was stated simply "New trial". By petition to rehear, defendants James Weaver Williams and James Earl Williams have pointed out that the opinion referred only to the action of *Parker, Administrator v. Williams* and held that the trial court erred in submitting an issue on contributory negligence to the jury and that, because we cannot say what effect the submission of that issue had or might have had on the jury's determination of the issue of defendants' negligence, the circumstances of the case required a new trial. Defendants correctly point out that we did not discuss the submission of an issue on contributory negligence as to plaintiff Hall. They are of the opinion that the result as stated in our 7 December opinion requires a new trial as to her case, also. This was not the intended result. The brief for the plaintiff appellants did not discuss the question of contributory negligence as it related to Hall's case at all. It contained no argument with respect to this feature of assignment of error No. 1. The question was not before us. Had it been properly presented, we would have found no error in the submission of that issue to the jury as to Hall and would have specifically so stated in the opinion. The other contentions of plaintiff Marie Hall were carefully considered and found to be without merit.

For purposes of clarification: As to the appeal of plaintiff Hall, we find no error.

As to the appeal of Parker, Administrator, new trial.

Judges VAUGHN and CLARK concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 FEBRUARY 1978

IN RE NEAL No. 7718DC260	Granville and Guilford (77SP105)	Reversed
STATE v. BEST No. 772SC721	Martin (76CRS4835)	No Error
STATE v. BIGGS No. 771SC811	Chowan (77CRS824)	No Error
STATE v. BILLIE No. 7722SC783	Davidson (76CRS13698) (76CRS13699) (76CRS13700) (76CRS13701)	No Error
STATE v. BORDERS No. 7721SC637	Forsyth (77CR2311)	No Error
STATE v. COX No. 7712SC776	Cumberland (76CRS38814)	No Error
STATE v. DAVIS No. 779SC726	Person (77CRS1056) (77CRS1058) (77CRS1064) (77CRS1065)	No Error
STATE v. EPLEE No. 7723SC754	Avery (76CR1682) (76CR1683) (76CR1684)	No Error
STATE v. HERRING No. 778SC761	Lenoir (75CR10380) (75CR10381)	No Error
STATE v. PLESS No. 7719SC619	Cabarrus (76CR9742)	No Error
STATE v. ROSE No. 7727SC734	Gaston (77CR2738) (77CR2739)	No Error
STATE v. SCOTT No. 7718SC660	Guilford (75CRS61648)	No Error
STATE v. SHROPSHIRE No. 7726SC714	Mecklenburg (75CR23683)	Affirmed
STATE v. STEGALL No. 7720SC698	Union (77CR0112)	No Error
STATE v. WILLOUGHBY No. 7713SC436	Columbus (76CR2794)	New Trial

In re Worrell

IN THE MATTER OF THE WILL OF ISABELL WORRELL, DECEASED

No. 7712SC333 and No. 7712SC156

(Filed 21 February 1978)

1. **Jury § 6.3— caveat proceeding—voir dire examination of jurors—scope of examination improperly limited**

Though it was error for the trial court to refuse to permit propounders, during the voir dire examination of prospective jurors, to inquire if they believed in the right of a person to make a will, such error was not sufficiently prejudicial to warrant a new trial, particularly in view of the court's instruction to the jury that "[a] testatrix has the right to leave her property to whomever she pleases if she has the mental capacity to do so."

2. **Wills § 20— caveat proceeding—execution of will—changes—evidence properly excluded**

The trial court in a caveat proceeding did not err in failing to permit one of the propounders who was named executor in the will to testify with respect to his conversation with testatrix prior to preparation of the purported will relating how she wanted to leave her property and in not allowing him to testify regarding changes in the will she wanted made, since (1) with respect to preparation of the will, the record failed to show what the propounder's testimony would have been; any error was rendered harmless when the purported will was admitted into evidence and the propounder testified that he prepared it in strict conformity with testatrix' instructions; and (2) with respect to changes in the will, the excluded testimony would have shown a further unnatural attitude on the part of testatrix towards her children and certain of her grandchildren, the natural objects of her bounty.

3. **Wills § 22— mental capacity of testatrix—opinion testimony—time of observation of testatrix**

While the competency of a person to make a will is to be determined as of the date of its execution, or its republication, as by a codicil, opinion testimony is not limited to witnesses who observed the person on that date; rather, evidence of the person's mental capacity before and after that date is admissible, provided the time is not too remote to justify an inference that the same condition existed at the time of execution of the will.

4. **Wills § 22— caveat proceedings—mental capacity of testatrix—opinion testimony admissible**

Witnesses in a caveat proceeding who expressed an opinion as to the mental capacity of the testatrix observed or had contacts with testatrix on dates and occasions sufficiently close to the date of the execution of the purported will to express their opinions as to testatrix' mental capacity on that date, and such opinion testimony was not improper because it was given in response to a question as to whether, from their *knowledge* and observation of testatrix, the witnesses had opinions as to the testatrix' mental capacity, the word "knowledge" being used in the same sense as "acquaintance with."

5. **Wills § 23— caveat proceeding—mental capacity of testatrix—nature of natural objects of bounty—error not prejudicial**

Propounders in a caveat proceeding were not prejudiced by the trial court's error in instructing the jury that the testatrix must have sufficient mental capacity to know the "nature of" the natural objects of her bounty, since the jury instructions as a whole fairly presented the law applicable to the case.

6. **Wills § 23— caveat proceeding—mental competency of testatrix—obligation to natural objects of bounty**

The trial court in a caveat proceeding did not err in instructing the jury that "[t]he question of mental capacity involves that question of whether the testatrix's mind was in such condition that she recognized her obligation to the objects of her bounty and their relation to her . . . ," since a testator's obligation to the natural objects of his bounty is a proper factor for the jury to consider on the question of mental competency.

7. **Wills § 22— caveat proceeding—testatrix' competency "to make a will"—evidence and instructions not prejudicial**

The trial court in a caveat proceeding did not commit prejudicial error in allowing a witness to testify that testatrix was not mentally competent to make a will and in repeating the error in the recapitulation of the evidence, since counsel for caveator meticulously asked each of their seven or eight witnesses whether testatrix on the day in question had sufficient mental capacity to know the nature and extent of her property, to know the natural objects of her bounty, or to realize the full force and effect of the disposition of her property by will; in only one instance did the witness reply that testatrix was not competent "to make a will"; and only in summarizing the testimony of that one witness did the court err.

8. **Clerks of Court § 4; Appeal and Error § 16.1— appeal from caveat proceeding—letters testamentary—no authority of clerk to revoke**

The clerk of superior court had no authority to revoke the letters testamentary issued to the person named executor in testatrix' purported will after a jury in a caveat proceeding returned a verdict in favor of caveators, since at the time the clerk attempted to revoke the letters, propounders' appeal from judgment in the caveat proceeding was pending. G.S. 1-294.

APPEALS by propounders from judgment entered by *Herring, Judge*, on 10 January 1977, and by caveators from judgment entered by Herring, Judge, on 4 February 1977 in Superior Court, CUMBERLAND County. Appeals consolidated for hearing and determination. Heard in the Court of Appeals 9 January 1978.

Isabell Worrell (Mrs. Worrell) died on 15 April 1976 and a paper writing dated 29 December 1975 was probated as her will. Her surviving son and daughter filed a caveat challenging her capacity to make a will. Seavy Carroll, who was named executor

in, and Campbellton Presbyterian Church, the primary beneficiary under, the will, filed answers in support of the will.

At trial propounders presented Carroll and two other witnesses who testified with respect to the preparation and execution of the will which was then introduced into evidence. The purported will left $500 to Mrs. Worrell's son, $10 to her surviving daughter, various sums to certain grandchildren and great grandchildren and the residue of the estate to Campbellton Presbyterian Church.

Caveators testified and presented several of Mrs. Worrell's friends as witnesses. Their testimony tended to show that at the time in question Mrs. Worrell was 83 years old; that she was in good health until about two years before her death when she grew feeble and her memory and sight deteriorated; that she had heart trouble which required a pacemaker; that she refused to properly wash herself or her clothes and had bad bathroom habits; that she could not take care of herself but refused to live at a rest home, spending the last years of her life living with friends and moving from place to place; that she was greatly concerned with money and would keep substantial sums of cash on her person; that her son signed involuntary commitment papers in order to obtain a mental examination of her but she was never committed; that she had always differed with her children and toward the end of her life showed resentment toward them; that she never attended any church regularly and never mentioned the Campbellton Presbyterian Church; that she told her children that she had left her estate to an orphanage; and that she was buried at a Baptist church. Several witnesses testified that in their opinion Mrs. Worrell did not have sufficient mental capacity to make a will on 29 December 1975.

Propounders presented witnesses who testified that Mrs. Worrell was competent on 29 December 1975 and gave other testimony contradictory to that given by witnesses for the caveators.

Issues were submitted to and answered by the jury as follows:

1. Was the paper writing dated December 29, 1975 executed by Isabell Worrell according to the requirements of the law for a valid Last Will and Testament?

Answer: Yes.

2. Did Isabell Worrell at the time of signing and executing the paper writing have sufficient mental capacity to make and execute a valid Last Will and Testament?

Answer: No.

3. Is the paper writing and every part thereof, the Last Will and Testament of Isabell Worrell?

Answer: No.

On 10 January 1977 the court entered judgment predicated on the verdict declaring that the paper writing in question was not the last will and testament of Mrs. Worrell. Propounders gave notice of appeal and on 12 January 1977 the court made appeal entries.

On 20 January 1977 the Clerk of the Superior Court of Cumberland County entered an order revoking the letters testamentary of Carroll, executor. Carroll appealed the clerk's order and on 4 February 1977 Judge Herring entered an order reversing the clerk, holding that the clerk was without authority to revoke the letters issued to Carroll pending the appeal of the propounders. Caveators appealed from the order reinstating Carroll as executor.

A. Maxwell Ruppe for propounders.

Barrington, Jones & Witcover, by Henry W. Witcover, for caveators.

BRITT, Judge.

APPEAL FROM 10 JANUARY 1977 JUDGMENT

[1] Propounders contend first that the trial court erred in refusing to permit them, during the voir dire examination of prospective jurors, to inquire if they believed in the right of a person to make a will. We think this contention has merit.

G.S. 9-15(a) specifically provides that any party to an action, or his counsel of record, "shall be allowed, in selecting the jury, to make direct oral inquiry of any prospective juror as to the fitness and competency of any person to serve as a juror . . . ."

The voir dire examination of prospective jurors serves a dual purpose: (1) to ascertain whether grounds exist for challenge for cause; and (2) to enable counsel to exercise intelligently the peremptory challenges allowed by law. *State v. Carey*, 285 N.C. 497, 206 S.E. 2d 213 (1974); *State v. Dawson*, 281 N.C. 645, 190 S.E. 2d 196 (1972). The primary purpose of the voir dire of prospective jurors is to select an impartial jury. *State v. Lee*, 292 N.C. 617, 234 S.E. 2d 574 (1977).

While the regulation of the manner and extent of the inquiry on voir dire rests largely in the trial judge's discretion, his exercise of discretion is not absolute and is subject to review on appeal. 8 Strong's N.C. Index 3d, Jury § 6. It is conceivable that many people, for one reason or another, do not agree with the statutory right of a person to make a will. In view of that possibility, we think the propounders should have been allowed to question prospective jurors with respect to their feelings on that question.

Although we feel that the trial court erred, we do not think the error, standing alone, was sufficiently prejudicial to warrant a new trial. This is particularly true in view of the court's instruction to the jury that "[a] testatrix has the right to leave her property to whomever she pleases if she has the mental capacity to do so".

[2] Propounders contend next that the court erred in failing to permit Mr. Carroll to testify with respect to his conversation with Mrs. Worrell prior to preparation of the purported will relating how she wanted to leave her property; and, in not allowing him to testify regarding changes in the will she wanted made. We find no prejudicial error in this contention.

The first part of this contention relates to Carroll's testimony when propounders presented their initial evidence to prove the formal execution of the purported will. The record fails to disclose what Carroll's testimony would have been had he been allowed to testify, therefore, we are unable to say if the exclusion was prejudicial. *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975). Furthermore, it would appear that any error was rendered harmless when the purported will was admitted into evidence and Carroll testified that he prepared it in strict conformity with Mrs. Worrell's instructions.

The second part of the contention relates to Carroll's effort to testify with regard to changes Mrs. Worrell stated she wanted to make in the purported will. Carroll testified that Mrs. Worrell contacted him with regard to these changes not long before she died, but by the time he was able to prepare a new will and see her in the hospital, her condition had deteriorated to the extent she was unable to transact business.

Carroll's testimony on this point is included in the record. The only changes the new will would have made would have been to reduce the bequests to her grandchildren John Scott Worrell and Elizabeth Ann Snyder from $500.00 each to $1.00 each, the bequests to her son Frederick from $500.00 to $1.00 and the bequests to her daughter Sarah from $10.00 to $1.00. Assuming, *arguendo*, that propounders have properly preserved their exceptions to the exclusion of this testimony, and that the testimony was admissible, we do not think the exclusion was sufficiently prejudicial to warrant a new trial. While it would have confirmed her desire to leave the major portion of her estate to the Campbellton Presbyterian Church, it would have shown a further unnatural attitude towards her children and certain of her grandchildren, the natural objects of her bounty.

Propounders contend next that the court committed prejudicial error in allowing caveators' witnesses to give their opinions on Mrs. Worrell's mental capacity. We find this contention without merit.

On this contention propounders argue first that proper foundation for the opinion testimony was not laid in that it was not shown that the witnesses saw Mrs. Worrell on 29 December 1975, the date she executed the purported will.

[3] While the competency of a person to make a will is to be determined as of the date of its execution, or its republication, as by a codicil, *In Re Hargrove*, 206 N.C. 307, 173 S.E. 577 (1934), *In Re Ross*, 182 N.C. 477, 109 S.E. 365 (1921), opinion testimony is not limited to witnesses who observed the person on that date. "Evidence of the party's mental condition before and after the particular time in question is admissible, provided the time is not too remote to justify an inference that the same condition existed at the time in question." 1 Stansbury's N.C. Evidence, Brandis Revision, § 127, page 406.

The question then arises, when is such evidence to be deemed remote? While it is impossible to get a definite answer from the text writers and decided cases, the rule of reason has been adopted as the law in this State. *In Re Hargrove, supra.* As was said in *Hargrove* (page 311), "[n]o precise or mathematical definition can be fashioned. . . . The interpretation of the term must ultimately depend upon the variability of given facts and circumstances. . . . An examination of many authorities discloses that the rule of reason in such matters is the prevailing judicial thought".

[4] A careful review of the testimony given by the witnesses for the caveators leads us to conclude that each of them observed, or had contacts with, Mrs. Worrell on dates and occasions sufficiently close to 29 December 1975 to express his or her opinion as to Mrs. Worrell's mental capacity on that date.

Propounders argue that the opinion testimony was improper because it was based in part on the witnesses' *knowledge* of Mrs. Worrell. We find this argument unpersuasive. The question asked each of the witnesses was phrased substantially as follows: From your knowledge and observation of (testatrix) do you have an opinion as to whether or not on 29 December 1975 she had mental capacity to know the natural objects of her bounty, to comprehend the kind and character of her property, to understand the nature and effects of her act and to make a disposition of her property?

We think the word "knowledge" was used in the same sense as "acquaintance with". A person *knows* another person in about the same sense that he is *acquainted with* that person. Probably the question would have been better had it been phrased "From your acquaintance with and observation of Mrs. Worrell", etc., but we perceive no prejudice to propounders in the way it was phrased.

Propounders contend next that the court committed error prejudicial to them in permitting the caveators to recall a propounders' witness for further cross-examination and then present a witness in rebuttal. We find no merit in this contention. In the trial of a case the order of proof rests largely in the discretion of the trial judge. 7 Strong's N.C. Index 2d, Trial § 14. We perceive no abuse of discretion in the instance complained of.

[5] Propounders contend that the trial court erred in instructing the jury that the testatrix must have sufficient mental capacity to know the "nature of" the natural objects of her bounty. We find no merit in this contention.

In his instructions on the second issue, after stating, among other things, that there was a presumption that Mrs. Worrell had sufficient mental capacity to make a will and that the burden was on caveators to prove by the greater weight of the evidence that she did not have sufficient mental capacity, the trial judge charged:

> The law recognizes degrees of mental unsoundness, and not every degree of mental unsoundness or mental weakness is sufficient to destroy testamentary capacity. Testamentary capacity is determined objectively from the standpoint of the purpose to be accomplished. [A testatrix at the time of executing her will must have sufficient mental capacity to know the nature of the natural objects of her bounty and to comprehend the kind and character of her property]
>
> (PROPOUNDER EXCEPTS TO THAT PART OF THE CHARGE IN BRACKETS.) EXCEPTION NO. 50 and to understand the nature and effect of her act, and to make a disposition of her property.

While we agree with propounders that it is not necessary for the maker of a will to have sufficient mental capacity to know the nature of the natural objects of her bounty, we think the error in this instance was *de minimus*. Jury instructions must be considered contextually when challenged for error. *Motor Company v. Insurance Company*, 220 N.C. 168, 16 S.E. 2d 847 (1941); *Cab Co. v. Casualty Company*, 219 N.C. 788, 15 S.E. 2d 295 (1941). When the charge in this case is considered as a whole, we think it fairly presented the law applicable to the case.

[6] Propounders contend that the trial court erred in giving the following jury instruction:

> "The question of mental capacity involves that question of whether the testatrix's mind was in such condition that she recognized her obligation to the objects of her bounty and their relation to her. If one cannot recall or comprehend

the obligations she morally owes to the natural objects of her bounty, she cannot be said to have testamentary capacity.

We find no merit in this contention.

Propounders argue that the recognition of her obligation to the natural objects of her bounty had no bearing on the mental capacity of the testatrix. While no case in this jurisdiction has been cited, and our research discloses none, specifically supporting the challenged instruction, we believe several Supreme Court opinions support it by implication.

In *In Re Burns' Will*, 121 N.C. 336, 28 S.E. 519 (1897), the court held that in a caveat proceeding and on the question of sanity of the testator, the fact that the testator disinherited all of his children except one to whom he left all of his property, was competent evidence to be passed upon by the jury as bearing upon the capacity of the testator, and hence was the proper subject of discussion by counsel in his argument to the jury.

In *In Re Will of West*, 227 N.C. 204, 41 S.E. 2d 838 (1947), the testator, a white bachelor, devised and bequeathed a substantial part of his property to two Negro children of whom he was the reputed father, and the remainder of his property to his white relatives. In an opinion by Justice Seawell, the court said (page 209): "We are not required at this time to say to what extent testamentary capacity may be impeached by infractions of, or want of conformity to traditions, customs, standards of the testator's community or section, which are supposed to strongly influence personal conduct. In cases of doubtful testamentary capacity, however, evidence of an exclusion of those who, by ties of blood, might be supposed to be the natural objects of the testator's bounty has been accepted as bearing upon the question of mental capacity. *In re Will of Hinton*, 180 N.C., 206, 104 S.E., 341; *In re Redding's Will*, 216 N.C., 497, 5 S.E. (2d), 544."

In *In Re Will of Hinton*, 180 N.C. 206, 104 S.E. 341 (1920), the testator left his substantial holdings to his prosperous living children, to the exclusion of the widow and children of a deceased son whom the evidence showed were in poor financial circumstances. In upholding the admissibility of evidence tending to show the prosperity of the living children and the destitution of the family of the deceased son, the court said (page 212): "Disinheritance of children, or those who, under the particular

facts of this case appears [sic] to have had a strong claim on the testator's bounty, such, for example, as his grandchildren, is competent evidence to show his mental incapacity to execute a will, and generally to show the state of his mind in respect to the transaction. *In re Burn's Will*, 121 N.C., 336; *Bost v. Bost*, 87 N.C., 477; *Reel v. Reel*, 8 N.C., 248; *Howell v. Barden*, 14 N.C., 442."

In the cases just reviewed we think our Supreme Court was saying, among other things, that a testator's obligation to the natural objects of his bounty is a proper factor for the jury to consider on the question of mental competency. Furthermore, the sword cuts both ways as the jury might consider the lack of obligation that the testator owes an erring or unworthy natural object of his bounty.

Propounders contend the trial court erred in instructing the jury "on want of capacity by reason of delusions where there was no evidence of delusions". This contention has no merit. Instructions on this point were fully justified by the evidence that Mrs. Worrell had delusions about people trying to get her money as well as delusions about her being mistreated by her daughter.

[7] Propounders contend next that the court committed prejudicial error in allowing a witness to testify that Mrs. Worrell was not mentally competent to make a will and in repeating the error in the recapitulation of the evidence. We think this contention is without merit.

Propounders argue that it is improper for a witness to testify that a decedent did not have the mental capacity "to make a will" and cites primarily *In Re Will of Tatum*, 233 N.C. 723, 65 S.E. 2d 351 (1951). While we agree with the general rule stated by propounders, we do not think there was a substantial violation of the rule in this case as there was in *Tatum*.

The court in *Tatum* did not award a new trial for the reason that the witnesses expressed opinions that the testator did not have the mental capacity "to make a will", but for the reason that the trial judge, after each summarization of the testimony of some 21 witnesses for the caveators, stated that the witness gave as his opinion that the testator did not have sufficient mental capacity "to make a will". The court pointed out that the witnesses, with "inconsequential" exceptions, in response to questions, the form of which had been sanctioned by the court, stated in

substance that in their opinion the testator on the day in question did not have sufficient mental capacity to know the nature and extent of his property, to know who were the natural objects of his bounty, or to realize the full force and effect of the disposition of his property by will. A new trial was granted on the ground that the trial judge expressed an opinion in violation of G.S. 1-180 in erroneously telling the jury that 21 witnesses testified that in their opinions testator "did not have the mental capacity to make a will".

In the case at hand, counsel for caveators meticulously asked each of their seven or eight witnesses the question in the form sanctioned in *Tatum* and other cases. In only one instance was the answer in violation of the stated rule and only in summarizing the testimony of that witness did the court violate that rule. We think it is easy to distinguish this case from *Tatum*. It is noted that in 1 Stansbury's N.C. Evidence (Brandis Revision) § 127, page 405, the writer refers to the *asking* of the question as opposed to the answer of the witness, as follows: "In will cases it is improper to ask a witness's opinion of the testator's capacity to *make a will*, since a question in that form assumes the witness's knowledge of the legal standards of testamentary capacity".

Finally, propounders contend the trial court abused its discretion in denying their motion to set the verdict aside and grant them a new trial. We find no merit in this contention as the evidence fully supported the verdict.

For the reasons stated, we conclude that propounders have failed to show sufficient error to warrant disturbing the verdict and the judgment appealed from.

* * *

APPEAL FROM 4 FEBRUARY 1977 JUDGMENT

[8] The judgment entered in the caveat proceeding on 10 January 1977 contains the following provision:

> 2. That the executor named in said paper writing and heretofore qualified by the clerk of this court upon probate in common form is without legal authority further to proceed, and he will at once render to the clerk a final account of all funds and property which has come into his hands and sur-

render the same to a properly appointed and qualified administrator to be appointed by the Clerk.

Propounders gave proper notice of appeal from said judgment and on 12 January 1977 the court made appeal entries.

In an order dated 14 January 1977, filed 20 January 1977, the Clerk of the Superior Court of Cumberland County revoked the letters testamentary issued to Carroll, executor. Carroll appealed from the order and on 4 February 1977 Judge Herring entered judgment declaring null and void the order entered by the clerk for the reason that propounders had appealed from the 10 January 1977 judgment. Caveators appealed to this court.

G.S. 1-294 provides, among other things, that "[w]hen an appeal is perfected as provided by this article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein. . . ." As stated above, the 10 January 1977 judgment entered in the caveat proceeding contained specific provision relating to the status of Carroll as executor. Propounders, including Carroll, executor, duly appealed from the judgment, therefore, the clerk had no authority to revoke his letters testamentary.

* * *

10 January 1977 judgment, no error.

4 February 1977 judgment, affirmed.

Judges HEDRICK and WEBB concur.

J. RUSSELL CAPPS, KENNETH R. MOSER, MAURICE S. TOLER, MORRIS GOLDBERG, GEORGE T. MORRIS, MRS. LESTER M. GREENE, JR., MRS. THOMAS W. LINDER, PHILLIP L. SMITH, J. M. ALLEN, JR., MRS. EARL R. PARKER, PHILLIP BUNN, C. P. HELMS, WILBER M. EFIRD, W. H. MIMS, ERNEST C. BRASWELL, ROBERT E. BECK, JANET S. BECK, JEAN M. WHITE, JOE P. HARRIS, HARRY C. LYON, MRS. WILLIE H. COOKE, MRS. W. F. CRANFILL, WARNER N. ALLEN, BRUCE W. MILLER, EARL EDWARDS AND B. L. FOIL, PLAINTIFFS v. THE CITY OF RALEIGH, DEFENDANT AND SUMMIT RIDGE, INC., JOHN W. THEDIECK, JR., DAN C. AUSTIN AND HOUSING AUTHORITY OF THE CITY OF RALEIGH, INTERVENOR-DEFENDANTS

No. 7710SC90

(Filed 21 February 1978)

1. **Rules of Civil Procedure § 56— summary judgment—findings and conclusions**

It is not a part of the function of the court on a motion for summary judgment to make findings of fact and conclusions of law.

2. **Municipal Corporations § 30.20— rezoning proposal—actual notice not required**

Actual personal notice to the owners of land affected by a rezoning proposal is not necessary in order for the defense of laches to be available in an action attacking the rezoning ordinance.

3. **Municipal Corporations § 30.20— rezoning—notice of hearing—description of property**

A metes and bounds description of property to be rezoned is not required in the notice of public hearing on the rezoning proposal, and plaintiff property owners received constructive notice that their property might be rezoned where the notice published in a newspaper stated that the area to be affected was "Northwest, North and Northeast Raleigh, vicinity of U.S. Hwy. 70; intersection of Creedmoor Road and Leesville Road; North Haven, North Ridge, intersection of Old Wake Forest Road, Spring Forest Road and Litchford Road; and U.S. Hwy. 1 and 401 (North), Millbrook Road, New Hope Church Road, and Trawick Road." Therefore, the defense of laches was available in an action by plaintiffs attacking the rezoning ordinance.

4. **Equity § 2.2— laches—motion for summary judgment—declaratory judgment action**

The defense of laches is properly raised by summary judgment motion and is applicable in a declaratory judgment action.

5. **Municipal Corporations § 31; Equity § 2.2— attack on rezoning ordinance—laches**

Plaintiffs were barred by laches from attacking a rezoning ordinance where they did nothing to invalidate the ordinance until they filed a petition to "down zone" the rezoned property five years and nine months after the rezoning ordinance was adopted, and their only justification for the delay was that they had received no actual notice of the adoption of the rezoning ordinance,

and where defendants, in reliance on the rezoning ordinance, collectively had spent in excess of $600,000 in grading, paving, house construction, installation of water and sewer lines, architectural and engineering services, and acquisition of property to serve the area as public parks, and had entered into legal obligations for the expenditure of substantial additional sums.

Judge ARNOLD dissenting.

APPEAL by plaintiffs from judgment of *Bailey, Judge*, entered 15 December 1976, Superior Court, WAKE County. Heard in the Court of Appeals 16 November 1977.

Plaintiffs, on 23 July 1976, filed this action asking that the court enter a declaratory judgment declaring that Zoning Ordinance "1969 858-ZC-76" (which was zoning proposal Z-31-69) of the City of Raleigh is "unlawful, invalid and void insofar as it pertains to plaintiffs and the property bounded by U.S. Highway 1 and U.S. Highway 401 (north), New Hope and Trawick Roads" (hereinafter referred to as the Area). Plaintiffs alleged that they are residents, citizens and taxpayers of Wake County, and own various tracts of land and homes located outside the City of Raleigh but within one mile thereof and within the Area which is the subject of the litigation.

Defendant City of Raleigh answered denying the invalidity of the ordinance and asserting the defenses of laches and estoppel.

Upon motion, Summit Ridge, Inc., John W. Thedieck, Jr., Dan C. Austin, and the Housing Authority of the City of Raleigh were allowed to intervene. Each answer filed by the intervenors denied the invalidity of the ordinance, asserted the defenses of estoppel and laches, and included a motion for summary judgment. Defendant City of Raleigh also moved for summary judgment.

Interrogatories were filed and answered by plaintiffs and defendants. Depositions were taken and affidavits filed.

At the 13 December 1976 Session of Wake Superior Court, hearing was had on the motions for summary judgment. Judgment allowing the motions was filed on 15 December 1976, and plaintiffs appeal therefrom.

Teague, Johnson, Patterson, Dilthey and Clay, by Robert M. Clay and Robert W. Sumner, for plaintiff appellants.

Thomas A. McCormick, Jr., Office of the City Attorney, for defendant appellee, the City of Raleigh.

Boyce, Mitchell, Burns and Smith, by Eugene Boyce, for defendant appellees, Summit Ridge, Inc., Dan C. Austin, and John W. Thedieck, Jr.

Allen, Steed and Allen, by D. James Jones, Jr., for defendant appellee, Housing Authority of the City of Raleigh.

MORRIS, Judge.

[1] At the outset we feel compelled again to point out that it is not a part of the function of the court on a motion for summary judgment to make findings of fact and conclusions of law. "As we have pointed out on previous occasions, finding the facts in a judgment entered on a motion for summary judgment presupposes that the facts are in dispute. '. . . [T]he Supreme Court and this Court have emphasized in numerous opinions that upon a motion for summary judgment it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried.' *Stonestreet v. Compton Motors, Inc., et als*, 18 N.C. App. 527, (Filed 27 June 1973)." *Insurance Co. v. Motor Co.*, 18 N.C. App. 689, 692, 198 S.E. 2d 88, 90 (1973). Despite our frequent reminders, we find that some of the trial judges continue to treat the motion for summary judgment as a hearing upon the merits before the court without a jury where the judge becomes the trier of the facts. Granted, in rare situations it can be helpful for the trial court to set out the *undisputed* facts which form the basis for his judgment. When that appears helpful or necessary, the court should let the judgment show that the facts set out therein are the undisputed facts. The judgment now before us does not so indicate. It does appear, however, that the *material* facts set out are not in dispute.

Plaintiffs contend that the court erred in failing to find as a fact that plaintiffs had no actual notice of the change in the zoning classification of their property and further erred in failing to conclude as a matter of law that actual notice was necessary before their declaratory judgment action could be barred as a matter of law by the doctrine of laches. This is plaintiffs' assign-

ment of error No. 4, and it demonstrates clearly, we think, the confusion resulting from finding facts on a summary judgment motion. Obviously, if the facts are not in dispute, there is no need to "find facts". If there is a need to "find facts", then summary judgment will not be appropriate if those facts are material. Rule 56(c) of the North Carolina Rules of Civil Procedure provides in pertinent part that, upon motion, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." However, if there be a dispute as to an immaterial fact, summary judgment is not precluded. *Keith v. Reddick, Inc.*, 15 N.C. App. 94, 189 S.E. 2d 775 (1972).

Defendants based their motions for summary judgment on their contention that plaintiffs are barred by laches and estoppel as shown by the pleadings, admissions, affidavits, interrogatories, and depositions filed. We look to the record to determine the undisputed facts relative to these contentions and find that the following are facts which are not in dispute and which are material to the question.

Plaintiffs, as alleged in the complaint, were at the time of the adoption of the ordinance complained of and at the time of the entry of summary judgment, residents and owners of property in the Area. On 30 June 1969 and on 8 July 1969, there was published in the Raleigh Times, a newspaper of general circulation in the City of Raleigh and Wake County, "Notice of Public Hearing on Application to Change the Zoning Ordinance of the City of Raleigh". This notice stated that a joint meeting of the City Council and Planning Commission of the City of Raleigh would be held in the Council Chamber, Municipal Building on 16 July at 2:15 p.m. at which time public hearings would be conducted for the purpose of considering applications to change the Zoning Ordinance which includes the Zoning District Map. Among the areas to be considered for rezoning was the following:

> "Z-31-69 Northwest; North and Northeast Raleigh, vicinity of U.S. Hwy. 70; intersection of Creedmoor Road and Leesville Road; North Haven, North Ridge, intersection of Old Wake Forest Road, Spring Forest Road and Litchford Road; and U.S. Hwy. 1 and 401 (North), Millbrook Road, New Hope

Church Road, and Trawick Road, all properties coming under zoning jurisdiction of the City of Raleigh by reason of recent annexation. Portions to R-4, R-6, R-10, O & I-1, O & I-2, Shopping Center and industrial according to maps on file in the Planning Dept."

Some two weeks prior to the date set for the hearings, the City mailed notices of the public hearing and proposed zoning ordinance changes to the homes of a number of residents of the Area. Four of the named plaintiffs were among the addressees of those notices. The City also posted and erected signs around the perimeter of the Area affected. The signs were white with red circles and bold black lettering. In 7/8" boldface the signs said "REZONING HEARING"; and in 3/4" boldface, "ALL PERSONS INTERESTED IN OR AFFECTED BY A CHANGE OF ZONING CLASSIFICATION OF THIS PROPERTY ARE INVITED TO ATTEND A PUBLIC HEARING AT THE MUNICIPAL BUILDING, 2:15 P.M." Space was provided for the insertion of a description of the property involved and the date of hearing. Additionally, there were various news articles and a map relating to the Area published in the Raleigh Times both before and after 15 September 1969.

Following the publication of the notices, public hearings were held on 16 July, 30 July, 12 August, 18 August and 15 September 1969. On 15 September 1969, the City of Raleigh enacted Zoning Ordinance "1969 858-ZC-76" which changed the zoning classification of the Area from R-4 to R-6, which allows multifamily dwellings and single family dwellings subject to a limitation of six housing units per acre.

In June 1969, and for some time thereafter, plaintiff Russell Capps was Wake County Planning Director in charge of zoning matters. In June of 1973, Summit Ridge acquired two tracts of land each containing approximately 30 acres at a total cost of $235,834 of which $106,834 was paid in cash and a purchase money note given for the balance. Thereafter in 1973, 1974, 1975 and 1976, Summit Ridge incurred cost and expense by way of architectural and engineering plans, street grading, paving, installation of water and sewer lines to both tracts, and construction of housing.

In April 1973, the City of Raleigh acquired 59 acres in the Starmount-New Hope area "which area encompasses the 1850

acres contemplated in the Capps suit". The City paid $122,000 for that property which is now known as the Marsh Creek Park. In July 1973, the City purchased an additional 16 acres at a purchase price of $45,000 and this is now known as Timberlake Park. These were acquired primarily due to the projected population density of the areas as permitted by R-6 zoning.

In 1973 the Raleigh Housing Authority began a search for land upon which to construct 60 units of apartments. A portion of one of the tracts owned by Summit Ridge was initially selected and on 7 November 1973, the Housing Authority entered into a contract for architectural and engineering services. This site was not approved but on 16 July 1975 a 13-acre portion of the same tract was approved. As of 28 September 1976, the Housing Authority had spent some $31,168.63 on this project and an additional $17,327 for schematic drawings pursuant to contract was soon to be paid.

On or about 24 June 1975, plaintiffs filed a petition to "down zone" the Area to R-4, and approximately a year later the petition was denied. On 23 July 1976, this suit was filed.

The effect of these undisputed facts was a question of law for the court to determine. The court concluded that the motions for summary judgment should be allowed because plaintiffs were guilty of laches and that their delay was unreasonable and without justification. Plaintiffs contend this was error. We disagree.

[2] Plaintiffs deny that they had actual notice of the proposed change in zoning and urge that without a finding of actual notice, the defendants' defense of laches will not lie. We agree with plaintiffs that there is a dispute as to whether they had actual notice. We do not agree that the defense of laches is unavailable where notice is constructive. Plaintiffs rely on *Stutts v. Swaim*, 30 N.C. App. 611, 228 S.E. 2d 750 (1976), *cert. den.* 291 N.C. 178 (1976). There the ordinance was enacted 12 November 1968, and the action was instituted 5 June 1974. Defendants Swaim owned approximately four acres of land adjacent to or near plaintiffs' land. The land owned by defendants Swaim and plaintiffs was zoned R-1, Residential, permitting single family and two family residences but specifically excluding mobile homes. In November 1968 the defendant City enacted an ordinance rezoning the Swaim proper-

ty to M-H, Mobile Home. Plaintiffs allege they had no notice of the change and the ordinance was therefore invalid. Defendants asserted the defense of laches. As to that defense, we held that the evidence was not sufficient to establish a prima facie showing and to require a finding and conclusion by the court. A plaintiff testified that until 1973 there was only one mobile home on the property. He had a conversation with defendant Swaim about a second mobile home which Swaim had recently placed on the property and was told by Swaim that he had no intention of placing any more mobile homes on the property; that it was too valuable for that; and that if he could get a loan he intended to build a home next to the witness's property. In March of 1974, Swaim had constructed a drive near the witness's property and put in a new well all of which the witness thought pertained to the contemplated new home. At that time he said he would place more mobile homes on the property as soon as he could get them; at the time of trial there were four mobile homes and one house on the property. Those plaintiffs who testified said they knew nothing about the rezoning ordinance of 1968 until 1973 or 1974. Defendants presented no evidence regarding expenditures made by them pursuant to the enactment of the rezoning ordinance. We held that

> ". . . defendants failed to carry the burden of showing that the delay by plaintiffs in challenging the validity of the ordinance in question was unreasonable and that the delay worked to their disadvantage, injury or prejudice. Therefore, the trial judge did not err in failing to find facts and make conclusions with respect to defendants' plea of laches." 30 N.C. App. at 619, 228 S.E. 2d at 755.

We do not interpret this case as supportive of plaintiffs' position. In *Stutts*, we said:

> "We find no merit in plaintiffs' contention that the rezoning ordinance is invalid because they had no notice of the 12 November 1968 meeting of the governing board of defendant city. The court found, on competent evidence, that a notice of a public hearing as required by law was duly published in a newspaper circulated in Randolph County on 24 September and 1 October 1968. We hold that the notice was sufficient. *Walker v. Elkin*, 254 N.C. 85, 118 S.E. 2d 1 (1961)." 30 N.C. App. at 614, 228 S.E. 2d at 752.

In *Helms v. Charlotte*, 255 N.C. 647, 652, 122 S.E. 2d 817, 821 (1961), the Court referring to *Blankenship v. City of Richmond*, 49 S.E. 2d 321 (Va. 1948), said:

> "Notice of a public hearing on a proposed amendment to the zoning ordinances was given by advertisement in a local newspaper. The Court held the notice sufficient and stated: 'The fact that the complainants did not see the notice certainly cannot affect the validity of the ordinance in question when everything required by the statute was done before its adoption. It is a matter of almost daily occurrence that rights are affected and the status of relationships is changed upon the giving of similar notice, but no one may successfully contend that acts predicated upon such notice are rendered invalid because persons affected did not see the notice in the newspaper.' This is in accord with the prevailing majority view throughout the country." (Citations omitted.)

See also 27 Am. Jur. 2d, *Equity*, §§ 166-167.

[2] We hold that actual personal notice is not required in order for defendants to be able to avail themselves of the defense of laches.

[3] Plaintiffs urge that if constructive notice be sufficient in this case, they had no constructive notice because the notice was defective. Again we disagree. At the time this ordinance was enacted, G.S. 160-175 was in effect and provided:

> "Method of procedure. — The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced, and from time to time amended, supplemented or changed. However, no such regulation, restriction or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. A notice of such public hearing shall be given once a week for two successive calendar weeks in a newspaper published in such municipality, or, if there be no newspaper published in the municipality, by posting such notice at four public places in the municipality, said notice to be published the first time or posted not less than fifteen days prior to the date fixed for said hearing."

Nowhere does the statute require a metes and bounds description. The notice states that the area to be affected is Northwest, North and Northeast Raleigh; that the area is in the *vicinity of* U.S. Highway 70; intersection of Creedmoor Road and Leesville Road; North Haven, North Ridge, intersection of Old Wake Forest Road, Spring Forest Road and Litchford Road; and U.S. Highway 1 and 401 (North), Millbrook Road, New Hope Church Road, and Trawick Road. This is sufficient to put property owners in the vicinity of these streets and roads on notice that their property might be rezoned.

[4, 5] We now proceed to the merits of the defense. The defense of laches is properly raised by summary judgment motion. *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E. 2d 576 (1976). "In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied." *Teachey v. Gurley*, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938). Defendants properly do not question plaintiffs' right to attack the zoning ordinance in a declaratory action, and the Court in *Taylor v. City of Raleigh*, supra, approved the assertion of the defense of laches in a declaratory judgment action " '[s]ince proceedings for declaratory relief have much in common with equitable proceedings. . . . But the mere passage or lapse of time is insufficient to support a finding of laches; for the doctrine of laches to be sustained, the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke it.' 22 Am. Jur. 2d, Declaratory Judgments, § 78 (1965). *See also*, 101 C.J.S. *Zoning* § 354 (1958)." *Taylor v. City of Raleigh*, 290 N.C. at 622-623, 227 S.E. 2d at 584-585. What will constitute laches depends on the facts and circumstances of each case. Here we think the undisputed facts clearly show that plaintiffs did nothing after the ordinance was adopted on 15 September 1969 to indicate their displeasure with the change in the classification of the Area until 1975 when, on 24 June, they filed a petition to "down zone" the Area to R-4. Their only reason or justification is that they had no *actual* notice of the adoption of the ordinance. We hold that, under the facts of this case five years and nine months is an unreasonable delay without reasonable excuse.

The undisputed facts show that since 15 September 1969, the defendants collectively have expended in excess of $600,000 in grading, paving, house construction, installation of water and sewer lines; in architectural and engineering services; and in acquisition of property to serve the Area as public parks. In addition, they have entered into legal obligations for the expenditure of substantial additional sums and have undergone substantial changes in economic, legal, and planning positions. All these rights acquired and established and obligations undertaken have been in reliance on the zoning ordinance.

We are of the opinion and so hold that Judge Bailey, from the undisputed facts material to the issue, correctly allowed defendants' motions for summary judgment.

Affirmed.

Judge HEDRICK concurs.

Judge ARNOLD dissents.

Judge ARNOLD dissenting.

While the statute does not require a metes and bounds description of the proposed area it does require an adequate description which will put the property owners in the area on notice. In my opinion there is a genuine issue of fact as to whether the description before us is adequate, and thus, whether plaintiffs had constructive notice.

LOUCHHEIM, ENG & PEOPLE, INC. v. JAMES H. CARSON, JR., AND NORTH CAROLINIANS FOR CARSON, A POLITICAL COMMITTEE

No. 7710SC205

(Filed 21 February 1978)

1. Elections § 15— illegal campaign contributions—advances

The advance of money or anything of value to a political candidate by a corporation, labor union or business entity constitutes an illegal contribution under G.S. 163-278.19. G.S. 163-278.6(6),(9).

2. Elections § 15— illegal campaign contributions—purpose of statutes

The purpose of statutes regulating campaign contributions and expenditures by corporations and labor unions is to protect the populace from undue influence by corporations and labor unions, and to insure the responsiveness of elected officials to the public at large.

3. Elections § 15— political candidate—advancement of money by public relations firm for advertising—illegal contribution or expenditure

The payment of money by a corporation engaged in the business of public relations for media advertising for the campaign of a political candidate with the expectation of reimbursement by the candidate's campaign committee when sufficient funds were raised to cover these expenses constituted an advancement and thus was an illegal contribution or expenditure within the purview of G.S. 163-278.19(a).

4. Elections § 15— illegal campaign contributions—constitutionality of statute

The trial court's construction of G.S. 163-278.19 as prohibiting a public relations firm from paying the advertising expenses of a political candidate with the expectation of reimbursement when funds were raised by the candidate does not bar all credit transactions between businesses and political candidates, and the statute, on its face and as applied by the court, does not constitute an unconstitutional intrusion upon the public relations firm's rights to contract and carry on a lawful business activity.

5. Contracts § 6; Elections § 15— obligation to repay illegal campaign advancement—no enforcement by courts

The courts will not enforce an obligation to repay advancements made by a corporation to a political candidate in violation of G.S. 163-278.19.

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 17 December 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 17 January 1978.

Civil action wherein plaintiff seeks to recover $22,251.65 for debts allegedly owed by the defendant, James H. Carson, Jr., for services rendered during the defendant's unsuccessful campaign for election to the office of Attorney General of North Carolina. The allegations in plaintiff's complaint are summarized and quoted as follows:

Plaintiff is a corporation engaged in the business of public relations. In July 1974 it transacted business in Raleigh, North Carolina, as Capital Communications of North Carolina, Inc. During the same period of time the defendant held the office of Attorney General of North Carolina and was preparing to campaign in the impending election as the Republican candidate for the same office. On 1 July 1974 the defendant and his campaign staff

conferred with officers of the plaintiff and agreed that plaintiff would manage the media campaign for defendant. The defendant and his staff authorized the plaintiff to do whatever was necessary to handle this portion of the campaign. The plaintiff further alleged:

> 7. That the defendant, acting for himself and through his campaign managers, workers, employees, and agents, assured the plaintiff at all times that it would be paid fully for its services rendered and for monies advanced to purchase media advertising, posters, buttons, and other campaign devices for defendant's campaign.
>
> 8. That relying upon the promises and assurances of the defendant, the plaintiff commencing in July, 1974, and continuing through October, 1974, rendered full services to the defendant in procuring, arranging, directing and generally managing all aspects of media advertising of defendant's campaign for Attorney General; that the plaintiff, in the defendant's behalf, and in reliance upon the assurance of payment, advanced money for the purchase of media advertising for defendant's campaign; that from time to time, the defendant paid or caused to be paid through his campaign committee portions of the amounts outstanding for such services and for money advanced to purchase media advertising.

The defendant was at all times aware of the expenditure being made in his behalf and as of 30 October 1974 "the defendant owed to the plaintiff for actual money advanced the sum of Nineteen Thousand Three Hundred Forty-nine and 26/100ths Dollars ($19,349.26)," plus $2,902.39 in commissions. On 28 October 1974 the defendant's campaign committee sent a check payable to plaintiff in the amount of $10,000, but the check was returned for lack of sufficient funds.

In his answer the defendant denied the material allegations of the complaint and set up several defenses, among which appears the following:

> 2. That the Complaint alleges that said corporation advanced funds in the approximate amount of $20,000.00 for the political campaign, in an effort to elect the defendant to the office of Attorney General of North Carolina.

3. That North Carolina General Statute § 163-728.6(9) [sic] defines the word "expenditure" to include any advance, loan or transfer of funds.

4. That North Carolina General Statute § 163-278.19 prohibits a corporation from making any expenditure in aid of or on behalf of or in opposition to any candidate or political committee.

. . .

6. That public policy of the State of North Carolina prohibits condoning unlawful activities by Capital Communications, Inc., and its president, Jerome Louchheim and requires that the action be dismissed.

Defendant also filed a counterclaim in which he alleged that plaintiff, through its president Jerome Louchheim, knowingly and wilfully violated the law in "arrang[ing] an unlawful extension of credit to the campaign efforts of the defendant," and in doing so, damaged defendant's reputation in the amount of $50,000. Subsequent to filing his answer and counterclaim, the defendant moved pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure for judgment on the pleadings.

In a reply to the defendant's counterclaim the plaintiff alleged that it "did not make a contribution or expenditure as the term is used in G.S. 163-278.19, but paid for the cost of some advertising pending the receipt by the committee of campaign funds."

The trial court in consideration of defendant's motion for judgment on the pleadings concluded that the advance of money by plaintiff for media advertising for defendant's campaign was an expenditure by a corporation for a candidate for political office as prohibited by G.S. 163-278.19(a); and that the statute, so construed, is not violative of the North Carolina and United States Constitutions. Accordingly, judgment was entered for defendant on the plaintiff's claims, from which plaintiff appealed. The judgment was not dispositive of defendant's counterclaim.

Akins, Harrell, Mann & Pike, by Bernard A. Harrell, for plaintiff appellant.

Tharrington, Smith & Hargrove, by Wade M. Smith, for defendant appellee.

HEDRICK, Judge.

[1] In his first two assignments of error the plaintiff contends that the trial court erred in concluding on the basis of the pleadings that the plaintiff made a campaign contribution or expenditure in violation of the General Statutes of North Carolina. The statutes codified under Article 22A which regulate contributions and expenditures in political campaigns are of recent origin and have never been interpreted by the courts of this State. *See* G.S. 163-278.6—163-278.35 (1976), G.S. 163-278.36 (Supp. 1977). General Statute 163-278.19 reads in pertinent part as follows:

> *Violations by corporations, business entities, labor unions, professional associations and insurance companies.* — (a) Except as provided in G.S. 163-278.19(b), it shall be unlawful for any corporation, business entity, labor union, professional association or insurance company directly or indirectly:
>
> (1) To make any contribution or expenditure . . . in aid or in behalf of or in opposition to any candidate or political committee in any election or for any political purpose whatsoever; . . . .

The term "contribution" as used in this statute is defined as "any *advance*, conveyance, deposit, distribution, transfer of funds, loan, payment, gift, pledge or subscription of money or anything of value whatsoever." G.S. 163-278.6(6) (emphasis added). The term "expenditure" is similarly defined as "any purchase, *advance*, conveyance, deposit, distribution, transfer of funds, loan, payment, gift, pledge or subscription of money or anything of value whatsoever." G.S. 163-278.6(9) (emphasis added). Thus, the advance of money or anything of value to a political candidate by a corporation, labor union or business entity constitutes an illegal contribution or expenditure within the meaning of this statute. The question presented in this case is whether the payments of money made by the plaintiff for media advertising in conjunction with defendant's campaign constitute "advances" as prohibited by the foregoing statutes.

In the pleadings as summarized and quoted above plaintiff described its own acts in the allegations that "plaintiff, in the defendant's behalf, and in reliance upon the assurance of payment, advanced money for the purchase of media advertising for defendant's campaign"; and "[t]hat the plaintiff corporate . . . paid

for the cost of some advertising pending the receipt by the committee of campaign funds." Plaintiff in its brief recognizes that the inartful wording of its pleadings would seem to bring its conduct within the statutory prohibition but argues that the "overall sense" of the pleadings is to the contrary.

In ascertaining the meaning of the words in a particular statute the courts should keep one eye to the common definition of the word and one eye to the purposes of the statute and the evil to be remedied. *Montague Brothers v. Shepherd Co.*, 231 N.C. 551, 58 S.E. 2d 118 (1950). According to common usage, to "advance" money means "to furnish money for a specific purpose understood between the parties, the money or sum equivalent to be returned; furnishing money or goods for others in expectation of reimbursement." Blacks Law Dictionary 72 (rev. 4th ed. 1968).

[2] The purpose of the federal statute regulating campaign contributions and expenditures by corporations and labor unions, 2 U.S.C. § 441(b) (1976) (formerly 18 U.S.C. § 610), which is similar in its language and scope to our own statute, is to protect the populace from undue influence by corporations and labor unions, and to insure the responsiveness of elected officials to the public at large. *United States v. C.I.O.*, 335 U.S. 106, 92 L.Ed. 1849, 68 S.Ct. 1349 (1948); Annot., 24 A.L.R. Fed. 162 (1975). As we read G.S. 163-278.19, we perceive its purposes to be identical to those of its federal counterpart. Our Legislature, as well as Congress, has specified that the advance of money by a corporation in behalf of a political candidate is frustrative of these purposes.

[3] Thus, with the definition of "advance" and the presumed intent of our Legislature in the enactment of the campaign contribution regulations in mind, we conclude that the payments made by plaintiff constituted illegal expenditures within the meaning of G.S. 163-278.19(a). In its reply plaintiff alleged that it expended substantial sums of money for the purchase of media advertising for the defendant's campaign until the defendant's committee could raise sufficient funds to cover these expenses. It is precisely this type of activity which could encourage favored treatment by an official once he is elected. We think the Legislature intended to curb such acts in its enactment of G.S. 163-278.19 and its inclusion of "advance" within the definitions of contribution and expenditure.

Plaintiff argues that the statute, so construed, would prohibit all credit transactions between corporations and candidates for public office. Such an expansive interpretation of the statute is not justified by our conclusion in this case. We do not think that the plaintiff's expenditures in the present case were typical of the ordinary extension of credit to a client for services rendered. In this regard, we find particularly illuminating the plaintiff's allegation "[t]hat at all times, the defendant knew that media advertising had to be currently paid and was aware of the laws and regulations concerning media expenses." Implicit in this contention is the knowledge on the part of the plaintiff of the illegality of its payments; from such knowledge it is reasonable to infer that plaintiff was aware that in paying the defendant's expenses, it was going beyond the mere extension of credit.

Plaintiff also challenges the trial court's conclusion that "[t]he statute makes no distinction between the advertent and inadvertent advancement or expenditure of funds." This conclusion was apparently addressed to the plaintiff's claim in connection with the check which was submitted by the defendant and returned for lack of sufficient funds. The plaintiff's assessment of the trial court's ruling on this point appears in its brief as follows:

> What the trial court is really saying here is that if the candidate pays a firm for its services by check, and the check turns out bad, the obligation is then converted into an "inadvertent contribution" and thus falls within the prohibition of the statute.

We are in no position to determine the accuracy of the plaintiff's statement as to the trial judge's purpose in including the foregoing conclusion. However, we regard the worthless check as nothing more than an acknowledgment by the defendant that the plaintiff had advanced money in his behalf. Our analysis has focused on the acts of the plaintiff in advancing money for the purchase of media advertising for the defendant from July to October, 1974. The fact that the defendant recognized a "moral" obligation to the plaintiff on 28 October 1974 and attempted to satisfy it in part with a worthless check does not alter the complexion of plaintiff's prior illegal acts. And if the obligation itself is unenforceable then a check representative of such obligation cannot be made the basis of a claim. *Corbett v. Clute*, 137 N.C. 546, 50 S.E. 216 (1905).

[4] Plaintiff next contends that the statute, G.S. 163-278.19, is unconstitutional as construed by the trial court. Plaintiff argues that the trial court's construction of the statute would permit an unconstitutional infringement upon its rights to contract and carry on a lawful business activity which are embodied in the due process clause of the United States Constitution, U.S. CONST. amend. XIV, amend. V; and the law of the land clause of the North Carolina Constitution, N.C. CONST. art. I, § 19.

Freedom to contract and engage in a lawful business activity are rights guaranteed by the state and federal constitutions. *Muncie v. Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474 (1960); *Alford v. Insurance Co.*, 248 N.C. 224, 103 S.E. 2d 8 (1958). However, these rights are not absolute, and limitations thereon imposed by the Legislature are not violative of the constitutional provisions so long as they are reasonable in light of the purposes to be accomplished. *Morris v. Holshouser*, 220 N.C. 293, 17 S.E. 2d 115 (1941). Plaintiff argues that the statute in issue, as construed by the trial court, is arbitrary in its contravention of constitutional rights.

As previously stated, in order to prevent undue corporate and union influence on federal elections, Congress deemed it necessary to prohibit contributions and expenditures in behalf of political candidates from these sources. The federal courts have examined the encroachment on constitutional rights inherent in specific applications of the statute. The prohibition of direct contributions of money or advances of money by a corporation has been found reasonably related to a permissible State objective. *United States v. Chestnut*, 394 F. Supp. 581 (S.D. N.Y. 1975), *aff'd*, 533 F. 2d 40 (2d Cir. 1976). On the other hand, where the statute was construed to prohibit a national bank from making a fully secured loan to a political candidate, it was found to violate the fifth amendment by intruding into the normal course of business of the bank without sufficient relationship to the objective of the statute. *United States v. First National Bank of Cincinnati*, 329 F. Supp. 1251 (S.D. Ohio 1971).

Plaintiff's constitutional claims were premised on the assumption that the trial court's construction of G.S. 163-278.19 would bar all credit transactions between businesses and political candidates. Such a construction would raise constitutional questions of a different magnitude than those presented by our more

limited construction and might well involve an unreasonable intrusion on constitutional rights. In any event, the plaintiff's payment of the defendant's advertising expenses were clearly advances as prohibited by the statute; and the prohibition thereof constitutes only a minimal intrusion on plaintiff's constitutional rights, and is clearly reasonable in light of the purposes to be accomplished by the statute. We hold that the statute on its face, and as applied by the trial court, is constitutional.

[5] The plaintiff in this case has sought to enforce an obligation arising out of a transaction which we have found to be in violation of G.S. 163-278.19. If this Court were to lend its aid and compel the defendant to repay money advanced contrary to the statute, the policy declared by the Legislature in the enactment of that statute would be frustrated. Thus we will follow the advice offered by our Supreme Court at an earlier time: "[W]hen the court discovers that it is invoked to aid in enforcing an illegal transaction, the court *ex mero motu* will withdraw its hand." *Cansler v. Penland*, 125 N.C. 578, 581, 34 S.E. 683, 684 (1899). *See also McArver v. Gerukos*, 265 N.C. 413, 144 S.E. 2d 277 (1965). The plaintiff's acts, as reflected in the pleadings, preclude its recovery in the courts of this State for money advanced in the amount of $19,349.26.

However, what we have heretofore said relates only to the plaintiff's claim for $19,349.26. We are unable to determine on the basis of these pleadings whether plaintiff's claim for $2,902.39 based on "commissions" is barred as an illegal contribution or expenditure to a political candidate pursuant to G.S. 163-278.19. The pleadings do not establish whether the "commissions" were earned by the plaintiff in connection with the illegal advancement of $19,349.26. Since the pleadings do not reflect an insurmountable bar to plaintiff's claim of $2,902.39, this portion of the judgment for defendant must be reversed. Furthermore, the judgment for defendant from which the appeal was taken makes no disposition of defendant's counterclaim.

The result is: that portion of the judgment dismissing plaintiff's claim against the defendant for $19,349.26 is affirmed; that portion of the judgment dismissing plaintiff's claim for commissions of $2,902.39 is reversed and remanded to Superior Court for further proceedings with respect to plaintiff's claim for $2,902.39 and defendant's counterclaim.

Affirmed in part.

Reversed and remanded in part.

Judges BRITT and WEBB concur.

JAMES E. GREENWAY AND WIFE, ALICE F. GREENWAY v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY AND WILLIAM A. PLEASANT

No. 7717SC135

(Filed 21 February 1978)

1. Insurance § 113— limiting provision—no restriction of standard policy allowed

An insurer may insure only such properties as are situated outside the limits set out in a limiting provision, which provision is descriptive, not restrictive of the standard coverage, and what an insurer may not do is promise general coverage, receive appropriate premium payment and then restrict coverage by a restrictively limiting provision.

2. Insurance § 122— fire insurance—limiting endorsement—installation of telephone—reasonableness of endorsement

In an action to recover the balance allegedly due under a fire insurance policy where defendant paid plaintiffs only 75% of the agreed value of their house which had been destroyed by fire because plaintiffs had not installed a telephone as required for 100% coverage by an "Unprotected Dwelling Endorsement A," which was attached to plaintiffs' policy, the endorsement provision was reasonable because tied to an increased risk and was in nowise restrictive of anything in the standard policy in violation of G.S. 58-177(3) but was descriptive of the coverage contemplated in and charged for by the standard policy.

3. Insurance § 128— fire insurance—limiting endorsement—no waiver by insurer

In an action to recover the balance allegedly due under a fire insurance policy which contained "Unprotected Dwelling Endorsement A," providing for reduction of coverage by 25% if there were not a telephone upon the premises, plaintiffs' argument that the endorsement provision was waived because defendant insurer, via defendant agent, knew the dwelling was under construction and without a telephone but still insured it and accepted premium payments is without merit, since the dwelling was completed well before the fire and the provision, which clearly contemplated the completed dwelling, was not waived.

4. Insurance § 3— failure to sign endorsement—endorsement valid

The fact that an endorsement in a fire insurance policy which limited coverage to 75% of the value of the dwelling if there were no telephone on the

premises was not signed did not invalidate it, since the signature requirement of G.S. 58-177(3) comes into play only after the standard policy has been accepted, and the limiting endorsement was an integral part of the original policy and was clearly referred to on its face.

5. **Unfair Competition— fire insurance policy—no misrepresentation—no neglect of duty by insurer or agent—no unfair trade practice**

Because the endorsement in a fire insurance policy made no misrepresentation and because neither defendant agent nor defendant insurer violated any duty owed plaintiffs, neither defendant could possibly be guilty of any unfair practice pursuant to G.S. 75-1.1 because of the endorsement, if, *arguendo*, such statute contemplated regulating the insurance industry at all.

6. **Rules of Civil Procedure § 56— summary judgment—no timely motion—summary judgment proper**

Plaintiff's contention that the trial court improperly granted summary judgment for defendant insurer, even though no motion was made by defendant insurer until the day of the hearing on plaintiffs' and defendant agent's motions for summary judgment, is without merit, since summary judgment may be rendered against the moving party when appropriate, and it was therefore immaterial that defendant insurer's motion was not made within the time limit.

PLAINTIFFS appeal from *Walker (Hal H.), Judge*. Orders filed 2 December 1976 and 22 December 1976, in Superior Court, CASWELL County. Heard in the Court of Appeals 6 December 1977.

Plaintiffs began action against defendant Insurance Company to recover the balance allegedly due under a fire insurance policy, $18,000 building and $9,000 contents coverage. Defendant-insurer had insured plaintiffs' house against loss by fire; the house had burned on 9 February 1975; and defendant had paid only 75% of the agreed value because plaintiffs had not installed a telephone as required for 100% coverage by an "Unprotected Dwelling Endorsement A," which was attached to plaintiffs' policy, and which plaintiffs alleged was wrongfully included in their policy. Plaintiffs filed an amended complaint on 10 May 1976, joining William Pleasant, defendant-insurer's agent, as codefendant, alleging negligence on the part of both defendants, and also seeking treble damages pursuant to G.S. 75-16 because of defendant-insurer's unfair and deceptive trade practice in forcing the limiting endorsement upon the plaintiffs without their consent or understanding by material misrepresentation. Defendants answered, denied negligence and misrepresentation, and asserted contributory

negligence on the part of plaintiffs for admitted failure to read their policy. Extensive discovery followed. Plaintiffs timely moved for summary judgment against defendant-insurer and for certain interrogatories compelling defendant-agent to answer. Defendant-agent timely moved for summary judgment against plaintiffs. Defendant-insurer moved the day of the summary judgment hearing for summary judgment against plaintiffs.

Plaintiffs' pleadings and affidavits tended to show that they had acquired land in August 1974 on which to build a home. The construction was to be financed through FHA which would pay out the loan monies only upon the premises being insured. Plaintiff-husband applied for fire insurance, through defendant-agent, with defendant-insurer in September 1974. The application indicated that the dwelling to be insured was under construction. Plaintiff claimed that he was never informed of the telephone requirement for full coverage and never discussed rates but that defendant-agent told him he would have full coverage. The application he signed made no mention of the telephone requirement. Plaintiffs received their policy in October but never read it. Plaintiff-husband admitted that his copy contained a slip of paper entitled "Unprotected Dwelling Endorsement A" and that the face of the policy contained the specific endorsement code number. Defendant-agent came to the house at least twice while it was under construction and never mentioned anything about a telephone. Plaintiffs were away on 9 February 1975 when their house burned down and defendants refused to pay more than 75% of the policy limit.

Defendants' pleadings and affidavits tended to show that plaintiffs were informed of the telephone requirement when they initially applied for the insurance because it was one of the factors involved in classifying the house and computing the premiums. Defendant-insurer was not ordinarily willing to insure 100% of loss of a rural, "unprotected" dwelling, situated far from a fire department, but it would do so if certain conditions were met, including the maintenance of a telephone. These conditions were spelled out in the "Unprotected Dwelling Endorsement A" and the code number of the endorsement appeared clearly on the policy face as did the classification "10A" designating the dwelling as an "Unprotected Dwelling." Plaintiffs got a lower premium for total coverage as a result of accepting the conditions of the

special endorsement and supposedly meeting them. Defendant-insurer insured buildings under construction which could not meet all the conditions if insured accepted the condition and fulfilled them when the building was completed. Defendant-agent claimed that defendant-insurer did not require him to inquire, after issuance of insurance, whether insured is meeting accepted conditions, and that the duty is rather on the insured to notify insurer if he can or will not meet the conditions.

After consideration of all the pleadings and affidavits, the trial court denied both of plaintiffs' motions, granted defendant-agent's and defendant-insurer's motions, preserving plaintiffs' claim for additional living expenses. From these orders plaintiffs appeal.

Ramsey, Hubbard & Galloway by Mark Galloway for plaintiff appellants.

Henson & Donahue by Perry C. Henson and Ronald G. Baker for defendant appellee, North Carolina Farm Bureau Mutual Insurance Company.

Jordan, Wright, Nichols, Caffrey & Hill by R. Thompson Wright for defendant appellee, William A. Pleasant.

CLARK, Judge.

The first issue raised by this appeal is whether "Unprotected Dwelling Endorsement A," providing for reduction of coverage by 25% if there were not a telephone upon the premises, was unenforceable. Plaintiffs first attack endorsement "A" on the ground that it is *restrictive* of the coverage provided in the standard fire insurance policy (G.S. 58-176), and therefore violates G.S. 58-177(3), which provides in pertinent part:

> "A company may write or print upon the margin or across the face of a policy, in unused spaces or upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form, *and all such slips, riders, and provisions must be signed* by an officer or agent of the company so using them. *Provided, however, such provisions shall not have the effect of making the provisions of the standard policy form more restrictive . . . .*" [Emphasis added.]

[1] There is no statutory definition of "restrictive." The word, construed in light of the statutory object and not in a narrow or technical sense, was intended to cover any clause or provision included in or appended to the standard fire policy whereby an essential provision of the standard fire policy, materially influencing the rights of the insured, is limited or modified. *Glover v. Insurance Co.*, 228 N.C. 195, 45 S.E. 2d 45 (1947), held a provision in a fire insurance policy restrictive of the standard policy provisions. The standard policy insured for all direct loss by fire. The provision excluded coverage for loss by a fire originating on a neighbor's property whenever the insured's property was within a specified distance of the neighbor's combustible property. The provision thus restricted coverage to compensation for certain kinds of fire while the standard policy provided coverage for loss by all fires. The premium assessment was most certainly based on the general coverage of the standard policy provisions. The *Glover* court made the distinction between the limiting provision, which was truly restrictive in character, and one that is "descriptive of the sole risk classification" underwritten by the insurer. 228 N.C. at 198, 45 S.E. 2d at 47. It is clear that an insurer may insure only such properties as are situated outside the limits set out in a limiting provision, which provision is descriptive, not restrictive, of the standard coverage. What an insurer may not do is promise general coverage, receive appropriate premium payment and then restrict coverage by a restrictively limiting provision.

[2] It is clear, from an examination of the face of the standard policy and of the "Unprotected Dwelling Endorsement A" at issue in the case *sub judice*, that the endorsement is descriptive of the coverage agreed to and paid for under the standard policy provisions rather than restrictive. Both the application and the standard policy classify the dwelling to be insured as "10A," unprotected and rural, and both indicate the charge of a discounted premium. The standard policy clearly indicates the "Unprotected Dwelling Endorsement" Code Number, "257-4(11-70)," on its face. The classification 10A determined the house to be "unprotected," an insured-risk rural dwelling far from a fire department. The acceptance of the endorsement's conditions for 100% coverage gave plaintiffs the discounted premium. The plaintiffs are clearly wrong in their collateral contention that the endorse-

ment was invalid because there was no increased risk involved. The insurer's risks in insuring a dwelling in a rural area far removed from a fire station are obviously greater than of insuring a dwelling close to a station; the risks of insuring a remote dwelling without telephone communication are obviously greater than of insuring such a dwelling with adequate, immediate communication. Therefore, we hold that the endorsement provision was reasonable because tied to increased risk, and in nowise restrictive of anything in the standard policy, which nowhere promises 100% compensation. The provision is descriptive of the coverage contemplated in and charged for by the standard policy.

[3, 4] Plaintiffs' argument that the endorsement provision was waived because defendant-insurer, via defendant-agent, knew the dwelling was under construction and without a telephone but still insured it and accepted premium payments is without merit. It is not necessary to decide whether the endorsement provision would have applied to limit coverage had the dwelling burned down before construction was completed and a telephone could be installed. In the case *sub judice* the dwelling was completed well before the fire and the provision, which clearly contemplated the completed dwelling, was not waived. The fact that the endorsement was not signed does not invalidate it. The statute cited earlier does require signature, but this requirement seems to come into play only *after* the standard policy has been accepted. The common law rule of "incorporation by reference" is sufficient. 43 Am. Jur. 2d, Insurance, § 284, p. 346. Statutes such as we have in North Carolina are not designed to abrogate common law rules in general but to soften such rules as affect misrepresentation or warranty, to modify the doctrine of *caveat emptor* to suit modern concepts of commercial fairness. 43 Am. Jur. 2d, Insurance, § 757, p. 740. They also protect against a company sneaking limitations in *after* acceptance. But they do not completely shift the burdens of responsibility off the buyer and onto the seller of insurance. No statute has abrogated the common-law burden placed on the buyer of insurance to read his policy. 43 Am. Jur. 2d, § 754, p. 738. In the case *sub judice* the limiting endorsement was an integral part of the original policy and was clearly referred to on its face. The fact that plaintiff did not read his policy did not excuse him from its provisions.

[5] There is conflicting testimony as to whether plaintiffs knew of the telephone requirement. This conflict, however, does not raise a material issue of fact. It is clearly not the duty of an insurer or its agent to inquire and inform an insured as to all parts of his policy:

> "We cannot approve the position that in the absence of a request it was the agent's legal duty to explain the meaning and effect of all the provisions in the policy, or that his failure to inquire . . . was a waiver of the requirement . . . ." *Hardin v. Ins. Co.*, 189 N.C. 423, 427, 127 S.E. 353, 355 (1925).

Plaintiffs in this case made no requests for explanation; they agreed to the 10A classification, paid the premiums and admitted they knew the endorsement slip was physically part of the policy they accepted. No duty arose such that the defendant-agent, and, by imputation, the defendant-insurer, might be negligent for violating it. Plaintiffs' admitted failure to read the policy, is, as noted, no defense to the enforcement of the endorsement's limitations. *Hardin, supra.* Because the endorsement made no misrepresentation and because neither defendant-agent nor defendant-insurer violated any duty owed plaintiffs, neither defendant could possibly be guilty of any unfair trade practice pursuant to G.S. 75-1.1, if, *arguendo*, such statute contemplates regulating the insurance industry at all.

[6] Plaintiffs' final contention, that the trial court improperly granted summary judgment for defendant-insurer even though no motion was made by defendant-insurer until the day of the hearing, is also without merit. G.S. 1A-1, Rule 56(c) does not require that a party move for summary judgment in order to be entitled to it.

> ". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to *any* material fact and that *any* party is entitled to a judgment as a matter of law. . . ." [Emphasis added.]

Thus, when appropriate, summary judgment may be rendered against the moving party. The fact that defendant-insurer's motion was not made within the time limit is therefore immaterial; it

need not have been made at all. Plaintiffs' motion, made well before the deadline, triggered the evaluation that led to the grant. Shuford, N.C. Civil Prac. & Proc., § 56.6.

The trial court's judgment is

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

THOMAS O'GRADY, JAMES R. PRIDEMORE, PETER MACQUEEN III AND MARY G. MACQUEEN v. FIRST UNION NATIONAL BANK OF NORTH CAROLINA v. BANK OF NORTH CAROLINA, N.A. v. JACK F. STEWART AND WAYNE C. HUDDLESTON

No. 775SC161

(Filed 21 February 1978)

1. **Bills and Notes § 19; Evidence § 32.5— rescission of collateral for loan—evidence of condition—parol evidence rule**

In this action to rescind a letter of credit as collateral for a note to a bank, an unconditional guaranty of a portion of the note, and one maker's signature on the note on the ground that the bank had relieved two persons of liability on the debt when it accepted a second note in substitution of the original note, testimony by two plaintiffs that they signed the letter of credit and guaranty on the condition that the two persons would remain liable on the debt was properly excluded as being in violation of the parol evidence rule where the evidence showed that plaintiffs did not communicate the alleged condition to the bank.

2. **Bills and Notes § 20— action to rescind collateral—counterclaim on note—judgment for defendant**

In an action to rescind a letter of credit and guaranty given as security for a note to a bank on the ground that a condition precedent had been breached, the trial court did not err in concluding that the ultimate facts were not in dispute, dismissing plaintiffs' case at the conclusion of all the evidence, and entering judgment for defendant bank on its counterclaim for the balance remaining due on the note where the note was admitted into evidence without any conditions or contingencies attached, and the evidence showed that the note had not been paid according to its terms.

3. **Rules of Civil Procedure § 52— separate findings and conclusions—sufficiency of judgment**

A judgment in which the court determined that the ultimate facts were not in dispute, dismissed plaintiffs' case and entered judgment for defendant on its counterclaim was sufficient to meet the mandate of G.S. 1A-1, Rule

52(a)(1) that the court find the facts and state separately its conclusions of law, although it would have been better for the court to have stated its findings and conclusions in more detail.

APPEAL by plaintiffs from *James, Judge.* Judgment entered 2 September 1976 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 10 January 1978.

This is a civil action filed on 11 August 1975 by Thomas O'Grady, plaintiff, to rescind an irrevocable commercial letter of credit in the amount of $26,000.00 dated 9 April 1975 on the grounds that the First Union National Bank (hereinafter FUNB), defendant, relieved Jack and Flora Stewart of any liability on the debt; by plaintiffs, Peter MacQueen III and Mary G. MacQueen, to rescind an unconditional guaranty of $7,500.00 on the same grounds as plaintiff, O'Grady; and by plaintiff, James R. Pridemore, to rescind his execution of the note of 9 April 1975 on the grounds that the defendant, FUNB, has relieved Jack and Flora Stewart from any liability on the debt. The Bank of North Carolina, N.A., was made a party defendant as it issued the letter of credit sought to be rescinded. The defendant, FUNB, answered and counterclaimed for judgment against the plaintiff, O'Grady, upon the letter of credit, against the plaintiffs, Peter MacQueen and Mary MacQueen, upon their guaranty and against the plaintiff, Pridemore, upon his liability on the note. The letter of credit and guaranty represented collateral security for a loan in the principal amount of $45,000.00. FUNB also filed a third party complaint against Jack F. Stewart and Wayne C. Huddleston, both of whom had entry of default and judgment by default entered against them.

At the call of the case, all of the parties, by consent, waived a trial by jury, and the case was heard by the trial judge. The evidence presented tended to show that Jack Stewart, Wayne Huddleston, and James R. Pridemore were developers of motels in Rocky Mount, North Carolina, Rowland, North Carolina, and Florence, South Carolina, were in need of construction funds, and requested the defendant, FUNB, to make a loan to them for $45,000.00 which the defendant bank agreed to do upon its receiving proper security for the loan. The negotiations relating to the loan culminated in the signing of the first note dated 3 April 1975 by Jack Stewart, Flora Stewart, James Pridemore, and Wayne C.

Huddleston through his attorney in fact, Pridemore. Only Jack Stewart, Pridemore, and Huddleston were shown on the note as primary obligors. The loan proceeds were not disbursed as a result of the 3 April 1975 note, as the requested collateral security for the note had not been received by the defendant bank.

Thereafter, plaintiff O'Grady caused the Bank of North Carolina, N.A., to issue a letter of credit in favor of FUNB in the amount of $26,000.00, and plaintiffs MacQueen executed and delivered to FUNB their guaranty in the amount of $7,500.00. On 9 April 1975, plaintiff Pridemore went to FUNB offices in Rocky Mount to obtain the proceeds from the loan. The 3 April note was a three-year note, and bank officials discovered that the letter of credit only extended for one year. Thus, a new note was prepared containing a one-year repayment provision. The new note, dated 9 April 1975, was executed by Jack F. Stewart, Wayne C. Huddleston, and James R. Pridemore as primary obligors, and was signed by James R. Pridemore personally, by Wayne C. Huddleston through his attorney in fact, Pridemore, and by Stewart through his attorney in fact, Pridemore. FUNB thereupon disbursed the loan proceeds of $45,000.00 to Pridemore by means of its check made payable to Stewart, Pridemore, and Huddleston and which was negotiated by Pridemore by his endorsements in the same manner, personally and through his powers of attorney, as he had executed the 9 April note.

At the close of all of the evidence, defendant, FUNB, moved for a directed verdict dismissing plaintiffs' action and granting defendant, FUNB, judgment against the plaintiffs on its counterclaim. Both motions were allowed, and the plaintiffs appeal.

Crossley & Johnson, by Robert White Johnson, for the plaintiff appellants.

Parker, Rice & Myles, by Charles E. Rice III, for the defendant appellee, FUNB.

ERWIN, Judge.

[1] The plaintiff, O'Grady, would have testified, if permitted, that he had the letter of credit issued on the condition that Jack and Flora Stewart would remain liable on the note. The plaintiffs, MacQueen, would have testified, if permitted, that they executed

the guaranty on the condition that Jack and Flora Stewart would remain liable on the note. The plaintiffs contend that these were conditions precedent.

Relying upon *Bailey v. Westmoreland*, 251 N.C. 843, 112 S.E. 2d 517 (1960), *Perry v. Trust Co.*, 226 N.C. 667, 40 S.E. 2d 116 (1946), and *Overall Co. v. Hollister Co.*, 186 N.C. 208, 119 S.E. 1 (1923), the plaintiffs contend that this testimony should have been admitted into evidence as an exception to the parol evidence rule and that the exclusion thereof amounts to prejudicial error. We do not agree.

Justice Bobbitt (later Chief Justice) in the case of *Bailey v. Westmoreland, supra*, at 845 and 846, 112 S.E. 2d at 519 and 520, stated the rule that controls the admission of parol evidence:

> "The parol evidence rule, upon which defendants' contention is based, 'prohibits the admission of parol evidence to vary, add to, or contradict a written instrument.' Stansbury, North Carolina Evidence § 251. However, 'The parol evidence rule presupposes the existence of a legally effective written instrument. It does not in any way preclude a showing of facts which would render the writing inoperative or unenforceable.' Stansbury, *op. cit.*, § 257.
>
> '. . . the rule excluding parol evidence has no place in an inquiry unless the court has before it some ascertained paper beyond question binding and of full effect. Hence, parol evidence is admissible to show conditions precedent, which relate to the delivery or taking effect of the instrument, as that it shall only become effective on certain conditions or contingencies, for this is not an oral contradiction or variation of the written instrument but goes to the very existence of the contract and tends to show that no valid and effective contract ever existed; . . .' 32 C.J.S., Evidence § 935. In accord: 20 Am. Jur., Evidence § 1095; 8 Am. Jur., Bills and Notes §§ 1051 and 1052; Wigmore on Evidence, Third Edition, § 2410; Stansbury, *op. cit.*, § 257.
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> * * *
>
> The parol evidence, in large measure, consists of testimony of the defendants as to what was said and done *by plaintiff* in their personal transactions with him. This

testimony, properly admitted, was amply sufficient to sustain the verdict."

In *Perry v. Trust Co., supra,* at 671, 40 S.E. 2d at 118 and 119, Justice Devin stated:

> "We think the plaintiff in this case has offered evidence which, when considered in the light most favorable for him, affords ground for the permissible inference, deducible therefrom, that the $2,300 papers and the $1,971 note relate to the same transaction, and evidence in the main the same obligation; that the three notes aggregating $2,300 were not based upon a present consideration, but were executed upon condition that the payee take up the outstanding liens on plaintiff's land; that upon the payee's failure so to do the $1,971 note was later given by the plaintiff to the payee's administrator to cover these same obligations, or a substantial part thereof; and further that this note for $1,971, which the plaintiff stands ready to pay, was accepted by the then acting administrator as constituting a discharge of the previously executed notes. *Ins. Co. v. Morehead,* 209 N.C., 174, 183 S.E., 606."

In *Overall Co. v. Hollister Co., supra,* at 209, 119 S.E. at 1 and 2, Justice Stacy (later Chief Justice) reversed the trial court below to permit parol evidence to be admitted and stated the following:

> "Defendant denied liability and, upon the trial, offered to show that the order in question was given with the distinct understanding and upon the express condition that the same should not become effective or operative if certain overalls previously ordered from another dealer were received by defendant; and further, that before plaintiff had acknowledged and accepted said order, defendant advised the plaintiff by letter that defendant would receive the overalls previously ordered as aforesaid, and that defendant would and did thereby cancel the order given to plaintiff's agent. Notwithstanding this letter, plaintiff thereafter shipped the overalls and now brings this suit to recover their value as per stipulated price.

All of the defendant's proposed evidence was excluded on objection. Therefore the single question presented by the appeal is the competency or incompetency of the evidence offered by the defendant.

* * *

We think the evidence offered by the defendant brings the instant case within the latter rule and that a new trial must be awarded and another jury impaneled to pass upon the evidence."

In these cases, the conditions and contingencies were known by the parties to the instruments prior to their execution. However, the evidence here shows that O'Grady and the MacQueens did not communicate the alleged condition to the defendant, FUNB. Further, Jack F. Stewart was made a third party defendant, and default judgment was rendered against him, indicating that FUNB had not relieved Stewart of liability on the debt.

This brings this Court to the assignments of error Nos. 2 and 3.

2. The trial court erred in finding that there were no factual disputes as to the matters and issues of law raised by the pleadings and evidence in the case.

3. The trial court erred in dismissing the plaintiffs' case at the conclusion of all the evidence and in entering judgment for the defendant, FUNB, on its counterclaim without making findings of fact or conclusions of law.

[2] After the evidence as set out above was properly excluded, the trial court had before it the 9 April 1975 note, properly admitted into evidence by the plaintiffs and the defendant without any conditions or contingencies attached, and clear evidence that the note had not been paid according to the terms thereof, which was sufficient to conclude at the close of the evidence that the ultimate facts were not in dispute, and that the plaintiffs were indebted to the defendant, FUNB, for the balance remaining due on the note as alleged in its counterclaim. We, therefore, conclude that the plaintiffs' second assignment of error is without merit.

Though the defendant FUNB's motion for a directed verdict against the plaintiffs was incorrectly designated as such, we have treated it as a motion for involuntary dismissal under G.S. 1A-1, Rule 41(b), similar to the motion for compulsory nonsuit under former G.S. 1-183, *See Higgins v. Builders and Finance, Inc.*, 20 N.C. App. 1, 200 S.E. 2d 397 (1973), cert. denied, 284 N.C. 616, 201 S.E. 2d 689 (1974). Also, FUNB's motion for a directed verdict in its favor and against the plaintiffs on its counterclaim was incorrectly labeled, in that, this was a nonjury trial. In reality, this latter motion was nothing more than a request that the trial court enter judgment in favor of FUNB on its counterclaim. G.S. 1A-1, Rule 52(a)(1) provides as follows:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

[3] We conclude that the judgment entered below was not commendable in all respects, but we find no reversible error. Once the evidence as to the alleged condition was properly excluded, we agree with the trial court "that there are no factual disputes as to the matters and issues of law raised by the pleadings and evidence in this case." In effect, the trial court found that the plaintiffs had no defense to the defendant FUNB's counterclaim, that the balance due on the note had not been paid, and that judgment should be entered against the plaintiffs. Suffice it to say that on the facts of this case, we hold that the trial court made sufficient findings of fact and conclusions of law. While it would have been better form for the trial court to have stated its findings and conclusions in more detail, such a technical defect is not reversible error when the ultimate facts were not in dispute, and a request for additional findings had not been made. A purpose of Rule 52(a)(1) is to assist the appellate courts in determining whether or not the trial court correctly found the facts and applied the law to them. *See Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E. 2d 26 (1977). The judgment before us is sufficient to meet the mandate of Rule 52(a)(1).

The judgment for the defendant is

Affirmed.

Chief Judge BROCK and Judge VAUGHN concur.

NORTH CAROLINA NATIONAL BANK v. HENRY THOMAS EVANS, BETTY TRIP EVANS, AND J. RUSSELL WOOTEN

No. 773DC182

(Filed 21 February 1978)

1. **Fraudulent Conveyances § 1— "voluntary" conveyance defined**

A conveyance of real property is said to be "voluntary" when it is effected without consideration; legal consideration consists of some benefit or advantage to the promisor, or of some loss or detriment to the promisee.

2. **Fraudulent Conveyances § 3.4— conveyance to tenant in common—conveyance not voluntary—summary judgment proper**

In an action to have deeds representing the transfer of land from the defendants Evans to the defendant Wooten set aside as fraudulent conveyances, defendant Wooten was entitled to summary judgment where the complaint and affidavits tended to show that defendant Wooten and defendants Evans were tenants in common of the land in question; as consideration for the conveyances defendant Wooten assumed defendants Evans' indebtedness to a savings and loan association secured by a deed of trust on the property; defendant Wooten also assumed defendants Evans' indebtedness to a bank evidenced by an unsecured promissory note; and plaintiff's own affidavits tended to show that defendant Wooten paid a valuable consideration to defendants Evans for the property. Plaintiff's contention that defendant Wooten's affidavits did not establish that he paid *adequate* consideration for the property involved is without merit, since "adequacy" of consideration was irrelevant in this case to the question of whether the conveyance was "voluntary."

Judge WEBB dissenting.

APPEAL by plaintiff from *Whedbee, Judge.* Judgment entered 1 December 1976 in District Court, PITT County. Heard in the Court of Appeals 12 January 1978.

Civil action wherein plaintiff seeks to recover a deficiency judgment against defendants Henry Thomas Evans and Betty Trip Evans in the amount of $3,252.54 plus interest, and to have deeds representing the transfer of land from the defendants Evans to the defendant Wooten set aside as fraudulent conveyances.

In its amended complaint, plaintiff alleged the following: that on 10 July 1973 defendants Evans executed a note for $12,000, payable to plaintiff and secured by a security interest in a 1974 Freedom Mobile Home; that on 15 March 1976 defendants Evans defaulted in the payment of the indebtedness, and pursuant to the

security agreement plaintiff sold the mobile home for $2,500; that on 19 March 1976 defendants Evans, as tenants in common of certain tracts of land with defendant Wooten, conveyed their one-half undivided interest in said land to defendant Wooten; and that defendants Evans and defendant Wooten were close friends and business associates on the date of the conveyances. The remaining pertinent allegations in plaintiff's complaint read as follows:

> On information and belief, plaintiff alleges that the conveyances . . . were voluntary and without adequate consideration, and defendants Evans, after the said conveyances, did not retain property fully sufficient and available, above and beyond the exemptions guaranteed them under the Constitution and Laws of North Carolina, to pay their debts then existing.
>
> In the alternative and on information and belief, plaintiff alleges that the conveyances . . . were voluntary and without adequate consideration, and made by defendants Evans with the actual intent to defraud plaintiff, even though sufficient property was retained by defendants Evans, above and beyond the exemption guaranteed to them by the Constitution and Laws of North Carolina, to pay their debts then existing.
>
> Plaintiff has caused to be filed in the office of the Clerk of Superior Court of Pitt County, a Notice of *Lis Pendens* against the properties described . . . .

The defendant Wooten filed an answer denying that the conveyances were voluntary and without adequate consideration and alleging that he paid valuable consideration for the land conveyed. Defendant Wooten also filed a counterclaim against the plaintiff for abuse of process alleging that he sustained damages of $10,000 as a result of the notice of lis pendens filed by plaintiff. Defendant Wooten then moved for summary judgment and supported his motion with affidavits tending to show that in consideration for the conveyances defendant Wooten assumed the payment of the balance due on notes secured by deeds of trust on the property conveyed in favor of First Federal Savings & Loan Association of Pitt County, North Carolina; and assumed the payment of the balance due on an unsecured note payable to Planters

National Bank in Ayden, North Carolina, the outstanding balance amounting to at least $7,000.

The trial court entered an order striking the notice of lis pendens and granting summary judgment in favor of defendant Wooten as to plaintiff's claim against defendant Wooten to have the deeds set aside as fraudulent conveyances. Plaintiff appealed.

Everett & Cheatham, by James T. Cheatham and Edward J. Harper II, for plaintiff appellant.

Williamson, Shoffner & Herrin, by Robert L. Shoffner, Jr., for defendant appellee.

HEDRICK, Judge.

Plaintiff assigns as error the order of the trial court granting summary judgment in favor of defendant Wooten, arguing "that there exists a genuine issue as to the material fact as to whether the conveyances from the defendants Evans to the defendant Wooten were voluntary and without adequate consideration . . . ."

A conveyance with intent to defraud creditors is void in North Carolina. G.S. 39-15. The foundation of a claim seeking to set aside a deed as a fraudulent conveyance can be established in accordance with principles clearly set forth in the landmark case of *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914). The Supreme Court in *Aman* discussed five possible applications of the rules regarding fraudulent conveyances:

> (1) If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid.
>
> (2) If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally.
>
> (3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors,

it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained.

(4) If the conveyance is upon a valuable consideration *and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee* and of which intent he had no notice, it is valid.

(5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the *grantor*, participated in by the *grantee* or of which he he [sic] has notice, it is void.

Aman v. Walker, supra at 227, 81 S.E. at 164. Plaintiff seeks to bring his claim within the application in paragraph (2) or (3) above. Thus, plaintiff's claim against defendant Wooten under either of these principles is grounded on the allegation that the conveyances by defendants Evans to defendant Wooten of property described in the complaint were "voluntary."

[1] A conveyance of real property is said to be "voluntary" when it is effected without consideration. Blacks Law Dictionary 403, 1747 (4th Ed. 1968); *L & M Gas Co. v. Leggett*, 273 N.C. 547, 161 S.E. 2d 23 (1968); *Wilson v. Crab Orchard Development Co.*, 5 N.C. App. 600, 169 S.E. 2d 50 (1969). Legal consideration "consists of some benefit or advantage to the promisor, or of some loss or detriment to the promisee." *Stonestreet v. Oil Co.*, 226 N.C. 261, 263, 37 S.E. 2d 676, 677 (1946). *See also Carolina Helicopter Corp. v. Cutter Realty Co., Inc.*, 263 N.C. 139, 139 S.E. 2d 362 (1964).

[2] A motion for summary judgment pursuant to Rule 56 carries with it the burden of offering evidence sufficient to "show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e). Defendant Wooten supported his motion for summary judgment with evidence tending to show that as consideration for the conveyances he assumed defendants Evans' indebtedness to the First Federal Savings & Loan Association

secured by a deed of trust on the property, and defendants Evans' indebtedness to Planters National Bank evidenced by an unsecured promissory note. Thus, in the face of defendant Wooten's motion for summary judgment supported by evidence that the conveyances were not voluntary, the plaintiff could not rest on the conclusory allegation in its complaint made on information and belief that the conveyances were "voluntary." It was incumbent upon the plaintiff in response to the motion to offer evidence of specific facts that the conveyances were made without a valuable consideration flowing between the defendants Evans and defendant Wooten. Rather than offering evidence that the conveyances were "voluntary," plaintiff's own affidavits tended to show that the defendant Wooten paid a valuable consideration to the Evanses for the property.

Plaintiff argues, however, that the defendant Wooten's affidavits do not establish that he paid *adequate* consideration for the property involved. Since the plaintiff has failed to allege or raise an issue of defendant Wooten's participation in the alleged fraud, it is not necessary to consider whether the consideration paid is so deficient as to suggest fraud on his part. In the setting of this case "adequacy" of consideration is irrelevant to the question of whether the conveyance was "voluntary." *See Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539 (1962).

In light of our holding, it is not necessary that we discuss plaintiff's other assignments of error. On this record the defendant Wooten is entitled to summary judgment as to plaintiff's claim to have the deeds conveying the property described in the complaint set aside as fraudulent conveyances.

The judgment appealed from is affirmed and the cause is remanded to the District Court for further proceedings.

Affirmed and Remanded.

Judge BRITT concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I differ from the majority as to the significance of the consideration proven by affidavit in this case. Mr. Wooten has offered affidavits showing that legal consideration was paid for the transfer of the property. The plaintiff does not dispute by its affidavits that legal consideration was paid by Mr. Wooten. Indeed, it cannot dispute this.

Considering the affidavits of both sides, I believe there is a genuine issue as to whether there was valuable consideration. Legal consideration is not the issue.

I disagree that "adequacy" of consideration is irrelevant to the question of whether the conveyance was "voluntary" in this case. A conveyance that is fraudulent as to creditors can, nevertheless, be binding between the parties to the conveyance. *Lane v. Becton*, 225 N.C. 457, 35 S.E. 2d 334 (1945). Implicit in the holding in *Lane v. Becton, supra*, is the concept that consideration may be sufficient to support the deed between contracting parties, but not sufficient to remove the transaction from fraud.

L & M Gas Co. v. Leggett, 273 N.C. 547, 161 S.E. 2d 23 (1968), which is cited by the majority in defining "voluntary" conveyances, provides a good definition for determining if a conveyance was "voluntary." Justice Branch writing for the Court defined "voluntary" conveyances as follows: "A conveyance is voluntary when it is not for value, *i.e.*, when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud." *L & M Gas Co. v. Leggett, supra* at 549, 161 S.E. 2d at 25.

I believe the Court must look into the adequacy of consideration before it can properly grant summary judgment against a plaintiff on the issue of whether a conveyance was voluntary. This is an action affecting the title to real estate which is proper for a notice to be filed pursuant to G.S. 1-116(a). Since a genuine material issue of fact existed as to whether the consideration paid represented a "reasonably fair price," it was error for the trial judge to grant summary judgment in favor of defendant Wooten. I would reverse the trial judge's order.

STATE OF NORTH CAROLINA v. MARION URIAH HODGES, JR.

No. 772SC797

(Filed 21 February 1978)

1. **Homicide § 19.1— reputation of deceased—exclusion of testimony not prejudicial**

Defendant in a homicide prosecution was not prejudiced where the trial court sustained the district attorney's objection to defense counsel's questions to defendant as to why he shot the victim, since defendant answered that he was afraid of the victim because of his reputation as a dangerous man, and the court did not strike that testimony.

2. **Homicide § 32.1— second degree murder—nonsuit motion denied—verdict of guilty of manslaughter—denial of motion not prejudicial**

Defendant failed to show that he was prejudiced by the trial court's denial of his motion for nonsuit on the charge of second degree murder, since defendant was, in effect, acquitted of second degree murder when he was convicted of manslaughter.

3. **Criminal Law § 111.1— defendant's statement to police officers—jury instruction proper**

The trial court did not fail to define properly the law relating to the admission of a statement defendant made to a police officer prior to trial where the court instructed the jury to consider all the circumstances under which the statement was made in determining the weight that should be given it.

4. **Homicide § 28— reputation of deceased for violence—rebuttal evidence—jury instructions proper**

The trial court in a homicide prosecution properly instructed the jury that the State could rebut defendant's evidence of the reputation of deceased for violence by showing evidence of the good character of deceased for peace and quiet, since there was sufficient testimony to support such an instruction.

5. **Criminal Law § 113.9— objections to jury charge—time for making**

Objections to the trial court's jury charge in stating the evidence and contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise, objections are deemed to have been waived and will not be considered on appeal.

Judge WEBB dissenting.

APPEAL by defendant from *Small, Judge*. Judgment entered 29 June 1977 in Superior Court, MARTIN County. Heard in the Court of Appeals 31 January 1978.

Upon a plea of not guilty defendant was tried on a bill of indictment charging him with the murder of Kenneth Harris (Har-

ris). The State asked for no greater verdict than murder in the second degree.

Evidence presented by the State is summarized in pertinent part as follows:

On the morning of 22 November 1976 defendant was deer hunting with four other men. A short while before noon defendant was sitting in his truck on the side of a rural road with one of his hunting companions sitting on the passenger side of the truck. Three other members of the party were standing on the road outside the truck when Harris drove up in his truck. Defendant was parked on the extreme left side of the road heading north and Harris, who was headed south, stopped his truck in the middle of the road near the front of defendant's truck.

Harris got out of his truck and went directly to the driver's side of defendant's truck. Defendant called Harris a "pretty boy" after which Harris called defendant a s.o.b. Harris reached into the truck and grabbed defendant's shoulders and throat. A scuffle ensued during which the truck door opened and defendant ended up lying on the ground a few feet from his truck. As defendant was being pulled from the truck, he grabbed a .22 Derringer pistol which was on the seat and as he hit the ground a shot was fired and Harris moaned and fell. No one saw the gun prior to the shot being fired and Harris had no weapon on his person.

Defendant instructed his friends to call the rescue squad. He then surrendered to the sheriff's department where he gave a statement admitting that he had shot Harris with the .22 caliber Derringer. According to testimony of Mrs. Harris, defendant called her husband in October 1976; upon being told that Harris could not come to the telephone, defendant told Mrs. Harris to tell him that he would hunt on the Gall Berry Road whenever he pleased and that he had something for Harris. Mrs. Harris told defendant that she considered his statement to be a threat and hung up the telephone. It was stipulated that Harris died as a result of a gunshot wound inflicted by defendant.

Defendant testified that he shot Harris because he was afraid of him due to his reputation as a dangerous man; that he knew that Harris was going to hurt him if he did not shoot; that Harris opened the truck door, pulled him out of the truck and threw him on the ground; that this made him so mad he shot Harris in the

chest; and that he had had no previous trouble with Harris although Harris had told him once to keep his dogs out of Harris' fields.

Two of defendant's hunting associates testified to hearing complaints and threats passed between Harris and defendant several weeks and months prior to the shooting. Five witnesses testified that Harris had a bad reputation in the community for being a dangerous and violent man. Six witnesses testified as to defendant's general good character and reputation in the community.

The State presented evidence on rebuttal tending to show that Harris' general character and reputation in the community was good. There was also evidence tending to show that Harris was 39 years of age at the time of his death, was approximately six feet tall and weighed approximately 200 pounds; and that defendant was 42 years of age, was five feet eight inches tall and weighed approximately 195 pounds.

The court instructed the jury that they might return a verdict of guilty of murder in the second degree, guilty of manslaughter or not guilty. They returned a verdict finding defendant guilty of manslaughter and from judgment imposing prison sentence of 18 years, defendant appealed.

Attorney General Edmisten, by Associate Attorney Kaye R. Webb, for the State.

W. B. Carter and Clarence W. Griffin for defendant appellant.

BRITT, Judge.

[1] Defendant contends first that the court committed prejudicial error in sustaining the State's objections to his counsel's questions to him as to why he shot Harris. We find no merit in this contention.

This contention relates to Exceptions 4, 5 and 6. With respect to them, the record discloses:

Q. Mr. Hodges, why did you shoot Mr. Harris?

A. Well, I was afraid of him and I knew he was going to hurt me.

Objection of the District Attorney sustained.

EXCEPTION NO. 4

Q. Can you tell us why you shot Mr. Harris?

A. I knew he was going to hurt me.

Objection of District Attorney sustained.

EXCEPTION NO. 5

I was afraid of him because I knowed he had a bad reputation. He had a reputation for being dangerous. . . .

Q. I ask you, Mr. Hodges, why you were afraid of him.

OBJECTION by the District Attorney sustained.

EXCEPTION NO. 6

The witness was permitted to make the following answer to the court reporter in the absence of the jury: "because he had a dangerous reputation. He assaulted his brother, was charged with assaulting his brother and two or three more in the neighborhood."

Defendant argues that a defendant may show that he shot and killed his adversary under a reasonable apprehension of death or great bodily harm, and that the exclusion of his testimony to that effect was reversible error; he cites *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), and other cases. While we agree with the stated rule, we do not think it was violated to defendant's prejudice in the case at hand.

Although we think the trial court erred in sustaining the State's objections indicated by Exceptions 4 and 5, we perceive no prejudice to the defendant. The court sustained the objections but it did not strike the answers or instruct the jury not to consider the answers. Then, in the next sentence, defendant was allowed to state without objection that he was afraid of Harris because he had a reputation for being dangerous.

With respect to the question and answer to which Exception 6 relates, we think the objection was properly sustained for the reason that defendant had just stated why he was afraid of Harris. This conclusion is confirmed by the excluded answer—

"because he had a dangerous reputation". Clearly, the remaining portion of the excluded answer, that relating to Harris' assaulting other people, was not admissible for the reason that there was no showing that defendant had personal knowledge of the assaults. *State v. Mize*, 19 N.C. App. 663, 199 S.E. 2d 729 (1973).

Defendant's contention that the court erred in permitting Mrs. Harris to testify that she told defendant over the telephone that she considered a statement made by him a threat has no merit for the reason that there was no objection to the question that produced the testimony or a motion to strike it. The record indicates that the objection was to Mrs. Harris' testimony that she recognized defendant's voice over the telephone. 4 Strong's N.C. Index 3d, Criminal Law § 162.

[2] Defendant's contention that the trial court committed prejudicial error in denying his motion for nonsuit of the charge of second-degree murder has no merit. In the first place, we think the evidence was sufficient to sustain a verdict of second-degree murder. Assuming, however, that it was not sufficient, defendant has failed to show prejudice since he was, in effect, acquitted of second-degree murder. *State v. Miller*, 272 N.C. 243, 158 S.E. 2d 47 (1967).

[3] With respect to his Exception 13, which relates to a portion of the jury charge, defendant contends the trial court failed to properly define the law relating to the admission of a statement defendant made to a police officer prior to trial. This contention has no merit.

Defendant relies on *State v. Edwards*, 211 N.C. 555, 191 S.E. 1 (1937), which holds that the whole of a confession must be taken together, considering both those portions which are favorable to as well as those which are against the accused. The principle expressed in *Edwards* is not applicable to this case for the reason that there was no attempt by the State to separate defendant's statement to the officer into pro and con components. The instruction given to the jury was for it to consider all the circumstances under which the statement was made in determining the weight that should be given to it. The instruction was not contrary to the holding in *Edwards*.

In his brief defendant argues his Exception 14 which evidently refers to a portion of the jury charge. However, the record

fails to contain an Exception 14 in the charge and the portion of the charge to which it might relate. That being true, the exception is not considered. Rule 10, Rules of Appellate Procedure, 287 N.C. 671, 698, 699.

Exceptions 15 and 16 relate to the court's instructions on corroborative evidence and conflicts in the evidence. Defendant contends that the court committed prejudicial error in giving these instructions for the reason that no evidence was introduced for the purpose of corroboration and there was no conflicting evidence. We find no merit in this contention. On the question of corroborative evidence, assuming there was no evidence presented solely for the purpose of corroborating other evidence, we can perceive no prejudice to defendant because of the isntruction. As to the conflicts in the evidence, definitely there were conflicts, justifying the instruction on that point.

[4] Exception 17 relates to the court's instruction to the jury to the effect that the State may rebut defendant's evidence of the reputation of deceased for violence by showing evidence of the good character of Harris for peace and quiet. Defendant argues that there was no evidence offered by the State that Harris had a reputation for peace and quiet. He further argues that the State offered evidence of the general good character of Harris; that the evidence was improper under *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967), and *State v. Champion*, 222 N.C. 160, 22 S.E. 2d 232 (1942); and that he should be granted a new trial as was done in those cases.

As to defendant's first argument pertaining to Exception 17 aforesaid, we think the testimony of witness Eubanks was sufficient to justify the instruction. Without objection Mr. Eubanks testified that Harris' general "character and reputation" in the community in which he lived was good, that he "saw no signs of violence", and that he never heard anyone express an opinion that Harris was "of a dangerous propensity". As to defendant's second argument, evidence of Harris' general reputation and standing was not objected to, therefore, defendant is deemed to have waived any objection thereto. *State v. Lowery*, 286 N.C. 698, 213 S.E. 2d 255 (1975), *modified* 428 U.S. 902, 49 L.Ed. 2d 1206, 96 S.Ct. 3203 (1976).

[5] Defendant's Exceptions 18, 19, 20 and 21 relate to certain portions of the jury charge pertaining to contentions of the State. We find no merit in defendant's challenge to these parts of the charge for the reason that objections to the charge in stating the evidence and contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise, objections are deemed to have been waived and will not be considered on appeal. *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973); *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970).

Defendant's other exceptions brought forward and argued in his brief also relate to the jury charge. It suffices to say that we have carefully reviewed these portions of the charge, particularly those pertaining to self-defense, and conclude that they too are free from prejudicial error.

In defendant's trial and the judgment appealed from, we find

No error.

Judge HEDRICK concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority in its conclusion that the error in sustaining objections to certain questions propounded to the defendant was not prejudicial. The defendant was relying principally on self-defense. It went to the heart of his case for him to testify that he shot Mr. Harris because he was afraid of him and knew Mr. Harris was going to hurt him. By excluding this testimony, I believe the Court committed prejudicial error. The majority concludes that since the record shows the defendant answered in spite of the objection that no prejudicial error occurred. I do not believe we can assume the jury ignored the action of the judge in sustaining the objections. I also take note of the fact that although from reading the record it would appear the answers, objections and rulings came in an orderly sequence, it could well have been that all were simultaneous so that with three people talking at once the jury never heard the answers.

STATE OF NORTH CAROLINA v. RICKY A. STEPHENS

No. 7716SC748

(Filed 21 February 1978)

1. **Criminal Law § 66.17— pretrial confrontation of defendant at police station —in-court identification of independent origin**

In a prosecution for common law robbery, the trial court did not err in allowing the victim to make an in-court identification of defendant after the court had excluded evidence of the viewing of defendant by the victim at the police station, since the court concluded upon ample, competent evidence that the in-court identification was based entirely on the victim's recollection of defendant's appearance at the time of the robbery and that it was unaffected by the improper viewing held at the police station.

2. **Robbery § 4.2— common law robbery—sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for common law robbery where it tended to show that defendant accosted his victim on a public sidewalk as she carried her employer's bank bag; defendant wrested the bag from the employee's hands; the victim positively identified defendant as her assailant; and four other witnesses saw defendant on the occasion and identified defendant in court.

3. **Arrest and Bail § 6— obstructing officer in performance of duty—sentence beyond statutory maximum**

Two year sentence of imprisonment imposed upon defendant who was convicted of obstructing an officer in violation of G.S. 14-223 is vacated, and the case is remanded for entry of a sentence within the statutory maximum of six months.

APPEAL by defendant from *Canaday, Judge.* Judgments entered 17 December 1976 in Superior Court, ROBESON County. Heard in the Court of Appeals 17 January 1978.

The defendant was charged in a magistrate's order of obstructing a law enforcement officer while discharging duties of his office and upon a bill of indictment for common law robbery.

The State's evidence at the trial of the cases tended to show that on the morning of 17 September 1976, Joyce Kinlaw, an employee of Provident Finance Company, went to Southern National Bank and obtained Provident's night depository bag. While walking back, she saw the defendant approaching her at a distance of about 15 feet. Defendant made "two or three quick steps" toward her and grabbed for the depository bag. She tussled with the defendant face-to-face for a "minute or two." The

defendant eventually got the bag and its contents away from her and ran down the street. The defendant was wearing green clothes and a gray toboggan.

Four other witnesses saw the defendant on the occasion. J. P. Taylor testified that he saw the defendant take the bag from the woman on the street, and the defendant ran toward him for the "whole half a block," coming within one foot of the witness through the cement he had just poured. Ertle Rice testified that he saw the defendant running south on Chestnut Street after the robbery and that the defendant came within 20 feet of him. Judy Britt testified that she saw the defendant take the bag from Joyce Kinlaw, observing the defendant from a distance of six feet. Clarence Britt testified that he saw the defendant running toward him after the witness went outside his store upon hearing a woman scream. All four of the witnesses identified the defendant in court.

Captain Covington of the City of Lumberton Police Force testified that he found a green jacket or shirt on Walnut Street, and at the back of a building off Walnut Street, he found a pair of green pants and a "gray looking toboggan." The witness found a half-pack of cigarettes in the pocket of the jacket and later gave them to the defendant, who asked, "Where were they?" He was told they came out of the jacket pocket. The defendant responded, "I better take them—I will need them."

Mrs. Kinlaw was taken to the Lumberton Police Station by Officer McVicker to look at a suspect and to see if she could identify him. Mrs. Kinlaw looked at the defendant at the police station and could and did identify the defendant as being the person who had accosted her earlier on the sidewalk. Finding that neither Officer Phillips of the Lumberton Police Department nor any other officer advised the defendant of his right to have counsel present at such lineup or viewing, the presiding judge excluded the evidence of the viewing of the defendant by Mrs. Kinlaw. The court also concluded that the motion to suppress evidence of Mrs. Kinlaw's in-court identification of the defendant should be denied because the in-court identification was based entirely upon Mrs. Kinlaw's recollection of the defendant's appearance at the time he accosted her on Chestnut Street, unaffected by the viewing held at the Lumberton Police Station.

Regarding the charge of obstructing a law enforcement officer, Officers Bullock and McVicker testified as to the defendant's attempt to leave the police station. Both testified that they attempted to prevent the defendant from leaving, in the course of which the defendant pushed Officer Bullock and struck Officer McVicker in the face with his fist, causing considerable bleeding and necessitating surgery on his nose.

The defendant testified and denied any connection with the robbery, stating that he was in another area of Lumberton when the events occurred. After he was arrested, he was pushed by the officer and grabbed around the neck and choked, and one of the officers swung a leather blackjack at the defendant. After that, defendant hit McVicker.

The defendant was found guilty on both charges and was sentenced on the charge of obstructing an officer in Case No. 76CR13651 for a term of two years in the custody of the Director of Prisons, and on the charge of common law robbery in Case No. 76CR13576 for a term of ten years in the custody of the Director of Prisons. The defendant appealed.

Attorney General Edmisten, by Associate Attorney Lucien Capone III, for the State.

Martha K. Walston, for the defendant appellant.

ERWIN, Judge.

[1] The defendant contends that although the motion to suppress evidence of the viewing was properly allowed, the court erred in allowing the in-court identification for the reason that the in-court identification was so tainted by the unlawful viewing that the two cannot be separated. We do not agree.

An in-court identification of an accused by a witness who took part in such an improperly conducted pre-trial confrontation must be excluded unless it is first determined by the trial judge on voir dire that the in-court identification is of independent origin and thus not tainted by the illegal pre-trial identification. *United States v. Wade*, 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *modified on other grounds*, 428 U.S. 902, 49 L.Ed. 2d 1205, 96 S.Ct. 3202 (1976). The trial court found from the voir dire ex-

amination ". . . that the motion to suppress evidence of Mrs. Kinlaw's in-court identification of the defendant should be denied for that such in-court identification is based entirely upon Mrs. Kinlaw's recollection of the defendant's appearance at the time he accosted her on the sidewalk of Chestnut Street, unaffected by the viewing held at the Lumberton Police Station."

The findings and conclusions of the trial court are indeed supported by competent evidence. The witness had an excellent opportunity to observe her assailant; on voir dire she testified that it was daylight and "a pretty sunshiny day," and that she saw the defendant "face to face." On cross-examination, Mrs. Kinlaw testified, "I'll never forget his face nor his eyes." Where the findings and conclusions of the trial court on voir dire are supported by competent evidence, as here, they are conclusive on appeal and must be upheld. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. Morris*, 279 N.C. 477, 183 S.E. 2d 634 (1971).

[2] From the evidence presented at the trial of this case, the trial judge correctly overruled the defendant's motion for judgment as of nonsuit on the charge of common law robbery. Upon motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. Where there is sufficient evidence, direct or circumstantial, by which the jury could find that the defendant had committed the offense charged, then the motion should be denied. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); 4 Strong's N.C. Index 3d, Criminal Law § 106 at 547. We hold that the evidence in this case was sufficient to submit the charge of common law robbery to the jury and sufficient for a conviction of such charge.

The defendant's assignment of error as to the admission into evidence of certain state exhibits and related testimony is without merit. The defendant contends that there was not enough connection between him and the articles of clothing and other items introduced in evidence by the State because they were not found at the scene of the crime or in the defendant's possession. This exception is overruled. *See State v. Jarrett*, 271 N.C. 576, 157 S.E. 2d 4 (1967), and *State v. Eagle*, 233 N.C. 218, 63 S.E. 2d 170 (1951).

The defendant assigns six exceptions to comments made by the district attorney during the course of the trial. The defendant

contends that the comments and questions contributed to the denial of the defendant's right to a fair and impartial trial. With one exception, the conduct complained of occurred on cross-examination of the defendant. We hold this assignment to be without merit. When a defendant in a criminal case elects to take the stand and testify, he is subject to impeachment on cross-examination. *See State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), and *State v. Sheffield*, 251 N.C. 309, 111 S.E. 2d 195 (1959).

We hold that the questions or comments made by the Court before the jury were clearly designed to clarify and promote understanding of the trial and to keep the proceedings running smoothly, and did not constitute an expression of opinion. *See State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, --- U.S. ---, 53 L.Ed. 2d 1091, 97 S.Ct. 2971 (1977), and *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968), *cert. denied*, 393 U.S. 1087, 21 L.Ed. 2d 780, 89 S.Ct. 876 (1969).

We have considered all assignments of error made by the defendant and find them to be without merit. In the trial below of both cases, the defendant has failed to show prejudicial error.

No error.

[3] In Case No. 76CR13651, the defendant was found guilty of obstructing an officer in violation of G.S. 14-223 which provides for a maximum punishment of six months' imprisonment. The two-year sentence is vacated, and this case is remanded for the entry of a proper sentence.

Judges PARKER and VAUGHN concur.

DOUGLAS WADE FORTE, A MINOR, BY HIS GUARDIAN AD LITEM, CLAUDIA RUTH FORTE; AND CLAUDIA RUTH FORTE, INDIVIDUALLY v. DILLARD PAPER COMPANY OF RALEIGH, INC. AND J. M. THOMPSON COMPANY

No. 7710SC173

(Filed 21 February 1978)

Negligence § 51.3— attractive nuisance—roof near ground level—removal of fence—fall through skylight

Summary judgment was improperly entered for defendants in an action to recover under the attractive nuisance doctrine for injuries sustained by the five-year-old plaintiff when he fell through a skylight on the roof of the building owned by one defendant and being repaired by the second defendant where evidence before the court tended to show: defendant owner's building had a flat roof and was 30 feet high in the front, but because of the slope of the terrain, was only three feet from the ground level in back; a chain-link fence approximately 12 feet high was normally at the rear of the building; defendant owner employed defendant contractor to perform repairs on the building; workmen of defendant contractor removed a portion of the chain-link fence in order to perform the repairs and left the fence down at the end of the day; defendant contractor's workmen observed some children behind the building and warned them to stay away from the area; and the minor plaintiff entered through the opening in the fence, climbed on the roof of the building, and thereafter fell through one of the bubble-shaped skylights on the roof to the concrete floor 25 feet below, suffering serious injuries.

APPEAL by plaintiffs from *Smith (Donald), Judge*. Judgment entered 3 December 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 11 January 1978.

This is a civil action brought by the minor plaintiff by his guardian ad litem, Claudia Ruth Forte, and by Claudia Ruth Forte individually to recover for injuries sustained by the minor plaintiff when he fell through the roof of a building owned by defendant, Dillard Company, and for expenses and lost earnings incurred by and for mental anguish suffered by the plaintiff, Claudia Ruth Forte, as a result of the injuries to the minor. The complaint alleged that the defendant, Dillard Company, owned a certain tract and one-story building in Raleigh, which had a flat roof and was approximately thirty feet in height in front, but which, because of the slope of the terrain, was only approximately three feet high at the rear, with a chain-link fence approximately twelve feet in height around the rear portion; that the roof contained a number of bubble-shaped skylights; that there were a number of homes and apartments nearby, with many small

children living in the area; that the defendant, Thompson Company, was employed by the defendant, Dillard Company, on the date of the injuries to the minor plaintiff as its agent to perform certain work in connection with the building; that on the date the injuries were sustained, employees of the Thompson Company, acting in the course and within the scope of their employment, opened or removed a portion of the fence, allowed it to remain in such condition, and left the area for the day; that the defendants knew that "the roof of said building was easily accessible to small children playing in the vicinity . . . and the roof of said building was an attractive and alluring area for children to play, and was extremely hazardous to small children," except for the fence around the building's rear portion. In the alternative, the plaintiffs alleged that employees of the defendant, Dillard Company, had opened or removed a portion of the fence, that Dillard Company knew, or in the exercise of reasonable care, should have known, that the fence's removal made the roof easily accessible and alluring to small children, and that an extremely hazardous condition had been thereby created.

As a result of the negligent acts or omissions of the defendants, the complaint alleged that on 28 May 1975, the minor plaintiff entered through the open fence and climbed on the roof; that thereafter, he broke through one of the skylights and fell approximately 25 feet to the concrete floor below, suffering serious injuries; that the minor plaintiff, five years old at the time of the fall, was attracted onto the roof and could not appreciate the dangers involved; and that the negligent acts or omissions of the defendants were the proximate cause of the minor plaintiff's fall and injuries.

The defendants answered, alleging that the fence had been removed in order to perform certain repairs to the rear portion of the building and that defendant, Dillard Company, had contracted with defendant, Thompson Company, to perform such repairs. Both defendants denied all allegations of their negligence and alternatively alleged contributory negligence on the part of Douglas Wade Forte and Claudia Ruth Forte. The defendants moved for summary judgment pursuant to Rule 56(b).

By affidavit, the Thompson Company's job supervisor stated that on 28 May 1975, he had taken a crew to the Dillard Building in order to perform certain work at the rear of the building; that

in order to perform the work, it had been necessary to remove the fence; that the crew had observed some children behind the building; that the children were warned to stay away from the area; that the crew did not know that children had been climbing on the roof; and that the roof and skylights appeared to be perfectly normal and usual in all respects. The Vice President of the defendant, Dillard Company, stated by affidavit that it had contracted in May 1975 with the defendant, Thompson Company, to make certain repairs at the rear of the building; that such repairs required that the fence be temporarily removed; that the fence was down on 28 May 1975 and was replaced the next day with additional height added to it; that while the fence was down, a sign was erected to the effect that there was danger and for people to keep off the property; and that on 28 May 1975, the roof and skylights were in generally good condition.

The plaintiff, Claudia Ruth Forte, submitted an affidavit in which she stated that she and her son resided in an apartment near the Dillard Building; that the roof at the rear of the building is only about three feet above ground level; that on 28 May 1975, her son had gone outside to play at approximately 5:30 p.m. and had been gone only about ten minutes when a neighborhood child informed her that her son had fallen through the roof; that when she arrived at the building, she observed the broken skylight above where her son was lying; and that the fence at the rear of the building had been partially opened or taken down.

Summary judgment was entered for defendants, and plaintiffs appealed.

Dawkins, Toms & Beebe, by Frederic E. Toms, for the plaintiff appellants.

Smith, Anderson, Blount & Mitchell, by Samuel G. Thompson, for the defendant, Dillard Paper Company, appellee.

Teague, Johnson, Patterson, Dilthey & Clay, by Robert W. Sumner, for the defendant, J. M. Thompson Company, appellee.

ERWIN, Judge.

The plaintiffs urge this Court to hold that there are sufficient, genuine issues of material facts in this case to reverse the trial court's holding that the defendants are entitled to a judg-

ment as a matter of the law. We conclude that the summary judgment entered below is improper.

In *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970), this Court stated at p. 638:

> "While neither the federal rules nor the North Carolina rule excludes the use of the procedure in negligence actions, it is generally conceded that summary judgment will not usually be as feasible in negligence cases where the standard of the prudent man must be applied. Barron and Holtzoff, Federal Practice and Procedure (Wright Ed.) Vol. 3, § 1232.1; Gordon, The New Summary Judgment Rule in North Carolina, *supra*. But summary judgment is proper where it appears that even if the facts as claimed by the plaintiff are proved, there can be no recovery, Barron and Holtzoff, Federal Practice and Procedure, *supra*, thus providing a device for identifying the factually groundless claim or defense."

In *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972), Justice Huskins, speaking for the Supreme Court, stated at p. 704 as follows:

> "Our Rule 56 and its federal counterpart are practically the same. Authoritative decisions both state and federal, interpreting and applying Rule 56, hold that the party moving for summary judgment has the burden of 'clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded.' 6 Moore's Federal Practice (2d ed. 1971) § 56.15[8], at 2439; *Singleton v. Stewart*, *supra*. Rendition of summary judgment is, by the rule itself, conditioned upon a showing by the movant (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to a judgment as a matter of law. G.S. 1A-1, Rule 56(b); *Kessing v. Mortgage Corp.*, *supra*."

In order for the plaintiffs to recover at all, they must present evidence at the time of trial to show that this case comes within the so-called attractive nuisance doctrine which represents an exception to the general rule regarding liability of landowners for injuries sustained on the premises by trespassers.

Judge Morris, writing for this Court in *Lanier v. Highway Comm.*, 31 N.C. App. 304, 229 S.E. 2d 321 (1976), stated at pp. 310 and 311:

> " 'Generally, the attractive nuisance doctrine is applicable when, and only when, the following elements are present: (1) The instrumentality or condition must be dangerous in itself, that is, it must be an agency which is likely to, or probably will, result in injury to those attracted by, and coming into contact with, it. (2) It must be attractive and alluring, or enticing, to young children. (3) The children must have been incapable, by reason of their youth, of comprehending the danger involved. (4) The instrumentality or condition must have been left unguarded and exposed at a place where children of tender years are accustomed to resort, or where it is reasonably to be expected that they will resort for play or amusement, or for the gratification of youthful curiosity. (5) It must have been reasonably practicable and feasible either to prevent access to the instrumentality or condition, or else to render it innocuous, without obstructing any reasonable purpose or use for which it was intended.' *McCombs v. City of Asheboro*, 6 N.C. App. 234, 242-43, 170 S.E. 2d 169 (1969), citing 65 C.J.S., Negligence, § 63 (76), p. 815."

Thompson's workmen had observed some children behind the building, and they were warned by the workmen to stay away from the area; the same crew left the fence down at the end of the day. Thereafter, the minor plaintiff went upon the building. Whether or not the defendants could foresee injury to the minor plaintiff is an issue to be resolved by application of the prudent man standard.

While it is frequently stated that even a child of very tender years should be held to appreciate the danger of falling from a height, this case does not permit such an easy resolution. Given the unusual construction of this building, with the easy access and allurement to the roof provided by the sloping terrain and removal of the fence, we cannot conclude as a matter of law that the plaintiffs will be unable to bring themselves within the so-called attractive nuisance doctrine. This five-year-old plaintiff, who wished to satisfy his childish curiosity and attracted by this roof a mere three feet from ground level, climbed onto it to play

with the plastic skylights, could not know that the floor was 25 feet below, and therefore, was unable to appreciate the danger. To us, a genuine issue of fact exists with reference to the dangerous condition presented to the minor plaintiff as he played on top of a plastic skylight on the roof of this building, as well as with reference to the other factors which have led us to conclude that the plaintiffs are entitled to try to establish themselves within the doctrine at a trial on the merits.

We have given full consideration to the comprehensive brief filed by the defendant appellants. We are mindful that there are several cases on the doctrine, some tending to support the plaintiffs' position and some tending to support the defendants' position, which are difficult to reconcile, because the facts are so vitally important in each case in this area.

Summary judgment is a drastic remedy, and there must be a cautious observance of its requirements to assure that no party is deprived of a trial when there are genuine issues of material fact.

The defendants have failed to establish as a matter of law that they were entitled to summary judgment.

Reversed and remanded.

Chief Judge BROCK and Judge VAUGHN concur.

MARTHA ANDREWS JOHNSON WING AND JANE VIRGINIA ANDREWS POWER PHILBRICK v. WACHOVIA BANK & TRUST COMPANY, N.A., SUCCESSOR TRUSTEE, AND AUGUSTA ANDREWS YOUNG, JULIA MARKS DOZIER, ALEXANDER A. MARKS, LAURENCE H. MARKS, ALEX B. ANDREWS III, JULIA ANDREWS PARK, MARY S. ANDREWS WORTH, GRAHAM H. ANDREWS, JR., F. M. SIMMONS ANDREWS, AUGUSTA YOUNG MURCHALL, ELEANOR YOUNG BOOKER, SANDRA JOHNSON WALKER, RICHARD T. DOZIER, JR., JANE DOZIER HARRIS, WILLIAM M. MARKS III, RALPH STANLEY MARKS, FRANCES MARKS BRUTON, JULIA MARKS YOUNG, ELIZABETH MARKS GREEN, JANE MARKS CLINE, HAL V. WORTH III, JULIA WORTH RAY, SIMMONS HOLLADAY WORTH, JOHN W. ANDREWS, SARA SIMMONS ANDREWS JOHNSTON AND MARY GRAHAM ANDREWS ADDITIONAL PARTIES: JESSICA ANNE MURCHALL EDGMON, MELINDA SUSAN MURCHALL, JOHN ALEXANDER MURCHALL, ROBERT ANDREW BOOKER, PAUL CURTIS BOOKER, MINOR, WILLIAM CONRAD WALKER, JR., MINOR, JAMES ALEXANDER WALKER, MINOR, TIMOTHY TODD WALKER, MINOR, SHARON VIRGINIA WALKER, MINOR, ANNE GILCHRIST DOZIER, MINOR, PATRICIA JANE DOZIER, MINOR, LAURA CROMWELL DOZIER, MINOR JULIA MARKS HARRIS, CHARLES ANDREW HARRIS III, WILLIAM MARK HARRIS, MINOR, WILLIAM M. MARKS IV, MINOR, ANN ELVA MARKS, MINOR, RALPH STANLEY MARKS, JR., MINOR, RICHARD HUGHES MARKS, MINOR, ALEXANDER ANDREWS GRANT BRUTON, MINOR, EDWARD MACCAULEY BRUTON, MINOR, FRANCES BRINLEY BRUTON, MINOR, HAL VENABLE WORTH IV, MINOR, KELLY ANDREWS WORTH, MINOR, FRED C. RAY III, MINOR, GRAHAM ANDREWS RAY, MINOR, MABLE Y. ANDREWS, SHERMAN YEARGAN, TRUSTEE, HOWARD E. MANNING, TRUSTEE, WILLIAM HENRY CLARKSON, JR., OUR LADY OF LOURDES CATHOLIC CHURCH, JOHN A. MCALLISTER, GUARDIAN AD LITEM

No. 7710SC204

(Filed 21 February 1978)

1. Wills § 41 – testamentary trust – vesting of income rights – rule against perpetuities

A testamentary trust providing for the payment of trust income to the named sister and two brothers of testator for life, to eleven named nieces and nephews of testator for life, and to twelve great nieces and great nephews of testator and to those great nieces and great nephews born within 21 years after testator's death, and providing that the trust shall extend during the joint and several lives of testator's named sister and brothers, his named nieces and nephews, his named great nieces and great nephews, and during the joint and several lives of any other nieces and nephews or great nieces or great nephews born prior to and alive at the time of testator's death, and until the death of the last survivor of testator's sister and brothers, the last survivor of his nieces and nephews, and the last survivor of his great nieces and great nephews alive at his death, with a further provision for the shifting of

income to other class members and to other classes as members of each class die, *is held* not to violate the rule against perpetuities as to the income beneficiaries since (1) the sister, brothers, nieces and nephews are persons named in the will and alive at testator's death, and the income interest of all of them will be vested at the death of the last sister, brother, niece or nephew, and (2) the right to income is indefeasibly vested in each great niece and great nephew within twenty-one years after testator's death subject to increase as brothers, sister, nieces and nephews die.

2. **Wills § 41— testamentary trust—vesting of corpus—rule against perpetuities**

The vesting of the corpus of a testamentary trust did not violate the rule against perpetuities where testator's will is to be construed in one of two possible ways: (1) the will did not dispose of the corpus after the termination of the trust, and the corpus thus vested in testator's heirs at law at his death, with possession postponed until the trust terminates; or (2) the will by implication gives the corpus to members of the last class of income beneficiaries, testator's great nephews and great nieces, or to their estates, in the proportion of their income interests at the time of the termination of the trust, and the corpus is thus vested in great nephews and great nieces or their estates at the time their income rights are completely vested.

APPEAL by plaintiffs and defendant, A. B. Andrews III, from *Herring, Judge*. Judgment entered 2 December 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 17 January 1978.

This appeal brings to the Court the question of whether a limitation by the will of Alexander B. Andrews violates the rule against perpetuities. The plaintiffs brought an action under our Declaratory Judgment Act, G.S., Chap. 1, Art. 26, to have the limitation declared violative of the rule. The Supreme Court of North Carolina has passed on other matters involving this will. *Trust Co. v. Andrews*, 264 N.C. 531, 142 S.E. 2d 182 (1965).

The parts of the will on which the disposition of this case depends are as follows:

"2. . . . I give, devise, and bequeath the remainder of my estate, of whatsoever kind, character or description, whether real or personal, into the hands of my brothers J. H. Andrews and G. H. Andrews, their successor or successors and associate or associates, as trustee or trustees, to have and to hold . . . upon the following uses and trusts, . . .

(a) . . . they shall divide the annual income into twenty equal parts or shares which shall be disposed of as set out in items

(b) One share of the net income shall be annually paid to my sister Mrs. Jane Andrews Marks, . . . for and during her natural life.

(c) One share of the net income shall be annually paid to my brother John H. Andrews, . . . for and during his natural life.

(d) One share of the net income shall be paid to my brother Graham H. Andrews, . . . for and during his natural life.

(e) One share of the net income shall be divided into equal parts, or divisions, and paid to my eleven (11) nieces and nephews; namely, [naming them] for and during their lifetime.

(f) Upon the death of either my sister Jane H. Andrews or my brothers John H. Andrews or Graham H. Andrews, the one share severally allotted to them shall cease, and it shall be allotted to, and added to, the one share to be divided among the eleven (11) living nieces and nephews, which directions shall apply to each of these three shares to my sister and two brothers.

(g) Upon the death of anyone of my now living eleven (11) nieces and nephews, his or her share shall cease and the division of this share remaining among the nieces and nephews shall be only to those then alive.

(h) When the number of nieces and nephews shall be reduced by death down to four, then the annual share of any one dying thereafter shall not be divided among those surviving, but then such share or shares shall be added to the sixteen shares to be divided among my great nieces and great nephews.

(i) The income from the sixteen shares shall be equally divided among my great nieces and nephews, now twelve (12) in number, and those who hereafter may be born within twenty-one (21) years after my death, they to share equally with the others.

* * *

6. The trust created by this will shall extend for, and during, the joint and several lives of my two surviving brothers and sister, namely: [naming them]

* * *

Also, shall extend for, and during, the joint and several lives of my eleven surviving nieces and nephews, namely: [naming them]

* * *

Also, shall extend for, and during, the joint and several lives of eight (8) great nieces and four (4) great nephews, namely: [Mr. Andrews actually named only ten great nieces and great nephews]

(b) And for and during the joint and several lives of any other nieces or nephews or great nieces or great nephews born prior to, and alive at the time of my death, and until the death of the last survivor of my brothers and sister, and the last survivor of my nieces and nephews, and the last survivor of my great nieces and nephews (alive at my death), as just above referred to, and no longer."

Mr. Andrews' will is dated 21 November 1945, and was admitted to probate in 1946. Judge Herring denied the plaintiffs' motion for judgment on the pleadings and dismissed the action, holding that the limitation does not violate the rule against perpetuities.

Vaughan S. Winborne, for plaintiff appellants.

Emanuel and Thompson, by W. Hugh Thompson, for defendant appellant, Alex B. Andrews III.

Joyner and Howison, by Henry S. Manning, Jr., for Wachovia Bank & Trust Company, N.A., Successor Trustee under the will of A. B. Andrews.

Manning, Fulton and Skinner, by Howard E. Manning, Jr., for defendant appellees.

Maupin, Taylor and Ellis, P.A., by G. Palmer Stacy III, for defendant appellees.

John A. McAllister, Guardian ad litem for minor defendants and unborn great great nieces and nephews of Alexander B. Andrews and any unknown persons having an interest or claim to the estate of Alexander B. Andrews.

WEBB, Judge.

We hold that Judge Herring was correct in his judgment and should be affirmed.

The rule against perpetuities has been interpreted many times in North Carolina. *See Springs v. Hopkins*, 171 N.C. 486, 88 S.E. 774 (1916); *Trust Co. v. Williamson*, 228 N.C. 458, 46 S.E. 2d 104 (1947); *Mercer v. Mercer*, 230 N.C. 101, 52 S.E. 2d 229 (1949); *Parker v. Parker*, 252 N.C. 399, 113 S.E. 2d 899 (1960); *Poindexter v. Trust Co.*, 258 N.C. 371, 128 S.E. 2d 867 (1962); and *Palmer v. Ketner*, 29 N.C. App. 187, 223 S.E. 2d 913 (1976). Our interpretation of the rule is based on a reading of these cases and the textbooks cited below.

We believe that the courts of this State have adopted the rule as stated by John Chipman Gray as follows:

> "No interest is good unless it must vest, if at all, not later than twenty one years after some life in being at the creation of the interest." Gray, Rule Against Perpetuities § 201 (4th ed.)

Professor Richard R. Powell in his work, Powell on Real Property, Vol. 5, Chap. 71, has a very good discussion of the rule. He points out that the rule against perpetuities is a product of the struggle to preserve the alienability of property.

Professor Powell quotes the rule as stated by John Chipman Gray and criticizes it as not being accurate. He contends for a different statement of the rule and his contention has been adopted in the Restatement of Property as follows:

> "Thus the rule against perpetuities promotes alienability by destroying future interests which interfere therewith either by eliminating the power of alienation for too long a time or by lessening the probability of alienation for too long a time . . ." Restatement of Property § 370, Comment i (1944)

Applying the rule as articulated in this State or as contended for by the Restatement, we believe the result would be the same in this instance.

[1] We shall construe Mr. Andrews' will only to the extent necessary to decide this case. We believe that if the rights of all income beneficiaries under the trust and the rights of all parties in the corpus after the trust has terminated are vested within the permissible period, the limitation does not violate the rule. Examining first the vesting of rights in income beneficiaries, it is apparent that the brothers, sister, nieces and nephews of Mr. Andrews are persons named in the will and alive at his death. The income shifts between them and to great nieces and great nephews, but at the death of the last sister, brother, niece or nephew, the income interest of all of them will be vested. This much complies with the rule.

As to the great nieces and great nephews who share in the income, this class is complete within twenty-one years of the testator's death. We hold that the right to income is indefeasibly vested to each of them at that time subject to increase as

brothers, sister, nieces and nephews die. None of the parties have asked for any other interpretation as to income beneficiaries and we believe it is the only proper construction. The right to income of the great nieces and great nephews being vested within the lives of sister, brothers, nieces and nephews, all of whom were named in the will and alive at testator's death, plus the twenty-one years from testator's death in which the great nieces and great nephews class can open vests these income beneficiaries' rights within the permissible period. Thus, all income beneficiaries' interests are vested within the permissible period.

[2] Examining the vesting of the corpus of the trust, we believe there are the following two possibilities: (1) Mr. Andrews did not dispose of the corpus after the termination of the trust and it passed at his death by intestate succession to his heirs at law at that time. If this is the proper construction, the corpus vested at Mr. Andrews' death in his heirs at law at the time of his death, with possession postponed until the trust terminates, which does not violate the rule. (2) The will might also be construed to hold that by implication it gives the corpus of the trust to the great nieces and great nephews or to their estates in the proportion of their income interests at the time of the termination of the trust. If the corpus is vested in great nieces and great nephews or their estates at the time their income rights are completely vested, this would be within the permissible period. It would not matter that their possession of the corpus is postponed during the duration of the trust. Man's ingenuity can no doubt conceive of other interpretations of the will which could postpone the vesting of the corpus to a later time. None were suggested in the briefs or in oral argument and we hold that the corpus must vest under the will in one of the above two ways. We hold that both these ways comply with the rule against perpetuities.

The plaintiffs contend that by paragraph six of the will the trust could extend beyond the permissible period in that its duration could be measured by an after born niece or nephew. In light of our holding that all interests must vest within the permissible period, we do not believe the duration of the trust is controlling. For this reason, we do not pass on this contention of the plaintiffs as to the construction of the will.

We are aware that *Mercer v. Mercer*, *supra*, held that a trust must terminate within the permissible period. In *McQueen v.*

Trust Co., supra, the Court distinguished *Mercer* and in *Poindexter v. Trust Co., supra,* we believe that *Mercer* was overruled. Plaintiffs contend that since *Mercer* was the law at a time that the trust under Mr. Andrews' will was being administered, we cannot now rule that the limitation under his will does not violate the rule. We do not accept this argument. Nowhere in either the *McQueen* or *Poindexter* cases do we read that they were to have only prospective effect. We believe they declare the common law of this State as to limitations in instruments now in effect.

In an amendment to its answer, Wachovia Bank & Trust Company, N.A., Successor Trustee under the will, asked for a construction of the will as to the ultimate beneficiaries. The Successor Trustee did not appeal from Judge Herring's ruling dismissing the action, and we do not now make any ruling on this prayer for relief.

Howard E. Manning and William H. Clarkson, Trustees for Our Lady of Lourdes Catholic Church, have pled the statute of limitations, G.S. 1-56, and laches. In light of our opinion in this case, we do not consider these questions.

The judgment of the Superior Court is affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. RONALD CHASE WYRICK

No. 7718SC752

(Filed 21 February 1978)

1. **Criminal Law § 89.2— corroborating testimony**

The trial court did not err in the admission of a detective's testimony for the purpose of corroborating two State's witnesses where defendant had impeached both witnesses by cross-examination and by offering evidence contradicting their testimony.

2. **Criminal Law § 117.4— refusal to instruct on "unsupported" accomplice testimony**

The trial court did not err in refusing to give defendant's tendered instruction that the jury could "convict on unsupported testimony of an accomplice, or coconspirator, but it is dangerous and unsafe to do so," where the court properly charged on the jury's duty to scrutinize an accomplice's

testimony and the weight to be given such testimony, and where the accomplice testimony was in fact supported by other evidence in the case.

3. Automobiles § 140— altering vehicle serial number—assignment of number by DMV

A conviction of altering a motor vehicle serial number in violation of G.S. 20-109(b)(1) must be set aside and a new trial granted where the trial court failed to require the jury to find beyond a reasonable doubt that the number alleged to have been altered was assigned to the motor vehicle by the Division of Motor Vehicles.

4. Criminal Law §§ 140.3, 177.1— sentence to begin at expiration of sentence set aside—remand

Where there was no error in the trial on one charge, but the sentence thereon was made to begin at the expiration of the sentence on another charge upon which a new trial has been granted, the judgment on the charge upheld must be set aside and the cause remanded for judgment.

APPEAL by defendant from *Collier, Judge.* Judgments entered 20 April 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 18 January 1978.

The defendant was indicted by separate bills for the felonies of altering a motor vehicle serial number and conspiracy to alter a motor vehicle serial number. Upon his pleas of not guilty to both charges, the jury returned verdicts of guilty. From judgments sentencing him to consecutive terms of five years' imprisonment for altering a motor vehicle serial number and not less than one nor more than five years' imprisonment for conspiracy, defendant appealed.

The State offered evidence tending to show that, during September, 1972, George Wesley Taylor purchased a green 1972 Chevrolet El Camino truck. In 1973, the defendant, Ronald Chase Wyrick, purchased a wrecked blue 1972 Chevrolet El Camino truck. The defendant, together with Taylor and others, drilled out the serial number of the green truck and replaced it with another number. The engine from the blue truck was then placed into the green truck which the defendant took to a Chevrolet dealership in Mountain City, Tennessee. There it was sold, and the proceeds of the sale were given to the defendant.

The green truck was later recovered by law enforcement authorities. An examination of the identification numbers for this vehicle indicated the number on the dashboard and the number

on the engine matched the numbers assigned to the blue truck. The confidential identification number placed on the vehicle by the manufacturer matched a number previously assigned to the green truck.

Defendant's evidence as to altering the motor vehicle number was in the nature of an alibi. His evidence as to the conspiracy tended to show that he purchased the blue truck as an accommodation to an acquaintance and had never entered into or known of a conspiracy.

Attorney General Edmisten, by Associate Attorney David Roy Blackwell and Deputy Attorney General William M. Melvin, for the State.

Luke Wright and Robert D. Albergotti for defendant appellant.

MITCHELL, Judge.

[1] Defendant first contends the trial court erred in allowing Detective G. D. Payne of the Greensboro Police Department to testify, over defendant's objections, for the purpose of corroborating the State's witnesses, Frank Campbell and Broughton Sutton. This contention is without merit, as the defendant cross-examined both witnesses and offered evidence contradicting their testimony.

The controlling rule of law is set forth in *State v. Carter*, 293 N.C. 532, 535, 238 S.E. 2d 493, 495 (1977), as follows:

> In this jurisdiction, evidence tending to support a witness's credibility is admissible when he is impeached in any manner including contradictory statements, cross-examination, or contradiction by other witnesses. *State v. Cope*, 240 N.C. 244, 81 S.E. 2d 773. Some of our more recent cases tend to recognize the admissibility of corroborative evidence without even considering the question of whether the witness has been impeached. See, 1 Stansbury's N.C. Evidence, *Witnesses*, Sec. 50 (Brandis Rev.), and cases there cited.

Defendant further contends that the trial court erred in permitting the State to cross-examine him concerning his conviction in 1967 for automobile larceny and fraud. We find no error in the

admission of this evidence. *State v. Currie*, 293 N.C. 523, 529, 238 S.E. 2d 477, 480 (1977).

[2] Defendant next assigns as error that part of the charge of the trial court relating to the testimony of accomplices. The trial court denied the defendant's timely submitted written request for an instruction that: "You may convict on unsupported testimony of an accomplice, or co-conspirator, but it is dangerous and unsafe to do so."

During its charge, the trial court gave a thorough and complete definition of the term "accomplice" and proceeded to instruct the jury:

> An accomplice is considered by the law to have an interest in the outcome of the case. If you find that the witness was an accomplice, you should examine every part of the testimony of this witness or these witnesses with the greatest care and caution. If, after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence in the case.

The charge of the trial court was sufficient to meet its obligation to give a correct instruction concerning accomplice testimony. *See State v. White*, 288 N.C. 44, 215 S.E. 2d 557 (1975). The trial court was not required to parrot the instructions requested by the defendant as the charge given was, to the extent required by the evidence, substantially in conformity with that requested. *State v. Bailey*, 254 N.C. 380, 119 S.E. 2d 165 (1961).

The charge given by the trial court did not conform to the defendant's request for an instruction with reference to the "unsupported" testimony of an accomplice. This was entirely proper as the testimony of the accomplices tended to be supported by other evidence in the case.

Witness William Megaw testified that he sold a wrecked blue El Camino truck to the defendant. Additionally, he testified as to the vehicle identification numbers on the wrecked truck. Witness John Cunningham, a salesman at a Tennessee automobile dealership, testified that the defendant brought the green El Camino truck to Tennessee for sale. Cunningham also testified from his direct observation that the confidential vehicle identification number did not match the public identification numbers on the

dashboard and engine. Other evidence also tended to support the testimony of those individuals who testified as accomplices.

At most, the trial court is required to instruct the jury in conformity with tendered instructions only to the extent such requested instructions are supported by competent evidence in the case. Instructions which are tendered but do not conform to the evidence need not be given in substance or otherwise. The trial court properly denied the written motion for instructions and properly instructed the jury on the weight to be given accomplice testimony. This assignment of error is overruled.

[3] Defendant additionally contends that he must be granted a new trial on the charge of altering a motor vehicle serial number in violation of G.S. 20-109(b)(1), as the trial court erred by failing to charge the jury with respect to all elements of the offense. Specifically, defendant contends that the trial court failed to require that, prior to returning a verdict of guilty, the jury find beyond a reasonable doubt the number alleged to have been altered was assigned to the motor vehicle by the Division of Motor Vehicles.

The bill of indictment alleges, in pertinent part, that the number in question had been assigned to the vehicle, "by the Department of Motor Vehicles of North Carolina." The State, through the testimony of Walter J. Parrish, Jr., introduced substantial evidence consuming more than two pages of the printed record and tending to show that the number had been assigned to the vehicle by the Department of Motor Vehicles.

With regard to the essential elements of this offense, the trial court instructed the jury:

> I charge that for you to find the defendant Wyrick guilty of this charge the State must prove two things beyond a reasonable doubt: First, that he, Ronald Wyrick, removed or altered a motor vehicle serial number. Second, that he did so with the intent to conceal or misrepresent the true identity of that vehicle.
>
> So I charge you, Members of the Jury, that if you find from the evidence and beyond a reasonable doubt that on or about August 24, 1973, Ronald Chase Wyrick, alone or with others, removed or altered the motor serial number of a 1972 El

Camino pickup truck and that in so doing, he intended to conceal or misrepresent the true identity of that 1972 El Camino vehicle, then it would be your duty to find him guilty.

In the above quoted portion of the charge, the trial court inadvertently omitted an essential element of the offense condemned by G.S. 20-109(b)(1). At the time of the alleged offense, the statute specifically required, *inter alia*, that the serial or motor number alleged to have been altered be one assigned by the Department of Motor Vehicles. Effective 1 July 1975, the Department of Motor Vehicles was redesignated the Division of Motor Vehicles of the Department of Transportation by amendment to G.S. 20-1. At the same time, the term "Division" was substituted for the term "Department" by amendment at all pertinent places in G.S. 20-109. The charge of the trial court, however, makes no reference to the requirement that the serial or motor number alleged to have been altered be one assigned by the Department of Motor Vehicles (now, Division of Motor Vehicles of the Department of Transportation).

The requirement that a serial or motor number alleged to have been altered be one assigned to a vehicle by the Division of Motor Vehicles of the Department of Transportation (formerly, Department of Motor Vehicles) is an essential element of the offense condemned by G.S. 20-109(b)(1). Before the State is entitled to a conviction under this statute, it must prove the presence of this element beyond a reasonable doubt from the evidence. See, *State v. Hairr*, 244 N.C. 506, 94 S.E. 2d 472 (1956).

The trial court must explain each essential element of the offense charged. *State v. Lunsford*, 229 N.C. 229, 49 S.E. 2d 410 (1948). When it does not, it is prejudicial error sufficient to warrant a new trial. Here, the inadvertent omission of an essential element was such error. *State v. Logner*, 269 N.C. 550, 153 S.E. 2d 63 (1967); 4 Strong, N.C. Index 3d, Criminal Law, § 113, p. 581.

The State contends that the defendant never challenged that portion of the State's evidence tending to show the vehicle identification numbers allegedly altered were assigned to the vehicle by the Department of Motor Vehicles. The State further contends that, since there was no issue of fact to which the jury could apply the law, the court was not required to charge on this point. In

support of these contentions, the State calls our attention to the case of *State v. Spratt*, 265 N.C. 524, 144 S.E. 2d 569 (1965).

Spratt involved a prosecution for an attempt to commit armed robbery. The defendant relied upon an alibi. In charging the jury the trial court omitted an instruction that the jury must find the taking to have been with an intent to steal. It was held that the evidence and the defense of alibi did not raise a direct issue as to intent. Therefore, the trial court's charge to the jury that, in effect, before they could return a verdict of guilty, they must find the defendant attempted to take the property with "intent to rob" was sufficient. The word "rob" was found to import an intent to steal.

We find *Spratt* distinguishable from the present case. It did not involve a situation in which the trial court completely omitted any reference to an essential element. Here, there was just such complete omission.

The defendant pled not guilty. His plea of not guilty put in issue every element of the offense charged, including the credibility of the evidence, even though portions of the evidence were uncontradicted. *State v. Stone*, 224 N.C. 848, 32 S.E. 2d 651 (1945); *State v. Patton*, 2 N.C. App. 605, 163 S.E. 2d 542 (1968), later app., 5 N.C. App. 164, 167 S.E. 2d 821 (1969); and 4 Strong, N.C. Index 3d, Criminal Law, § 24, p. 101. The failure of the trial court to instruct the jury as to an essential element of the crime charged was, therefore, prejudicial error which will necessitate a new trial on this charge.

Exceptions and assignment of error relating to the trial court's instructions to the jury defining the crime of conspiracy to alter a motor vehicle serial number are not brought forward or argued, and we deem them abandoned. Nevertheless, we have thoroughly reviewed the instructions of the trial court relative to conspiracy and find them proper.

The defendant brought forward numerous additional exceptions and assignments of error relating solely to his conviction on the substantive charge of altering a motor vehicle serial number. Having found reversible error in that case for which we must order a new trial, we decline to discuss those assignments of error as they may not arise upon retrial.

[4] We have found no error in the trial on the charge of conspiracy to alter a motor vehicle identification number (77CRS18020). However, as the sentence on that charge is to begin at the expiration of the sentence on the charge (77CRS18026) of altering a motor vehicle number, it must be set aside and the cause remanded for judgment. *State v. Sutton*, 244 N.C. 679, 94 S.E. 2d 797 (1956).

For error, in the trial (77CRS18026) of the defendant for altering a motor vehicle number in violation of G.S. 20-109(b)(1), we order a

New trial.

In his trial on the charge of conspiracy to alter a motor vehicle identification number (77CRS18020), the defendant had a fair trial free of prejudicial error, but for reasons previously stated, we order that case

Remanded for judgment.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. STANLEY EUGENE SAUNDERS

No. 771SC720

(Filed 21 February 1978)

1. **Narcotics § 1.3— sale and delivery of marijuana to minor—possession with intent to sell and deliver *not* lesser included offense**

Possession of marijuana with intent to sell and deliver is not a lesser included offense of sale and delivery to a minor, since the crime of sale and delivery to a minor can be complete where no unlawful possession occurs; therefore, defendant could be convicted both of possession with intent to sell and deliver and sale and delivery to a minor, even though the two charges arose out of the same transaction and were proved by virtually identical evidence.

2. **Narcotics § 4.5— stipulation by defendant—erroneous instruction—prejudicial error**

In a prosecution for possession of marijuana with intent to sell and deliver and sale and delivery of marijuana to a minor where defendant and the State stipulated only that certain material analyzed by an SBI agent was marijuana,

the trial court committed prejudicial error when, in recapitulating the State's evidence in his charge to the jury, the court implied that defendant admitted in the stipulation that the substance determined by the SBI agent to be marijuana was given to a named minor by defendant in exchange for cash.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 3 May 1977 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 12 January 1978.

Defendant was tried on an indictment charging him with possession of marijuana with intent to sell and deliver, a violation of G.S. 90-95(a)(1). The indictment also charged that defendant, being 18 years of age or older, sold and delivered marijuana to a person under 16 years of age, a violation of G.S. 90-95(e)(5). Defendant pled not guilty, but the jury returned verdicts of guilty on both counts. The court consolidated the two counts for judgment and ordered defendant committed for five years as a "committed youthful offender". From this judgment, defendant appealed.

Attorney General Edmisten, by Associate Attorney Rebecca R. Bevacqua, for the State.

Twiford, Trimpi and Thompson, by John G. Trimpi, for defendant appellant.

MORRIS, Judge.

[1] We first consider defendant's contention that the crime of possession of marijuana with intent to sell and deliver is a lesser included offense of sale and delivery of marijuana by a person 18 years or older to a person under 16 years of age. Defendant accurately points out that, by its very terms, a violation of G.S. 90-95(e)(5) (delivery of a controlled substance by a person 18 years of age or over to a person under 16 years of age) can only be shown by proof, *inter alia*, that a violation of G.S. 90-95(a)(1) has occurred. However, G.S. 90-95(a)(1) encompasses several distinct criminal acts relating to controlled substances, including not only selling or delivering, but also possession with intent to sell or deliver. The only portion of G.S. 90-95(a)(1) which defendant was charged with violating was the portion making it unlawful for any person to possess a controlled substance with intent to sell or deliver.

In determining whether possession with intent to sell and deliver is a lesser included offense of sale and delivery to a minor, we must apply the test used by our Supreme Court in *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973). Applying that test to the present case, we find that while the two charges arose out of the same transaction and were proved by virtually identical evidence, the crimes charged are distinct and separate offenses. The crime of sale and delivery to a minor can be complete where no unlawful possession occurs, but proof of unlawful possession is clearly an essential element of the crime of possession with intent to sell and deliver. Possession with intent to sell and sale are, therefore, distinct offenses, and the former is not a lesser included offense of the latter. *State v. Yelverton*, 18 N.C. App. 337, 196 S.E. 2d 551 (1973).

[2] Immediately prior to the conclusion of the State's evidence, the defendant and the State stipulated to the following:

> "(1) That on March 21st, 1977, Special Agent N. C. Evans, of the North Carolina State Bureau of Investigation, received a white envelope containing plant material, by registered mail, from Deputy Lowell Wood; that Agent Evans chemically analyzed such plant material and determined the same to be less than one ounce of marijuana; that Agent Evans returned the remaining plant material to Deputy Wood on March 25, 1977, by first class mail.
>
> (2) That on March 21, 1977, Special Agent N. C. Evans received a Marlboro cigarette box, containing three pink hand-rolled cigarettes, from Deputy Sheriff Lowell Wood, by registered mail; that Agent Evans conducted a chemical test on the vegetable material contained in such cigarettes and determined the same to be less than five grams of marijuana; that thereafter Mr. Evans returned the same to Deputy Wood by first class mail on March 25, 1977.
>
> (3) That Special Agent N. C. Evans is a qualified chemist, specializing in the chemical analysis of controlled substances, for the State Bureau of Investigation."

The stipulation does not state that defendant gave a bag of vegetable material to anyone; neither does it state that the substance received by Kevin Forbes was determined to be marijuana. The stipulation simply states that the substance sent to

Agent Evans by Deputy Lowell Wood was determined to be marijuana, leaving the State with its burden of proving that the substance analyzed by Agent Evans was the same substance defendant sold to Kevin Forbes. More specifically, the State sought to prove that a series of transactions and exchanges originating with the defendant culminated in the acquisition of the marijuana by Deputy Wood. Tracing each transaction or exchange, the State offered proof that defendant sold a quantity of marijuana to Kevin Forbes, a 14-year-old student; that Forbes sold a "joint" containing a portion of that marijuana to Eddie Barnes, a 16-year-old student; that Louis Blanchard, Jr., a teacher, took the "joint" from Barnes and gave it to Principal Jimmy Webb; that Webb put the "joint" in an envelope and gave it to Wallace O'Neal, the police school liaison officer; and that O'Neal gave the envelope to Deputy Wood. The State also offered proof that the remainder of the marijuana which defendant sold to Kevin Forbes was rolled into three marijuana cigarettes and placed into an ordinary cigarette pack; that when Forbes was called to the principal's office, he gave the cigarette pack containing the three "joints" to Tammy Sawyer, a 17-year-old student; that Tammy Sawyer gave the cigarette box to Principal Webb; that Webb gave the cigarette box to O'Neal; and that O'Neal gave the cigarette box to Deputy Wood. The State offered ample evidence to establish each link in the chain of possession, but the credibility of that evidence was for the jury to determine.

Not only did defendant fail to concede that he participated in the chain of events described in the State's evidence, he presented evidence tending to contradict the State's evidence. Defendant took the stand, denying any participation in the transactions. He also denied ever having smoked marijuana. Defendant's father also testified that he knew of no marijuana use by his son and that he had never smelled any smoke around their house other than ordinary tobacco smoke. Furthermore, the officers who searched defendant's bedroom found no marijuana or odor of marijuana; in fact, they found nothing "that would be connected or identified in any manner with the use and possession of marijuana."

In recapitulating the State's evidence in his charge to the jury, the trial judge described the stipulation, along with some of the other evidence, as follows:

"The State further offered evidence which in substance tends to show that Kevin Forbes said that he had contacted the defendant on the 9th of March, . . . and that on the 10th . . . they went in a bathroom where Stanley Saunders gave him a bag of a vegetable material in exchange for $5.00.

The State further offered evidence which in substance tends to show, and this was stipulated, that *that substance* was sent to the State Bureau of Investigation Laboratory in Raleigh, where it was examined by the chemist, Mr. N. C. Evans, and that his analysis with respect to the material which was in Eddie Barnes' cigarette pack was that it was the substance marijuana in a quantity of less than one ounce; and that his examination of the substance which was in the Marlboro pack taken from Tammy Sawyer was marijuana, and in a quantity of less than five grams." (Emphasis added.)

Despite the State's obligation to prove each essential step in the transaction, the clear implication conveyed to the jury by the judge's charge is that defendant admitted or stipulated that the substance Agent Evans determined to be marijuana was given to Kevin Forbes by defendant in exchange for $5.00. A strikingly similar misstatement in the charge to the jury occurred in *State v. Thornton*, 283 N.C. 513, 196 S.E. 2d 701 (1973), and the Supreme Court there held that "[s]uch inadvertence on the part of the court effectively negated the paramount issue raised" and entitled defendant to a new trial. *Id.* at 520, 196 S.E. 2d at 706. Likewise, the trial judge's unintentional expression in this case was prejudicial error and entitles defendant to a new trial on both charges.

We have not considered defendant's remaining assignments of error because they are unlikely to reoccur.

New trial.

Judges CLARK and MITCHELL concur.

STATE OF NORTH CAROLINA v. LAWRENCE McADOO, ANTHONY JONES AND COY KIRKPATRICK

No. 7715SC794

(Filed 21 February 1978)

1. **Criminal Law § 101.1— statement by prospective juror—prior crime by defendant—denial of mistrial**

A prospective juror's statement during *voir dire* examination that he knew one of the defendants because such defendant "had tried to lift a power saw from me" was not so prejudicial as to require a mistrial where the prospective juror thereafter stated in the presence of other members of the panel that defendant was found not guilty on that charge, and where there is nothing in the record to indicate that defendants were prevented from questioning the jurors on *voir dire* as to what weight they gave to the prospective juror's statement.

2. **Constitutional Law § 72— testimony by codefendant—incriminating statements made by defendant**

A codefendant was properly allowed to testify as to statements made to him by defendant which tended to implicate defendant where defendant had the right to cross-examine the codefendant.

3. **Criminal Law § 89.3— corroboration—hearsay statement by another**

In this prosecution for attempted safecracking, breaking or entering and larceny, testimony by a police officer that a codefendant told the officer that defendant did not enter the building until the police car came by was not admissible to corroborate defendant's testimony since the testimony was not a prior consistent statement of defendant but was a hearsay statement by another person.

4. **Criminal Law § 114.2— instructions—no expression of opinion**

The trial judge did not express an opinion on the evidence when, in instructing on the contentions of the parties, he stated that "of course they [the defendants] contend," or when he stated that "the State contends . . . the testimony of the defendant McAdoo, which the State contends, that you should not believe certainly in that respect."

5. **Criminal Law § 118.2— statement of State's contentions—inferences from evidence—no expression of opinion**

In this prosecution for attempted safecracking, breaking or entering and larceny in which one defendant testified that he did not go into the building with the codefendants but waited outside and only went in after a police car had passed, the trial court did not assume facts not in evidence when he instructed the jury that the State contended defendant should have gone to his girl friend's apartment or elsewhere, that he would not have gone into the building to keep persons who were not close friends out of trouble, and that he would not have stood outside the building at 1:30 a.m. without knowing what was going on, since such contentions could properly be inferred from the evidence.

State v. McAdoo

APPEAL by defendants from *Fountain, Judge.* Judgment entered 23 February 1977 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 31 January 1978.

The three defendants have appealed from sentences imposed in Alamance County after each of them was convicted of attempted safecracking, felonious breaking or entering and felonious larceny. The defendants' assignments of error are discussed in the opinion.

On 14 November 1976, officers with the City of Burlington Police Department entered the building of Burlington Farm Services, Inc. at approximately 2:00 a.m. after it was noticed that a window in the building had been broken. The building had been closed for the night. The officers found the three defendants lying in a fertilizer bin inside the building. The officers observed a safe in the building with the door partially damaged. The manager of Farm Services, Inc. testified that there were six chain saws missing from the building when he entered after being called by the police in the early morning hours of 14 November 1976.

While the jury was being selected, the District Attorney asked a Mr. Gilliam, one of the prospective jurors, if he knew any of the defendants. The juror stated that he knew defendant Kirkpatrick because Kirkpatrick "had tried to lift a power saw from [me]." The court, on its own motion, excused the prospective juror. Mr. Kirkpatrick's attorney was then permitted to ask the juror, while the juror was seated in the courtroom and in the presence of all other members of the panel, if it were not a fact that Kirkpatrick was found not guilty of this charge. The juror answered "yes." All defendants made a motion for mistrial which was denied.

Defendant McAdoo took the witness stand and, among other matters, testified over the objection of defendant Jones, to several statements made to him by Jones which tended to implicate Jones.

Attorney General Edmisten, by Assistant Attorney General Claude W. Harris, for the State.

Angela R. Bryant, for defendant appellant, Lawrence McAdoo.

Daniel H. Monroe, for defendant appellant, Anthony Jones.

Hemric and Hemric, P.A., by W. Kelly Elder, Jr. and H. Clay Hemric, Jr., for defendant appellant, Coy Kirkpatrick.

WEBB, Judge.

[1] Each of the defendants assigns as error the failure of the trial judge to grant motions for mistrial made by each defendant when a prospective juror said that he knew the defendant Kirkpatrick because Kirkpatrick "had tried to lift a power saw from [me]." Each relies on *State v. Drake*, 31 N.C. App. 187, 229 S.E. 2d 51 (1976). In that case, a disinterested witness overheard a juror express the opinion after the State's evidence was complete, but before the defendant had offered evidence, that the defendant would probably offer evidence of self-defense which he, the juror, felt would be manufactured. In *Drake*, a new trial was ordered because the court did not conduct an investigation by calling the juror as a witness or otherwise. The defendants contend this case is governed by *Drake*.

We believe this case is distinguishable from the *Drake* case. In *Drake*, the jury had been selected and the trial was in progress. The defendant's attorney made a motion to call the juror for examination and the motion was denied. There was no opportunity in *Drake* to determine if the jury failed to follow the court's mandate not to reach any conclusion until all the evidence was heard and the jury charged. In this case, there is no showing that any of the parties did not have adequate opportunity to question the jury as to any prejudicial effect the statement of Mr. Gilliam may have had.

It was prejudicial to the defendants that a juror announced in open court that one of the defendants had tried to steal a chain saw from him. This prejudice was only partly cured by the juror's statement that the defendant was found not guilty of this charge. The question which we face is whether this statement is so prejudicial as to require a new trial. We hold that it is not. There is nothing in the record to show that any defendant was prevented from questioning the jury on *voir dire* as to what weight they gave Mr. Gilliam's statement. Without any more than has been shown on this record, we cannot hold the defendants are entitled to a new trial.

[2] The defendant, Anthony Jones, assigns as error the allowance of testimony by defendant McAdoo as to what Jones had told him. Defendant Jones cites *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968) and *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968) in support of this contention. The rule of *Bruton* precludes the use of a confession by a nontestifying defendant if it implicates a codefendant. The rationale of this rule is that it prevents the codefendant from confronting the defendant who is a witness against him. Under *Bruton*, if the defendant who makes the confession testifies, the codefendant cannot exclude the confession. Jones properly states in his brief that he had the right to cross-examine McAdoo. We believe this right makes admissible McAdoo's testimony as to what Jones told him. Admissions by defendants in criminal actions have been admissible in our courts for many years. *See 2 Stansbury's N.C. Evidence*, § 167 n. 20 (Brandis rev. 1973), citing many cases. This assignment of error is overruled.

[3] Defendant McAdoo assigns as error the exclusion of offered testimony by one of the police officers that defendant Jones told the officer that McAdoo did not enter the building until the police car came by. McAdoo contends that this evidence would have corroborated his own testimony. We note that the testimony offered in corroboration of McAdoo was not a prior consistent statement by McAdoo, but a hearsay statement by Jones. *1 Stansbury's N.C. Evidence*, § 52 (Brandis Rev. 1973), at page 153 says:

> "The grounds upon which the witness's own prior statements are admitted do not justify the reception of *another person's* extrajudicial statements, and such statements would seem to be inadmissible hearsay unless they fall within some exception to the hearsay rule or are offered to impeach or corroborate the declarant's own testimony in the case."

This assignment of error is overruled.

[4, 5] As his final assignment of error, defendant McAdoo says that the trial judge expressed an opinion on the evidence while stating the contentions of the parties. At one point, the judge said "of course they [the defendants] contend." Defendant McAdoo argues that this implies an untruth as to McAdoo. We cannot accept this implication. The court also said "[t]he State contends . . .

the testimony of the defendant McAdoo, which the State contends, that you should not believe, certainly in that respect." Defendant McAdoo contends this is error under *State v. Rhinehart*, 209 N.C. 150, 183 S.E. 388 (1935). We do not believe the *Rhinehart* case is controlling. In that case, the trial judge made several statements which our Supreme Court held put too much emphasis on the good character of the State's witnesses and the unreasonableness of defendant's testimony. In this case, we believe the court gave a fair statement of the State's contention without expressing an opinion. The defendant McAdoo offered evidence that he did not go into the building with the other defendants, but waited outside and only went in after the police car had passed the building the first time. The court in giving the contention of the State on this point said:

> "[T]he State contends . . . that McAdoo . . . that he could have gone back to his girl friend's apartment nearby; that he could have gone home into Orange County if he had wished to; and that he would not have gone into a building about which he knew nothing to get two men out who were not particularly close friends of his to keep them from getting in trouble nor the State contends would he have stood outdoors after 1:30 at night on a railroad track not knowing what was going on or what his purpose was in being there."

Defendant McAdoo complains that this statement of the contention of the State involves assumptions of evidence not supported by the record. He contends that his evidence shows that he knew why he was there, and there was no evidence his girl friend had an apartment nearby.

Reading this portion of the charge contextually, we believe it fairly states the contention of the State without expressing an opinion. We believe that reading the entire record, the State could contend the defendant McAdoo was contending he did not know why he was there and the State could legitimately contend McAdoo should have gone to his girl friend's apartment or somewhere other than standing outside a building while he knew or should have known it was being broken into by persons he had accompanied to the building.

In the trial we find

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. RICARDO WILLIAM VINCENT

No. 779SC697

(Filed 21 February 1978)

1. **Indictment and Warrant § 17.2— time of rape—alibi evidence—variance between indictment and proof**

Where the State presented evidence tending to show that the alleged rape occurred on the date fixed by the bill of indictment, the defendant then presented alibi evidence, and the State, after defendant had rested, presented rebuttal evidence tending to show that the crime alleged occurred on a different date approximately one week earlier than that charged in the bill of indictment, there was a fatal variance between the indictment and the proof which required a new trial on the charge of second degree rape.

2. **Criminal Law § 86.2— impeachment of defendant—use of prior void conviction—denial of due process**

In a prosecution for rape and assault with intent to commit rape, the trial court erred in allowing the prosecution to ask defendant in the presence of the jury whether he had been convicted of crime against nature in 1960, since defendant offered evidence that he was without counsel during the 1960 trial due to his indigency and the State offered no evidence to the contrary, and the use of that prior void conviction for the purpose of impeachment deprived defendant of due process.

Judge MORRIS concurs in the result.

APPEAL by defendant from *Canaday, Judge*. Judgment entered 22 April 1977 in Superior Court, VANCE County. Heard in the Court of Appeals 10 January 1978.

The defendant was charged in two separate bills of indictment, both proper in form, with the felonies of first-degree rape and assault with intent to commit rape. At trial he pled not guilty to both charges, and the jury returned verdicts of guilty of second-degree rape and assault with intent to commit rape. From judgments sentencing him to consecutive terms of not less than fifteen nor more than twenty years' imprisonment for second-

degree rape and not less than eight nor more than ten years' imprisonment for assault with intent to commit rape, defendant appealed.

The State's witness, Almerdia Denise Rand, testified, in substance, that on 28 November 1976 she lived with her mother and younger brother and sister in the home of the defendant. On that date she went for a ride in the defendant's car. After they had ridden for approximately twenty minutes, the defendant stopped the car, hit her, took off her pants and panties, and had sexual intercourse with her. Prior to that time she had not engaged in sexual intercourse with anyone.

Miss Rand further testified that, on the evening of 21 December 1976 she was in the home and went upstairs to bed. After she had gotten into bed, the defendant came upstairs twice. On the second occasion, the defendant began to feel her with his hands. She tried to scream, but he choked and hit her. She stated that she was scared and ran downstairs to her mother.

The State offered other witnesses for the purpose of corroborating Miss Rand's testimony. After these witnesses testified, the State rested.

The defendant testified in his own behalf and presented other witnesses. All testimony by the defendant and by others on his behalf was in the nature of alibi testimony tending to show he was in New York on 28 November 1976.

After the defendant rested his case, the State introduced rebuttal evidence. The testimony offered by the State on rebuttal tended to indicate the alleged rape had, in fact, occurred on 21 November 1976.

Attorney General Edmisten, by Associate Attorney James L. Stuart, for the State.

A. A. Zollicoffer, Jr., for defendant appellant.

MITCHELL, Judge.

Defendant brings forward numerous exceptions and assignments of error, most of which relate solely to the charge upon which the jury found him guilty of second-degree rape. We need not discuss all of the assignments.

[1] The defendant contends there was a fatal variance between the time of the crime as alleged in the bill of indictment and the time as established by the State's evidence. There is merit in this contention.

The time fixed in a bill of indictment usually is not an essential fact, and the State may prove the crime was committed on another date. Time is not ordinarily of the essence of an offense, but when the State fixes the date in the indictment and the defendant presents evidence of an alibi relating to that date, time becomes of the essence. The State may not, after the defendant has presented his alibi evidence and rested his case, introduce evidence tending to show the defendant's commission of the crime charged on another date. To permit a conviction on such evidence would violate rights guaranteed by the Constitution of North Carolina. N.C. Const. art. 1, § 23; *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961).

In the present case, the State presented evidence tending to show the alleged rape occurred on the date fixed by the bill of indictment. The defendant then presented alibi evidence. After the defendant had rested, the State presented rebuttal evidence tending to show that the crime alleged occurred on a different date approximately one week earlier than that charged in the bill. This represented a fatal variance between the indictment and the proof which will require a new trial on the charge of second-degree rape.

As a new trial will be required on the charge of second-degree rape, it would not be amiss for us to note that there was some evidence introduced tending to indicate the alleged rape may have occurred in Virginia. As the trial court pointed out at one juncture, the evidence was not totally conclusive as to whether the crime, if any, was committed in Virginia or North Carolina.

Since the trial in this case, the Supreme Court of North Carolina has held in *State v. Batdorf*, 293 N.C. 486, 238 S.E. 2d 497 (1977) that, when jurisdiction is challenged, the State must carry the burden of proof and show beyond a reasonable doubt that North Carolina has jurisdiction to try the defendant. The trial court, in such cases, should instruct the jury that it must return a special verdict indicating lack of jurisdiction if it is not

satisfied beyond a reasonable doubt that the crime occurred in North Carolina.

In *Batdorf*, the Supreme Court also indicated that, where a motion to dismiss for improper venue pursuant to G.S. 15A-952 is made, the State must carry the burden of proving by a preponderance of the evidence that the crime occurred in the county in which the indictment was returned. The evidence presented at trial in this case, however, would not have required an instruction on the State's burden of proof with regard to venue, as all of the evidence introduced indicated the crime alleged occurred in either Virginia or Vance County, North Carolina.

As there must be a new trial on the charge of second-degree rape, we need not consider whether *Batdorf* is to be given retroactive application to trials commencing prior to 11 November 1977, the date on which the opinion in that case was filed. *See generally*: Annot., 10 A.L.R. 3d 1371 (1966). As a new trial of this case will obviously occur after that date, the holding in *Batdorf* will be fully applicable, and we presume the trial court will properly instruct the jury accordingly.

[2] The defendant also contends the trial court denied him due process of law when it permitted the State to ask him during cross-examination whether he had been convicted in 1960 of crime against nature. Prior to taking the witness stand to testify in his own behalf, the defendant made a motion through counsel that the trial court not permit the State to ask any questions of him concerning his 1960 conviction for crime against nature. He then took the witness stand solely for the purpose of giving testimony concerning the prior conviction for crime against nature in order that the court might rule upon his motion, and the following transpired:

> "Q. Approximately what was the date of your conviction to the best of your recollection?
>
> A. 1960, I think.
>
> Q. 1960. Did you have an attorney representing you at the trial?
>
> A. No. I didn't.

Q. No attorney was appointed?

A. No attorney was appointed.

Q. Did you have funds to employ an attorney?

A. No.

Q. And as a result of that conviction did you serve time?

A. I did."

On cross-examination the defendant gave substantially similar testimony to that he had given on direct examination. The trial court then denied the defendant's motion and permitted the State to ask him in the presence of the jury whether he had been convicted of crime against nature in 1960. The defendant responded before the jury that he had been so convicted.

The use of prior void convictions for purposes of impeachment of a criminal defendant deprives him of due process where their use might well have influenced the outcome of the case. *Loper v. Beto*, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed. 2d 374 (1972). The burden of proof is, of course, on the defendant in cases such as this to prove his inability to employ counsel at the time of the conviction which he contends was invalid. Here, the defendant's testimony indicated that he was without counsel during the 1960 trial due to his indigency, and the State offered no evidence to the contrary. The defendant, therefore, carried his burden of proving he was without counsel due to indigency at the time of his conviction in 1960 for crime against nature. *Kitchens v. Smith*, 401 U.S. 847, 28 L.Ed. 2d 519, 91 S.Ct. 1089 (1971) (per curiam). Permitting the defendant to be questioned concerning this conviction was error which will require a new trial.

For the errors previously discussed, the defendant is entitled to a new trial on both the charge of second-degree rape and the charge of assault with intent to commit rape. As to each of those cases, we order a

New trial.

Judge CLARK concurs.

Judge MORRIS concurs in the result.

STATE OF NORTH CAROLINA v. DAVID AMBROSE ODOM

No. 7726SC868

(Filed 21 February 1978)

1. **Searches and Seizures § 8— search before formal arrest—search incident to arrest**

A search of a suspect's person before his formal arrest is justified as incident to the arrest where probable cause to arrest existed prior to the search and the evidence seized was in no way necessary to establish the probable cause.

2. **Searches and Seizures § 8— search incident to arrest—probable cause for arrest**

An officer had probable cause to arrest defendant for possession of heroin before the discovery of the heroin on defendant's person, and a warrantless search of defendant before his formal arrest was lawful as being incident to the arrest, where a reliable informant, who had himself sold heroin, told the officer that he had seen heroin on defendant's person and that defendant was taking another person to a certain house so that the other person could buy heroin; the informant later told the officer that defendant and his companion had been delayed while the companion sought money; shortly thereafter the officer observed defendant and his companion arrive at the described location in defendant's car and the companion go into the house and return to defendant's car; the officers stopped defendant's car and discovered packets of heroin on defendant's person; and the officer had used the same informant on previous occasions and his information had proved reliable in the past.

APPEAL by defendant from *Baley, Judge.* Judgment entered 8 June 1977, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 February 1978.

Defendant was indicted for the felonious possession of heroin, a controlled substance. At his trial, before any evidence was presented to the jury, defendant moved to suppress evidence which was seized during a search of defendant. Following the denial of his motion, defendant pleaded guilty.

During the *voir dire* hearing held on defendant's motion to suppress, the State's evidence tended to show that H. F. Frye of the Charlotte Police Department had received information about defendant at approximately 11:30 p.m., 17 August 1976. Frye testified that he received a phone call from a reliable informant who told him that Odom had heroin on his person and that Odom was taking Harvey Gray to Joe Flowe's house so that Gray could get some heroin. Frye stated that he had received information

from the informant on previous occasions and had found such information reliable.

Frye, along with Officer Dellinger, then drove to Plymouth Avenue and parked near the house at 213 Plymouth, Flowe's house. After sitting in his pickup truck for thirty minutes, Frye, seeing no sign of defendant, left and had another conversation with the informant. At that time the informant told Frye that Gray's money was short but that Gray had been able to obtain the money. According to the informant, who had overheard a conversation between Gray and defendant, the two men were leaving for Flowe's house at that time. Frye returned to his position at 213 Plymouth and thereafter observed Gray and defendant arrive in defendant's car.

Gray got out of the car and went to Flowe's house where he had a conversation with Flowe for about five minutes. At one point the two men looked at Frye's truck. Gray then left the house and returned to defendant's car, and Flowe pulled a gun from his person, pointed it at Frye, and yelled at Frye to come out. Gray and defendant then left the area in defendant's car which was stopped later by a patrol car driven by Officer Hawks. Frye was also in the patrol car. He testified that he told defendant the information they had and that he watched Hawks "pat down" the defendant. Hawks called Frye's attention to a needle and syringe, five packets of suspected heroin, and some pills. Frye then placed defendant under arrest. R. D. Hawks testified that he had searched defendant and found the heroin in defendant's hat.

Defendant put on evidence tending to show that he had been stopped by the two officers and that one of them had ordered him to strip from the waist down. Defendant denied ever having used heroin and stated that one of the officers could have pulled the packets from his pockets.

The trial court entered its findings of fact and concluded that there were ample grounds upon which to base probable cause to arrest and search the defendant, that evidence uncovered by that search was admissible in evidence, and that Officer Frye did not have sufficient time to secure a warrant. To these conclusions defendant excepted and appealed.

Attorney General Edmisten, by Assistant Attorney Sandra M. King, for the State.

Michael S. Scofield, Public Defender, by Assistant Public Defender Richard D. Boner, for defendant appellant.

ARNOLD, Judge.

Appellate review of the order denying defendant's motion to suppress evidence is authorized by G.S. 15A-979(b).

Defendant argues that there was no probable cause for the search of his person, that no existing circumstances permitted a warrantless search of defendant, and that the trial court therefore erred in denying his motion to suppress evidence seized in that search. We do not agree.

[1] In *State v. Wooten*, 34 N.C. App. 85, 237 S.E. 2d 301 (1977), this Court held that where a search of a suspect's person occurs before, instead of after, formal arrest, such search can be equally justified as "incident to the arrest" provided probable cause to arrest existed prior to the search and provided it is clear that the evidence seized was in no way necessary to establish the probable cause.

Our Supreme Court has defined probable cause as follows:

> "Probable cause and 'reasonable ground to believe' are substantially equivalent terms. 'Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty . . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. One does not have probable cause unless he has information of facts which, if submitted to a magistrate, would require the issuance of an arrest warrant.' "

State v. Harris, 279 N.C. 307, 311, 182 S.E. 2d 364, 367 (1971).

[2] Defendant argues that the State failed to show that Officer Frye had enough information to satisfy a magistrate that a warrant should be issued. He relies on *Aguilar v. Texas*, 378 U.S. 108,

12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964), and contends that the *Aguilar* two-pronged test by which an informant's information is judged was not met. In the *Aguilar* decision the United States Supreme Court stated that although an affidavit filed by police officers may be based on hearsay information and need not reflect direct personal observations of the affiant, the magistrate must be apprised of (1) some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed them to be, and (2) some of the underlying circumstances by which the officer concluded that the informant was credible. *Id.* at 114, 12 L.Ed. 2d at 729, 84 S.Ct. at 1514.

In the present case Officer Frye had sufficient information to meet both tests. First, a reliable informant, who had himself sold heroin, told Frye in the first conversation that he had seen the heroin on defendant's person; furthermore, he gave him details about the purchase to be made at Flowe's house. In their second conversation the informant told Frye that he had overheard Gray and the defendant, and that the two of them were delayed while Gray sought money. Secondly, Officer Frye testified that he had used the same informant on previous occasions and that he had been reliable in the past. Even without considering the evidence of the gun drawn by Flowe, we conclude that there was probable cause to arrest defendant and that the search incident to the arrest was lawful.

Defendant's second argument is that the search was illegal because the police officers failed to get a search warrant under conditions which required a search warrant. Since we have already concluded that this search was incident to an arrest—an exception to the rule requiring warrants—defendant's argument has no merit. Moreover, an officer may arrest without a warrant any person who the officer has probable cause to believe (1) has committed a criminal offense in the officer's presence, or (2) has committed a felony. G.S. 15A-401(b). *See, e.g. State v. Hardy*, 31 N.C. App. 67, 228 S.E. 2d 487 (1976). Officer Frye, based on the evidence in this case, had probable cause to believe that defendant had committed a criminal offense in his presence and that defendant had committed a felony.

Affirmed.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. RONNIE HUTSON

No. 7717SC816

(Filed 21 February 1978)

1. **Criminal Law § 143.12— revocation of probation—sentence imposed proper**

Where the record was not clear that the defendant was originally sentenced to more than three months in prison in a prosecution for issuing a worthless check, the trial court erred in revoking probation and activating a six month prison sentence.

2. **Criminal Law § 143.2— expression of opinion by judge—inapplicability of statute in probation revocation hearing**

Defendant's contention that the judge in a probation revocation hearing violated G.S. 1-180 by his questions and statement is without merit, since G.S. 1-180 imposes on trial judges the duty not to express an opinion before a jury as to whether a fact has been proved.

3. **Criminal Law § 143.10— probation revocation hearing—restitution—sufficiency of evidence of violation**

Where probation judgments provided that defendant would make payments of $75 per month with full restitution to be made in one year, the judgments did not mean that defendant was not in violation unless he had failed to make full payment within the year; furthermore, even if defendant did make an agreement with his probation officer that payments in a lesser amount would be made, such agreement would not be binding at the revocation hearing.

4. **Criminal Law § 143— probation revocation hearing—petition for bankruptcy—effect on court's jurisdiction**

Where defendant was convicted of issuing worthless checks and was placed on probation upon condition that he make full restitution, the superior court in a probation revocation hearing was not divested of jurisdiction so far as restitution was concerned because defendant had filed a petition for bankruptcy, since defendant had pled guilty to issuing worthless checks, had been found in violation of the terms of his suspended sentence and had had his probation revoked by the district court before he filed his petition in bankruptcy.

APPEAL by the defendant from *Seay, Judge*. Judgment entered 5 May 1977 in Superior Court, SURRY County. Heard in the Court of Appeals 2 February 1978.

This is an appeal by the defendant from the invocation of a suspended sentence. The defendant pled guilty in the District Court of Surry County to three charges of issuing worthless checks and no contest to one charge of the same offense. The

record is ambiguous as to the original sentence imposed in Case No. 75CRS8798. The entry on the back of the warrant shows the defendant pled no contest on 27 January 1976 and received a sentence of three months suspended for one year on condition that the check be paid by 15 March 1976. The jacket in which the papers were filed in Surry County has an entry on it which shows that prayer for judgment was continued on 27 January 1976 on condition that the check be paid by 15 March 1976. On 27 May 1976, probation judgments in all four cases were signed by Judge Van Noppen. The defendant was given six months in each case with the sentence in 75CRS8798 to commence at the expiration of the sentence imposed in 75CRS8999, the sentence in 75CRS9000 to commence at the expiration of the sentence imposed in 75CRS8798 and the sentence imposed in 75CRS9215 to commence at the expiration of the sentence imposed in 75CRS9000. The sentences were suspended and the defendant was placed on probation for two years. Each probation judgment provided:

> "Check and Cost to be paid by 5/27/77; Pay $75.00 per month under the supervision of the probation officer until he determines that more can be paid each month."

On 29 December 1976, probation was revoked in the District Court of Surry County and all the active sentences were put into effect. The defendant gave notice of appeal to the Superior Court and on 5 May 1977, Judge Seay signed orders revoking probation in all cases and activating the suspended sentences.

The defendant has appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Jesse C. Brake, for the State.

Billings and Billings, by W. Joseph Burns, for the defendant appellant.

WEBB, Judge.

[1] The defendant contends his sentence should not have been made active for six months in Case No. 75CRS8798 and we believe this contention has merit. Since the record is not clear that the defendant was originally sentenced to more than three months in prison, we hold that the judgment invoking the sentence in this case be vacated. Case No. 75CRS8798 is remand-

ed to the Superior Court of Surry County for the imposition of a sentence not to exceed three months.

[2] The defendant by his second assignment of error contends that Judge Seay violated G.S. 1-180 by his questions and statement during the hearing in Superior Court. G.S. 1-180 imposes on trial judges the duty not to express an opinion before a jury as to whether a fact has been proved. Since it applies only to jury trials, it has no application in this case. We note that we have found nothing improper in Judge Seay's questions or statements at the Superior Court hearing.

[3] By his third assignment of error, the defendant challenges Judge Seay's finding of fact number 3A. This finding of fact is as follows:

> "That when placed on probation, the defendant was ordered to pay the cost of the Court action and restitution at a rate of $75.00 per month under the supervision of the probation Officer but before May 27, 1977. The defendant has failed to comply with the Judgment of the Court in that he has not made any of these $75.00 per month payments as ordered."

The defendant contends that by the terms of the probation judgment he was not in violation unless he had failed to make full payment by 27 May 1977. The defendant also contends this finding of fact is incorrect because after probation had been revoked in the District Court and while the case was on appeal to the Superior Court, the defendant made a new arrangement for restitution with the probation officer, which was not violated by the defendant. We believe both of these contentions are without merit. Each of the four probation judgments provided that the defendant would make payments of $75.00 per month with full restitution to be made by 27 May 1977. We do not read the judgments to mean the defendant could not violate probation before 27 May 1977, so far as restitution was concerned. As to an agreement between the defendant and the probation officer that payments in a lesser amount would be made, it is not clear from the record that there was such an agreement; but if there were, we hold that it would not be binding at the revocation hearing.

[4] The defendant also contends that the Court was divested of jurisdiction so far as restitution was concerned because he had

filed a petition for bankruptcy. The defendant relies on *In re Penny*, 414 F. Supp. 1113 (W.D.N.C. 1976). We believe that case is distinguishable. In the *Penny* case, the defendant was declared bankrupt before he was charged in a warrant with issuing a worthless check. He had listed his liability on the check in his petition for bankruptcy and was under order of the federal court not to pay it except under the supervision of the bankruptcy court. In this case, the defendant did not file his petition for bankruptcy until several months after he had pled guilty in the District Court of Surry County to issuing the worthless checks. He had been found in violation of the terms of his suspended sentence and his probation had been revoked by the District Court before he filed a petition in bankruptcy. The revocation of this suspended sentence in no way interfered with the order of the bankruptcy court since there was no such order at the time probation was revoked.

In Case No. 75CRS8798, judgment vacated and cause remanded.

Affirmed in Cases No. 75CRS8999, No. 75CRS9000, and No. 75CRS9215.

Judges BRITT and HEDRICK concur.

PATSY R. HOLT, ADMINISTRATRIX OF THE ESTATE OF WILLIAM F. MILLSAPS, DECEASED v. CITY OF STATESVILLE AND REA CONSTRUCTION COMPANY

No. 7722SC272

(Filed 21 February 1978)

Municipal Corporations § 17.1— street being paved—protruding manhole cover—death of motorist

Plaintiff's evidence in a wrongful death action was sufficient for submission to the jury on the issue of negligence by defendant city and defendant construction company and did not establish contributory negligence on the part of plaintiff's intestate as a matter of law where it tended to show: plaintiff's intestate was driving his automobile 35 mph on a rainy night along a street being paved by defendant construction company under a contract with defendant city; the pavement at an intersection was broken with a two-inch drop off from the pavement to gravel covering the intersection; defendant con-

struction company had left a manhole cover protruding three inches above the level of the road in the intersection; there were no lights, signs or barricades warning motorists of these conditions; and the intestate's automobile struck the protruding manhole cover, swerved and struck a tree, causing the intestate's death.

APPEAL by plaintiff from *Albright, Judge*. Judgment entered 24 November 1976, in Superior Court, IREDELL County. Heard in the Court of Appeals 1 February 1978.

Plaintiff instituted a wrongful death action under G.S. 28A-18-2 against defendants for the death of her son, William Millsaps. Each defendant filed an answer denying negligence on its part, pleading contributory negligence by the deceased, and cross-claiming against the other defendant. At trial, plaintiff's evidence produced the following account of deceased's death:

On the night of 4 January 1975, Millsaps was driving his 1970 automobile in an easterly direction on Alexander Street in Statesville. REA Construction Company had been paving Alexander Street pursuant to a contract with the City of Statesville, and, according to plaintiff's witnesses, had left a manhole cover protruding as much as three inches above the level of the road. Millsaps, who was driving the automobile, hit the cover of the manhole, which was located in the center of Alexander Street, swerved, and hit a tree. Millsaps died two days later as a result of injuries sustained in the accident.

Plaintiff's testimony also included evidence from one of the four passengers in Millsaps' automobile that deceased was driving normally, between 35 and 40 m.p.h., that Millsaps had his headlights on, and that there were no lights, signs, or barricades warning of the manhole. J. P. Eckman, who investigated the accident for the Statesville Police Department, testified on cross-examination and over plaintiff's objection that there was an odor of alcohol on deceased's breath.

After plaintiff's evidence, defendants moved for a directed verdict, but the motion was denied. Defendants then put on evidence by other passengers of the automobile. Judy Chambers testified that deceased had been drinking within three or four hours before the accident and that between 1:00 a.m. and 1:30 a.m. he was staggering, but not "bad enough to fall up against something." Another passenger, Charles Keaton, testified that

Millsaps was driving 51 m.p.h. but that "Millsaps was operating the motor vehicle in a normal fashion" and that he had not seen Millsaps take a drink of an alcoholic beverage and had not smelled alcohol on his breath. Defendant REA Construction Company introduced into evidence, over plaintiff's objection, G.S. 20-141(b)(1) which states:

> "(b) Except as otherwise provided in this Chapter, it shall be unlawful to operate a vehicle in excess of the following speeds:
>
> "(1) Thirty-five miles per hour inside municipal corporate limits for all vehicles."

From the granting of defendants' motion for a directed verdict at the close of all the evidence, plaintiff appeals.

Jay F. Frank for plaintiff appellant.

Pope, McMillan & Bender, by Harold J. Bender and Charles C. Green, Jr., for defendant appellee, City of Statesville.

Moore & Willardson, by Larry S. Moore and John S. Willardson, for defendant appellee, REA Construction Company.

ARNOLD, Judge.

By her assignments of error plaintiff contends that the court erred in the following instances:

(1) By allowing the investigating officer to testify that he detected an odor of alcohol on the deceased and that he found a beer bottle next to the vehicle;

(2) By refusing to allow her to testify that while deceased was in hospital he told her that he loved her;

(3) By refusing to allow her testimony that the deceased was in pain;

(4) By refusing to allow her to identify a photograph of deceased and introduce the same as evidence;

(5) By allowing the introduction into evidence of § 20-141(a) through (b)(1) of the General Statutes;

(6) By refusing the testimony of Patricia Millsaps that she did not smell alcohol about deceased; and

(7) By refusing to allow a rebuttal witness for plaintiff to testify about an earlier conversation in which a defense witness said nothing about the deceased's being at a certain residence and drinking.

We disagree with plaintiff and see no merit in further discussion of these arguments.

The principal question presented by this appeal is whether it was error to grant defendants' motions for directed verdict. From our vantage it appears that it would have been more prudent in the instant case to have submitted this case to the jury while reserving judgment notwithstanding the verdict. G.S. 1A-1, Rule 50.

After reviewing the evidence in the light most favorable to plaintiff, giving her the benefit of all reasonable inferences to be drawn and resolving contradictions in her favor and considering so much of defendants' evidence as is favorable to plaintiff, *see, e.g. Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976), we find that the evidence was sufficient to be submitted to the jury on the issue of defendants' negligence and that it did not establish contributory negligence as a matter of law.

According to the evidence taken in the light most favorable to plaintiff, the accident occurred on a rainy night at an intersection which was under construction. The pavement was broken with a two-inch drop off from the pavement to gravel which covered the intersection. The manhole cover protruded three inches above the level of the road, and it was in the middle of the road. There were no warning lights or barricades to put motorists on notice of these conditions. Intestate was driving 35 m.p.h. when the accident occurred.

Defendants' motion for directed verdict was granted on the grounds that plaintiff failed to show actionable negligence, and that the evidence showed contributory negligence as a matter of law. Judgment cannot be sustained on either ground.

Though the evidence surely does not compel such a verdict, there is evidence which would support a finding that defendants were negligent in leaving an exposed manhole in the middle of an intersection without erecting any warning devices to forewarn motorists that the intersection was under construction. Moreover,

the record does not clearly show that the intestate had driven through the intersection just prior to the accident and therefore should have had actual notice that the intersection was under construction. The jury might well find contributory negligence on the part of the intestate, but we cannot say that reasonable minds could reach no other conclusion.

Judgment granting defendants' motion for directed verdict is

Reversed.

Judges PARKER and MARTIN concur.

PARRISH TIRE COMPANY v. ROBERT E. LEE MOREFIELD III

No. 7721DC210

(Filed 21 February 1978)

Contracts § 16— promissory note—condition precedent to payment—failure to show condition existed—no recovery on note

A promissory note executed by defendant and another to the order of plaintiff upon which defendant wrote, "Upon condition of no maturity date at all," before he signed it amounted to an agreement between the parties that defendant was not required to pay until he had the money to afford it, at which time he would if he could; therefore, because of defendant's agreement to pay only conditionally, the condition being that he should have the money to afford it, plaintiff was required to offer proof of defendant's ability to pay before plaintiff could recover in an action on the note.

APPEAL by plaintiff from *Alexander (Abner), Judge.* Judgment entered 1 November 1976 in District Court, FORSYTH County. Heard in the Court of Appeals 17 January 1978.

This is a civil action to recover $670.83, being one-half of the face amount of a promissory note executed by defendant and another to the order of plaintiff. Plaintiff alleged that one-half of the face amount of the note had been paid by the co-maker but that defendant had refused to pay the other half upon demand. Defendant answered and admitted execution and non-payment of the note by him but denied liability, pleading failure of consideration.

At trial before a jury, plaintiff introduced the original note into evidence without objection. This instrument, which was on a printed form, was dated "11-4-1968," was signed by defendant and one other person under seal, and recites that "For value received, at the time or times stated in the Schedule of payments herein," the makers "promise to pay to order of Parrish Tire Co.," the sum of $1341.66. In a blank space on the face of the note headed "Schedule of Payments" appear the handwritten words, "Upon condition of no maturity date at all," followed by defendant's signature.

Plaintiff's witnesses testified that the note represented a debt incurred by M & M Transport Co. to plaintiff on open account from 1967 to 1968 and that defendant and his co-maker executed the note to guarantee payment of that debt. C. C. Mertes, plaintiff's employee who obtained execution of the note, testified that defendant signed after writing the words "no maturity date" on the note and that he "understood the defendant's writing as meaning he would not pay until he had the money to afford it and would if he could."

At conclusion of plaintiff's evidence, the court granted defendant's motion for a directed verdict. From judgment dismissing the action, plaintiff appealed.

House and Blanco by Robert Talley for plaintiff appellant.

Yeager and Powell by Edward L. Powell for defendant appellee.

PARKER, Judge.

The note in suit was never transferred or negotiated, and we are here concerned only with the rights and obligations of the original parties. In determining these, we apply principles of law applicable to the interpretation and effect of contracts generally.

"Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution." *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E. 2d 622, 624 (1973). "The court will give legal effect to the words of a contract in accordance with the meaning actually given to them by one of the parties, if the other knew or had reason to know that he did so." 3 Corbin, Contracts § 543, at 140

(1960). In the present case plaintiff's evidence establishes that defendant gave the words which he wrote on the face of the note before signing it, "Upon condition of no maturity date at all," the meaning that defendant "would not pay until he had the money to afford it and would if he could." Plaintiff's evidence also establishes that plaintiff knew, at the time the contract was made, that defendant was giving this meaning to his words. Therefore, for purposes of passing on the trial court's ruling granting defendant's motion for a directed verdict, we accept plaintiff's evidence as establishing that the agreement between the parties at the time the contract was made was that defendant was not required to pay "until he had the money to afford it," at which time he "would if he could."

The parties have cited no decision of the appellate courts of this State, and our own research has disclosed none, which determines the legal effect of contract language requiring a party to pay only when "he had the money to afford it" or words of similar import. Courts of other jurisdictions, however, have been confronted with this problem. "In a majority of the states in which the question has arisen, and in Canada, it is held that a promise to pay when the promisor 'is able' is not an absolute but a conditional promise to pay; and that therefore the promisee, in order that he may recover on such a promise, must allege and prove ability of the promisor to pay the debt." Annot., 94 A.L.R. 721, 721 (1935). *Contra, Sanford v. Luce*, 245 Iowa 74, 60 N.W. 2d 885 (1953); *see* 5 Williston on Contracts, § 804 (3d ed. 1961). In our opinion the majority view more accurately reflects the actual intent expressed in such a promise. Defendant here did not agree to pay in any and all events; he agreed to pay only conditionally, the condition being that he should have the money to afford it. Such a condition became a condition precedent to his obligation to perform.

A condition precedent is a fact or event, " 'occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available.' " *Cargill, Inc. v. Credit Assoc., Inc.*, 26 N.C. App. 720, 722-23, 217 S.E. 2d 105, 107 (1975), quoting 3A Corbin, Contracts § 628 at 16 (1960). The burden was on the plaintiff in this case to offer evidence in support of all essential elements to establish his

claim. The occurrence of the condition precedent was an essential element of plaintiff's case, and it was therefore incumbent upon plaintiff to offer proof of defendant's ability to pay. *Thomas v. American Radio and Television*, 228 Ark. 1050, 312 S.W. 2d 183 (1958); *Smith v. Graham Refrigeration Products Company*, 333 Mass. 181, 129 N.E. 2d 884 (1955); *American University v. Todd*, 39 Del. 449, 1 A. 2d 595 (Super. Ct. 1938).

No such proof was offered. Therefore, the trial court correctly granted defendant's motion for a directed verdict.

Affirmed.

Judges VAUGHN and ERWIN concur.

STATE OF NORTH CAROLINA v. ORLANDUS JONES

No. 7712SC802

(Filed 21 February 1978)

Criminal Law § 117— character evidence—instructions—substantive evidence—consideration on credibility

In a rape case in which defendant testified in his own behalf, the trial court erred in instructing the jury that character evidence offered in defendant's behalf could be considered as substantive evidence without additionally instructing that it could be considered as bearing upon his credibility.

APPEAL by defendant from *Gavin, Judge*. Judgment entered 18 August 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 31 January 1978.

The defendant was charged by two counts in a single bill of indictment with the felonies of second-degree rape and obtaining carnal knowledge of a virtuous girl between twelve and sixteen years old. Upon his pleas of not guilty to both counts, the jury returned verdicts of guilty. From judgments sentencing him to consecutive terms of forty years' imprisonment for second-degree rape and ten years' imprisonment for obtaining carnal knowledge of a virtuous girl between twelve and sixteen years old, defendant appealed.

The State's evidence consisted primarily of the testimony of Kitty Gerlosky. She testified that on 8 December 1975, she was fourteen years of age. At about 7:30 a.m. that morning, she went to the bus stop near her home but did not get on the school bus. Instead, she left the bus stop and went to a play area in a park in some nearby woods.

Miss Gerlosky testified that she remained in the general vicinity of the play area for approximately one hour. At that time a man she identified as the defendant, Orlandus Jones, approached her. She stated the defendant was wearing a blue and white checked coat over another blue coat. He had a dog which appeared to be a German shepherd and another which appeared to be a beagle with him and was carrying a gun.

Miss Gerlosky testified that the man built a fire and entered a conversation with her. He asked her if she wanted to make love, and she told him no. He then grabbed her hands and tripped her. She stated that she tried to get away and physically resisted his advances. The defendant removed her clothes and told her that he was going to throw her in the river if she didn't stop trying to get away from him. She stated the defendant then choked her until she stopped resisting.

Miss Gerlosky testified that the defendant then had sexual intercourse with her by force and against her will. She at no time consented to his advances. She also testified, and the State introduced expert medical evidence tending to show, that she had never previously had sexual intercourse with anyone.

Miss Gerlosky testified that the defendant, having completed the act of sexual intercourse with her, asked if she intended to tell. She told him she did not, and he left.

The State offered other witnesses who testified to prior consistent statements by Miss Gerlosky. The State also presented witnesses who testified to having seen a man who matched the defendant's general description and who had with him two dogs in the vicinity of the alleged rape on the morning of 8 December 1975. None of the other witnesses could identify the defendant as the man they had seen.

The defendant testified in his own behalf and gave testimony in the nature of an alibi. He presented other witnesses whose

testimony tended to corroborate him. Additionally, these witnesses gave testimony as to his good character and reputation.

Attorney General Edmisten, by Associate Attorney Patricia B. Hodulik and Special Deputy Attorney General Edwin M. Speas, Jr., for the State.

Anthony E. Rand for defendant appellant.

MITCHELL, Judge.

The defendant testified in his own behalf and also offered several witnesses who testified as to his good character and reputation in the community in which he lived. The trial court gave the following instructions with regard to this evidence.

> Members of the Jury, evidence has been received in this case with regard to the defendant's reputation. Although good character and reputation is not an excuse for crime, the law recognizes that a person of good character may be less likely to commit a crime than one who lacks that character. Therefore, if you believe from the evidence that the defendant has a good character, you may consider that fact in your determination of the defendant's guilty [sic] or innocence and give it such weight as you decide it should receive in connection with all of the other evidence.

The defendant assigns as error the failure of the court to instruct the jury that his character evidence could also be considered as bearing on his credibility.

Character evidence is a subordinate and not a substantive feature of the trial. The trial court, in the absence of a specific request, need not give any instruction relative to the significance of character evidence. *State v. Burell*, 252 N.C. 115, 113 S.E. 2d 16 (1960). When the trial court instructs the jury as to the significance of character evidence, however, the instructions must be correct and complete.

The defendant testified in his own behalf. Thus, it was error for the trial court to instruct the jury that character evidence offered in his behalf could be considered as substantive evidence without additionally instructing that it could also be considered as bearing upon his credibility. *State v. Wortham*, 240 N.C. 132, 81 S.E. 2d 254 (1954); *State v. Moore*, 185 N.C. 637, 116 S.E. 161

(1923), and cases therein cited. The trial court's omission in this regard was identical to those we have previously disapproved and will necessitate a new trial. *State v. Adams*, 11 N.C. App. 420, 421, 181 S.E. 2d 194, 195 (1971).

We fully recognize that verdicts and judgments should not be set aside for mere error which is not both material and prejudicial. *State v. Rainey*, 236 N.C. 738, 741, 74 S.E. 2d 39, 41 (1952). It is not necessary, however, for us to determine in this case whether the failure properly to instruct on the significance of character evidence introduced after a defendant has testified could ever be harmless error. Here the defendant's testimony directly contradicted the only person who identified him as the perpetrator of the crime charged. In order to reach a verdict, it was absolutely unavoidable, therefore, that the jury pass on the credibility of the defendant. Its decision in this regard was crucial and determinative of the result which ensued.

As to both counts in the bill of indictment, there must be a

New trial.

Judges MORRIS and CLARK concur.

SWAIN COUNTY, A MUNICIPAL CORPORATION v. HATTIE SHEPPARD, FORMERLY HATTIE NATIONS, AND HUSBAND, D. C. SHEPPARD; AND STERLING C. NATIONS AND WIFE, WANDA NATIONS

No. 7730SC308

(Filed 21 February 1978)

Social Security and Public Welfare— Old Age Assistance lien—judgment not collected—lien voided

Plaintiff's Old Age Assistance lien against defendant's property which had been reduced to judgment but had not been enforced against the property was voided by Session Laws 1975, Chapter 48, which abolished all Old Age Assistance liens which had not actually been collected prior to the effective date of the Act.

APPEAL by defendants from *Ferrell, Judge*. Order entered 8 February 1977 in Superior Court, SWAIN County. Heard in the Court of Appeals 3 February 1978.

From October, 1957, to November, 1966, defendant Hattie Nations Sheppard received Old Age Assistance payments totaling $4,497.00 from plaintiff acting through its Department of Public Welfare. G.S. 108-30.1—changed to G.S. 108-29 in 1969 and repealed in 1973—provided for the creation of a general lien in favor of the county upon the real property of a recipient of such aid to the extent of the total amount of assistance paid.

Pursuant to this statute, plaintiff instituted action on 30 October 1967 to foreclose its lien on certain real property owned by defendant Hattie Nations Sheppard. No answer was filed and on 8 January 1968, judgment by default was entered against defendants directing that the realty be sold.

On 2 December 1969, an auction was held and the property was sold to the highest bidder for $6,000.00.

On 8 December 1969, prior to consummation of the auction sale, defendants moved to set aside the sale as null and void on the grounds that defendant Hattie Sheppard was then occupying the subject realty as her homesite and thus, pursuant to 108-34 (now repealed), a lien could not be enforced against this property.

The trial court entered an order temporarily enjoining the sale of the realty on 8 December 1969.

On 31 January 1977, defendants moved to dismiss the proceedings to enforce the lien based on two recent legislative enactments which abolished the Old Age Assistance lien. The trial court denied the motion and entered an order on 8 February 1977 dissolving the injunction and ordering the sale to proceed. Defendants appeal from this order.

McKeever, Edwards, Davis & Hays, by George P. Davis, Jr., for the plaintiff.

Jenkins, Lucas, Babb, and Rabil, by Jonathan V. Maxwell, for the defendants.

MARTIN, Judge.

In Session Laws 1973, Chapter 204, the General Assembly repealed G.S. 108-29 through G.S. 108-37.1, thereby abolishing the Old Age Assistance lien. The repeal included the following provision:

"This act shall not apply to any claims and liens created pursuant to G.S. 108-29 prior to the effective date of this act, and such claims and liens shall be entitled to full and complete enforcement as by law heretofore provided."

This latter provision of the repealing act was amended by Session Laws 1975, Chapter 48, effective 13 March 1975, which provided:

"All claims and liens created pursuant to G.S. 108-29 prior to the effective date of this act are hereby declared null and void, *excepting those liens which have actually been collected* by the county attorney prior to the effective date of this act." (Emphasis added.)

In denying defendants' motion to dismiss the foreclosure proceedings, the trial court concluded that the above emphasized language of the 1975 act "did not have the effect of voiding the judgment of [that] Court entered prior to the date of repeal by the Legislature."

The only question posed by this appeal is whether plaintiff's Old Age Assistance lien, having been reduced to judgment, was voided by the 1975 act abolishing all such liens which *have not actually been collected* prior to the effective date of the act.

Defendants strenuously argue that the provisions of the 1975 act clearly rendered null and void all Old Age Assistance liens not actually collected prior to 13 March 1975; and that plaintiff's lien, though reduced to judgment, was not collected prior to this date as the county had recovered no money in satisfaction thereof. We must agree with the defendants.

The language used by the Legislature to delineate the subject exception is clear and unambiguous whether standing alone or viewed in conjunction with other relevant statutory provisions. Thus, we must give the language its plain and definite meaning and cannot superimpose provisions or limitations not contained therein. *State v. Williams*, 291 N.C. 442, 230 S.E. 2d 515 (1976); *Fogle v. Board of Education*, 29 N.C. App. 423, 224 S.E. 2d 677 (1976). In this connection, we note that it is beyond dispute that having a judgment in one's possession and *actually collecting* on that judgment, in point of legal significance, are two entirely different notions. Accordingly, we must conclude that by abolishing

all liens except those actually collected, the Legislature intended to render null and void *all rights*, existing in favor of the county as a result of the payment of Old Age Assistance funds, upon which no monies had actually been recovered in satisfaction thereof.

That it is within the power of the Legislature to divest a county of a judgment, is without question. It is solely within the province of the Legislature to create, directly or indirectly, counties and like subdivisions and to invest them with powers to effectuate governmental purposes; thus, the Legislature may, in its discretion, increase, modify or abrogate these powers. *See Saluda v. Polk County*, 207 N.C. 180, 176 S.E. 298 (1934); *see also Sanitary District v. Lenoir*, 249 N.C. 96, 105 S.E. 2d 411 (1958). We find no violation of fundamental constitutional precepts in the abrogation, by legislative enactment, of a judgment existing in favor of a county.

We reverse the order of the trial court and remand the cause for entry of dismissal in accordance with this opinion.

Reversed and remanded.

Judges PARKER and ARNOLD concur.

MARIAH MOORE v. NELLIE GALLOWAY, ADMINISTRATRIX OF THE ESTATE OF WALTER NATHANIEL GALLOWAY, DECEASED, AND THE NORTHWESTERN BANK, A BODY CORPORATE

No. 7717SC280

(Filed 21 February 1978)

Banks and Banking § 4— status of bank account—joint account—summary judgment

In an action to determine the status of a bank account wherein plaintiff alleged that the account contained only the property of deceased and that deceased's heirs at law are entitled to the funds in the account, summary judgment was properly entered for defendant who contended that the account was a joint account with right of survivorship in deceased's brother.

APPEAL by plaintiff from *Long, Judge.* Judgment entered 19 November 1976 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 1 February 1978.

The plaintiff filed her complaint for a declaratory judgment as to the status of a bank account with defendant, Northwestern Bank, in Madison. The plaintiff alleged that the bank account contained the property of the deceased, Charlie Galloway, solely, and that his heirs at law are entitled to the funds in the account.

The defendant, Walter Galloway, answered, alleging that the account was a joint account with right of survivorship in himself. Walter Galloway subsequently died, and his answer was adopted by Nellie Galloway, administratrix of the estate of Walter Galloway, who thereafter filed a motion for summary judgment, which was allowed, and the plaintiff appealed.

Herman L. Taylor, for the plaintiff appellant.

Griffin, Post, Deaton & Horsley, by W. Edward Deaton and Albert J. Post, for the defendant, Nellie Galloway, appellee.

ERWIN, Judge.

The plaintiff contends that the court erred in granting the motion of the defendant-administratrix for summary judgment. We do not agree.

At the hearing on the motion for summary judgment, the defendant presented supporting affidavits of Verlie Knight and Peggy Dalton, both bank employees, stating in substance that they witnessed the execution of the joint account on 11 March 1975 by Charlie and Walter Galloway. The trial court permitted oral testimony at the hearing as provided for in G.S. 1A-1, Rule 43(e), *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Mrs. Verlie Knight testified as a witness for the defendant that she ". . . told Charlie that now if they sign at the bottom of the card this was putting this account in a joint account for right of survivorship and that if anything happened to him then the money in turn Walter would get half at his death and as soon as his estate was settled it would be his, so he asked me then to write his name on the line and I put the card outside the window (teller's) and that is why Walter's name, he signed it on two lines. We put Charlie's name under the bottom." The signature card in-

troduced into evidence verified the contentions of the defendant. The card provided, in part, "This agreement is governed by the provisions of Section 41-2.1 of the General Statutes of North Carolina." The language of the joint account is virtually identical to that of G.S. 41-2.1(g). Further, G.S. 41-2.1(b)(3) is controlling here and provided prior to the 1977 amendment that:

> "Upon the death of either or any party to the agreement, the survivor, or survivors, becomes the sole owner, or owners, of the entire unwithdrawn deposit subject to the claims of the creditors of the deceased and to governmental rights in that portion of the unwithdrawn deposit which would belong to the deceased had said unwithdrawn deposit been divided equally between both or among all the joint tenants at the time of the death of said deceased."

In our opinion, the defendant successfully carried her burden on the motion for summary judgment by supporting proof that there was a joint account with the right of survivorship. It then became incumbent upon the plaintiff to take affirmative steps to defend her position by offering proof of her own that there was a genuine issue of fact for trial. *See* G.S. 1A-1, Rule 56(e). This the plaintiff has failed to do. "If the defendant successfully carries his burden of proof, the plaintiff may not rely upon the bare allegations of his complaint to establish triable issues of fact, but must, by affidavits or otherwise, as provided by Rule 56, set forth specific facts showing that there is a genuine issue for trial." *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696 at 699, 179 S.E. 2d 865 at 867 (1971).

The plaintiff contends further that the summary judgment entered below contained findings of fact, although labeled undisputed by the court, which are in fact disputed by the plaintiff, and which plaintiff contends in and of themselves demonstrate that the cause was not the proper subject for resolution by summary judgment. If findings of fact are necessary to revolve an issue as to a material fact, summary judgment is improper. This court held in *Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 142, 215 S.E. 2d 162, 164-165 (1975) that:

> "After the hearing on plaintiff's motion for summary judgment under Rule 56, the trial judge proceeded to make what he termed 'Findings of Fact.' Summary judgment

should be entered only where there is no genuine issue as to any material fact. If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper. There is no necessity for findings of fact where facts are not at issue, and summary judgment presupposes that there are no triable issues of material fact. Although findings of fact are not necessary on a motion for summary judgment, it is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment. The 'Findings of Fact' entered by the trial judge, insofar as they may resolve issues as to a material fact, have no effect on this appeal and are irrelevant to our decision. *See Lee v. King*, 23 N.C. App. 640, 643, 209 S.E. 2d 831 (1974); *Eggimann v. Board of Education*, 22 N.C. App. 459, 464, 206 S.E. 2d 754 (1974); 6 Moore's Federal Practice ¶ 56.02[11] (2d ed. 1974)."

We hold that the findings of fact here were not necessary to resolve any issues as to a material fact, that the defendant has shown that there was no genuine issue as to any material fact, and that the granting of the defendant's motion for summary judgment was proper.

Affirmed.

Judges VAUGHN and CLARK concur.

COMMERCIAL UNION ASSURANCE COMPANIES v. ATWATER MOTOR COMPANY, INC.

No. 7715SC285

(Filed 21 February 1978)

1. Rules of Civil Procedure § 60— motion to set aside default judgment denied—no abuse of discretion

The trial court did not abuse its discretion in denying defendant's motion to set aside default judgment on the ground of excusable neglect where defendant contended that defendant's manager did not send plaintiff's complaint to defendant's insurance company as the manager had been instructed to do by defendant's attorneys; the manager was 24 years old and had been serving as general manager for only one month when the complaint was served; and

negotiations between the insurance companies of the plaintiff and defendant had been in progress in regard to the subject matter for more than a year and it was reasonable for the manager to assume the insurance company would handle the problem.

2. **Rules of Civil Procedure § 52— no finding of facts supporting order—no request for findings of fact**

The trial court was not required to find facts supporting his order denying defendant's motion to set aside default judgment in the absence of defendant's request for findings.

APPEAL by defendant from *Hobgood, Judge.* Order entered 3 February 1977 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 2 February 1978.

This action was instituted by plaintiff pursuant to G.S., Chap. 1B to recover contribution from defendant. On 20 July 1976, summons and complaint were served on the defendant. A few days after being served, Robert Kent Atwater, general manager of defendant, sent the complaint to defendant's attorneys. On 28 July 1976, defendant's attorneys returned the complaint by mail and instructed Mr. Atwater to make the complaint available to defendant's insurance company immediately. Mr. Atwater apparently disregarded these instructions. When defendant failed to file an answer or otherwise plead within 30 days after being served, the plaintiff filed a motion for default judgment. An entry of default and judgment of default were entered against defendant on 27 August 1976 by the Clerk of Superior Court of Alamance County. On 5 January 1977, defendant filed a motion under Rule 60(b) of the Rules of Civil Procedure to set aside the default judgment. Defendant alleged in affidavits supporting the motion that its failure to answer or otherwise respond to the complaint was excusable and that it had meritorious defense to plaintiff's complaint. Judge Hobgood denied the motion to set aside the default judgment and defendant appealed.

Smith, Moore, Smith, Schell and Hunter, by Robert A. Wicker, for plaintiff appellee.

Vernon, Vernon and Wooten, P.A., by Wiley P. Wooten and E. Lawson Brown, for defendant appellant.

WEBB, Judge.

[1] We hold that the order of Judge Hobgood must be affirmed. G.S. 1A-1, Rule 60 says:

> (b) 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, inadvertence, surprise or excusable neglect;
>
> * * *
>
> (6) Any other reason justifying relief from the operation of the judgment.

The defendant contends it should be within one of these provisions. The defendant's motion for relief was addressed to the discretion of the Superior Court and we are limited to determining whether the Superior Court abused its discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). Upon this record, we cannot find that Judge Hobgood abused his discretion in denying defendant's motion to set aside the judgment on the ground of excusable neglect. The defendant contends that the evidence shows that Mr. Atwater's inaction was excusable since he was 24 years old and had been serving as general manager for only a month at the time of the transaction. Also, defendant suggests that the neglect was excusable because negotiations between the insurance companies of the plaintiff and defendant had been in progress in regard to the subject matter for more than a year and it was reasonable for Mr. Atwater to assume the insurance company would handle it. The defendant further contends that the record shows it had such a meritorious defense that it is inequitable not to set the judgment aside. These are matters which were directed to the discretion of Judge Hobgood. Since we have held that Judge Hobgood did not abuse his discretion in not finding excusable neglect, we are bound by his order.

The defendant also contends that it is entitled to relief under subsection (6) which allows the setting aside of a judgment for "[a]ny other reason justifying relief from the operation of a judgment." The defendant argues that if it has not shown excusable neglect, subsection (6) allows this requirement to be waived in the ends of justice. Whether a court under subsection

(6) may set aside a judgment in the ends of justice without a showing of any specific facts we need not now decide. We are bound by Judge Hobgood's decision not to set the judgment aside under subsection (6) as well as subsection (1) if he did not abuse his discretion. We cannot hold that he abused his discretion in either instance.

[2] Defendant also argues that the order cannot stand since no findings of fact were made upon which to base the order. The same issue was addressed by this Court in *Haiduven v. Cooper*, 23 N.C. App. 67, 208 S.E. 2d 233 (1974). Judge Parker writing for the Court stated:

> "In order to grant a motion under Rule 60(b)(1) to relieve a party from a final judgment on the ground of mistake, inadvertence, surprise, or excusable neglect, the court must find both that defendant's neglect was excusable and that he had a meritorious defense. *Hanford v. McSwain*, 230 N.C. 229, 53 S.E. 2d 84 (1949). In the present case the judge did not find the facts upon which he based his ruling denying defendant's motion. Had he been requested to do so, it would have been error for the judge not to have found the facts, *Sprinkle v. Sprinkle*, 241 N.C. 713, 86 S.E. 2d 422 (1955), but absent a request he was not required to do so. G.S. 1A-1, Rule 52 (a)(2). In such case, it will be presumed that the judge, upon proper evidence, found facts sufficient to support his judgment. *Holcomb v. Holcomb*, 192 N.C. 504, 135 S.E. 287 (1926)."
>
> 23 N.C. App., at 69.

There is nothing in the record to indicate defendant requested the judge to find facts. We hold that *Haiduven v. Cooper, supra*, controls and we will presume that Judge Hobgood found sufficient facts to support his order.

We can find no error in the order denying defendant's motion to set aside the judgment.

Affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. VINSON PRESTON HARRIS

No. 7726SC751

(Filed 21 February 1978)

1. **Larceny § 4— larceny by trick—indictment**

Where an indictment charged defendant with the larceny of two diamond rings from a store and the State's evidence tended to show that defendant was wearing one ring which had been given to him by a store clerk when he grabbed the second ring and ran from the store, the indictment was not defective in failing to charge larceny "by trick" of the ring he was wearing, since larceny "by trick" is not a crime separate and distinct from common law larceny, and it is not necessary that a larceny indictment allege the manner in which the stolen property was taken and carried away.

2. **Larceny § 7.2— variance—description of property**

There was no material variance between an indictment charging larceny of a gold ring with nine diamonds and proof that the ring was a gold ring with a cluster of large diamonds.

3. **Criminal Law § 113.1— summary of evidence of State and of defendant—failure to use similar introductions**

The trial judge did not express an opinion when he introduced his summary of the State's evidence by stating that "the State has offered evidence which in substance tends to show and which the State contends does show . . ." while failing to use similar phraseology in introducing his summary of defendant's evidence.

APPEAL by defendant from *Grist, Judge*. Judgment entered 31 March 1977, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 January 1978.

Defendant was charged with (1) felonious larceny of two diamond rings and (2) assault with a deadly weapon, was found guilty of both offenses as charged, and appeals from consolidated judgment imposing a prison sentence of 5 to 7 years. The State's evidence tended to show defendant entered a jewelry store and asked the manager to show him a diamond ring. He put one ring on his finger, grabbed another, and ran. The manager and two others pursued, and defendant turned around and swung a penknife at one of them. Defendant was captured in the chase. The rings, valued at $1250, were not recovered.

The only defense witness was the defendant, who testified that he did not enter the jewelry store but was in the shopping

mall when someone ran by, and that he panicked and ran when someone tried to grab him.

Attorney General Edmisten by Assistant Attorney General Ralf F. Haskell for the State.

Jeffrey L. Bishop for defendant appellant.

CLARK, Judge.

[1] The indictment charged in one count the larceny of one diamond ring with nine diamonds and one diamond ring with five diamonds. The State offered evidence that the store clerk gave to the defendant and defendant was wearing the ring with a cluster of larger diamonds when he grabbed the five-diamond ring and ran from the store. Defendant argues that the indictment was defective in that it failed to charge "larceny by trick" of the ring he was wearing. The argument lacks merit. There was no actual trespass in the taking of the second ring, but there was a technical trespass when defendant got possession of the ring by trick or artifice. *State v. Bowers*, 273 N.C. 652, 161 S.E. 2d 11 (1968); *State v. Griffin*, 239 N.C. 41, 79 S.E. 2d 230 (1953).

"Larceny by trick" is not a crime separate and distinct from common law larceny, but the term is often used to describe a larceny when possession was obtained by trick or fraud. It is not necessary that the manner in which the stolen property was taken and carried away be alleged, and the words "by trick" are not required in an indictment charging larceny. *State v. Lyerly*, 169 N.C. 377, 85 S.E. 302 (1915).

Where the evidence tends to show that a defendant charged with larceny took or obtained possession of the property by trick or fraud, the burden is on the State to prove that defendant had a felonious intent at the time he took or got possession by trick or fraud. *State v. Bowers, supra.*

The case law has not been changed by G.S. 15A-924(a)(5) (effective 1 July 1975) which supplanted old G.S. 15-143 and dispenses with alleging means and methods by which an offense was committed. If a defendant desires additional information, G.S. 15A-952(b)(6) provides for a motion for bill of particulars under the provisions of G.S. 15A-925.

[2] Nor do we find merit in defendant's claim that there was a material variance in charge and proof because the indictment alleged a ring with nine diamonds and there was proof that it was a gold ring with a cluster of larger diamonds. In *State v. Hauser*, 183 N.C. 769, 111 S.E. 349 (1922), the indictment alleged larceny of one diamond but there was proof of theft of a brooch in which a diamond was inset surrounded by smaller diamonds and pearls. The court held that the variance was not material, adding "If the defendant stole the diamond, it makes no difference whether it was attached to the brooch or in a bag or box or lying about loose." 183 N.C. at 770, 111 S.E. at 350. In the case *sub judice* the variance was not as marked as that in *Hauser*, and we find the variance was not material.

We note that the indictment charged only one count of larceny for both rings, and all of the evidence tended to show that the value of the ring with five diamonds (so described in the charge and the proof) was $550, a value well above the minimum $200 value for felony larceny under G.S. 14-72. The larceny of this ring (the one that he grabbed from the counter) alone would have supported the verdict and judgment.

[3] The trial judge introduced his summary of the State's evidence by stating, "[T]he State has offered evidence which in substance tends to show and which the State contends does show, . . ." The judge did not use similar phraseology in introducing his summary of defendant's evidence. We do not find that this introductory diversity could have been considered by the jury as an expression of opinion in violation of G.S. 1-180, and there was no harmful error.

There was no evidence to support a charge on self-defense, and the trial court did not err in failing to instruct on self-defense.

The defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and MITCHELL concur.

NORTH CAROLINA NATIONAL BANK, A NATIONAL BANKING ASSOCIATION v. CHARLES F. SHARPE AND WIFE, BETTY R. SHARPE

No. 7722SC220

(Filed 21 February 1978)

Uniform Commercial Code § 78— default—debtors' demand that secured party take collateral—no obligation of secured party

Plaintiff who was the assignee of a note and purchase money security agreement on a mobile home purchased by defendants was not under an obligation to take possession of the collateral after default upon request or demand of defendant debtor. G.S. 25-9-501(1).

APPEAL by defendant from *Collier, Judge.* Judgment entered 5 January 1977 in Superior Court, IREDELL County. Heard in the Court of Appeals 18 January 1978.

Plaintiff's complaint alleges that as assignee of a note and purchase money security agreement on a mobile home purchased by defendants on 11 September 1973 from United Mobile Homes of America, Inc., it had repossessed and sold the collateral at public sale in 1976, following defendants' default in 1974, leaving a deficiency of $10,433.17, which defendants have refused to pay.

Defendants in their answer made a general denial, and by counterclaim alleged defects in the home, that they obtained an uncollectible judgment against United Mobile Homes, that they had, on numerous occasions during and since 1974, demanded that plaintiff take possession of the mobile home, but that plaintiff failed and refused to do so, and for this failure of plaintiff to mitigate damages the defendants were entitled to recover $10,000.

Plaintiff's reply generally denied the counterclaim.

Plaintiff moved for summary judgment. Both parties filed affidavits which in general supported the pleadings.

Defendants appeal from summary judgment for plaintiff.

Chamblee and Gourley by Robert H. Gourley for plaintiff appellee.

West, Groome, Tuttle & Thomas by Carroll D. Tuttle for defendant appellees.

CLARK, Judge.

This appeal raises a single issue: Is the secured party under an obligation to take possession of the collateral after default upon request or demand of the debtor? In the case before us the evidence relating the debtor's demand that the secured party take possession is conflicting, raising a question of fact. Thus, in determining whether plaintiff's motion for summary judgment was properly granted, we assume as a fact that such demand was made.

If the plaintiff secured party had an obligation to take possession after default upon demand of the defendant debtors, there would be merit to the defendants' argument that plaintiff was liable for any loss caused by his failure to meet this obligation. G.S. 25-1-106(1) provides that the remedies "shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . ." Subsection (2) of the same section states: "Any right or obligation declared by this chapter is enforceable by action" unless expressly otherwise provided or limited in the provision itself.

The answer to the issue before us is determined primarily by G.S. 25-9-501(1):

> "When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and except as limited by subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in § 25-9-207. The rights and remedies referred to in this subsection are cumulative."

Under this statute, on default the secured party *may* reduce his claim to judgment *or* otherwise enforce the security interest by any available judicial procedure.

The secured party *may* reduce his claim to judgment and levy execution on the collateral based on the judgment, and the lien relates back to the dates of the perfection of the security in-

terest. A judicial sale pursuant to the execution is a foreclosure by judicial procedure, and the secured party may purchase at the sale. G.S. 25-9-501(5).

On default the secured party has the right to take possession of the collateral unless otherwise agreed. G.S. 25-9-503. The obligation of the secured party while in possession is specified by G.S. 25-9-207. But the right of the secured party to take possession does not impose an obligation to take possession upon demand of the debtor. If so, the alternative remedies provided the secured party by G.S. 25-9-501(1) would be meaningless. And the obligations of the secured party to secure and protect the collateral as required by G.S. 25-9-207 are not applicable unless and until the party has exercised his right of possession.

We find that plaintiff had no duty to take possession of the collateral upon demand of defendant, and that plaintiff was not liable in damages for failure to do so. The summary judgment for plaintiff is

Affirmed.

Judges MORRIS and MITCHELL concur.

COOR FARM SUPPLY SERVICE, INC. v. JESSE JAMES THOMPSON AND WIFE, ELLA M. THOMPSON

No. 7711SC375

(Filed 21 February 1978)

Appeal and Error § 9— attachment order dissolved—appeal—trial on merits while appeal pending—appeal moot

Plaintiff's appeal from the trial court's order dissolving an order of attachment entered by the clerk is moot where, pending the hearing of this appeal, trial on plaintiff's action to recover balance allegedly due for merchandise sold and delivered took place in superior court resulting in a money judgment in favor of plaintiff against defendant.

APPEAL by plaintiff and cross-appeal by defendants from *McLelland, Judge*. Order entered 9 March 1977 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 10 February 1978.

Supply Service v. Thompson

This is a civil action to recover judgment for balance allegedly due for merchandise and supplies sold and delivered. Defendants answered, denying any indebtedness and pleading the statute of limitations. On 2 February 1977 plaintiff obtained an order of attachment from the Clerk of Superior Court. Pursuant to this order, the sheriff on 4 February 1977 levied on defendants' farming equipment. On 10 February 1977 defendants moved to set aside the order of attachment on the grounds (1) that it had been entered without notice or opportunity to be heard in violation of defendants' State and Federal Constitutional rights and (2) that the affidavit on which it was based was fatally defective in that it failed to comply with G.S. 1-440.11(a)(2)b. On 15 February 1977 plaintiff filed motion for leave to amend its affidavit on which the attachment was based.

These motions came on for hearing before Judge D. M. McLelland, the Judge of Superior Court presiding at the 28 February 1977 Civil Session of Superior Court in Johnston County. On 9 March 1977 Judge McLelland filed an order (1) allowing plaintiff's motion to amend its affidavit for attachment; (2) finding G.S. Chap. 1, Art. 35, to be constitutional; but (3) finding that plaintiff's original affidavit for attachment and the affidavit as amended, considered together, failed to comply with G.S. 1-440.11(a)(2)b. On these findings Judge McLelland dissolved the order of attachment theretofore entered by the Clerk of Superior Court.

Plaintiff appealed from the order dissolving the attachment. Defendants filed a cross-appeal, assigning error to the court's ruling adjudging G.S. Chap. 1, Art. 35, to be constitutional.

Mast, Tew, Nall & Moore by W. Richard Moore, Joseph T. Nall, and George B. Mast for plaintiff appellant.

L. Austin Stevens for defendants appellees and cross-appellants.

PARKER, Judge.

On oral argument counsel for the parties informed this Court that, pending the hearing of this appeal, trial of plaintiff's action has taken place in the Superior Court, resulting in a money judgment in favor of the plaintiff against the male defendant. It is apparent, therefore, that the questions sought to be presented by

this appeal have become moot, plaintiff's present remedy being to enforce collection of its judgment. An appellate court will not decide a moot question. 1 Strong's N.C. Index 3rd, Appeal and Error § 9.

We note that the constitutional question which defendants sought to present by their cross-appeal has already been decided adversely to their contentions. *Properties, Inc. v. Ko-Ko Mart, Inc.*, 28 N.C. App. 532, 222 S.E. 2d 267 (1976), *petition for discretionary review denied*, 289 N.C. 615, 223 S.E. 2d 392 (1976).

Appeal dismissed.

Judges MARTIN and ARNOLD concur.

GARY VERNON LYON PLAINTIFF v. SHERRY SMITH YOUNGER DEFENDANT AND THIRD-PARTY PLAINTIFF v. TIMMY HOWARD LYON THIRD-PARTY DEFENDANT

No. 7723SC133

(Filed 21 February 1978)

Compromise and Settlement § 1.1; Torts § 7— ratification of insurer's settlement —bar to claim for contribution and property damages

In a passenger's action arising out of a collision between two automobiles, original defendant's ratification of her insurance carrier's settlement with the third-party defendant constituted a recognition of the nonliability of the third-party defendant which barred the original defendant's claim against the third-party defendant for both contribution and property damages.

APPEAL by third-party plaintiff from *Crissman, Judge*. Judgment entered 19 January 1977 in Superior Court, WILKES County. Heard in the Court of Appeals 6 December 1977.

Plaintiff instituted an action to recover for personal injuries sustained in a collision between the automobile in which he was a passenger and the automobile driven by defendant. He alleged specific acts of negligence on the part of defendant. Defendant answered, denying any negligence on her part and asserting as further defenses the sole negligence of plaintiff's driver and the contributory negligence of plaintiff. By her answer defendant also instituted a third-party action against plaintiff's driver alleging concurrent negligence of third-party defendant and asking for con-

tribution and, alternatively, that third-party defendant was solely responsible for the accident and seeking to recover property damages from the third-party defendant. The third-party defendant answered, denying negligence and asserting, as a further defense, that original defendant's liability insurance carrier had paid him (third-party defendant) for his personal injuries and property damage and that this payment would bar any recovery by defendant from third-party defendant. Defendant then moved to strike the third-party defendant's cross claim on the ground that third-party defendant was not entitled to double recovery, he having alleged that he had been paid for his injuries and property damages by defendant's liability carrier. Third-party defendant moved for summary judgment as to defendant's "cross action and cross claim". These motions were heard on the pleadings and arguments of counsel, and the court allowed the motion to strike third-party defendant's cross claim and allowed third-party defendant's motion for summary judgment, dismissing defendant's cross action for contribution and cross claim for property damage. From this judgment defendant appealed.

McElwee, Hall and McElwee, by John E. Hall, for defendant (third-party plaintiff) appellant.

No appearance contra.

MORRIS, Judge.

Defendant's position is that the release and payment of money by defendant's insurance carrier and ratification of that payment by defendant may amount to an admission of liability by the defendant, but it should bar only defendant's claim for damages to her own property and not her claim for contribution for liability to the original plaintiff. We do not agree. We think this case is controlled by *Snyder v. Oil Co.*, 235 N.C. 119, 68 S.E. 2d 805 (1952). There Ruth Snyder was a passenger in the automobile operated by one Dixon. The automobile collided with a truck owned by Kenan Oil Company and operated by one Keen. Ruth Snyder brought an action against the Oil Company and Keen to recover damages for personal injuries received in the collision. The defendants answered and alleged negligence on the part of Dixon. On these allegations they moved that Dixon be made a third-party defendant as joint tort-feasor for the purpose

of enforcing contribution. Dixon was made a party defendant and filed answer. In her answer she alleged that the negligence of the driver of the truck was solely responsible for the collision and the injuries sustained by her and her passengers and damage to her automobile. She further asserted that the corporate defendant had settled with her and her husband for personal injuries and property damages to the car and also for injuries sustained by her two minor children who were passengers in her car at the time of the collision. She specifically pled these settlements in bar of defendant's right to recover against her by way of contribution or otherwise. Original defendants moved to strike the portions of the answer having to do with settlement. The motion was denied and defendants appealed. The Court, speaking through Barnhill, said:

> "The settlement by the corporate defendant of the claim of defendant Dixon against it for personal injuries and property damages resulting from the collision of the truck being operated by Keen, the agent and employee of the oil company, and the automobile being operated by defendant Dixon, as effectually adjusted and settled all matters which arose or might arise out of said collision, as between the oil company and Dixon, as would a judgment duly entered in an action between said parties. By said compromise settlement each party bought his peace respecting any liability created by the collision. The adjustment of said claim by the payment of the amount agreed constituted an acknowledgment, as between the parties, of the liability of the oil company, and the non-liability, or at least a waiver of the liability, of the defendant Dixon.
>
> Neither party thereafter had any right to pursue the other in respect to any liability arising out of any alleged negligence proximately causing the collision which is the subject matter of this suit." *Snyder v. Oil Co.* at 120.

After discussion with respect to the allegation of settlement with Dixon's *passengers*, the Court held that all reference to any settlement of any claim other than that of the owner and operator of the automobile should have been stricken.

In the case *sub judice*, the settlement by the original defendant's liability insurance carrier with the third-party defendant,

ratified by defendant, constituted a recognition of the "nonliability, or at least a waiver of the liability", of the third-party defendant. *See McKinney v. Morrow*, 18 N.C. App. 282, 196 S.E. 2d 585 (1973), *cert. den.* 283 N.C. 665 (1973). Recognition of the third-party defendant's nonliability would effectively bar a claim for contribution as well as a claim for property damage.

The judgment of the trial court is, therefore,

Affirmed.

Judges HEDRICK and ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 FEBRUARY 1978

JENKINS v. JENKINS No. 7724DC316	Watauga (75CVD117)	Affirmed
LEE v. DEPT. OF TRANSPORTATION No. 7729IC298	Industrial Comm. (TA-5410)	Affirmed
MAYO v. RAWLS No. 773DC239	Pamlico (76CVD45)	Reversed and Remanded
ROBERTS v. ROBERTS No. 772DC167	Beaufort (76CVD46)	Affirmed
STATE v. BARNER No. 7710SC804	Wake (77CRS18913)	No Error
STATE v. BAUGH No. 7725SC831	Catawba (77CRS4704) (77CRS4703)	No Error
STATE v. BILLINGSLEA No. 7726SC618	Mecklenburg (77CR8622) (77CR8623) (77CR8624)	No Error
STATE v. CHAMBERS No. 7710SC756	Wake (77CRS9040)	No Error
STATE v. HARDY No. 778SC809	Wayne (75CR12189) (75CR12499)	Affirmed
STATE v. HARVELL No. 7718SC826	Guilford (76CRS19455)	Affirmed
STATE v. HEWETT No. 7713SC687	Brunswick (76CR5025) (76CR5026)	New Trial
STATE v. HILL No. 7727SC834	Gaston (77CRS5977) (77CRS5978) (77CRS5979)	No Error
STATE v. McCALL No. 7719SC801	Randolph (76CRS8843)	No Error
STATE v. PARKER No. 773SC858	Pitt (77CRS8633) (77CRS8634)	No Error
STATE v. PRICE No. 7727SC708	Cleveland (77CRS216)	No Error

STATE v. WALLACE No. 775SC815	New Hanover (76CR19360)	No Error
STATE v. WOODY No. 7729SC758	McDowell (76CR5326) (76CR5330) (76CR5331)	No Error

IN THE MATTER OF THE APPEAL OF: NORTH CAROLINA FORESTRY FOUNDATION, INC., FROM THE ASSESSMENT OF ITS PROPERTY KNOWN AS THE "HOFMANN FOREST" FOR AD VALOREM TAXATION BY ONSLOW COUNTY FOR 1974 AND 1975

No. 7710SC191

(Filed 7 March 1978)

1. **Taxation § 25— ad valorem taxes—timberland—payments in lieu of taxes—listing of property by county—discovered property—exempt property**

Timberland upon which a foundation made payments in lieu of taxes for the years 1969-1973 pursuant to former G.S. 105-279(b) was properly "listed" by the county in the name of the foundation for the years 1970-1974 either as discovered taxable property pursuant to G.S. 105-312 or as exempt property pursuant to G.S. 105-282.

2. **Taxation § 25— ad valorem taxes—discovered property—necessity for notice and hearing**

Discovered property is "listed in the name of the taxpayer who listed it for the preceding year" within the meaning of G.S. 105-312(c), and notice to the taxpayer and an opportunity for a hearing are not required by the statute, when the property was listed personally by the taxpayer or was listed in the taxpayer's name by "any other person," according to law, for the preceding year. Therefore, the listing of a foundation's timberland for the previous year by the tax supervisor removed any requirement of notice of discovery or the granting of a hearing to the foundation concerning its taxes for the present year.

3. **Taxation § 19— ad valorem taxes—application for exemption—failure of county to respond—no presumption of acceptance**

A county's failure to respond to an application for exemption of property from ad valorem taxation did not establish a presumption, rebuttable or otherwise, that the application for exemption had been granted.

4. **Taxation § 19— ad valorem taxes—application for exemption—absence of hearing at county level**

A foundation was not denied any substantial right by the lack of a hearing at the county level on its application for exemption of property from ad valorem taxation where the lack of a hearing was due partly to its own inattentiveness, and where the foundation received a full hearing before the Tax Commission and a review of the Tax Commission's decision in the superior court.

5. **Taxation § 25— ad valorem taxes—waiver of defenses by county**

A county waived any affirmative defenses it may have had in a proceeding to review an assessment for ad valorem taxes by its failure to raise such defenses before the Property Tax Commission. Furthermore, equity did not require either the superior court or the Court of Appeals to take cognizance of the county's belated attempts to assert such defenses where the

appeal to the Property Tax Commission, superior court, and the Court of Appeals has been limited to a review of assignments of errors of law arising from uncontested facts.

6. Taxation § 22— ad valorem taxes—nonprofit corporation—educational, scientific, charitable purposes—exclusive use—lease of timberland to business

Forest land owned by a nonprofit corporation was not "used exclusively" for educational and scientific purposes within the meaning of G.S. 105-275(12), for educational purposes within the meaning of G.S. 105-278.4, or for charitable purposes within the meaning of G.S. 105-278.6(7), and thus was not exempted from ad valorem taxation by those statutes, where the nonprofit corporation generated income by leasing the property to a commercial packaging company which used the forest as a source of timber and pulpwood for its business, notwithstanding the nonprofit corporation may have used the income for educational and scientific purposes and may have used the forest incidentally for education and scientific research, since it is the actual use of the property by the lessee that determines whether the property is "used exclusively" for an exempted purpose.

7. Taxation § 22— ad valorem taxes—nonprofit corporation—protected natural area

Forest land owned by a nonprofit corporation which was leased to a commercial packaging company for use as a source of timber and pulpwood was not exempted from taxation under G.S. 105-275(12) as realty held for educational and scientific purposes "as a protected natural area," although the corporation has improved the forest as a habitat for deer and quail by extensive road building, draining and cutting, since the term "protected natural area" means property which, insofar as possible, is kept in a pristine state free from those interferences which any given generation may feel to be "improvements" on nature.

8. Taxation § 21— ad valorem taxes—forest land—ownership not in State

The "Hofmann Forest" is not owned by North Carolina State University and exempt from taxation as State property under G.S. 116-16, but is owned by the North Carolina Forestry Foundation, Inc., a nonprofit corporation, since the evidence shows that although the University is to receive the Foundation's assets upon dissolution, it has neither legal nor beneficial ownership of the Forest; the University is merely represented on the Foundation's board of directors; and the Foundation's board of directors is not controlled by the University but has the power to act without regard to the wishes of the University.

APPEAL by petitioner from *Herring, Judge.* Judgment entered 3 November 1976, in Superior Court, WAKE County. Heard in the Court of Appeals 12 January 1978.

This is a civil action in which the North Carolina Property Tax Commission (hereinafter "Tax Commission") found certain property of the petitioner subject to ad valorem taxation in

Onslow County. The Superior Court heard the matter on the petitioner's petition for review of the final administrative action of the Tax Commission and, from the judgment of the Superior Court affirming the ruling of the Tax Commission, the petitioner appealed to this Court.

Petitioner, the North Carolina Forestry Foundation, Inc. (hereinafter "Foundation"), was incorporated in 1929 and, in 1934, purchased lands known as the "Hofmann Forest," which was comprised of approximately 81,000 acres of timberland in Jones and Onslow Counties. Approximately 50,000 acres of the "Hofmann Forest" (hereinafter "Forest") is located in Onslow County and, with the exception of a small percentage which has been completely cleared, is the subject of this action. The Foundation, a nonprofit organization, was incorporated for the expressed purpose of promoting the science of forestry by holding tracts for educational and scientific purposes. The parties stipulate that, in 1934, the Attorney General expressed his opinion that the Forest should be exempt from ad valorem taxes because of the public nature of the Foundation and the purpose for which the lands were held. In 1945, the Foundation signed a ninety-nine year lease with the Halifax Paper Company, Inc., which included the following:

> [I]n order to properly prosecute the objects for which the Foundation was organized, it is necessary and desirable that an outlet be found having the disposition by sale of merchantable timber, pulpwood and wood-products, equal to the annual growth of all merchantable timber, trees, and wood growing upon the real property.

The lease further indicated the Foundation was in need of income for debt payment and equipment. Hoerner-Waldorf Corporation (hereinafter "Corporation"), a packaging manufacturer, is successor to the interest of the Halifax Paper Company, Inc., and now holds the lease which affords it the right to cut timber and pulpwood. Additionally, it holds all hunting rights. The Corporation in return pays substantially below market value for the timber, constructs roads, maintains drainage ditches and fire lanes across the Forest and permits entry by students and scientists from time to time for the study of forestry science.

The Foundation's evidence tended to show that three of its directors are professors of forestry at North Carolina State University. Upon dissolution of the Foundation, all of its assets, if

any, are to be distributed to the School of Forestry Resources of North Carolina State University. The revenues received from the Corporation are the Foundation's major source of revenue, and the funds pay the salaries of the Foundation's employees working in the Forest, one of whom visits the Forest twice a week. The Foundation donates funds to North Carolina State University, but is not required to do so.

The Foundation contends the Corporation is nothing more than its agent, and as such, is permitted to purchase lumber and pulpwood at reduced rates. In 1974 the Corporation cut 10,700 cords of pulpwood and 275,000 cords of saw timber from the Forest and maintained from 25 to 100 workers there. The Corporation is not required to reseed or replant after cutting the various types of timber but usually does so, after consulting with the Foundation supervisor.

The Corporation permits students and scientists to use the Forest, for study "provided, however, that such study groups or students will do nothing whatsoever to interfere with any program undertaken or in progress by [Corporation] in or on Hofmann Forest. In 1974 two groups used the Forest for educational purposes; the State Department of Natural and Economic Resources for 100 days, and North Carolina State University for 12 days.

The Corporation's manager testified that it conducted public tours, that this practice is fairly common among private timber companies and that the research gleaned from the Forest benefited it commercially. He additionally testified that the Forest was the Corporation's main source of timber and pulpwood and, on recross-examination, stated that:

> The primary interest of Hoerner-Waldorf Corporation in its operation of the Hofmann Forest *is to have a source of pulpwood and timber for its operations*, although, as I mentioned before, when we assumed responsibility for harvesting and development work, we recognized that we were taking on other responsibilities in regard to the forest. [Emphasis added.]

It was stipulated that, in 1969 the Attorney General expressed his opinion that the Forest was no longer exempt from ad

valorem taxation. The Foundation at that time chose the option available under G.S. 105-279(b), of paying ten cents (10¢) per acre in lieu of the standard tax on similar real property. This option was not available to the Foundation during 1974 or 1975 due to passage by the General Assembly of Chapter 668 of the Session Laws of 1973 which by amendment to the statute deleted the option effective 1 July 1973.

The Foundation received a notice from Onslow County on 15 July 1974 of its ad valorem tax liability of $25,466.40 for 1974. The Onslow County Board of Equalization and Review had adjourned on 6 May 1974.

By letter dated 11 November 1974, the Foundation objected to the Forest being subjected to ad valorem taxation and sought to present its arguments relative to claimed exemptions to the Onslow County Board of Commissioners. In a letter dated 13 January 1975 from the Onslow County Manager, the Foundation was notified that the Onslow County Board of Commissioners had rejected the letter of 11 November 1974, but would be willing to meet with the Foundation to consider any presentation it wished.

By letter dated 29 January 1975, the Foundation notified the county manager that it would file a formal application for exemption of the Forest for the year 1975 and requested any meeting with the commissioners concerning the 1974 tax liability be deferred until action had been taken with respect to the 1975 application for exemption. On 30 January 1975, the Foundation transmitted an application for exemption of the Forest to the office of the Onslow County Tax Supervisor by certified mail. The application for exemption was received and signed for by an employee of the county but apparently never reached the tax supervisor personally.

On 1 August 1975 a tax notice was mailed to the Foundation by Onslow County showing a total 1975 ad valorem tax liability of $23,558.98 for the Forest property. The Foundation received no acknowledgment of or information concerning its application for exemption.

The Foundation applied for a hearing before the Tax Commission. The Tax Commission, sitting as the State Board of Equalization and Review, on 4 December 1975 conducted a full *de*

novo hearing into the assessment of the Forest for 1974 and 1975 ad valorem taxation by Onslow County. On 26 April 1976 the Tax Commission rendered a written decision and order determining the property was not exempt from ad valorem taxation for 1974 and 1975 and affirming the assessments by Onslow County for those years.

On 27 May 1976 the Foundation petitioned the Superior Court for review of the final administrative decision of the Tax Commission. On 3 November 1976, the Superior Court entered a judgment and order affirming the final decision of the Tax Commission in all respects. From that judgment and order of the Superior Court, the Foundation took this appeal.

Poyner, Geraghty, Hartsfield & Townsend, by Thomas L. Norris, Jr. and Curtis A. Twiddy, for petitioner appellant, North Carolina Forestry Foundation, Inc.

James R. Strickland and Joyner & Howison, by R. C. Howison, Jr. and J. E. Tucker, for Onslow County, respondent-appellant-appellee.

MITCHELL, Judge.

[1] Appellant Foundation first contends that the Superior Court erred in affirming the Tax Commission's decision that Onslow County did not fail properly to discover the Foundation's property prior to adjournment of the Onslow County Board of Equalization and Review during 1974. This contention is without merit.

From 1969 through 1973, the Foundation did not pay ad valorem taxes on its timberland in Onslow County. Instead, it made payments, in lieu of taxes, of ten cents (10¢) per acre per year on this property pursuant to the terms of then G.S. 105-279(b). During those years, the Foundation did not contend that the property in question was of a type classified as "excluded from the tax base" by G.S. 105-275 which set forth all of the forms of property classified as "excluded" property. Additionally, the Foundation did not contend during those years that its timberland in Onslow County was exempt from taxation under the terms of G.S. 105-278 which set forth a listing of classes of property exempt from taxation and purported on its face to be an exclusive listing of such property. Rather, the Foundation made

its payments of ten cents (10¢) per acre per year in lieu of paying the county taxes "otherwise assessed against such timberland" pursuant to G.S. 105-279(b), which did not by its terms purport to grant either an "exclusion" or an "exemption" from ad valorem taxation.

If the timberland in question was neither exempt nor excluded property, but instead ordinary taxable real property merely subject to a statute permitting an alternate method of payment, the amendment of G.S. 105-279 in no way altered the Foundation's underlying tax liability on the property or its duty to list the property for ad valorem taxes each year. Under this view, had the Foundation failed to list the property in years prior to 1973, the county would have been obliged to discover the property pursuant to G.S. 105-312.

If, however, the Foundation's Forest property were viewed as being "exempt" by virtue of G.S. 105-279(b), it would have been, nonetheless, subject to listing. Until its repeal, effective 1 January 1974, G.S. 105-282 commanded the county to enter in its tax records the name of the owner together with a clear description and statement of value of all property exempt from taxation.

If property upon which payments in lieu of taxes pursuant to G.S. 105-279(b) be considered exempt property, then, nothing else appearing, we must presume the tax supervisor, a public official, acted pursuant to law and listed the Foundation's property pursuant to G.S. 105-282. 10 Strong, N.C. Index 3d, Public Officers, § 8.1, pp. 472-73. Although this presumption may not be used, standing alone, as proving an independent material fact, it is supported in the present case by the sworn testimony before the Tax Commission of James Justice, tax supervisor for Onslow County. He testified that in Onslow County, by statute, real estate is automatically listed for ad valorem taxes. He further testified that prior to 1974, the Foundation was making payments of ten cents (10¢) per acre in lieu of ad valorem taxes on the Forest land. Beginning in 1974 he listed the Foundation's Forest property for taxes in the same manner as adjoining forest land.

Additionally, the presumption that the Forest was listed pursuant to G.S. 105-282, if the property was exempt, is supported by the documentary exhibits filed with this Court together with the record in this case. Respondent's Exhibit Number 10 de-

scribed as "Onslow County Tax Collector's Collection Record" properly sets forth the name and address of the Foundation together with an indication that the property listed thereon apparently lies within White Oak Township and that the acreage is that of the Forest property in question. The exhibit appears to be a tax record for the years 1970 through 1975 inclusive. For each year during 1970 through 1973 inclusive, the exhibit reflects under the column "total tax" an amount equal to ten cents (10¢) multiplied by the Foundation's acreage. In each of those years, the exhibit reflects that amount was paid. For the years 1974 and 1975, the exhibit reflects payment of the ordinary ad valorem tax at the assessed value of the property.

If the Foundation's property was not exempt property prior to 1974, and G.S. 105-279(b) merely provided for special or alternate payment, the same exhibits and the testimony of the tax supervisor would support the presumption that the county had discovered the property, then carried it forward in the Foundation's name in each year prior to 1974 in accordance with the terms of G.S. 105-312 and G.S. 105-303(b). Therefore, whether the Forest property in Onslow County is viewed as having been "exempt" property during the year 1973 and preceding years or as taxable property upon which the owner was permitted to make a special or alternate payment in lieu of taxes, we conclude that the property was "listed" in the name of the Foundation and described with particularity from at least 1970 through 1975 inclusive.

As G.S. 105-279 was rewritten effective 1 July 1973, the Foundation had notice that it was required to list its Forest property in Onslow County for 1974 just as any other taxpayer. The Foundation is presumed to know the law and to know, therefore, that its Forest property is not now and has never been excluded from the tax base. *Pinkham v. Mercer*, 227 N.C. 72, 40 S.E. 2d 690 (1946). The Foundation was, therefore, presumed to know of any amendment to G.S. 105-279 and that the amendments which rewrote that statute did not remove its duty to list its property and to pay the standard tax rate on its property for 1974.

The Foundation apparently recognized that, effective with the 1974 tax period, it no longer had the option of payments in lieu of taxes, and that, pursuant to G.S. 105-282.1, every owner of property claiming an exemption or exclusion must file its applica-

tion for such not later than 31 May 1974. On 11 November 1974, the Foundation wrote the Onslow County Board of Commissioners to apply for exemption of its Forest property. In that letter, signed by Rudolph Pate, Secretary of the Foundation, it was expressly recognized that: "Because the Foundation failed to make application for exempt status prior to May 31, 1974, its claim of exemption is based on its right to appeal provided by North Carolina General Statutes, Section 105-282.1(c). . . ." By this communication, the Foundation specifically recognized that its application for exemption was not timely filed.

[2] The Foundation then contended and now contends that it was entitled under G.S. 105-282.1(c) and G.S. 105-312(c) and (d) to receive notice from the tax supervisor that the property had been discovered and listed in its name and that it was entitled to appear before the Onslow County Board of Equalization and Review to contest the discovery with a right of additional appeal to the Tax Commission. We do not agree.

G.S. 105-312(c) requires the tax supervisor to carry forward to the lists of a current year all real property that was listed in the preceding year but not listed for the current year. When so carried forward, the property is to be listed "in the name of the taxpayer who listed it" in the preceding year. The Foundation would have us construe the phrase "in the name of the taxpayer who listed it" quite literally and limit its application in this case solely to a prior listing of the Forest in the name of the Foundation and by the Foundation. We do not find this interpretation of the language employed by the statute persuasive.

It is an elementary rule of statutory construction that, all sections and subsections of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair and reasonable intendment. *In re Hickerson*, 235 N.C. 716, 71 S.E. 2d 129 (1952). Any irreconcilable ambiguity in such cases should be resolved so as to effectuate the true legislative intent. *Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 214 S.E. 2d 98 (1975).

Applying these principles, we look to G.S. 105-312(a)(1) which defines the term "discovered property" as used in that statute and in the entire subchapter and provides it "shall include prop-

erty that was not listed by the taxpayer *or any other person* during a regular listing period." [Emphasis added.] With this legislatively mandated definition in mind, we conclude that the phrase "listed in the name of the taxpayer who listed it for the preceding year" as used in G.S. 105-312(c) includes a listing of property in the name of the taxpayer both when listed personally by the taxpayer and when listed in the taxpayer's name by "any other person," according to law, for the preceding year.

It is our duty to interpret the language of statutes so as not to lead to absurd results or contravene the manifest purpose of the statute and in such manner as will give effect to the reason and purpose of the law. *Hobbs v. County of Moore*, 267 N.C. 665, 149 S.E. 2d 1 (1966). This construction of the phrase promotes the object of the statute that all property be listed promptly, and recognizes the rule that a statute should not be construed to defeat or impair its object if that can reasonably be done without violence to the legislative language. *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975).

Having so interpreted the phrase, we turn to the language of G.S. 105-312(c) which, in some instances, requires notice to the taxpayer and the opportunity to appear pursuant to G.S. 105-312(d). Under the terms of G.S. 105-312(c), the notice and hearing requirements and procedures:

> [P]rescribed in subsection (d) . . . shall be followed unless the property discovered is *listed in the name of the taxpayer who listed it for the preceding year* and the property is not subject to appraisal under either G.S. 105-286 or G.S. 105-287 in which case no notice of the listing and valuation need be sent to the taxpayer. [Emphasis added.]

The provisions of G.S. 105-286 and G.S. 105-287 are not applicable in the present case. Therefore, as we have construed the phrase "listed in the name of the taxpayer who listed it for the preceding year" to include a listing in the name of that taxpayer by any other person according to law, the listing for the previous year by the tax supervisor in the name of the Foundation would remove any requirement of notice of discovery or granting of a hearing to the Foundation concerning its 1974 taxes. For reasons previously discussed, such listing by the tax supervisor is presumed, and no notice or hearing was required.

Having determined that no notice or hearing was required, we need not consider the issue of whether the county's letter of 13 January 1975 offering to allow the Foundation to make a presentation to the Onslow County Commissioners concerning its 1974 listing, coming after the adjournment of the Onslow County Board of Equalization and Review, was an adequate opportunity for a hearing. Neither are we called upon to decide whether the Foundation's letter of 29 January 1975 requesting a more or less indefinite deferral of the 1974 matter until action had been taken on the Foundation's 1975 application for exemption constituted a waiver of any hearing.

The Foundation's next contention concerns the listing of its property for 1975 ad valorem taxes. It is uncontested that the petitioner Foundation timely mailed an application for exemption of its Onslow County property to the county tax supervisor and that the application was timely received by an agent of the county. Mr. James Justice, the tax supervisor for Onslow County, testified, however, that he had not to his knowledge ever received the Foundation's application for exemption for 1975.

[3] The Foundation contends that general principles of law and G.S. 105-282.1 in particular require that Onslow County's failure to respond to the application require that it be deemed accepted for the year 1975. We specifically reject this contention and decline to hold that the failure of Onslow County to respond to the application for exemption established a presumption, rebuttable or otherwise, that the application for exemption had been granted.

It would appear that, on this point, both the county and the Foundation must accept some fault. Neither party's course of dealing with the other in this case is a model of efficiency.

[4] A more direct and knowledgeable approach by both parties to the problems involved possibly could have eliminated the need for the lengthy record, numerous exhibits and exhaustive briefs of the parties filed with this Court. In any event, it is difficult for us to determine how the Foundation has been denied any substantial right by the lack of a hearing at the county level due to its own inattentiveness compounded by that of the county. The Tax Commission has authority, notwithstanding irregularities at the county level, to review matters such as those presented in this

case. See, *In re Appeal of Broadcasting Corp.*, 273 N.C. 571, 579, 160 S.E. 2d 728, 733 (1968). The Foundation sought and received a full hearing *de novo* before the Tax Commission at which, unlike hearings before county boards, a full and complete written record was made. The Foundation has additionally sought and received a review of the Tax Commission's findings, conclusions and final decision before the Superior Court.

At the hearing before the Superior Court on the Foundation's petition for review of the final administrative action of the Tax Commission, the respondent county moved to dismiss the petition and sought to raise affirmative defenses. The record does not reveal that a similar motion was ever made before the Tax Commission or that the affirmative defenses were ever raised or argued there, despite the fact that there is specific precedent for hearings before the Tax Commission limited to the issues presented by motions to strike and dismiss. *Brock v. Property Tax Comm.*, 290 N.C. 731, 738, 228 S.E. 2d 254, 259 (1976).

[5] Our courts have long recognized that the public interest demands questions relating to the base of taxable property be settled as cheaply and speedily as possible consistent with due process. *Belk's Department Store, Inc. v. Guilford County*, 222 N.C. 441, 448, 23 S.E. 2d 897, 903 (1942). We hold that the respondent county waived any affirmative defenses it might have had by its failure to raise them before the Tax Commission, and the Superior Court properly overruled and denied the respondent's motion to dismiss. Additionally, as the appeal to the Tax Commission, the Superior Court and ultimately to this Court has been limited almost entirely to an effort to bring up for review assignments of errors of law arising from uncontested facts, we do not feel equity required the Superior Court or requires us now to take cognizance of the respondent's attempts to assert affirmative defenses which it did not present and argue before the Tax Commission.

The petitioner Foundation contends that the Tax Commission erred by failing to find the Forest property in Onslow County exempt from taxation under the terms of four specific statutory exemptions. Three of the four statutes relied upon by the Foundation as alternative grounds for exemption from ad valorem taxes require the property to have been used exclusively for the pur-

pose exempted. Each statute sets forth its own requirements, but each commands the property be exclusively used for the required purpose. The applicability of those statutes will, therefore, to a great extent hinge upon our construction of the term "exclusive use."

[6] The Foundation contends its Forest in Onslow County is exempt from taxation under G.S. 105-275(12) which excludes from the tax base:

> Real property owned by a nonprofit corporation or association *exclusively held and used by its owner for educational and scientific purposes as a protected natural area.* (For purposes of this subdivision, the term "protected natural area" means a nature reserve or park in which all types of wild nature, flora and fauna, and biotic communities are preserved for observation and study.) [Emphasis added.]

Not only the purpose for holding the real property but also its actual use determines whether it is to be excluded from or included in the tax base. Use, rather than ownership or objective, is the primary exempting characteristic of the Machinery Act, G.S. 105-271 through G.S. 105-395, which includes the statutes under consideration. H. Lewis, *Annotated Machinery Act of 1971*, (Supp. 1973, Comment, p. 55). While it is true that the Foundation holds the Forest for educational and scientific purposes, its use of the property is not limited to such purposes. The Foundation also uses the Forest to generate income by leasing it to the Corporation which, by the Foundation's own evidence, is primarily concerned with the use of the Forest as a supply of timber and pulpwood for its business. The amounts the Corporation pays its lessor, the Foundation, are the result of the Corporation's commercial activity, which the evidence revealed involves active competition with other commercial packaging corporations.

The Corporation's manager testified that the use of the Forest by the Corporation did involve some concern for it as an educational and scientific resource. He made it clear, however, that the Corporation's main interest in the Forest was as a source of timber for commercial activities.

No matter what euphemism is employed, it is readily apparent from the evidence that the Forest is used as a commercial

timber farm. That it is also used for scientific research is, at best, incidental.

The fact that the Foundation is precluded by its articles of incorporation from using any profits or revenues paid it under the lease for other than educational purposes is not determinative in this instance. It is the manner in which the real property itself is used which is to be determinative and not the purpose to which possible future profits may be put.

In *Rockingham County v. Elon College*, 219 N.C. 342, 13 S.E. 2d 618 (1941), rental property of Elon College was held non-exempt even though the college used the rental income exclusively for educational purposes. The determining factor seems to have been that the real property itself was used to generate income from commerce by renting it to businessmen. It was held in that case that Article V, sec. 5 [now Article V, sec. 2 (3)] of the Constitution of North Carolina, granting the General Assembly discretionary authority to exempt property held for educational purposes, was not subject to a construction permitting such exemptions. That case is analogous to the case *sub judice*. It is the commercial use of the real property by the lessee, the Corporation, that generates the Foundation's income and is determinative of whether the real property is "used exclusively" for an exempted purpose. The Forest is not, therefore, "used exclusively" for educational and scientific purposes. Rather, it is used primarily as commercial property.

The 1945 lease of the Forest by the Foundation to the Corporation, together with 1951 amendments thereto, is a lengthy and detailed document in the nature of a contract which must be construed according to the general rules governing the construction of contracts in ascertaining the intent of the parties. *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539 (1962). It would appear the parties never intended that the interests of the Foundation in using the Forest for educational purposes would override the Corporation's interests in using it as a timber farm. The contract, in the form of the lease, permitted the Foundation the use of the property for educational and scientific purposes only upon the condition that such study groups or students would do nothing whatsoever to interfere with any program undertaken or in progress by the Corporation in or on the Forest. As previously pointed out, the use of the property rigidly

complied with this section of the lease. The actual use of the property was almost exclusively for the commercial purposes of the Corporation with only incidental use for any other purposes.

[7] Additionally, G.S. 105-275(12) requires that the real property exempted by its terms be held not only for educational and scientific purposes. There is the additional requirement that it be held for such purposes "as a protected natural area." Although the Foundation concedes it has engaged in extensive road building, draining and cutting in the Forest, it contends these activities have improved the habitat for deer and quail and should bring it within the definition of a "protected natural area." Following this line of reasoning, it could be argued that completely removing the timber and planting crops of corn and grain on the Foundation property each year would improve it by making it more conducive to certain forms of animal life. The property would, thereby, remain a "protected natural area." This, of course, would be to misconstrue the term "protected natural area."

We hold the term "protected natural area" to mean property which, insofar as possible, is kept in a pristine state free from those interferences which any given generation may feel to be "improvements" on nature. Mankind's judgment as to what constitutes an "improvement" on nature has been so frequently wrong in the past, that the General Assembly apparently wished to set aside some areas which, with the exception of minor alterations necessary for observation and study, would be left free from direct tampering by humans. We conclude the General Assembly intended the protection of such natural areas be of a passive nature designed to prevent manmade or natural disasters and not of an active nature envisioned as "improvements" of the areas.

We are not called upon to consider and do not hold that such activities as placing fire towers in an area or removing injured or diseased animals would be activities of a type so interfering with the area as to remove its status as a "protected natural area." Such questions are best left for cases in which they are presented squarely for consideration. We do hold, however, that the use to which the Foundation put its Forest in Onslow County did not qualify it as a "protected natural area."

Statutes exempting property from taxation due to the purposes for which such property is held and used must, of course,

be strictly construed against exemption and in favor of taxation. *Harrison v. Guilford County*, 218 N.C. 718, 12 S.E. 2d 269 (1940); *Piedmont Memorial Hospital v. Guilford County*, 218 N.C. 673, 12 S.E. 2d 265 (1940). In the present case, we need not rely on this rule of construction, as whether judged by the "exclusive use" or "protected natural area" tests, the Foundation's property clearly falls outside the terms of G.S. 105-275(12).

[6] With one exception which will be discussed, the remaining statutes relied on by the Foundation also employ the "exclusive use" test. Under the stipulated facts in this case, the Foundation simply does not pass that test. G.S. 105-278.4 exempts real and personal property used for educational purposes if *"[w]holly and exclusively used for educational purposes* by the owner *or* occupied gratuitously by another non-profit educational institution . . . *and wholly and exclusively used by the occupant for non-profit educational purposes."* [Emphasis added.] The *Rockingham* case and our previous discussion in this case require that we hold the Foundation does not use the Forest exclusively for educational purposes. Additionally, as previously noted, the Foundation's evidence itself makes it clear that the Corporation does not occupy the property gratuitously or exclusively for nonprofit educational purposes. The exemption set forth in G.S. 105-278.4 does not, therefore, apply.

The Foundation additionally contends it is entitled to an exemption under the terms of G.S. 105-278.6(7). Even if the Foundation as owner of the property is, as required by the statute, "[a] nonprofit, life saving, first aid, or rescue squad operation," it does not qualify for the exemption. The statute provides that property of such organizations shall be exempt from taxation if "[a]s to real property, it is actually and exclusively occupied and used, and as to personal property, it is entirely and completely used, by the owner for charitable purposes." For reasons previously pointed out, the Forest was not exclusively used for "charitable purposes" as defined within the statute.

[8] Finally, the Foundation contends the Forest is owned by the University of North Carolina and exempt from taxation under G.S. 116-16. Article V, sec. 2 (3) of the Constitution of North Carolina commands, *inter alia*, that property belonging to the State shall be exempt from taxation. The Foundation contends

that the Forest is owned by North Carolina State University as a branch of the University of North Carolina and exempt under G.S. 116-16, which is founded on the constitutionally mandated exemption of State owned property. It is clear, however, that North Carolina State University is merely represented on the Foundation's Board of Directors. Although it is to receive the Foundation's assets, if any, upon dissolution, it has neither legal nor beneficial ownership of the Forest. The Foundation is now, and has been from the original purchase, the sole owner of the Forest. Additionally, the stipulated evidence tends to indicate that the Foundation's Board of Directors is in no way controlled by North Carolina State University and apparently has the power to act without regard to the wishes of the University. The Foundation being the sole owner of the Forest, G.S. 116-16 does not exempt or exclude the property from taxation.

For reasons previously stated, the judgment of the Superior Court affirming the Tax Commission is

Affirmed.

Judges MORRIS and CLARK concur.

IN THE MATTER OF THE APPEAL OF: NORTH CAROLINA FORESTRY FOUNDATION, INC., FROM THE ASSESSMENT OF ITS PROPERTY KNOWN AS THE "HOFMANN FOREST" FOR AD VALOREM TAXATION BY JONES COUNTY FOR 1975

No. 7710SC190

(Filed 7 March 1978)

1. Taxation § 22— ad valorem taxes—nonprofit corporation—no exemption as property used for educational or charitable purposes—no exemption as State property

Forest land owned by a nonprofit corporation and leased to a packaging manufacturer which used the forest as a source of timber and pulpwood was not exempt from ad valorem taxation as property used exclusively for educational and charitable purposes or as State property. G.S. 105-275(12); G.S. 105-278.4; G.S. 105-278.6; G.S. 116-16.

2. Taxation § 25— ad valorem taxes—valuation—long-term lease

A foundation which owned forest land was not entitled to have the value of a long-term lease of the property excluded from the valuation of the property for ad valorem taxes. G.S. 105-273(8).

APPEAL by petitioner from *Herring, Judge.* Judgment entered 3 November 1976, in Superior Court, WAKE County. Heard in the Court of Appeals 12 January, 1978.

Petitioner, North Carolina Forestry Foundation, Inc., (hereinafter "Foundation") was incorporated in 1929, and, in 1934, bought the "Hofmann Forest," which covers 31,648 acres in Jones County and 81,867 in Onslow County. The Foundation, a non-profit organization, was incorporated for the expressed purpose of promoting the science of forestry by holding woodlands for educational and scientific purposes. It was stipulated that in 1934 the Attorney General expressed his opinion that the forest should be exempt from ad valorem taxes "because of the public nature of the [Foundation] and the purpose for which these lands are held . . . ." In 1945, the Foundation signed a ninety-nine year lease with the Halifax Paper Company, Inc., which lease included the following purpose:

> ". . . [I]n order to properly prosecute the objects for which the Foundation was organized, it is necessary and desirable that an outlet be found having the disposition by sale of merchantable timber, pulpwood and wood-products, equal to the annual growth of all merchantable timber, trees, and wood, growing upon the real property. . . ."

The "contract" further provided that the Foundation was in need of income for debt payment and equipment. Hoerner-Waldorf Corporation (hereinafter "Corporation"), a packaging manufacturer, now holds the lease which affords the right to cut timber and pulpwood. It holds all hunting rights. The Corporation in return pays substantially below market price for the timber, constructs roads, maintains drainage ditches and fire lines across the forest and permits scientists and students to use the forest from time to time for study.

It was stipulated that, in 1969, the Attorney General expressed his opinion that the forest was no longer exempt. The

Foundation chose the option available under former G.S. 105-279 of paying ten cents per acre rather than the standard taxation. Former G.S. 105-279 was repealed in 1971, effective 1974. The Foundation filed timely application for exemption on several grounds; that the forest was used exclusively for educational or charitable purposes, that it was owned by the University of North Carolina. G.S. 105-275(12), 105-278.4, 105-278.6, 116-16. The Foundation obtained a hearing before the Jones County Board of Equalization which held the forest non-exempt. The Board also heard argument as to the proper assessment of the property and adopted the County's figure of $3,164,800 for 1975. The Foundation appealed to the Tax Commission which held an extensive hearing.

The Foundation's evidence tended to show that three of the Foundation's directors are professors of forestry at State University. Upon dissolution of the Foundation, all its assets are to be distributed to State. The revenues received from the Corporation are its major source of revenue, and the funds pay the salaries of its two forest employees, one of whom, the supervisor, visits the forest twice a week. The Foundation donates funds to State, but is not required to do so. The Foundation claimed that the Corporation is nothing more than its agent, and as such, is permitted to purchase lumber and pulpwood at reduced rates. In 1974 the Corporation cut 10,700 cords of pulpwood and 275,000 cords of saw timber, and it maintains from 25 to 100 workers in the forest. The Corporation is not required to reseed but usually does so, after consulting with the Foundation supervisor. The Corporation permits students and scientists the use of the Forest, ". . . provided, however, that such study groups or students will do nothing whatsoever to interfere with any program undertaken or in progress by [the Corporation] in or on Hofmann Forest. . . ." In the year 1974 two groups used the Forest for educational purposes, the State Department of Natural and Economic Resources for 100 days, and State University for 12. The Corporation's manager testified that it conducted public tours, that this practice is fairly common among timber companies and that the research gleaned from the forest benefited it commercially. The Forest

was its main source of timber and pulpwood and, on recross-examination, its manager stated that:

> "The *primary* interest of Hoerner-Waldorf Corporation in its operation of the Hofmann Forest *is to have a source of pulpwood and timber for its operations*, although, as I mentioned before, when we assumed responsibility for harvesting and development work, we recognized that we were taking on other responsibilities in regard to the forest." [Emphasis added.]

The County offered little direct evidence on the issue of exemption.

On the issue of valuation, the Foundation presented evidence that the $100 an acre assessed by the County was $70 too high because the County was arbitrary and because it failed to deduct from the assessment the encumbrance of the long-term leasehold. The Foundation argued for an assessment of $30 per acre, reached by the capitalization method of valuation, which method necessarily reduced the assessment by the amount assessed to the encumbrance. The County placed into evidence its 1974 general reappraisal and argued that its assessment was in accord. It argued further that the law was clearly against deducting for the leasehold encumbrance.

The Tax Commission made findings of fact and concluded that the Forest was not exempt and that the County's assessment was correct. The Superior Court affirmed the Tax Commission's conclusion. From this judgment the Foundation appeals.

Poyner, Geraghty, Hartsfield & Townsend by Thomas L. Norris, Jr. and Curtis A. Twiddy for petitioner appellant, North Carolina Forestry Foundation, Inc.

James R. Hood for Jones County; Joyner & Howison by R. C. Howison, Jr. and J. E. Tucker for both Jones and Onslow Counties, respondent-appellant-appellees.

CLARK, Judge.

[1] The Foundation contends first that its forest property is exempt from ad valorem taxation, and second that, even if it is not exempt, the County's assessment is erroneous. In a companion

case, In The Matter Of The Appeal Of: North Carolina Forestry Foundation, Inc. From The Assessment Of Its Property Known As The "Hofmann Forest" For Ad Valorem Taxation By Onslow County For 1974 And 1975, No. 76CVS2618, this Court in an opinion filed concurrently decided the issue of exemption, holding that the Hofmann Forest was not exempt from ad valorem taxation, and we accept and concur in the decision.

[2] The Foundation's attack on the trial court's affirmation of the Tax Commission's adoption of the County's assessment is without merit. In order to show error, the taxpayer must show that the tax supervisor used an arbitrary method of valuation, or that he used an illegal method. The assessment must substantially exceed the true value of the property. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975). The Foundation produces no evidence that the assessment substantially exceeded the true value or that the supervisor was arbitrary. The Foundation's main attack went to the method of valuation which failed to exclude the leasehold. Although a lease is a chattel real, and, prior to 1971, intangible personal property, it has always been taxed ad valorem and not by the State intangibles tax. *Bragg, Inv. Co. v. Cumberland County*, 245 N.C. 492, 96 S.E. 2d 341 (1957). While it is true that, prior to 1971, the leasehold was taxable to the lessee, and deducted from the value of the fee taxable to the lessor, the 1971 General Assembly changed the arrangement. Now leases are intangible personal property *only* when they are leases in "exempted real property." G.S. 105-273(8). Thus, the only leases taxable to the lessee are leases on fees exempt from taxation on the lessor. Where the fee is nonexempt, the lease is not intangible personal property and is taxable to the owner, as is all real and personal property not exempt under G.S. 105-274. The Foundation's exclusion of the long-term lease from the assessment of ad valorem taxes is directly contrary to the statutory mandate.

The Superior Court's affirmation of the Tax Commission's holdings, adopting the County Boards conclusions that the Forest is non-exempt property and that the Jones' County assessment of $100 an acre was not excessive, is

Affirmed.

Judges MORRIS and MITCHELL concur.

ROBERT LEE EMANUEL, JR. v. COLONIAL LIFE AND ACCIDENT INSURANCE COMPANY

No. 7716DC247

(Filed 7 March 1978)

Insurance § 60— accident insurance—exclusion for pre-existing disease—arteriosclerosis as disease—jury question

In an action by plaintiff to recover as beneficiary under an accident insurance policy which specifically excluded "any loss caused or contributed to directly or indirectly by any pre-existing disease, infirmity . . .," a question of fact as to whether the arteriosclerotic condition of the insured was so severe that it constituted a disease or infirmity within the meaning of the policy was raised and summary judgment was therefore improper where the evidence tended to show that the insured was involved in a serious automobile accident and sustained extensive injuries; insured was in good health before the accident; he developed a myocardial infarction only after the increased stress was placed on his heart following the accident; and insured was suffering from some degree of arteriosclerosis prior to the accident.

APPEAL by defendant from *Gardner, Judge.* Judgment entered 20 January 1977 in District Court, ROBESON County. Heard in the Court of Appeals 20 January 1978.

In this action plaintiff seeks to recover $7,500 as beneficiary in an accident insurance policy issued by defendant on the life of Robert Lee Emanuel (Mr. Emanuel). Plaintiff alleged in his complaint that the policy was issued on 12 January 1954, that Mr. Emanuel sustained multiple injuries in an automobile accident on 7 April 1975, that he died from the injuries on 22 May 1975, and that the policy was in full force and effect on that date.

Defendant filed answer admitting the issuance of the policy, that Mr. Emanuel sustained the injuries complained of, that he died on 22 May 1975, and that the policy was in full force and effect. In further defenses defendant denied liability on the grounds that the policy insured Mr. Emanuel "against Loss resulting directly, independently and exclusively of all other causes from bodily injuries effected solely through external, violent and accidental means . . ." and specifically excluded "(k) any loss caused or contributed to directly or indirectly by any pre-existing disease, infirmity, deformity or physical impairment or medical or surgical treatment therefor".

On 16 June 1976 defendant filed a motion for summary judgment on the grounds that there is no genuine dispute as to any material fact and submitted in support of the motion affidavits by Dr. B. B. Andrews and Dr. Jack E. Dunlap, the autopsy report and a deposition of Dr. Andrews. The affidavits and the autopsy report state that death was caused by a myocardial infarction which occurred several days to two or three weeks prior to death and a coronary artery occlusion; and that the bodily injuries sustained in the accident were contributing factors, but not the exclusive cause of death.

In his deposition, Dr. Andrews stated that his autopsy of the deceased revealed evidence of fractures of the legs, arteriosclerosis or thickening of the arteries of the heart five or six times their normal thickness, an occlusion of the right coronary artery and a myocardial infarction; that in his opinion, death occurred by the myocardial infarction as a result of the coronary artery occlusion; that the arteriosclerosis contributed to the insured's death; that arteriosclerosis generally occurs in everyone as they age, usually beginning in the late teens or early twenties; that the injuries sustained in the accident and corrective surgical procedures required could have resulted in sufficient stress to initiate the occlusion of the coronary artery because the heart was forced to increase circulation; that the increased circulation resulted in stress on the lining of the blood vessel which combined with the arteriosclerotic condition and could cause the thrombus or blood clot to form; and that the physical condition and general appearance of the deceased revealed a man of approximately sixty-three years of age who was in generally good condition except for the injuries and surgical wounds incurred as a result of the accident.

On 13 January 1977 plaintiff moved for summary judgment, relying on an affidavit of Dr. Andrews given on 24 August 1976, an affidavit of Dr. Dunlap given on 10 January 1977, and an affidavit of plaintiff given on 13 January 1977.

The affidavits of the two doctors, taken to enlarge and clarify their previous affidavits, describe the circumstances surrounding insured's death and the cause of death as follows:

> It is my opinion . . . that the death of Robert Lee Emanuel, Sr. was due to myocardial infarction as the result

of the occlusion of the right coronary artery and that the bodily injuries he received as a result of the automobile accident were contributory factors to the coronary artery occlusion and resulting myocardial infarction.

It is further my opinion that the myocardial infarction did not exist at the time of the automobile accident and that the injuries received in this automobile accident were of such degree and the stress of his surgery, and the process of reacting to and recovering from these injuries in a man of 63 years were sufficiently severe that the injuries received in this automobile accident could or might have initiated the occlusion of the coronary artery and resulted in myocardial infarction.

On 20 January 1977 the court denied defendant's motion and granted plaintiff's motion for summary judgment. Defendant appealed.

Womble, Carlyle, Sandridge and Rice, by Alan R. Gitter and William C. Raper, for defendant appellant.

I. Murchison Biggs, by I. Murchison Biggs and Adelaide G. Behan, for plaintiff appellees.

BRITT, Judge.

Defendant contends first that the trial court erred in granting summary judgment for plaintiff. We agree with this contention and in view of the discussion to follow on defendant's other contention, no discussion on the first contention is necessary.

Defendant contends next that the trial court erred in denying its motion for summary judgment, arguing that the materials submitted to the court showed conclusively that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. We disagree with this contention and hold that the materials presented to the court do show a genuine issue of material fact.

Since the enactment of our statute on summary judgment, G.S. 1A-1, Rule 56, our courts have stated many times that summary judgment is an extreme remedy and is appropriate only where no genuine issue of material fact is presented. *Haddock v.*

Smithson, 30 N.C. App. 228, 226 S.E. 2d 411, *cert. denied* 290 N.C. 776, 229 S.E. 2d 32 (1976).

In ruling on a motion for summary judgment, the court does not resolve issues of fact and must deny the motion if there is any genuine issue of a material fact. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). The party moving for summary judgment has the burden of establishing the lack of a genuine issue of material fact and in that regard the papers of the opposing party are indulgently regarded. *Van Poole v. Messer*, 19 N.C. App. 70, 198 S.E. 2d 106 (1973).

After a careful review of applicable North Carolina case law and statements of law from other jurisdictions, we conclude that upon the facts as presented in this case in the form of affidavits, depositions and autopsy records, a genuine issue of fact exists as to whether the insured was suffering from a preexisting disease which combined with the injuries sustained in the automobile accident to cause his death.

Two basic rules have developed in the United States with respect to the recovery under an accident policy which contains clauses which allow recovery only if death occurs independently and solely as a result of an accident and exclusive of any preexisting disease or infirmity. In some jurisdictions recovery will be allowed under an accident policy if there is existing disease and injuries sustained in an accident accelerate the effect of the disease and cause an earlier death. Other jurisdictions deny recovery if there is a preexisting disease which combines with the injuries sustained in the accident and causes an earlier death. Annot. 84 A.L.R. 2d 176 (1962); Annot. 82 A.L.R. 2d 611 (1962). North Carolina courts appear to have adopted a version of the latter philosophy which was concisely stated in *Penn v. Insurance Co.*, 160 N.C. 399, 404, 76 S.E. 262, 263 (1912):

> 1. When an accident caused a diseased condition, which together with the accident resulted in the injury or death complained of, the accident alone is to be considered the cause of the injury or death.
>
> 2. When at the time of the accident the insured was suffering from some disease, but the disease had no causal con-

nection with the injury or death resulting from the accident, the accident is to be considered as the sole cause.

3. When at the time of the accident there was an existing disease, which, cooperating with the accident, resulted in the injury or death, the accident cannot be considered as the sole cause or as the cause independent of all other causes.

Defendant argues that the materials presented at the summary judgment hearing establish conclusively that Mr. Emanuel had an existing *disease* at the time of his automobile accident, and that the disease, cooperating with the accident, caused his death thereby bringing the case under Rule 3 of *Penn.* Plaintiff argues that arteriosclerosis is not a *disease* within the meaning of the policy provisions in question and the rules set forth in *Penn,* therefore, the case comes under Rule 1 in *Penn.*

Research reveals that three basic views have been taken by courts as to whether arteriosclerosis is viewed as a disease or a normal condition of aging when recovery is sought under an accident insurance policy with provisions similar to those in the case at hand. The decisions, which appear to have been decided on a case by case basis, have held: (1) that arteriosclerosis is a disease as a matter of law; (2) that arteriosclerosis is a normal process of aging as a matter of law; and (3) that whether arteriosclerosis is a disease or a normal aging process is a question of fact for the jury. Annot. 61 A.L.R. 3d 822 (1975). This varied approach on the issue is also discussed in Couch on Insurance 2d, § 41-406, pp. 366-67. In order to determine whether the evidence in the present case establishes arteriosclerosis as a disease or a normal condition as a matter of law or whether it raises a question of fact for the jury, decisions involving similar factual situations from North Carolina and other jurisdictions must be examined.

North Carolina does not have a definitive decision on whether arteriosclerosis is classified as a disease or a normal aging process as a matter of law or whether the classification of arteriosclerosis is a question of fact for the jury. The facts, language and holdings in *Hicks v. Insurance Co.,* 29 N.C. App. 561, 225 S.E. 2d 164 (1976); *Horn v. Insurance Co.,* 265 N.C. 157, 143 S.E. 2d 70 (1965); and *Skillman v. Insurance Co.,* 258 N.C. 1, 127 S.E. 2d 789 (1962), provide guidance, but no definitive ruling on the issue.

In *Hicks* the deceased was covered by an insurance policy with accidental death benefits similar to those in the present case. The insured was a construction worker who fell from a ten-foot scaffold, sustained minor injuries, and died a short time later. The record in the case contained an autopsy report which stated "that the insured . . . expired from cardial complications of longstanding coronary artery disease with an old myocardial infarction." Testimony in the record also indicated that the insured suffered from "severe coronary artery disease"; that there was "no fresh thrombus in any of the arteries and no fresh infarction"; that the condition of the coronary artery and the infarction had existed in deceased for a number of months prior to the fall; and that the medical examiner had revised his original report on the cause of death from "traumatic injuries as a result of the fall from scaffold" to "myocardial infarction." Based on the evidence presented by affidavits, interrogatories and depositions, defendant's motion for summary judgment was granted. The Court of Appeals affirmed the lower court ruling with the following language:

> . . . Through its evidentiary material defendant established by expert medical opinion that Roy Hicks died as a result of a myocardial infarction which was due to coronary arteriosclerosis. Death of the insured from myocardial infarction would prohibit the beneficiary from recovery under the accidential insurance policy coverage and entitle defendant to judgment as a matter of law. 29 N.C. App. at 564, 225 S.E. 2d at 166.

The court stated further that the plaintiff had not fulfilled its burden to respond by affidavit to establish that there was a genuine issue for trial with respect to the cause of death by showing that death was due to accidental injury rather than heart failure. Finally the court concluded with the following dictum statement:

> Assuming arguendo that plaintiff's evidence in opposition to the motion for summary judgment raises an inference that the accidental fall contributed to the cause of death there is still no genuine issue for trial. Where death is caused by a preexisting diseased condition in cooperation with an accident it is not an accidental bodily injury independent of all

other causes. *Horn v. Insurance Co.*, 265 N.C. 157, 143 S.E. 2d 70 (1965). 29 N.C. App. at 564, 225 S.E. 2d at 166.

Based on the facts presented in the record and the opinion of the *Hicks* case, the preexisting disease which prevented recovery under the insurance policy was the "old myocardial infarction" and the longstanding severe coronary artery disease. There was no evidence presented in *Hicks* which even raised an inference that the insured's arteries were sclerosed only to the extent that was normal for a man in the insured's age bracket. We do not think *Hicks* supports defendant's argument that any degree of arteriosclerosis is a disease as a matter of law in North Carolina. At best *Hicks* indicates by dictum that before a summary judgment will be allowed for the insurer, the evidence must show that the arteriosclerosis was so severe that it had developed into a longstanding coronary artery disease and that the myocardial infarction occurred prior to the accident.

The *Horn* and *Skillman* cases also support the view that a question of fact was raised for the jury in the present case. In *Horn* the insured was a seventy-two-year-old man with a history of heart attacks and old hospital records indicated that he had been suffering from "arteriosclerotic cardiovascular disease" for the last ten years. Insured died within an hour after a minor automobile accident in which he sustained only superficial lacerations. The medical examiner stated that death resulted from severe heart disease and that the accident precipitated the heart attack. The Supreme Court reversed the trial court ruling allowing recovery on the insurance policy on the grounds that a nonsuit should have been granted since the insured was suffering from a preexisting disease and the mental shock of the accident alone could not be a sufficient injury to cause death.

In *Skillman*, the insured drove his car off the side of a road and into a river. An eyewitness, who was on a fishing boat at the time of the accident, testified that he went up to the side of the sinking car and offered to help the insured, but the insured smiled, moved to the center of the car seat, and went down with the car. When the insured's body was recovered, an autopsy revealed that death was the result of coronary occlusion; that the deceased's arteries were "pin point size"; and that there was nothing to show that death came from drowning or traumatic in-

juries. The uncontroverted evidence indicated that the insured had been suffering from arteriosclerosis and hypertension for about three years prior to his death; that he had been treated by numerous physicians with special diets and medication; that he had been involved in an automobile accident in April of 1956 of which he had no recollection; and that as a result of that accident he developed a temporary paralysis of one leg and a coma which the doctors found was a result of a cerebral occlusion. The case was submitted to the jury which held for the insurer on the grounds that the insured did not die exclusively by accidental means. Plaintiff appealed and the Supreme Court affirmed the trial court, holding that the insured could not recover because he fell under the third *Penn* rule since death was the result of a preexisting disease in cooperation with the accident.

The facts in both the *Horn* and *Skillman* cases are clearly distinguishable from these in the present case. In *Horn* and *Skillman*, the evidence was uncontradicted that the insureds were suffering from and had been treated for longstanding preexisting diseases which had been contributing factors, if not the sole causes of death. In both cases, death occurred a short time after a minor accident in which only superficial injuries were sustained.

In the present case, the evidence indicates that Mr. Emanuel had some degree of arteriosclerosis, but is unclear whether the sclerotic condition was normal for a sixty-three-year-old man; that he was in good physical condition prior to the accident and had no previous history of heart disease; and that the myocardial infarction developed *after* he was severely injured in the automobile accident, and probably resulted from the increased stress that was placed on his heart because of the injuries and the extensive surgery that was required. We think a question of fact exists as to whether the insured's arteriosclerotic condition was so severe that it could be classified as a "disease" within the meaning of the policy. *See generally Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975); *Bentley v. Insurance Co.*, 268 N.C. 155, 150 S.E. 2d 45 (1966). To hold otherwise would allow insurance companies to escape liability under an accident policy any time an insured dies as a result of injuries received in an accident, but is also suffering from even a normal degree of arteriosclerosis which may contribute to the accidental death.

Cases from other jurisdictions which are factually similar to the present situation also support the view that the evidence

presented raises a question of fact as to whether the arteriosclerotic condition of the insured could be classified as a preexisting disease or infirmity which contributed to his death. Although numerous cases can be found in which the courts have submitted this issue to the jury, the following discussion will only include several representative cases to illustrate the typical factual situations in which this issue becomes operative.

In *Preferred Accident Insurance Company of New York v. Combs*, 76 F. 2d 775 (8th Cir. 1935), a policy was issued to the insured which contained provisions similar to these in question here. Evidence showed that the insured fell and hit his head, that a brain hemorrhage resulted because the insured had arteriosclerosis or friable arteries which were a principal factor in producing the hemorrhage, and that prior to the accident the insured was in good health even though he had been successfully treated for high blood pressure approximately a year before. The lower court submitted the case to the jury on two issues: (1) whether the arteriosclerotic condition of the deceased constituted a disease within the meaning of the policy, and (2) whether the arteriosclerotic condition contributed to the death of the insured. The jury found for the beneficiary under the policy, but on appeal the case was reversed and remanded on the grounds that the second issue should not have been presented to the jury since it was beyond question under the evidence that the arteriosclerosis contributed to the insured's death and the only question was whether the arteriosclerosis constituted a disease within the meaning of the policy.

In holding that the question of whether the arteriosclerosis constituted a disease within the meaning of the policy was correctly submitted to the jury, the court first cited the general rules of law in the 8th Circuit governing this type of situation:

> . . . [I]f the insured was afflicted with a disease or bodily infirmity which caused the death, the insurance company was not liable; that if, at the time of the accident, the insured was "suffering from a pre-existing disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected with the disease or infirmity, but he died because the accident aggravated the effects of the disease, or the disease aggravated the effects of the accident, the ex-

press contract was that the association should not be liable for the amount of this insurance. The death in such a case would not be the result of the accident alone, but it would be caused partly by the disease and partly by the accident. * * *" 76 F. 2d at 779-80.

This rule is very similar to the North Carolina rule enunciated in *Penn*. Applying this rule to the condition of arteriosclerosis, the court stated:

> All men do not possess like physical strength, immunity to disease, and resistance to senile degeneration. Some are "inherently" strong, others achieve strength only through a vigorous, patient, and systematically prescribed course of development. Although aware of great discrepancies in physical vigor between individuals, insurance companies issue accident policies to the weak as well as to the strong; to the old as well as to the young. And to these contracts the companies are held. That an insured is frail or is in a generally weakened condition does not relieve the company from its obligations under the policy. (Citations omitted.) . . . .
>
> Just as differences between individuals constitute no ground for an insurance company's denying its responsibility under an accident policy, neither do the normal physical changes that inevitably accompany one's own advance in years afford relief to the insurer. Although the "processes of life and of death are still, in their essential nature, unfathomed mysteries," *Aetna Life Ins. Co. v. Allen* (C. C. A. 1) 32 F. (2d) 490, 493, we do know that because man lives, he must grow old. His hair greys; lines in his face appear; his senses become less acute; his ability to endure and to achieve decreases. But because one cannot participate in sport with the vigor of two decades earlier, because he cannot ascend and descend stairs with the energy of former days, because he is more susceptible to winter ills and less resistant to the ailments of the body, does not mean that one is "diseased" within the meaning of an accident policy. . . .
>
> What has just been said generally with respect to physical degeneration that accompanies advancing age applies specifically to that condition called arteriosclerosis. It is a fact of general knowledge—and there is evidence in the in-

> stant case—that, as one grows older, his arteries harden and become brittle, calcium deposits are laid therein, and he is considered "sclerotic." It is a physical characteristic of years and belongs in the category of greying hair, stiffening joints, and wrinkling skin. So long as it is "normal," so long as it advances to no greater degree than is customarily found in persons of the same age, this sclerosis cannot be termed a disease in the sense that defeats recovery. While arteriosclerosis has often been termed a disease and is at times rightly considered such, it must in the specific individual be more than is normal to render it a disease within the meaning of an accident policy. Any other interpretation would largely nullify contracts of the character here involved, for almost every individual out of his forties would then be "diseased" and, in most cases, therefore, unable to be eligible for the enjoyment of the benefits of the policy. The insurance company assumes the risks of normal physical degeneration, as distinguished from "disease." Such clearly was the intention of the parties when the contract was entered into. "A policy of insurance is not accepted with the thought that its coverage is to be restricted to an Apollo or a Hercules," said Mr. Justice Cardozo when he was Chief Judge of the New York Court of Appeals. *Silverstein v. Met. Life Ins. Co.*, 254 N.Y. 81, 171 N.E. 914, 915. Nor is it accepted with the thought that the mere weakenings of age will render its benefits incapable of enjoyment. 76 F. 2d at 781.

Following this analysis the court specifically held:

> While the burden of proof is of course on the plaintiff to bring herself within the provisions of the policy, (citations), and to show that an accident caused the injury, the question whether plaintiff has sustained that burden and by a preponderance of the evidence has shown that [the insured's] sclerotic condition was only that normal to persons of his age and not of the state where it constituted a disease, is, under this conflicting medical testimony, a question for the jury. 76 F. 2d at 784.

By comparing the factual similarities between the *Combs* case and the present case, and the similarity in the governing principles of the two jurisdictions, it can be seen that the *Combs* case

supports the view that a question of fact as to what constituted a disease within the meaning of the accident policy issued to Mr. Emanuel was created by the conflicting evidence concerning the extent of his sclerotic condition.

In *Novick v. Commercial Travelers Mutual Acc. Ass'n*, 203 Misc. 830, 118 N.Y.S. 2d 533 (1953), the insured was involved in an automobile accident and sustained certain injuries. Under an accident policy containing provisions similar to those in question here insured attempted to recover for disability which he claims developed as a result of the accident. The defendant insurer moved for summary judgment on three grounds, one of which was that the claimed disability was caused by disease, and not solely and exclusively by accidental means. The court reviewed the defendant's proof of an existing disease which indicated that the insured had been treated for coronary artery insufficiency, but had normal electrocardiogram following treatment and no marked changes due to coronary artery insufficiency appeared in his electrocardiogram until after the accident. The court denied the motion for summary judgment and stated that "[i]n this state of proof, there is a triable issue as to whether plaintiff was at the time of the accident suffering from a 'disease', as defined in the foregoing cases, and as to whether such disease was a concurring cause of disability." 118 N.Y.S. 2d at 538.

In *Police and Firemen's Insurance Association v. Blunk*, 107 Ind. App. 279, 20 N.E. 2d 660 (1939), the question of whether arteriosclerosis was so severe in an individual that it constituted a preexisting disease so as to prevent recovery under an accident policy was raised. The policy contained clauses similar to those in question here. The insured had been employed as a fireman for twenty-five years and his general health was good immediately prior to his death. Insured and other firemen had entered a burning building and encountered a fire caused by an explosion of a coal oil stove. The smoke was black, heavy and hot; and shortly after the insured entered the house, he emerged holding his throat and staggering. He was taken to the hospital where he died a short time later of a coronary occlusion which had been set off by the hot, dense coal oil smoke. The jury held for the beneficiary under the policy and the insurer appealed on the ground that death was contributed to by a preexisting heart disease. The appeals court affirmed the jury verdict of the lower

court and held that there was no error in refusing to direct a verdict for the insurer.

A similar situation occurred in the case of *Reed v. United States Fidelity and Guaranty Co.*, 176 Colo. 568, 491 P. 2d 1377 (1971). In that case, the policy contained clauses similar to those involved here. The insured was a volunteer fireman who became ill while fighting a fire and died on his way to the hospital. The autopsy disclosed "(1) '[c]oronary arteriosclerosis of prominent degree with evidence of very recent thrombotic occlusion of anterior descending branch of left coronary artery' and (2) '[e]vidence of effects of smoke inhalation in the tracheobronchial tree.' " Cause of death was listed as " 'thrombosis, anterior branch of left coronary artery due to coronary arteriosclerosis of several years' and 'smoke asphyxiation during fire fighting' as one of 'other significant conditions contributing to death but not related to the terminal disease condition.' " 491 P. 2d at 1379.

Two medical experts testified for the plaintiff that the decedent was a 56-year-old man in good health and that examinations over a course of years had given no indication of arteriosclerosis or heart disease. "Both medical experts agreed (1) that the examinations and the autopsy showed a heart and circulatory function which was well within normal limits for a 56-year-old man, (2) that arteriosclerosis is a part of the normal aging process and that any normal 56-year-old man would have shown the same or a greater degree of arteriosclerosis that the deceased had shown, (3) that 'but for' smoke inhalation, deceased would probably not have suffered a thrombosis, and (4) that 'but for' arteriosclerosis, the deceased would probably not have suffered a thrombosis." 491 P. 2d 1379. The experts also testified that the smoke inhalation would have put a strain on the decedent's heart which could cause a coronary heart attack. At the close of plaintiff's evidence defendant moved to dismiss on grounds that there was no accidental death and death was contributed to by a bodily infirmity or a disease. Trial court granted the motion, apparently holding that although arteriosclerosis is a condition of the aging process, it was a cause contributing to the insured's death and brought the loss within the exclusion of the insuring clause.

The Colorado Supreme Court noted that this was a case of first impression in their jurisdiction and reversed the trial court's

ruling on the grounds that the plaintiff's evidence had raised a question of fact for the jury as to whether the insured was suffering from a preexisting disease or infirmity because of his arteriosclerotic condition.

By comparing the factual situations presented in the four illustrative cases discussed to the instant case, it appears that the same rules should apply and that the conflicting evidence has raised a question for the trier of fact as to whether Mr. Emanuel's sclerotic condition was so severe that it could be classified as a preexisting disease or infirmity which would prevent recovery under the policy. While Dr. Andrews indicated that Mr. Emanuel's arteries in places were five or six times their "normal" thickness, he did not make it clear whether "normal" referred to a 20-year-old or a 63-year-old.

Although it is true that some cases have held that arteriosclerosis will preclude recovery under an accident policy similar to the one in question these cases can be easily distinguished because the arteriosclerosis or diseased condition was well-established and long-standing, and the accident usually minor. *See Order of the United Commercial Travelers v. Nicholson*, 9 F. 2d 7 (2nd Cir. 1925) (Insured was suffering from an advanced stage of arteriosclerosis and died of pneumonia after a minor fall.); *Horn v. Insurance Co., supra; Skillman v. Insurance Co., supra; Tomaiuoli v. U.S. Fidelity & Guaranty Co.*, 75 N.J. Super. 192, 182 A. 2d 582 (1962) (Insured, who was 72 years old and had been suffering for many years from arteriosclerotic heart disease, died as a result of a heart attack which he sustained following the excitement of a minor automobile accident in which he was not physically injured.); *Brown v. U.S. Fidelity & Guaranty Co.*, 336 Mass. 609, 147 N.E. 2d 160 (1958) (Insured, who died following a minor automobile accident in which he was not injured, had a history of coronary insufficiency for a number of years prior to the accident.); *Howe v. National Life Insurance Co.*, 321 Mass. 283, 72 N.E. 2d 425, 170 A.L.R. 1254 (1947) (Insured was involved in a minor automobile accident, but was not seriously injured. He died approximately two months later as a result of coronary thrombosis which was a result of a serious heart disease that had almost produced a fatal attack two weeks before he was involved in the accident under which coverage was claimed.); *Penn v. Insurance Company, supra. See also* Annot. 61 A.L.R. 3d

822 (1975); Annot. 84 A.L.R. 2d 176 (1962); Annot. 82 A.L.R. 2d 611 (1962).

The North Carolina cases dealing with similar situations have never made a definitive ruling on whether arteriosclerosis is to be treated as a disease or a normal condition of aging. Since the evidence in the present case indicates that the insured was involved in a serious automobile accident and sustained extensive injuries; that he was in good health prior to the accident; that he developed the myocardial infarction only after the increased stress was placed on his heart following the accident; and that he was suffering from some degree of arteriosclerosis prior to the accident, a question of fact as to whether the arteriosclerotic condition was so severe that it constituted a disease or infirmity within the meaning of the policy was raised, and a summary judgment for either party could not be properly granted.

For the reasons stated, that part of the order appealed from denying defendant's motion for summary judgment is affirmed; that part of the judgment allowing plaintiff's motion for summary judgment and awarding recovery in his favor is reversed; and this cause is remanded for further proceedings consistent with this opinion.

Affirmed in part, reversed in part and cause remanded.

Judges VAUGHN and ERWIN concur.

WASHINGTON PARK NEIGHBORHOOD ASSOCIATION AND ELLA JOHNSON v. WINSTON-SALEM ZONING BOARD OF ADJUSTMENT, GEORGE W. CRONE, FRED D. HAUSER, NORMAN SWAIM, JAMES R. LANCASTER, AND DAISY REED

No. 7721SC241

(Filed 7 March 1978)

1. Municipal Corporations § 30.21— Board of Adjustment hearings—no requirement to sound record

The N.C. Administrative Procedure Act does not require that a Board of Adjustment sound record its hearings in order to produce a reviewable official record.

2. **Municipal Corporations § 30.22— special use permit—affirmative findings required—sufficiency of evidence to support findings**

Petitioners' contention that respondent Board of Adjustment violated the city's code and acknowledged fair trial standards because the code required five affirmative findings before issuance of a special use permit and the Board's *pro forma* reading of the requirements at the beginning of its meeting and making no further reference to them amounted only to lip service is without merit, since there was adequate evidence to support the five affirmative findings that the ordinance required the Board to make before issuing a special use permit.

3. **Municipal Corporations § 30.21— hearing on special use permit application—limitation of issues—no error**

Where respondent Board held a hearing on applicants' request for a special use permit, but applicants were absent from the hearing, the Board did not violate fair trial standards by limiting the issues to be considered at a second hearing to those raised in the first hearing.

4. **Municipal Corporations § 30.6— special use permit granted—no statement of reasons required**

The section of the Winston-Salem Code which provides that the Board of Adjustment must state reasons for its denial of a special use permit but which does not require that such reasons be stated, over and above the regular findings, when the Board approves an application does not discriminate against persons aggrieved by the grant of another's application in violation of equal protection and due process guarantees, since it is only required that the parties have sufficient information to understand the Board's actions, and there is no requirement that parties aggrieved by a grant be treated as are parties aggrieved by a denial.

PETITIONERS appeal from *Collier, Judge*. Order entered 16 February 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 19 January 1978.

Petitioners filed petition for a writ of certiorari pursuant to G.S. 160A-388(e) and G.S. 150A-43 for review of the decision of Winston-Salem Zoning Board of Adjustment granting the application of Ronnie Glass and John D. Yarbrough for a special use permit to establish limited off-street parking on their property zoned for single-family residential use.

The matter came on for review 13 December 1976. At the hearing the court reviewed the minutes of the proceedings of the Board to test them against petitioner's allegations. Petitioners alleged that applicants Glass and Yarbrough purchased two lots, zoned R-4, residential, with parking lots a permitted special use, in 1971. The lots fronted on Broad Street. At time of purchase,

two single-family dwellings stood on the lots. In 1973 one of the homes was declared unfit for human habitation pursuant to the Winston-Salem Code and was demolished. In 1974 that lot was graded to street level with resulting sharp cuts and high embankments on either side. One of the sides abuts the lot belonging to Petitioner Johnson. In 1974 applicants applied to the Board of Aldermen to rezone the property from R-4 to I-2, Industrial. Their application was denied. Their 1976 application for special use permit went to the City-County Planning Board which suggested recommendation, after major modification. The Board first met 5 August 1976. Petitioners alleged "partial and materially incomplete and inaccurate minutes of said meeting were taken. . . ." The applicants were absent so the hearing was postponed until 2 September. At the 2 September hearing the Board limited questioning of applicants to issues raised by the Board the month previous. Petitioners alleged again that the minutes were partial and incomplete. The Board granted the special use "provided only 16 passenger cars or pickup trucks use this lot and that the lot entrance be chained off from 6:00 p.m. to 7:00 a.m." The petitioners attacked this decision in their writ to Superior Court, alleging that the Board failed to follow the procedures set out in its own code because it failed to keep complete and accurate minutes. The room in which both hearings were held was equipped for sound recording, but the equipment was not used. The limitation of the second hearing's questions to those drawn up in the first was also attacked. Petitioners also attacked the Board's decision because the appropriate code section required four affirmative findings before issuance of a special use permit and the "Board's *pro forma* reading of the four findings at the beginning of the meeting and its attempt to incorporate that reading into each decision rendered thereafter makes a nullity of that requirement." Petitioners further alleged that the four *pro forma* findings were not supported by competent, material and sufficient evidence. Petitioners attacked the Board's decision as an unconstitutional denial of due process as guaranteed by G.S. 160A-388(e), and G.S. 150A-43 through 150A-52, safeguarding petitioners from arbitrary Board action by guaranteeing right of meaningful review. Finally, petitioners attacked the consitutionality of Winston-Salem Code § 25-19(A)(2)(c)1, which requires that the Board state the reason for denial of a special use permit, but does not require that the Board state its reasons for approval.

Petitioners alleged that this distinction violates the equal protection clauses of the Fourteenth Amendment and of the N. C. Constitution.

The Board's minutes reveal that petitioners presented testimony which tended to show that the Winston-Salem School of the Arts is growing and desirous of maintaining the residential quality of its boundaries and that the parking lot would adversely affect this desire, that at the first hearing 37 persons were present who requested denial of the application. The Chairman of the Washington Park Neighborhood Association, an unincorporated association of some one hundred and thirty-five members, organized in part "to prevent further encroachment of industrial, commercial and high density land uses," testified that any use of the lots in question other than residential "would domino and stood a chance of the entire hill on Broad Street being turned into an industrial area." She further testified that applicants had been in violation of a zoning ordinance forbidding non-maintenance of a vacant lot so as to permit waist-high weeds and grasses, even before they were refused their 1974 rezoning permit, that traffic was already heavy and poorly monitored on the street running past the lot in question, that Petitioner Johnson's property had already been damaged by the cut and abutment, and that "the Association as a group felt this was a very important piece of property in the more total sense of their neighborhood." Testimony was presented that applicants could use other land as a parking lot. Petitioner Johnson testified that, although she had agreed to applicant's 1974 rezoning petition, she had done so because she didn't realize others might support her if she refused, that she no longer felt secure in her retirement home and "since they had dug out the big hole at her driveway she had been so disturbed about it that her mind was like that of an animal in a cage and what must she do now."

At the second hearing petitioners presented a petition, signed by 45 people, representing 28 families, all property owners living within a two-block area of the lot in question, alleging that rental business in the area would decline were the special use parking lot allowed, that an overall plan was in the process of being formulated by the Washington Park Neighborhood Association and the City-County Planning staff for growth in the area involved to which a parking lot would be inimicable, that the lots

were a natural border between Duke Power Company's installation and the residential district south of the lots, and that applicants had clearly bought the lots contemplating a successful rezoning petition and, when it was denied, graded the lot without permission and let it grow over so as to make it unsuitable for residential purposes.

Applicants testified that they have a business on the lot east of the ones in question and that they need to use the lot facing Broad Street as a parking lot for their employees because there are few available spaces on the street facing their business, and because their other property is clearly unsuitable; that the Planning Board recommended approval of their permit; that the remaining house is and will be rented; that the lot in question has been properly graveled to keep down dust; that only sixteen cars will be allowed to park on the lot, and then only during work hours; that they cannot use the lot for residential purposes, but that they plan to line the lot with pine trees or a buffer between the lot and petitioner Johnson's home and to install a pedestrian gate.

The Secretary of the Board read, at the beginning of each meeting, the four findings of fact which must be made by the Board before issuance of a special use permit:

> "(1) that the use will not materially endanger the public health or safety if located where proposed and developed according to the application and plan as submitted and approved,
>
> (2) that the use meets all required conditions and specifications,
>
> (3) that the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity, and
>
> (4) that the location and character of the use, if developed according to the application and plan submitted and approved, will be in harmony with the area in which it is to be located and in general conformity with the comprehensive plan of Winston-Salem and its environs."

The secretary explained that if a motion were made to approve a special use permit, seconded and passed, the above language

would not be repeated but the record would show that the Board had made an affirmative finding on each. He further explained that an additional finding would be required:

> "In approving an application for the issuance of a special use permit the Board of Adjustment may impose additional reasonable and appropriate conditions and safeguards to protect the public health and safety, and the value of neighboring properties, and the health and safety of neighboring residents."

The court found that the decision of the Zoning Board was supported "by competent and material evidence, was not arbitrary, oppressive or attended with manifest abuse of authority, was in accord with law, and should be sustained; . . ." From this order petitioners appeal.

Jim D. Cooley and William G. Pfefferkorn for petitioner appellants.

Womble, Carlyle, Sandridge & Rice by Roddey M. Ligon, Jr.; and City Attorney Ronald G. Seeber for respondent appellees.

CLARK, Judge.

[1] Petitioners raise much the same errors on appeal that they raised in their writ to the Superior Court. First they allege that the Board violated the procedures required by the City Code as well as those of the North Carolina Administrative Procedure Act, and both the Federal and State Constitutions, and that the court therefore erred in affirming the Board's decision. This assignment of error has several collateral parts, the first of which involves the issue of whether the record was adequate enough to permit review because there were errors and omissions in the record printed up from the handwritten minutes. Petitioners claim that the Administrative Procedure Act's requirement demands that sound recording be used where possible to produce a reviewable official record.

It is true that the hearings were held in a room equipped for sound recording, but it is not true that the Administrative Procedure Act requires that a Board of Adjustment sound record its hearings. So to demand would put a great burden on the Board, and for that reason municipal corporations were specifically ex-

cluded from the requirements of G.S. 150A-29 and G.S. 150A-37, that trial rules of evidence and production of evidence be followed in proceeding before State agencies. Handwritten records are adequate. The errors and omissions the petitioners allege are minimal and do not call the adequacy of this record into question.

[2] The petitioners raise a more important issue when they attack the Board's action as violative of Winston-Salem's own code as well as acknowledged fair trial standards. *Humble Oil and Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974), is the leading case on Code requirements in special use permit grants or denials, although it should be noted that *Humble Oil's* narrow holding involves requirements which must be met only before a special use may be denied:

> "Safeguards against arbitrary action by zoning boards in granting or denying special use permits are not only to be found in specific guidelines for their action. Equally important is the requirement that in each instance the board (1) follow the procedures specified in the ordinance; (2) conduct its hearings in accordance with fair-trial standards; (3) base its findings of fact only upon competent, material, and substantial evidence; and (4) in allowing or denying the application, it state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision." 284 N.C. at 471, 202 S.E. 2d at 138.

The findings the Winston-Salem Code required were substantially the same as those found reasonably specific in *Humble Oil.* Petitioners do not attack the ordinance requirements *per se* but claim that the Board gave only lip service to them, by having them read *pro forma* at the beginning of both meetings and paying no further attention to them. There is, however, nothing in the *Humble Oil* case that demands anything more, provided there is "competent, material, and substantial evidence" to hold the requirements met. *Humble Oil* specifically refuses to attempt a test for "substantial evidence" but quotes with approval Professor Hanft's quotation, from Chief Justice Hughes, in 49 N.C.L. Rev. 635, 667: " ' "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." It "must do more than

create the suspicion of the existence of the fact to be established . . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." ' " 284 N.C. at 470, 471, 202 S.E. 2d at 137. It clearly need not be uncontradicted. Although petitioners did present contrary evidence there was adequate evidence to support the five affirmative findings that the ordinance required the Board make before issuing the special use permit. It is preferable that a Board not read a finding in the alternative as this Board did with No. 3 and then adopt it without clarification as to which alternative was supported by the evidence. But in the case *sub judice* there was some evidence to support both alternatives so the Board's action was not confounding.

[3] Fair-trial standards were not violated by the Board's limiting of the second meeting's issues to those raised in the first. The petitioners had ample opportunity to be heard at both meetings and to cross-examine the applicants at the second. It is not sufficient to allege that the Board held the second meeting only because it became clear that the applicants had not made their case at the first. *Humble Oil* states that "[w]hen an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it." 284 N.C. at 468, 202 S.E. 2d at 136. Petitioners do not attack any of the five elements that go to make up a fair "Board" trial:

> "Notwithstanding the latitude allowed municipal boards, as Justice Bobbitt (now Chief Justice) pointed out in *Jarrell*, a zoning board of adjustment, or a board of aldermen conducting a quasi-judicial hearing, can dispense with no essential element of a fair trial: (1) The party whose rights are being determined must be given the opportunity to offer evidence, cross-examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal; (2) absent stipulations or waiver such a board may not base findings as to the existence or nonexistence of crucial facts upon unsworn statements . . . and (3) crucial findings of fact which are 'unsupported by competent, material and substantial

evidence in view of the entire record as submitted' cannot stand." *Humble Oil*, 284 N.C. at 470, 202 S.E. 2d at 137.

[4] Petitioners finally allege that § 25-19(A)(2)(c)1 of the Winston-Salem Code is unconstitutional. The section provides that "[i]f the Board of Adjustment *denies* the application for the issuance of a special use permit, it *shall enter the reasons for denial in the minutes of the meeting at which the action was taken. . . .*" [Emphasis added.] It does not so require such extra reasons, over and above the regular findings, when the Board approves an application. Petitioners maintain that this distinction discriminates against persons aggrieved by the grant of another's application in violation of equal protection and due process guarantees. They point to language, previously cited, from *Humble Oil* to support them: "in *allowing or denying* the application, it [the Board] state the basic facts on which it relied with sufficient specificity to in-from the parties, as well as the court, what induced its decision." [Emphasis added] 284 N.C. 471, 202 S.E. 2d at 138. If such additional statement is *essential* to support a grant as well as a denial of a special use permit, then the Winston-Salem ordinance is fatally defective. However, such statement must be deemed essential only to the denial of a special use permit. *Humble Oil* makes clear, in another passage previously cited, that a *prima facie* case for a special use permit is made upon the applicant's evidence that the findings laid out by the ordinance may be affirmatively found. The findings, found in the affirmative, are clearly adequate "basic facts." In other words, what a reviewing court, and the parties involved, are assured under *Humble Oil* is *information* sufficient to understand the Board's action. In the case *sub judice*, where the special use permit was approved, the parties involved and the reviewing courts can be quite clear as to why the Board approved the grant. *All* of the required findings were affirmative, otherwise the permit would not have issued. If the permit had been denied, the Board would have had to have specified which of the findings was negative. Nothing more is required by *Humble Oil* than that the parties have sufficient information to understand the Board's actions. It does not require that parties aggrieved by a grant be treated as are parties aggrieved by a denial. Petitioners make no allegation that any other procedure mandated by *Humble Oil* or by the Winston-Salem ordinance was violated in any way, nor do they make serious allegation that the

Board otherwise abused its discretion except insofar as it held against them.

The order appealed from is

Affirmed.

Judges MORRIS and WEBB concur.

HARRIS, UPHAM & COMPANY, INC. AND ITS SUCCESSORS, SMITH BARNEY, HARRIS UPHAM & COMPANY, INCORPORATED v. JAMES N. PALIOURAS

No. 7714SC359

(Filed 7 March 1978)

Accounts § 2— action on commodities account—account stated—amount of indebtedness

In plaintiff broker's action to recover an amount allegedly owed to it by defendant as a result of losses to defendant's commodities trading account, an account stated was established by the jury's finding that defendant did not protest within a reasonable time the transactions entered into by plaintiff on defendant's behalf and the statements of the account rendered by plaintiff to defendant, and plaintiff was entitled to have the jury answer an issue as to the amount of defendant's indebtedness to plaintiff.

APPEAL by plaintiff and defendant from *Hobgood, Judge.* Judgment entered 10 November 1976 in Superior Court, DURHAM County. Heard in the Court of Appeals 9 February 1978.

Plaintiff, a registered broker-dealer, instituted this action on 1 November 1974 against defendant, its former customer, seeking recovery of $72,200 allegedly owing plaintiff as a result of losses to defendant's commodities trading account. Attached to the complaint is an itemized statement showing the commodities, wheat and silver, purchased and sold allegedly in accordance with defendant's instructions, and the loss resulting therefrom which exceeds $35,000 deposited by defendant in his margin account.

In his answer, defendant admitted that the purchase and sales were made but denied that they were made in accordance with his instructions. He counterclaimed for $13,750, the amount

which he alleges would have been left in his account had plaintiff not breached its fiduciary obligation to execute, with such diligence and reasonable care as is consistent with the standards prevailing in the broker-dealer industry, all purchase and sale orders placed by defendant.

Relying to the counterclaim, plaintiff admitted the existence of an obligation to execute defendant's orders with diligence and reasonable care consistent with the standards prevailing in the industry but denied breaching that obligation.

Plaintiff's evidence tended to show:

On 11 February 1974 defendant contacted plaintiff's Durham office about the possibility of opening a commodities account. Plaintiff mailed some information to defendant and a week later defendant called back and stated his desire to open an account. Plaintiff thereupon mailed to defendant five documents for execution: a Customer's Agreement setting forth the duties of plaintiff and its customers including the statement that reports of the execution of orders, and statements of the accounts of defendant, would be conclusive on defendant if not objected to in writing, the former within two days and the latter within ten days after being forwarded to defendant by mail or otherwise; a Commodity Customer's Agreement; an Authorization to Transfer Customer's Segregated Funds; a Commodity Suitability Letter requiring the customer to disclose his liquid assets and previous commodities trading experience so that plaintiff could determine defendant's suitability for trading on the risky commodities market; and a letter detailing the risks involved in the commodities market and providing that the customer, by signing, indicates his understanding of the risks and his willingness to assume them. Defendant signed the documents on 21 and 25 February 1974 and mailed them to plaintiff with a $35,000 check.

Plaintiff's Durham office received the documents and check on the morning of Monday, 25 February 1974, and immediately called its New York office for approval of the account as defendant was very anxious to begin trading. Verbal approval was given on the basis of information supplied by defendant in the suitability letter indicating liquid assets of $500,000, a yearly income of $100,000, four bank accounts and two years of experience in trading on the commodities market.

At 11:30 a.m. on 25 February 1974 defendant placed four purchase orders, all for silver. At 11:31 a.m. the orders were transmitted to the market in New York by Teletype but by that time the silver market was locked "limit up", meaning the price had already fluctuated upward as far as was allowed for that day and no more purchases could be made. The market opened at 10:00 a.m. and had the orders been made earlier they might have been executed as there was some trading on the market prior to its becoming locked limit up. The market remained locked limit up for the remainder of the day. The orders placed by defendant were "day orders" and expired at the end of that day. Defendant was informed by telephone that the orders had not been executed.

On 26 February 1974 defendant ordered five contracts (25,000 bushels) of May Wheat and five contracts of December Wheat; these orders were executed by plaintiff. On the same day defendant also gave plaintiff five orders for silver but these orders were not executed because the silver market remained locked limit up. Defendant was informed by telephone at the end of the day that the wheat orders had been executed but the silver orders had not; a confirmation slip was mailed to defendant (a resident of Chapel Hill, N. C.) that night. Plaintiff informed defendant on that date that had the silver orders been executed, more money would have been required for his margin account; defendant indicated that he understood.

On 27 February 1974 defendant called in orders to buy five October silver and five December silver contracts; these orders were executed that afternoon when the silver market became unlocked and finally began to move downward. Defendant was informed of the purchase by telephone and a confirmation slip was mailed to defendant that night. Defendant was also informed that an additional $30,000 was now required for his margin account and he responded "no problem".

On Thursday, 28 February 1974, no purchase orders were entered by defendant. On the next day, 1 March 1974, plaintiff and defendant had become concerned because silver had continued to drop and defendant's account had suffered large losses.

Defendant called plaintiff's Durham office and did not seem to know what to do but talked vaguely about some "strange

price" theory. Plaintiff suggested that defendant do a "spread" by unloading some March silver, the only silver which could be traded at that time as the silver market had become locked limit down. Due to the risk involved in such a maneuver, plaintiff's Durham representative suggested that defendant talk with someone in its New York office. At defendant's request plaintiff had its Mr. Boyd call defendant from New York. Mr. Boyd agreed that a "spread", though risky, was the only option to defendant to prevent his losses from getting larger. Defendant did not indicate what he wanted to do and placed no orders on 1 March 1974.

On Monday, 4 March 1974, plaintiff heard nothing from defendant although plaintiff's Durham office had seven telephone lines. By that time defendant's losses had grown and over $60,000 was required for his margin account. On 5 March 1974 plaintiff informed defendant that $60,000 was required; defendant stated that there was no way he could come up with that much money but that he would send plaintiff $15,000 immediately. Plaintiff has never received the $15,000.

Also on 5 March 1974 defendant instructed plaintiff to liquidate his wheat holdings which plaintiff did, producing a debit to defendant's wheat account of $5,800; a confirmation slip showing these transactions was mailed to defendant. At this time plaintiff's New York office sent a telegram to defendant informing him that unless additional funds were placed in his margin account by 6 March 1974 his account would be closed out. The New York office had been calling defendant for additional money since 27 February 1974 when the silver was purchased for him.

On 6 March 1974, when no money was forthcoming from defendant, his remaining holdings were sold by plaintiff, resulting in a debit to his silver account of $66,400; a confirmation slip showing these transactions was mailed to defendant.

On 31 March 1974 a statement of account was mailed to defendant showing a total debit balance of $72,200. Similar statements of account were also mailed to defendant at the end of April, May and June 1974. Defendant never complained about the manner in which his account was handled, never paid the debit and has never filed any written objections to the confirmation slips or the statements of account.

Defendant's evidence tended to show:

He signed the papers sent to him by plaintiff but did not read them carefully as plaintiff referred to them as a "mere formality". His account with plaintiff was opened on 25 February 1974. He placed his first purchase order at 10:30 a.m. on that date for May and December wheat and five contracts of silver, any month. The wheat order was not executed until 26 February 1974 and the silver order was not executed until 27 February 1974.

He protested to plaintiff orally about the manner in which his orders had been executed. On 28 February 1974 he ordered plaintiff to "spread" or "straddle" his position by selling March silver. Plaintiff's Durham employees did not appear to know what a "straddle" was so they asked his permission to have their New York office call him.

Mr. Boyd of the New York office called him on Friday, 1 March 1974, agreed that a straddle was appropriate and told defendant that he would take care of the order. Defendant attempted to call plaintiff's Durham office on Monday, 4 March 1974, but all the telephone lines were busy. On 5 March 1974 he learned that his straddle order had not been executed, causing his losses to increase tremendously. Had he known the straddle would not be executed on 1 March 1974, he would have liquidated on that date. Had his orders been executed on the dates on which they were given, and had his account been liquidated on 1 March 1974, he would have suffered a loss of between $2,250 and $32,000, based on the ranges of selling prices on those dates. Thereupon, plaintiff owes defendant between $3,000 and $32,750.

Defendant received all of plaintiff's confirmation slips and statements of account; he did not protest in writing because he had already protested verbally and was never told by plaintiff to put his protest in writing.

At the close of defendant's evidence plaintiff moved for a directed verdict on the counterclaim but the motion was denied. Plaintiff presented rebuttal evidence. At the close of all the evidence defendant moved to amend his prayer for relief in his counterclaim to $32,750 but that motion was denied. Plaintiff renewed its motion for a directed verdict on the counterclaim and that motion was denied.

Issues were submitted to and answered by the jury as follows:

Issue No. 1. Did plaintiff and defendant enter into written contracts entitled "Customer's Agreement" and "Commodity Customer's Agreement" whereunder plaintiff became defendant's agent for the purposes of taking defendant's commodity orders and handling his commodity transactions?

Answer: Yes.

Issue No. 2. Did plaintiff under those contracts render to defendant accounts dated March 31, April 30, and May 31, for the Silver "unregulated account"?

Answer: Yes.

Issue No. 3. Did plaintiff under those contracts render to defendant accounts dated March 31, April 30, and May 31 for the Wheat "regulated account"?

Answer: Yes.

Issue No. 4. Did plaintiff, by its actions or words, waive any requirement of written notification as stated in the Contract?

Answer: No.

Issue No. 5. Did defendant protest within a reasonable time the account and transactions entered into by plaintiff on behalf of defendant?

Answer: No.

Issue No. 6. Under the counterclaim, did plaintiff breach its agency relationship with defendant?

Answer: Yes.

Issue No. 7. In what amount, if any, is defendant indebted to plaintiff? Issue No. 7 is not answered.

Issue No. 8. In what amount, if any, is plaintiff indebted to defendant?

Answer: $13,750.00.

Plaintiff moved for judgment notwithstanding the verdict or a new trial but the motions were denied. Thereafter the court, on its own motion, entered judgment notwithstanding the verdict as to Issues 6 and 8 on the ground that the evidence thereon was insufficient to be submitted to the jury.

Plaintiff then tendered a judgment awarding it $72,200 as a matter of law based upon the jury answers to Issues 1 through 5 but the court rejected the tendered judgment and entered judgment allowing the jury's verdict on Issue 7 to stand, resulting in no recovery by either party. Both parties appealed.

Haywood, Denny & Miller, by Egbert L. Haywood, for plaintiff appellant.

Newsom, Graham, Strayhorn, Hedrick, Murray, Bryson & Kennon, by Josiah S. Murray III, for defendant appellee.

BRITT, Judge.

While the able attorneys for the parties have discussed in their respective briefs detailed contentions of their clients relating to various aspects of the trial, we think a proper disposition of the appeals should be made on a consideration of the basic contentions of the parties.

Plaintiff contends primarily that this is an action on an account stated: that an account stated was established by the jury's answers to the first five issues; that the trial court erred in denying its motions for directed verdict on defendant's counterclaim; and that when the court entered judgment notwithstanding the verdict on the counterclaim, it should have awarded plaintiff judgment for the amount prayed.

Defendant disagrees with the stated contentions of plaintiff and further contends that the court erred in granting judgment n.o.v. on Issues 6 and 8, the issues relating to his counterclaim.

Both parties cite as a recognized authority on stockbroker law Meyer's treatise entitled *The Law of Stockbrokers and Stock Exchanges.* Plaintiff quotes from § 105, pp. 424 to 429, as follows:

(§ 105) 6. Broker's Statements as Accounts Stated.

(a) Acceptance; Retention without Objection.

An account rendered by a broker to his customer if expressly or impliedly assented to by the latter becomes an account stated. As such it is binding on the customer, except where there has been fraud or mistake, as to all matters which it embraces. The broker may institute suit on the account stated and recover by proving the rendition of the account and the customer's express or implied assent to it. He need not establish the transaction on which the account was based, for by the stating of the account a new contract arises between the parties which is independent of the original transaction and the consideration therefor. (Footnotes omitted.)

* * *

It is not necessary, however, for the customer to take an affirmative step in order to establish a broker's statement as an account stated. The receipt of the statement by the customer and his retention of it for a reasonable time without objection is regarded as an implied assent to its correctness. If the customer objects to the account or to any of its items, it is his duty to speak. Silence will be deemed acquiescence. (Footnotes omitted.)

* * *

(b) Form of Statement.

An account rendered, in order to become an account stated, need not be in any particular form. The monthly statements which brokers ordinarily render to their customers are sufficient. "An account rendered is one which is drawn up in form and delivered by the creditor to the debtor as an exhibition of the former's demand." Any statement which complies with this requirement will become an account stated if accepted or if retained without objection. (Footnotes omitted.)

* * *

(c) Objection to Statement.

* * *

The customer's objection to the account will be ineffective unless communicated to the broker. A secret disclaimer amounting only to a mental operation is insufficient.

(d) Timeliness of Objection.

An objection to an account rendered, in order to be effective, must be made within a reasonable time. The question of what time is reasonable is ordinarily one of fact for the jury, but the time which has elapsed in any particular case may be either so long or so short as to present a question of law for the court. (Footnotes omitted.)

A concise statement of the law relating to accounts stated in this jurisdiction is set forth in 1 Strong's N.C. Index 3d, Accounts § 2, as follows.

An account becomes an account stated when a balance is struck and agreed upon as correct after examination. Express agreement is not necessary, but an agreement may be implied by failure to object to an account within a reasonable time after the other party calculates the amount due and submits his statement of the account. What is a reasonable time is to be determined upon the basis of the circumstances of each case, and is ordinarily a question for the jury, certainly when there is conflict in the evidence or if adverse inferences may be drawn therefrom.

* * *

An account stated constitutes a new and independent cause of action and is conclusive on the parties in the absence of fraud or mistake. . . .

We perceive very little if any basic difference in the two statements of the law. We proceed now to try to apply the law to the case at hand.

While the agreement which defendant signed with plaintiff provides that reports of the execution of orders, and statements of the accounts of defendant customer, would be conclusive on defendant if not objected to in writing, the former within two days and the latter within ten days after being forwarded to defendant by mail or otherwise, Judge Hobgood elected not to apply so rigid a rule to defendant. On the contrary, by submitting Issue No. 5, he applied the "reasonable time" rule stated above. Since the jury answered the issue in favor of plaintiff, it is not in position to complain that the rigid provision set forth in the agreement was not applied.

We think the trial court erred in submitting Issues 6 and 8, particularly in the absence of an instruction that they would not be answered unless Issue No. 5 was answered in the affirmative. Even so, plaintiff is not in position to complain that Issues 6 and 8 were submitted since the court granted judgment notwithstanding the verdict as to them.

The remaining question relates to Issue No. 7, the amount of defendant's indebtedness to plaintiff. We think plaintiff was and is entitled to have this issue answered. While plaintiff cites authorities from other jurisdictions supporting its argument that the court should have answered the issue $72,200, the amount prayed for in the complaint and shown on the statements rendered to defendant, we are of the opinion that the issue should be answered by a jury.

In *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971), our Supreme Court held that the trial judge cannot direct a verdict under G.S. 1A-1, Rule 50, in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses, since it is the established policy of this State—declared in both constitution and statutes—that the credibility of testimony is for the jury, not the court, and a genuine issue of fact must be tried by a jury unless the right is waived.

For the reasons stated, we order that the portions of the judgment appealed from (1) allowing the verdict of the jury as to Issue No. 7 to stand, and (2) providing that plaintiff recover nothing of defendant, be vacated and that this cause be remanded to the superior court for a jury trial on Issue No. 7. In other respects, the judgment is affirmed.

Judgment affirmed in part, vacated in part, and cause remanded for further proceedings.

Judges HEDRICK and WEBB concur.

STATE OF NORTH CAROLINA v. KENNY RAY WARREN

No. 7725SC612

(Filed 7 March 1978)

1. **Burglary and Unlawful Breakings § 5.4— possession of recently stolen property—sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for felonious breaking and entering and felonious larceny where the evidence tended to show that two break-ins occurred, one on 1 September and one on 10 September; stolen goods were found in a van which defendant had in his possession as early as 1 September; a confidential informant told officers shortly after the second break-in that a van full of stolen goods could be found at a named address; officers maintained surveillance of the van from the afternoon of the second break-in until the next day when defendant got in the van and drove it away; officers stopped the van while defendant was driving and found stolen goods; and the jury could find from this evidence that defendant had possession of the stolen goods and exercised control over them so recently after they had been stolen that defendant himself was the thief.

2. **Constitutional Law § 67— confidential informant—disclosure of identity not required**

The trial court did not err in refusing to require disclosure of the identity of a confidential informant, since the prosecution is privileged to withhold the identity of an informant unless the informant was a participant in the crime or unless the informant's identity and testimony are essential to a fair determination of the case or are material to a defendant's defense, and there was no showing in this case of defendant's need for disclosure.

APPEAL by defendant from *Lewis, Judge.* Judgments entered 19 March 1977 in Superior Court, BURKE County. Heard in the Court of Appeals 29 November 1977.

In Case No. 9115 defendant was charged with the felonious breaking and entering into the dwelling of Mary Jo Watson on 1 September 1976 and the felonious larceny therefrom of described articles of personal property. In Case No. 9116 he was charged with the felonious breaking and entering into the dwelling of James P. Hollar on 10 September 1976 and the felonious larceny therefrom of described articles of personal property. The cases were consolidated for trial and defendant pled not guilty to all charges.

The State presented evidence tending to show: At some time between 6:30 a.m. and 1:00 p.m. on 1 September 1976, while Mr. and Mrs. Watson were at work, someone broke into their trailer

home and took a large number of articles of personal property without their permission. At some time between 6:45 a.m. and 4:00 p.m. on 10 September 1976, while Mr. and Mrs. Hollar were at work, someone broke into their home and took a large number of articles of personal property without their permission.

At approximately 5:30 p.m. on 10 September 1976 the police commenced surveillance of a white GMC van parked in the driveway at 407 North Street in Morganton. Wayne Warren, a nephew of defendant, lived at that address. Surveillance over the van was continued until the following afternoon. During their surveillance the officers saw people in the vicinity of the house and van on four or five occasions, but only once did anyone open the van. About 10:00 a.m. on 11 September a white female resembling Wayne Warren's wife was seen to unlock a door on the van and lean in, but she did not enter the van.

At approximately 2:30 p.m. on 11 September, defendant arrived in an automibile operated by one Paul Berry. Defendant got out of the car driven by Berry, walked to the van, got in the driver's side door without using a key, and drove away in the van, following the Berry automobile. The police followed the van and, after it had been driven approximately three quarters of a mile, stopped and searched it. Defendant was the driver and only occupant of the van. Search of the van revealed that it contained a large number of articles of household equipment and personal property, including articles subsequently identified as having been taken from the Watson and Hollar residences. These included a shotgun, a G.E. Toaster, a Sunbeam Iron, a Sears radio, a carpet shampooer, a Schick hair dryer, a G.E. tape recorder, and a Penney vacuum cleaner, taken from the Watson trailer home, and a 23-inch color television set, a 19-inch black and white television set, a .22 calibre Remington rifle, and a Seth Thomas clock, taken from the Hollar residence.

A voir dire examination was conducted to determine the legality of the police search of the van. During this examination evidence was presented to show that between 2:00 and 3:00 p.m. on 10 September 1976 an SBI agent received a telephone call from a confidential informant, whose information had proven to be reliable in the past, that there was a white van at 407 North Street full of "stolen stuff" that had been taken in recent breakins. At the conclusion of the voir dire hearing the court entered

an order finding facts from which it concluded that the search was valid, both because consent for the search was given by defendant and because the officers had probable cause to conduct the search even without a search warrant.

During the voir dire examination, defense counsel asked the SBI agent to identify his confidential informant. The court sustained the district attorney's objection and refused to require the State to disclose the name of the confidential informant. On cross-examination of the SBI agent before the jury, defense counsel again asked the witness to identify his confidential informant. The State's objections were again sustained. During this cross-examination the defense counsel brought out before the jury the facts concerning the information given by the confidential informant to the SBI agent, including information that the informant told the SBI agent that he had first observed the van at 407 North Street "late in the morning" of 10 September.

Defendant did not testify but presented evidence to show: Hobert Eugene Warren, defendant's brother and Wayne Warren's father, owned the van and used it in his carpet business. There were at least five sets of keys to the van which were in the possession of various people. Defendant had borrowed the van in early September during the week preceding Labor Day, which was on Monday, 6 September, to go to the races in Darlington. When Wayne Warren left his house on the morning of 10 September, the van was not in his driveway. He returned after 6:00 p.m. to find the van in his driveway with the doors locked. He looked into the van but could not open it because neither he nor his wife had a key. Wayne Warren did not know who parked the van in his driveway, but it was not unusual for his father's employees to leave the van at his house rather than driving the extra ten miles to his father's house. Floyd Keller, a former employee of Hobert Eugene Warren, was one of the persons who had a key to the van, and he called Wayne Warren at eight or nine o'clock on the morning of 11 September to tell him that defendant would move the van later. Paul Berry went to defendant's mobile home on 11 September. Defendant got a phone call, and the two men went to Wayne Warren's house to get the van.

Defendant also presented evidence to establish an alibi. Various witnesses testified that defendant and the van were at

Larry's Lounge in Hickory on 1 September. Witnesses also testified that defendant was sick on 10 September and did not leave his mobile home that day.

The jury found defendant guilty as charged on all counts. From judgments imposing prison sentences, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Sandra M. King for the State.

Patton, Starnes & Thompson, P. A., by Thomas M. Starnes for defendant appellant.

PARKER, Judge.

Defendant's first assignment of error was directed to the court's overruling of his objection to the evidence obtained by the search of the van. Defendant did not discuss this assignment of error in his brief. Accordingly, it is deemed abandoned. Rule 28(a), North Carolina Rules of Appellate Procedure.

[1] Defendant assigns error to the denial of his motions for directed verdict made on the grounds that there was insufficient evidence to justify submission of the cases to the jury. There was ample evidence to show that the crimes with which defendant was charged were committed by some one. The only question is whether there was sufficient evidence to show that it was the defendant who committed them. We hold that there was.

> "It is the general rule in this State that one found in the unexplained possession of recently stolen property is presumed to be the thief. This is a factual presumption and is strong or weak depending on circumstances—the time between the theft and the possession, the type of property involved, and its legitimate availability in the community." *State v. Raynes*, 272 N.C. 488, 158 S.E. 2d 351; *State v. Allison*, 265 N.C. 512, 144 S.E. 2d 578; Strong, N.C. Index, 2d, Larceny, § 5. To give rise to this presumption, it is not necessary that the stolen property be found actually in the hands of or on the person of the accused, it being sufficient if it was found in a container or place of deposit under his exclusive personal control.

State v. Lewis, 281 N.C. 564, 567, 189 S.E. 2d 216, 219 (1972). In addition, where, as in the present case, there is sufficient evidence that a building has been broken into and entered and

that property has been stolen therefrom by such breaking and entering, then a presumption of fact arises that one found in the unexplained possession of the stolen property soon after the breaking and entering is guilty both of the larceny and of the breaking and entering. *State v. Allison*, 265 N.C. 512, 144 S.E. 2d 578 (1965); *State v. Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472 (1969). Giving the State the benefit of these factual inferences and viewing the evidence in the light most favorable to the State, we find the evidence in the present case sufficient to carry the cases to the jury.

There was uncontradicted evidence that the Watson and the Hollar homes were broken into, one on 1 September and the other on 10 September 1976, and that a large and varied assortment of furnishings and other articles were stolen after each such breaking and entering. There was uncontradicted evidence that a large number of these articles were assembled in a cache in a white van. As to the goods stolen from the Hollar residence, there was evidence from which the jury could find that this occurred at some time between 6:45 a.m. on 10 September 1976, when Mr. and Mrs. Hollar left their residence to go to work, and "late in the morning" of the same day, which was when the informant stated to the SBI agent that he first saw the van with its cache of stolen goods. (Defense counsel placed this latter information before the jury by his cross-examination of the State's witness, SBI Agent Suttle, the officer to whom the confidential informant gave his report; no motion to strike was made, and the jury was entitled to consider the evidence concerning the confidential informant's statements to Agent Suttle for whatever probative value it might have. Similarly, the court could properly consider this evidence in ruling on the defense motions for directed verdict.) There was evidence that the police maintained a continuous watch over the cache of stolen goods from 5:30 p.m. on the day the Hollar residence was broken into until 2:00 p.m. the next day, when defendant came to the cache, entered the van, and took possession of the van and its contents. He was the first person observed by the police to do so.

Thus, the evidence was sufficient to support a jury finding that defendant had possession of the stolen goods and exercised control over them recently after they had been stolen. Such a finding would in itself support inferences of fact, which the jury might draw, that defendant was the thief and that he had participated in the breakings and enterings by which the goods had

been obtained. Evidence that the stolen goods cached in the van were not in defendant's actual possession for a portion of the time after the last breaking and entering would not destroy the inferences which the jury might legitimately draw from defendant's subsequent possession of the recently stolen goods.

In contending that the inferences should not be permitted in the present case, defendant's counsel calls attention to the following statement in *State v. Patterson*, 78 N.C. 470, 472-73 (1878);

> The possession of stolen property recently after the theft, and under circumstances excluding the intervening agency of others, affords presumptive evidence that the person in possession is himself the thief, and the evidence is stronger or weaker, as the possession is nearer to or more distant from the time of the commission of the offense.

He stresses the portion of the quoted statement referring to "circumstances excluding the intervening agency of others," and he calls attention to similar statements in later cases. Relying on this formulation of the so-called "doctrine of recent possession," he contends that the circumstances of the present case do not exclude the intervening agency of others and for that reason the inferences should not be permitted in this case. We point out, however, that in no case in which the doctrine is invoked will the evidence completely and positively exclude the possibility of "the intervening agency of others." Evidence to that effect would make it unnecessary to invoke the doctrine. By its very nature, the doctrine is useful only when the defendant's guilt cannot be established by direct evidence of his presence at the scene of the crime and of his participation therein. Thus, where the doctrine is invoked, there must always be a slight gap in the State's evidence failing to completely account for the possession of the stolen goods at every moment between the actual commission of the crime and the discovery of the goods in a defendant's possession, thereby making it impossible to completely exclude the possibility of some intervening agency.

We think the more accurate formulation of the doctrine is that contained in *State v. Jackson*, 274 N.C. 594, 597, 164 S.E. 2d 369, 370 (1968):

> Evidence or inference of guilt arising from the unexplained possession of recently stolen property is strong, or weak, or fades out entirely, on the basis of the time interval between the theft and the possession. . . . The possession, in point of

time, should be so close to the theft *as to render it unlikely that the possessor could have acquired the property honestly.* (Emphasis added.)

Other evidence in the present case lends support to the inferences arising from defendant's possession of the recently stolen property. There was evidence that the van had been in defendant's possession as early as 1 September 1976, the date of the break-in of the Watson residence, and that he may have continued to maintain control over it to 10 September 1976, the date of the break-in of the Hollar residence. Admittedly, this evidence does not exclude the possibility of the intervening agency of others, but it tends to negate that possibility and it supports the inference that defendant was the thief. Whether the evidence showed defendant guilty beyond a reasonable doubt was for the jury to determine; all that the court was called upon to determine was whether it was sufficient to take the cases to the jury. *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956). We agree with the trial court that it was.

[2] Defendant assigns error to the court's rulings sustaining the district attorney's objections to questions directed by defense counsel during cross-examination of the SBI agent regarding the identity of the confidential informant. The prosecution is privileged to withhold the identity of an informant unless the informant was a participant in the crime or unless the informant's identity and testimony are essential to a fair determination of the case or are material to a defendant's defense. *State v. Ketchie*, 286 N.C. 387, 211 S.E. 2d 207 (1975); *State v. Brown*, 29 N.C. App. 409, 224 S.E. 2d 193 (1976); *State v. Parks*, 28 N.C. App. 20, 220 S.E. 2d 382 (1975). In the present case the court conducted a voir dire examination of the SBI agent concerning his confidential informant. During this examination the agent testified that he did not have any information that his informant participated in or witnessed either of the break-ins involved in this case nor did the agent have any reason to suspect that he did. The agent also testified that he had no reason to suspect that his informant had driven the van. On this record there is no showing of defendant's need for disclosure of the informant's identity, and we find no error in the Court's refusal to require the disclosure.

The only other assignment of error brought forward in defendant's brief relates to the Court's instructions to the jury de-

fining and applying the "doctrine of recent possession." We have carefully examined the charge and find that the court correctly and adequately applied the law arising on the evidence in this case. In defendant's trial and in the judgments entered we find

No error.

Judges BRITT and VAUGHN concur.

HERFF JONES COMPANY, A DIVISION OF CARNATION COMPANY v. JOSEPH ALLEGOOD AND KEITH BARNES

No. 7712SC185

(Filed 7 March 1978)

1. **Venue § 9— motion for change of venue—postponement pending ruling on preliminary injunction**

The trial court did not err in postponing consideration of defendant's motion for a change of venue as a matter of right pending a ruling on whether a restraining order would be continued until a trial on the merits. G.S. 1A-1, Rule 65(b); G.S. 1-494.

2. **Appeal and Error § 9; Injunctions § 12.1— covenant not to compete—preliminary injunction—mootness**

Questions relating to the trial court's issuance of a preliminary injunction prohibiting defendants from violating a covenant not to compete are moot where the covenant was limited in duration to one year following termination of the employment relationship between plaintiff and defendants and that year ended while an appeal from the injunction was pending.

3. **Injunctions § 12.3— temporary injunction—irreparable injury—reason for absence of notice**

A temporary restraining order issued without notice was deficient in failing to state why the injury was irreparable and why the order was issued without notice.

4. **Injunctions § 13.2— convenant not to compete—preliminary injunction—failure to show irreparable injury**

Plaintiff failed to meet its burden of showing irreparable injury to support the issuance of a preliminary injunction prohibiting defendants from violating a covenant not to compete, and the facts found by the court did not support its conclusion that acts of defendants "in calling upon customers of the

plaintiff's poses a substantial threat to the plaintiff's business and subjects the plaintiff to a substantial threat of irreparable injury."

Judge CLARK dissenting.

APPEAL by defendants from order of *Gavin, Judge*, entered 4 October 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 12 January 1978.

On 10 September 1976, plaintiff filed a complaint alleging that defendants had breached their respective contracts of employment with the plaintiff (sales representative agreements) by, among other particulars, entering into competition with plaintiff within one year following the termination of the sales representative agreements. Plaintiff prayed for injunctive relief to restrain defendants from competing with plaintiff's business in the geographical area covered by the sales representative agreements, and for damages for breach of contract in the sum of $200,000. (An amended complaint setting out some of plaintiff's allegations in more detail was filed on 21 September 1976.) Also on 10 September 1976, plaintiff filed a motion, accompanied by affidavits, for a temporary restraining order pursuant to Rule 65 of the North Carolina Rules of Civil Procedure. On the same day, the temporary restraining order requested by plaintiff was entered by Judge Giles R. Clark, and defendants were ordered to appear in Cumberland County Superior Court on 20 September to show cause why the temporary restraining order should not be extended.

At some point prior to the 20 September hearing, defendant Allegood filed a motion accompanied by affidavit seeking (1) a change of venue to Wilson County, North Carolina, and (2) dissolution of the temporary restraining order. On 20 September, Judge E. Maurice Braswell declined to hear defendant's motion for change of venue until after a ruling on whether the temporary restraining order would be continued until a trial on the merits. Also, on his own motion, Judge Braswell continued the temporary restraining order until the next day (21 September) at which time the temporary restraining order was again continued by Judge Braswell pending an evidentiary hearing before Judge Robert L. Gavin set for 23 September.

The matter came on for hearing before Judge Gavin as scheduled. Following denial of defendants' motion to dissolve the

temporary restraining order on grounds that plaintiff had not complied with Rule 65, both sides presented evidence. After the hearing, Judge Gavin again continued the temporary restraining order until 4 October or such prior time as a further order might be entered.

Judge Gavin, by his order dated 1 October and filed 4 October, made findings of fact and conclusions of law and continued the temporary restraining order until a trial of the case on the merits. The court further required plaintiff to post a bond in the amount of $25,000.

On 8 October 1976, defendants gave notice of appeal from the various orders entered by Judges Braswell and Gavin. At the same time, defendants sought a stay of Judge Gavin's order, which was denied by Judge D. B. Herring, Jr., on 19 October.

Defendants next petitioned this Court for a writ of supersedeas, which was denied on 16 November. However, on 21 December, the Supreme Court, by Exum, Justice, granted defendants' application for writ of supersedeas, which stayed the enforcement of the restraining order pending review by this Court.

McLeod and Senter, by Joe McLeod, for plaintiff appellee.

Connor, Lee, Connor, Reece and Bunn, by David M. Connor and Cyrus F. Lee, for defendant appellants.

MORRIS, Judge.

[1] Defendants' first assignment of error is to the failure of the trial court to hear and grant defendant Allegood's motion for a change of venue as a matter of right. Defendant argues that since his motion was made in writing and in apt time, removal became a matter of substantial right and deprived the court of power to proceed further in essential matters until the right of removal was considered and passed upon. With this proposition we have no quarrel. *See Little v. Little*, 12 N.C. App. 353, 183 S.E. 2d 278 (1971). In our opinion, however, the trial court properly postponed consideration of the motion for removal pending a ruling on whether the restraining order would be continued.

Rule 65(b) of the North Carolina Rules of Civil Procedure states, in part:

> ". . . In case a temporary restraining order is granted without notice and a motion for a preliminary injunction is made, it shall be set down for hearing at the earliest possible time *and takes precedence over all matters except older matters of the same character; . . .*". (Emphasis supplied.)

Plaintiff's prayer for injunctive relief falls within the rule set out in *Collins v. Freeland*, 12 N.C. App. 560, 183 S.E. 2d 831 (1971), and thus suffices as a motion for a preliminary injunction for purposes of Rule 65(b). Thus the rule would appear to require that the hearing on the return of the temporary restraining order take precedence over a hearing on the motion for a change of venue. As a practical matter, this conclusion is buttressed by G.S. 1-494. That statutes requires that

> "[a]ll restraining orders and injunctions granted by any of the judges of the superior court shall be made returnable before the resident judge of the district, a special judge residing in the district, or any superior court judge assigned to hold court in the district where the civil action or special proceeding is pending. . . ."

The temporary restraining order entered on 10 September in this action, pending in Cumberland County, was made returnable "before the Superior Court Division of the General Court of Justice for Cumberland County" which is in the Twelfth Judicial District. Removal of the cause to Wilson County, in the Seventh Judicial District, would have prevented any return of the temporary restraining order entered by Judge Clark.

We hold, therefore, that the trial court committed no error in postponing consideration of the motion for a change of venue pending a hearing on the restraining order. Defendants' first assignment of error is overruled.

Defendants' remaining assignments of error concern the issuance of the temporary restraining order and its subsequent continuance (in effect a preliminary injunction) until a trial on the merits. It appears that plaintiff is no longer entitled to injunctive relief and that the questions presented by defendants' arguments are moot.

[2, 3] The convenant not to compete which is the subject of this action was expressly limited in duration to one year following the

termination of the employment relationship between plaintiff and defendants. Plaintiff's evidence shows that notice of termination of representation was mailed to defendants and dated 28 July 1976. Defendant Allegood testified that he began working for Hunter Publishing Company, a competitor of plaintiff, as early as April 1976. Thus, assuming that defendants' employment ended no later than 28 July 1976, the latest date through which defendants could be restrained from competing with plaintiff would have been 28 July 1977. That date having passed pending consideration of this appeal by this Court, the questions relating to the propriety of the injunctive relief granted below are not before us. As stated by the Supreme Court in *Parent-Teacher Assoc. v. Bd. of Education*, 275 N.C. 675, 679, 170 S.E. 2d 473, 476 (1969):

> "When, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court."

Thus, the questions raised by defendants regarding the injunctive relief granted by the trial court have been rendered moot by the passage of time. *See Enterprises, Inc. v. Heim*, 276 N.C. 475, 173 S.E. 2d 316 (1970). However, were this not true, the result on appeal would be the same. Rule 65(b) provides that "[a] temporary restraining order may be granted without notice to the adverse party if it clearly appears from *specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant* before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall . . . *define the injury and state why it is irreparable and why the order was granted without notice*. . . ." (Emphasis supplied.) Here the temporary restraining order simply recites: "and it appearing to the Court from the affidavit of Joe Vogel that the defendants were employed by the plaintiff under sales representative agreements which provided for covenants not to compete during the time of said employment and for one year following the termination of the employment of the defendants; and it further appearing to the Court that the defendants have competed with the plaintiff in violation of said

agreements and that the plaintiff has, or is likely to suffer irreparable damage due to the breach of said contracts by the defendants and based thereon, this temporary restraining order is issued without notice to the defendants." Since the complaint was not verified, the affidavit of Vogel must support the temporary restraining order. Clearly the order does not state why the injury is irreparable nor why the order was issued without notice. Defendants' position that their motion to dismiss the order should have been granted on the grounds that the irreparable damage was not disclosed and there was no statement in the order in compliance with Rule 65(b) is, we think, well taken. Parenthetically, we note that the temporary restraining order refers to the contract between the parties as one under the terms of which the defendants were "employed" by plaintiff. However, at the hearing Mr. Vogel testified that defendant Allegood was not defined in the contract as an "employee" of plaintiff but as an independent contractor.

[4] In the temporary restraining order a time was set for hearing. After hearing the court entered a preliminary injunction.

> "Ordinarily, to justify the issuance of a preliminary injunction it must be made to appear (1) there is probable cause that plaintiff will be able to establish the right he asserts, and (2) there is reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect plaintiffs' rights during the litigation. (Citations omitted.)" *Setzer v. Annas*, 286 N.C. 534, 537, 212 S.E. 2d 154, 156 (1975).

The burden was on plaintiff to establish its right to a preliminary injunction. We do not think plaintiff met its burden of showing irreparable injury, nor do we think the facts found by the court support its conclusion that the acts of defendants in violating the covenant not to compete "in calling upon customers of the plaintiff's poses a substantial threat to the plaintiff's business and subjects the plaintiff to a substantial threat of irreparable injury. . . ." Certainly in this situation a pecuniary standard exists for the measurement of damages should plaintiff prevail in its action for damages for breach of the covenant not to compete.

On 21 December 1976, the Supreme Court, by writ of supersedeas, stayed the enforcement of the restraining order

issued by the trial court, pending this appeal. Upon certification of this opinion to the Superior Court of Cumberland County, the effect of the writ of supersedeas terminates. *New Bern v. Walker*, 255 N.C. 355, 121 S.E. 2d 544 (1961). Plaintiff is not now entitled to restrain defendants from competing with it. Therefore, this case is remanded to the Superior Court of Cumberland County with directions that the preliminary injunction entered by Judge Gavin pending trial on the merits be dissolved.

Remanded with directions.

Judge MITCHELL concurs.

Judge CLARK dissents.

Judge CLARK dissenting:

The majority has ruled that the question of injunctive relief is moot. By writ of supersedeas on 21 December 1976 the Supreme Court stayed the enforcement of injunctive relief pending this appeal. The duration of the covenant not to compete also should be stayed or suspended pending appeal; otherwise, the supersedeas in effect would determine the substantive rights of the parties, the right to injunctive relief and the right to damages on dissolution under G.S. 1A-1, Rule 65(e).

After ruling that the question was rendered moot by the supersedeas, the majority has rendered an advisory opinion on the question of injunctive relief. In numerous cases in this State it has been held that an injunction will lie to restrain a defendant from engaging in a designated business in a prescribed territory in violation of a valid contract where there is reasonable apprehension of irreparable loss. The history of annual renewals of the contracts with the schools and other circumstances are such that there is no practical and certain pecuniary standard for the measurement of damages. I am unable to distinguish in principle some of those numerous cases from the case *sub judice.*

THOMAS EDWIN TOWNSEND v. NORFOLK AND SOUTHERN RAILWAY COMPANY, SUCCESSOR CORPORATION TO CAROLINA AND NORTHWESTERN RAILWAY, AND JOHN REID

No. 7725SC315

(Filed 7 March 1978)

1. **Railroads § 5.8— crossing accident—no contributory negligence as a matter of law**

In an action to recover damages for injuries sustained in a collision between defendant's train and plaintiff's tractor-trailer, the evidence did not disclose that plaintiff was contributorily negligent as a matter of law where it tended to show that there were no electrical warnings at the railroad crossing; plaintiff stopped, looked and listened before he drove his rig upon the first of defendant's tracks; plaintiff continued to maintain a proper lookout as he traversed the 47 feet from the first track, which was a side track, to the main track; and plaintiff's failure to observe defendant's train approaching from his left was caused proximately by the obstructions to plaintiff's visibility along defendant's tracks.

2. **Rules of Civil Procedure § 59— damages for personal injury—verdict not excessive**

In an action to recover damages for injuries sustained in a collision between defendant's train and plaintiff's tractor-trailer, the trial court did not err in denying defendant's motion for a new trial on the ground that the verdict of $151,835 was excessive where the evidence tended to show that plaintiff, who was 45 at the time of the collision, had driven tractor-trailer rigs for 25 years and during that period had enjoyed good health; as a result of the collision plaintiff suffered internal injuries, hypertension, a broken nose, and a back injury; plaintiff was hospitalized and incurred medical expenses of over $7000; plaintiff is currently in poor health and will continue to undergo medical treatment for the remainder of his life; and plaintiff has been unable to work since the accident and his disabilities are permanent.

Judge BRITT dissenting.

APPEAL by defendants from *Snepp, Judge.* Judgment entered 28 January 1977 in Superior Court, CALDWELL County. Heard in the Court of Appeals 7 February 1978.

Civil action wherein plaintiff seeks to recover $750,000.00 for injuries sustained in a collision between a train owned and operated by the defendants and a tractor-trailer operated by the plaintiff. At the conclusion of the presentation of evidence, issues were submitted to the jury and answered as follows:

1. Was the plaintiff injured by the negligence of the defendants?

Answer: Yes.

2. If so, did the plaintiff by his own negligence contribute to his injuries?

Answer: No.

3. What amount, if any, is the plaintiff entitled to recover of the defendants?

Answer: $151,835.00.

Judgment was entered upon the verdict from which the defendants appealed.

Wilson and Palmer, by Hugh M. Wilson, for the plaintiff appellee.

Patrick, Harper and Dixon, by Bailey Patrick and F. Gwyn Harper, Jr.; Joyner and Howison, by W. T. Joyner and Henry S. Manning, Jr., for the defendants appellants.

HEDRICK, Judge.

The defendants assign as error the denials of their timely motions for directed verdict and judgment notwithstanding the verdict. Defendants argue that the evidence establishes the contributory negligence of the plaintiff as a matter of law. In considering these assignments of error we note that the jury found the defendants negligent and this finding is not challenged by the defendants. Thus, the only question for determination with respect to these assignments is whether the evidence, "interpreted in the light most favorable to plaintiff, so clearly shows . . . [plaintiff's] negligence to have been a proximate cause of his . . . [injuries] that it will support no other conclusion as a matter of law." *Neal v. Booth*, 287 N.C. 237, 241, 214 S.E. 2d 36, 39 (1975).

[1] The evidence considered in this light tends to show the following: The collision from which this action grew occurred in Lenoir, North Carolina, at the intersection of Waycross Drive, which runs from east to west, and railroad tracks owned by the defendants, which run from north to south. A junction lies 300-400 feet south of the crossing at which a side track diverges from the main track, curving slightly to the east and then running roughly parallel with the main track across Waycross Drive. A distance of 47 feet separates the side track from the main track at the cross-

ing. A few feet west of the main track lie two other tracks which were not directly involved in the accident. There are no electrical signals at the crossing to warn motorists of approaching trains although there is a sign east of the crossing and a crossbuck between the side track and the main line.

The plaintiff in this action was employed as a truckdriver for Broyhill Industries at the time of the collision and had been so employed for six years. In this capacity he had become familiar with the railroad crossing on Waycross Drive. At approximately 12:30 p.m. on 7 September 1972 the plaintiff was returning from a long distance haul in an empty tractor-trailer rig owned by his employer. The weather was clear as the plaintiff turned onto Waycross Drive from Highway 321A and headed west towards the crossing. The plaintiff stopped his truck at a point 15 feet east of the easternmost track (the side track), which he considered to be the closest point from which he could safely view the tracks. The plaintiff provided the following decription of the scene from where he stopped:

> When I got there I stopped and looked both ways. To my right I saw a few small trees, not too many, along the side of the track. . . . There were a few trees to my right and just east of the railroad tracks and located along the right of way. . . . To my left from about 5 feet from the pavement there are solid trees here. These trees were to my left and east of the first track. . . . These trees on the east side of the track were mostly pine trees. The trees that I spoke of range from small bushes up to 10 to 12 feet high, some of them bigger than the others that are still there.

When the plaintiff saw that the tracks were clear and heard no whistles or bells which would indicate an approaching train, he resumed his travel across the side track at a speed of 5-10 m.p.h. At trial the plaintiff testified:

> The rig I was driving that day was 55 to 56 feet long. The distance between the first tracks and the second tracks that I crossed was 47 feet. I have measured that myself; it is 47 feet. I know from past experience from crossing that crossing that the back of my truck would not be off the first track before I got to the second track. There is not any way you can clear both tracks. . . . What I am saying is once I get on

this first track I am on the tracks until I clear the last of the four tracks.

The plaintiff also testified that the road on the crossing was extremely rough necessitating cautious driving at a low rate of speed. He proceeded across the side track and toward the main track, maintaining his speed at 5-10 m.p.h. and looking to the south as he drove. The plaintiff further testified as follows:

> As I was coming to my second track, then after I had crossed the first track coming up here . . . about halfway between these two tracks was a distance of about 47 feet, these bushes were real thick next to the main line track and some of them were as high as a good 8, 10 and 12 feet. I could not see in the southerly direction along those tracks where the trees were. As I looked in a southerly direction as I crossed the track, I did not see any train approaching. I could not see it from the obstructions of those trees. I don't believe that I could—no way.
>
> . . .
>
> . . . [T]he bushes to my left between the tracks were from 15 to 20 feet wide and I would say at least 30 feet down the track, up and down the tracks, north and south—around 30 feet or better. The height of these bushes and trees were from small bushes to some of 12 to 14 feet. From my position in the cab of the vehicle I was operating I could not see to the south down the railroad tracks over these bushes.

Nearing the main track the plaintiff continued to look to the south but also devoted considerable attention to maintaining control of his vehicle on the bumps and holes in the road. When he reached the main track he looked to the south through his windshield, and determining that no train was coming he proceeded across the track. The train collided with the truck and carried it to a point north of the intersection. The plaintiff suffered severe injuries in the accident.

Over the years our Supreme Court has decided many cases involving collisions between trains and automobiles or trucks. From these cases rules have evolved delineating the duties of motorists as they approach railway crossings. A driver of an automobile or truck is expected to stop at a point before the

crossing which yields a clear view of the tracks, and "look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company." *Johnson v. R.R.*, 255 N.C. 386, 388, 121 S.E. 2d 580, 582 (1961). "A traveler on the highway has the right to expect timely warning, but the engineer's failure to give such warning will not justify an assumption that no train is approaching." *Neal v. Booth, supra* at 242, 214 S.E. 2d at 39. "Where there are obstructions to the view and the traveler is exposed to sudden peril, without fault on his part, and must make a quick decision, contributory negligence is for the jury." *Johnson v. R.R., supra* at 388-9, 121 S.E. 2d at 582.

The defendants have presented in their brief a mathematical computation which allegedly proves that the plaintiff could have seen the approaching train from the side track and before he reached the main line. On this basis the defendants contend that the evidence demonstrates that the plaintiff stopped the truck at a point where unobstructed observation was impossible; that he failed to stop or look as he crossed the side track from which he could have seen the junction approximately 300 feet to the south where the defendants' train was passing on the main track; and that he failed to stop or look immediately before he reached the main track where the view to the south was unobstructed. The defendants conclude that these alleged failures on the part of the plaintiff constitute contributory negligence as a matter of law.

We disagree with the defendants' conclusion. Our Supreme Court has instructed on several occasions that "[m]athematical possibilities and the results of exact measurements showing minimal space in which observations could be made, should not be controlling factors in determining whether nonsuit should be allowed as a matter of law." *Johnson v. R.R.*, 257 N.C. 712, 716, 127 S.E. 2d 521, 524 (1962); *Neal v. Booth, supra* at 243, 214 S.E. 2d at 40. This is particularly true in this case since the evidence with respect to speed, distance and visibility contains so many variables as to render mathematical calculations meaningless in determining whether any act or omission upon the part of plaintiff was contributory negligence as a matter of law. The factors which are controlling in this case are the obstructions to the plaintiff's view as he proceeded across the tracks, the rough road which required his utmost attention, and the fact that from the time he began crossing the tracks some portion of his rig was at

all times extended across the side track, making it dangerous for him to stop.

Thus, while the evidence raises inferences that the plaintiff drove the tractor-trailer rig upon the defendants' railroad tracks when he knew or by the exercise of reasonable care should have known that defendants' train was approaching from the south on the main track, and that such negligence was a proximate cause of the collision, we cannot say that such is the only conclusion reasonably deducible from the evidence. The evidence likewise gives rise to inferences that the plaintiff stopped, looked and listened before he drove the rig upon the first track, and that he continued to maintain a proper lookout as he traversed the 47 feet from the side track to the main track; and that plaintiff's failure to observe defendants' train approaching from the south was caused proximately by the obstructions to plaintiff's visibility along defendants' tracks. We hold that the court did not err in submitting the case to the jury and in overruling the defendants' motions for directed verdict and judgment notwithstanding the verdict.

Defendants also assign as error the denial of their motions for a new trial made pursuant to Rule 59 on grounds that the verdict was not justified by the evidence, and that the verdict was excessive. A motion to set aside the verdict and order a new trial is addressed to the discretion of the trial judge and "his ruling thereon is irreviewable in the absence of manifest abuse of discretion." *Britt v. Allen*, 291 N.C. 630, 635, 231 S.E. 2d 607, 611 (1977).

[2] The evidence with respect to damages tends to show the following: Plaintiff was 45 years of age when the collision occurred. He had driven tractor-trailer rigs for 25-26 years and during that period had enjoyed good health. As a result of the collision the plaintiff suffered internal injuries, hypertension, a broken nose, and a back injury. The plaintiff was hospitalized and incurred medical expenses of $7,035.14. He is currently in poor health and will continue to undergo medical treatment for the remainder of his life. He has been unable to work since the accident, and his disabilities are permanent.

We hold that the defendants have shown no abuse of discretion by the trial court in its denial of the defendants' motions. These assignments of error are overruled.

No error.

Judge WEBB concurs.

Judge BRITT dissents.

Judge BRITT dissenting:

I respectfully dissent to the majority opinion for the reason that I think the evidence established contributory negligence on the part of plaintiff as a matter of law.

While the burden of proof on the issue of contributory negligence is on the defendants, and directed verdict on the issue may not be entered if it is necessary to rely either in whole or in part on defendants' evidence, defendants' evidence which is not in conflict with that of plaintiff and which tends to explain plaintiff's evidence may be considered. 9 Strong's N.C. Index 3d, Negligence § 35.

Plaintiff testified that he was very familiar with the crossing in question; that he knew that the second set of tracks constituted the main line; that he stopped before crossing the first sidetracks; and that he then proceeded at a speed of five to ten m.p.h. to cross the first sidetracks, to traverse some 47 feet between them and the main line, and to drive upon the main line without stopping again.

One of the most critical points in the evidence related to the distance between the main line tracks and the bushes on plaintiff's left between the main line and the first sidetracks. Plaintiff's testimony on this point was vague but his testimony, together with evidence which was not in conflict with it but which tended to explain it, clearly established that there was sufficient clearance between the bushes and the main tracks for plaintiff to have seen the approaching train had he stopped immediately before reaching the main line and looked to his left.

LUTHER Y. MARTIN, FATHER, EDNA MARTIN, MOTHER OF VINCENT KEITH MARTIN, DECEASED, EMPLOYEE v. BONCLARKEN ASSEMBLY, EMPLOYER, EMPLOYERS COMMERCIAL UNION INSURANCE CO., CARRIER

No. 7729IC314

(Filed 7 March 1978)

1. **Master and Servant § 60.4— workmen's compensation—laborer at assembly grounds—death by drowning in lake—accident arising out of and in course of employment**

The death of a 15-year-old laborer by drowning while swimming in a lake on his employer's premises during his lunch hour when the lifeguard was not on duty arose out of and in the course of his employment where the public was not invited to swim in the lake; decedent was authorized by his employer to swim in the lake during his lunch hour; and a regulation prohibiting swimming in the lake when the lifeguard was not on duty had not been communicated to decedent.

2. **Master and Servant § 71.1— workmen's compensation—death of minor employee—amount of award—rate of pay—job decedent would have been promoted to**

The evidence supported an award for the death of a minor employee based on a wage of $2.25 per hour for a class of work which the minor employee "would probably have been promoted to" where it showed that decedent was earning $2.00 per hour at the time of his death and that decedent's father, who did the same type of work, was making more than $2.00 per hour but not as much as $2.50 per hour.

APPEAL by the defendants from an order of the North Carolina Industrial Commission entered 15 February 1977. Heard in the Court of Appeals 7 February 1978.

The plaintiffs were the father and mother of Vincent Keith Martin, a 15-year-old boy, who drowned on 30 July 1974. At the time of the tragic accident, the decedent was employed as a laborer by the defendant, Bonclarken Assembly, and was swimming in a lake on the grounds of the Assembly during his lunch hour. The lake had a swimming area enclosed by a rope and within the swimming area there was a smaller section enclosed by a chain. Vincent Keith Martin was within the roped area but outside the chain when he drowned.

At the time the decedent entered the lake, the lifeguard had left to eat lunch. When the lifeguard left the lake, he removed some buoys from the water and locked them up. No sign was posted saying the pool was closed.

A sign was posted by the entrance to the lake at a place at which Vincent Keith Martin could have read it. The sign read as follows:

LAKE REGULATIONS

MONDAY-SATURDAY, Swimming and boating under supervision of lifeguard until 4:30 p.m.

MONDAY-SATURDAY, Swimming *only* 5:00 p.m.-7:00 p.m. AT YOUR OWN RISK.

SUNDAY ONLY, Lake Open from 2:00 p.m.-5:00 p.m. under supervision of lifeguard.

SWIMMING TEST BY LIFEGUARD
REQUIRED FOR SWIMMING
BEYOND CHAINED AREA

Mr. Harold Mace, the resident director of the Assembly, testified:

"We have two types of orientation. When we bring our resident staff in, we conduct—we have an orientation session at which time there is a several-page document of regulations given and they are instructed specifically that these rules, plus any posted rules, must be obeyed.

To the paid employees . . . the lake regulations are posted in order to reach anyone that we may fail to reach within the orientation period."

Vincent Keith Martin was a paid employee of the Assembly and not a member of the resident staff. There is no evidence that he ever saw any written regulations other than the sign posted at the lake.

After a hearing, Deputy Commissioner Richard B. Conely made findings of fact and conclusions of law substantially as follows: Vincent Keith Martin was employed by defendant Bonclarken Assembly on the date of his death. During his lunch hour he went swimming in the lake, which he had permission to do. There were regulations prohibiting swimming when the lifeguard was not on-duty during the lunch hour, but the decedent had not been instructed as to the regulations. The sign which was posted at the lake and which should have been seen by the de-

cedent was vague. It did not state that the lake was closed when the lifeguard was off-duty and could have meant that the lifeguard would be on-duty Monday through Saturday until 4:30 p.m. The decedent could have reasonably assumed he was swimming within the chained area as required by the posted regulations. He was not familiar with the lay out of the lake and could have assumed the roped-in area was the chained area. The Hearing Commissioner awarded compensation to the plaintiffs. The Industrial Commission adopted and affirmed the order of the Hearing Commissioner and the defendants have appealed to this Court.

George W. Moore, for plaintiffs appellees.

Morris, Golding, Blue and Phillips, by J. N. Golding, for defendants appellants.

WEBB, Judge.

On this appeal, we are limited to determining whether the Industrial Commission's findings of fact are supported by competent evidence and whether the conclusions of law based on the facts found are correct. *Inscoe v. Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977). We hold that the findings of fact are supported by competent evidence and the conclusions of law are correct.

The defendants have excepted to the following facts found by the Hearing Commissioner: (1) "Decedent was permitted by the written regulations of the defendant employer to use the swimming facilities at the lake when off-duty." (2) "There is no evidence that plaintiff was ever instructed that the lake was closed during lunch period or what constituted the 'chained area' of the lake." (3) There is no evidence ". . . that [decedent] was familiar with the way the lake was arranged for swimming," and (4) "There is no evidence of record that there were any signs posted to indicate . . . that the lake was closed at the time the decedent entered it."

As to finding number (1) above, the defendants contend there is nothing in the record to support a finding that the decedent was permitted by written regulations to use the swimming facilities. Conceding without deciding the point that he was not permitted by written regulations to do so, there is substantial evidence that he had permission to use the swimming facilities

and if the words "by written regulations" are struck from this finding of fact, it does not affect the outcome of this case.

As to finding of fact number (2) above, Guy Hill Jones, decedent's superior testified: "I never gave them any instructions either way on swimming." Mr. Mace's testimony was that the resident staff received instructions. The decedent was not a member of the resident staff. The defendants argue that the posted sign and the lay out of the lake itself, including the chained area, is enough to invalidate this finding. We believe the Hearing Commissioner was reasonable in his conclusion that there had to be an actual imparting of information from one person to another in order to find there had been an instruction.

As to finding number (3), the defendants argue that the fact the decedent had worked around the lake and had talked to the lifeguard while the lifeguard was on-duty invalidates this finding. We cannot hold the Hearing Commissioner erred in making such a finding on this evidence.

As to finding number (4) above, the evidence was that the lifeguard had taken the buoys out of the water. There is no evidence that he or anyone else had posted a sign that the lake was closed.

The defendants have also taken exception to a finding denominated by the Hearing Commissioner as a conclusion of law as follows: "The circumstances of the drowning are that the decedent was using facilities authorized by the employer for his use. Although there was a regulation that the lake was closed during the lifeguard's lunch hour, that regulation was never communicated to the decedent." We believe this conclusion is amply supported by competent evidence.

[1] The defendants contend that the accident which caused the death of Vincent Keith Martin was not one "arising out of or in the course of" his employment. These words, which are found in G.S. 97-2(6) have been interpreted many times. See all the cases cited in this opinion and also *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E. 2d 47 (1968). The phrases "arising out of" and "in the course of" are not synonymous and both must be fulfilled in order for the plaintiffs to recover.

An accident arises out of employment when it is the result of a risk or hazard incident to the employment and is not from a

hazard common to the public. There is no evidence in this case that the public was invited to swim in the lake. Accidents while swimming were a hazard for employees of the Assembly and not to the public at large. The accident arose out of the decedent's employment.

In this jurisdiction, three conditions must be fulfilled in order for an accident to be in the course of employment. These three conditions are of time, place, and circumstance. "Time" includes the time during a working day including the lunch hour. "Place" includes the premises of the employer. Clearly both these conditions are fulfilled in this case.

In respect to "circumstances," compensable accidents are those sustained while the employee is doing what a man so employed may reasonably do within a time which he is employed, and at a place where he may reasonably be during that time to do that thing. In view of the finding that decedent was authorized by the Assembly to swim in the lake during his lunch hour and that the regulation prohibiting swimming when the lifeguard was not on-duty had not been communicated to him, we hold the condition of "circumstance" is fulfilled.

The defendants cite several cases which they contend should govern and preclude recovery by the plaintiffs. Among these cases are *Robbins v. Nicholson*, 281 N.C. 234, 188 S.E. 2d 350 (1972); *Horn v. Sandhills Furniture Co.*, 245 N.C. 173, 95 S.E. 2d 521 (1956); *Moore v. Stone Company*, 242 N.C. 647, 89 S.E. 2d 253 (1955); *Matthews v. Carolina Standard Corporation*, 232 N.C. 229, 60 S.E. 2d 93 (1950); *Morrow v. State Highway and Public Works Commission*, 214 N.C. 835, 199 S.E. 265 (1938); *Teague v. Atlantic Co.*, 213 N.C. 546, 196 S.E. 875 (1938). We believe that all these cases are distinguishable. Each of them had some factor not present in this case which precluded coverage for the plaintiff. In *Robbins* it was held not to be a risk of employment to be killed by a jealous husband of a co-worker. In *Horn*, an employee crossing a public street to eat lunch was struck by an automobile. This was held a risk to which the public at large was subject and not limited to employees of the defendant. In *Moore*, the plaintiff, while eating lunch, out of curiosity set off 300 dynamite caps. It was held the plaintiff was not authorized to play with dynamite caps while eating lunch. In *Matthews*, the employee, during his lunch break, tried to jump on a truck that was moving on his

employer's premises. It was held this was not a hazard incident to his employment. In *Morrow*, the deceased jumped into a river to recover a paint brush after being told not to do so by his foreman. In *Teague*, a death was held not to arise out of employment when the deceased, contrary to the rules of his employer, tried to ride a crate conveyor to the second floor of the building rather than using the stairs.

In the case at bar, the Hearing Commissioner has found, based on competent evidence, and the Industrial Commission has adopted his findings, that Vincent Keith Martin, while employed by Bonclarken Assembly, was drowned while swimming during his lunch hour in a lake on the premises of the Assembly. It was also found, based on competent evidence, that the decedent was authorized by his employer to swim in the lake and although the written regulations prohibited Vincent Keith Martin from swimming while the lifeguard was not on-duty, this part of the regulations was never communicated to deceased. Based on these findings, the plaintiffs are entitled to death benefits.

[2] The defendants' last assignment of error relates to the amount of the award. The Hearing Commissioner awarded to the plaintiffs the sum of $60.00 per week for 400 weeks. It is obvious he calculated this sum at the rate of $2.25 per hour for a forty-hour week. The evidence was that decedent, a minor, was earning $2.00 per hour.

The language of G.S. 97-2(5) applicable at the time of this suit stated:

> Where a minor employee, under the age of 18 years, sustains a permanent disability or dies, the compensation payable for permanent disability or death shall be calculated, first, upon the average weekly wage paid to adult employees employed by the same employer at the time of the accident in a similar or like class of work which the injured minor employee would probably have been promoted to if not injured, or, second, upon a wage sufficient to yield the maximum weekly compensation benefit.

The evidence was that the decedent's father, who did the same type of work as the decedent, was making more than $2.00 per hour, but not as much as $2.50 per hour. We hold that this

evidence supports a finding by the Hearing Commissioner of an award based on $2.25 for a wage for a class of job the decedent "would probably have been promoted to."

The order of the Industrial Commission is

Affirmed.

Judges BRITT and HEDRICK concur.

DR. RALPH L. WARD, DR. THOMAS E. LEATH, DR. JOHN T. ROGERS AND DR. JAMES B. JOHNSON v. HOTPOINT DIVISION, GENERAL ELECTRIC COMPANY

D. L. PHILLIPS INVESTMENT BUILDERS, INC. v. HOTPOINT DIVISION, GENERAL ELECTRIC COMPANY

THE COLVIS COMPANY v. HOTPOINT DIVISION, GENERAL ELECTRIC COMPANY AND ECKERD'S DRUGS, INC.

HARRIS-TEETER SUPER MARKETS, INC. v. HOTPOINT DIVISION, GENERAL ELECTRIC COMPANY AND ECKERD'S DRUGS, INC.

No. 7726SC162

(Filed 7 March 1978)

Limitation of Actions § 4.2— damages from fire—defective appliance—no privity with manufacturer—statute of limitations—accrual of action

In an action to recover for damages sustained in a fire which occurred in a shopping center on 9 May 1969, said fire originating in a deep-fat fryer manufactured by defendant and sold to a company not a party to this action on 27 April 1962, the plaintiffs' causes of action did not arise and thus G.S. 1-52(5), the applicable statute of limitations, did not commence to run until the date of the fire which caused plaintiffs' injuries, since a cause of action accrues and the statute of limitations begins to run at the time of injury to a plaintiff who is not in privity with the manufacturer or seller of defective goods and who thus suffered no technical or slight injury at the time of the sale of the goods.

APPEAL by plaintiffs from order of *Snepp, Judge*, entered 19 August 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 January 1978.

This is a consolidated appeal involving four lawsuits resulting from a fire which occurred in a shopping center in Charlotte on 9 May 1969. The various plaintiffs in the four suits suffered damage as a result of the fire. They allege that the fire began in a deep-fat fryer located in Eckerd's Drug Store; that the deep-fat fryer was negligently designed by defendant Hotpoint Division, General Electric Company; and that defendant's negligence was the proximate cause of the fire and damage which resulted therefrom.

Plaintiffs' complaint also included counts relating to breach of warranties and strict liability in tort, which counts were dismissed in 1972. From the order dismissing these counts plaintiffs did not appeal.

Defendant filed answer and pled as a defense the three-year statute of limitations, G.S. 1-52, alleging that title to the instrumentality in question had passed from General Electric over nine years prior to the institution of these actions.

On 23 May 1975, defendant, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, filed its motion for summary judgment on the grounds that plaintiffs' claims were barred by the statute of limitations. This motion was supported by an affidavit which tended to show that the deep-fat fryer in question was purchased on 27 April 1962. No affidavits in opposition to defendant's motion appear in the record.

After reviewing the files in the actions and hearing arguments of counsel, the trial court allowed the motion for summary judgment, to which plaintiffs excepted and gave notice of appeal to this Court.

Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston, by William E. Poe, W. Samuel Woodard, and Irvin W. Hankins III; Golding, Crews, Meekins, Gordon and Gray, by James P. Crews and Marvin K. Gray; Fleming, Robinson and Bradshaw, by Gibson L. Smith, Jr., for plaintiff appellants.

Helms, Mulliss and Johnston, by W. Donald Carroll, Jr., and E. Osborne Ayscue, Jr., for defendant appellee.

MORRIS, Judge.

The sole question presented by this appeal is whether the record discloses that plaintiffs' claims are barred by the statute of

limitations. If so, defendant was entitled to judgment as a matter of law and summary judgment was appropriate. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E. 2d 878 (1971).

For purposes of this appeal, we assume the truth of plaintiffs' allegations that the deep-fat fryer was defective. We also assume as true the undisputed date of sale of the deep-fat fryer.

Plaintiffs contend that because there was no contractual relationship between them and defendant with regard to the defective goods, they had no cause of action until the date of their actual injury (*i.e.*, 9 May 1969, the date of the fire), and that the statute of limitations did not begin to run against them until that date, no matter how far in the past the defective product was manufactured and sold by defendant. Plaintiffs further contend that since they were not in privity with defendant, they suffered no injury that was "not readily apparent" prior to the date of the fire, and thus G.S. 1-15(b) (providing that claims arising out of injuries due to a latent defect must be brought within 10 years of the last act of the defendant giving rise to the claim) does not apply as to them. In support of these arguments, plaintiffs cite two recent decisions, to wit: *Raftery v. Construction Co.*, 291 N.C. 180, 230 S.E. 2d 405 (1976), and *Pinkston v. Baldwin, Lima, Hamilton Co.*, 292 N.C. 260, 232 S.E. 2d 431 (1977).

Defendant, on the other hand, contends that plaintiffs' claims arose and the statute of limitations began to run at the time of the manufacture of the deep-fat fryer (1962); that G.S. 1-15(b) would apply to the claims *sub judice* had they not arisen more than three years prior to its enactment (1971); and that language to the contrary in *Raftery, supra*, a wrongful death action, is merely dicta and is not a correct statement of the law in this State. (Defendant's brief was filed on 6 April 1977 and does not take into account the decision in *Pinkston, supra*, filed 7 March 1977).

We think the holdings in *Raftery* and *Pinkston* support plaintiffs' position. In discussing the question of whether plaintiff's intestate would have been entitled to maintain an action for personal injuries had he survived the blow to his head, the majority in *Raftery* stated that

> "Obviously, the negligence of the defendant (assumed for the purposes of this appeal) would confer no right of action upon

> the plaintiff's intestate until he suffered an injury proximately caused thereby. Until then, his cause of action was not complete and, nothing else appearing, the three-year statute would not begin to run against his right to sue. (Citations omitted)." 291 N.C. at 186, 230 S.E. 2d at 408.

This statement of the rule was affirmed by the majority in *Pinkston.*

> "In *Raftery,* the majority and concurring opinions reaffirmed the well-established rule that a statute of limitations does not begin to run until the cause of action has accrued and the plaintiff has a right to maintain a suit. A plaintiff's cause of action accrues only when he suffers some injury." 292 N.C. at 262-263, 232 S.E. 2d at 432.

We are not unaware of two decisions of this Court, *State v. Aircraft Corp.*, 9 N.C. App. 557, 176 S.E. 2d 796 (1970), and *Jarrell v. Samsonite Corp.*, 12 N.C. App. 673, 184 S.E. 2d 376 (1971), *cert. den.* 280 N.C. 180 (1972), which held that the cause of action arises at the time of defendant's wrongful act or omission, notwithstanding the fact that the plaintiff had no contractual or other relationship with the defendant. The result reached by this Court was based upon *Hooper v. Lumber Co.*, 215 N.C. 308, 1 S.E. 2d 818 (1939), which clearly held that even though the plaintiff brought his action within three years of the injury, the statute of limitations ran from the time of the wrongful act or omission from which the injury occurred. However, it should be noted that the Court in *Hooper* did not cite or discuss any of the earlier cases holding to the contrary, including *Mast v. Sapp*, 140 N.C. 533, 53 S.E. 350 (1906), and *Hocutt v. R.R.*, 124 N.C. 214, 32 S.E. 681 (1899), a case factually similar to *Hooper. See* Lauerman, *The Accrual and Limitation of Causes of Actions for Nonapparent Bodily Harm and Physical Defects in Property in North Carolina,* 8 Wake Forest L.Rev. 327, 373-377 (1972).

The *Hocutt* case, *supra,* arose out of the construction of ditches to drain railroad property which wrongfully diverted water from its natural course, and resulted in the flooding of plaintiff's land some 20 years after the digging of the ditches. This was the fourth such case and there were others subsequent to *Hocutt. See* Lauerman, *The Accrual and Limitation of Causes of Actions for Nonapparent Bodily Harm and Physical Defects in Property in North Carolina, supra. Mast v. Sapp, supra,* was not

a railroad case, but arose from the collapse of a water reservoir owned by the City of Winston and which had been in use for quite some time without having caused injury. The action involved determination of entitlement to damages paid by the City for property damage, the City having also paid damages for wrongful death. Language of the Court in *Mast* is interesting:

> "The defective condition of the reservoir was a menace to adjoining property, against which the owners might perhaps have had preventive relief in equity, but no legal right of another was at all infringed until by the process of time and the gradual operation of the primary cause, the wall was undermined and fell, in consequence of what the city had before that time done or failed to do. *Roberts v. Read,* 16 East, 215. This is what is called in law the 'consequential damage,' or, more correctly, the consequential injury, resulting from the faulty construction of the reservoir, and that is the *causa litis. Hocutt v. R.R., supra.* But just as soon as the wall fell on the lot of Mrs. Peoples and struck her house, the first injury, as said in *Ridley v. R.R.,* was sustained and her cause of action immediately arose. *Roberts v. Read, supra.*" 140 N.C. at 542, 53 S.E. at 353.

In *Motor Lines v. General Motors Corp.*, 258 N.C. 323, 128 S.E. 2d 413 (1962), an action for property damage allegedly caused by a defective carburetor on a truck sold to plaintiff, the Court followed *Hooper*, but left open the question of whether it would follow *Hooper* "in a case where there is no injury to plaintiff or invasion of his rights at the time of defendant's negligent act or omission, . . ." 258 N.C. at 326, 128 S.E. 2d at 416.

Thus it appears that the Supreme Court in *Raftery* and *Pinkston* did not exressly reject a rule of law it had previously adopted by holding that the cause of action accrues and the statute of limitations begins to run at the time of injury to a plaintiff who is not in privity with the manufacturer or seller of defective goods and thus suffered no technical or slight injury at the time of the sale of the goods. *See Williams v. General Motors Corp.*, 393 F. Supp. 387 (M.D.N.C. 1975), aff'd. 538 F. 2d 327 (4th Cir. 1976), cited by the *Raftery* majority. The earlier rule enunciated in *Hocutt* and similar cases as to property damage and

Mast as to property and personal injury has now been extended and made applicable to these situations. On the facts of the case *sub judice*, we hold that plaintiffs' causes of action did not arise, and thus the applicable statute of limitations did not commence to run, until the date of the fire which caused plaintiffs' injuries.

Raftery and *Pinkston* also firmly establish that G.S. 1-15(b) with its 10-year limitation does not apply in cases where the injured party, a stranger to the sale of the defective goods, suffered no latent injury due to the existence of a defect in the goods at the time of sale. According to this interpretation, G.S. 1-15(b) applies only where the plaintiff's initial injury is "not readily apparent". In the instant case, plaintiffs' initial injuries were readily apparent on the date of the fire. Thus G.S. 1-15(b) does not apply, and plaintiffs' claims are not barred even though the deep-fat fryer was manufactured and sold more than 10 years prior to the institution of these actions.

The applicable statute of limitations in this case is G.S. 1-52(5), which is a three-year statute. It began to run on 9 May 1969. The four actions involved in this appeal were instituted before the running of the three-year period and thus the statute of limitations had not run so as to bar these actions. Accordingly, the order of the trial judge granting defendant's motion for summary judgment is

Reversed.

Judges CLARK and MITCHELL concur.

KEVIN WALKER O'QUINN v. DR. BRUCE H. DORMAN, DR. THOMAS CRAVEN, JR., DR. CHARLES L. NANCE, JR.

No. 775SC143

(Filed 7 March 1978)

1. Physicians, Surgeons and Allied Professions § 15.1— expert testimony—hypothetical question based on evidence

In an action to recover damages for the alleged negligence of defendants in treating plaintiff's broken arm, evidence was sufficient to place before the

jury facts from which the jury could infer that plaintiff's wound had no appearance of infection when one defendant split the cast on plaintiff's arm on a given date; therefore, the trial court did not err in allowing defendant's expert witnesses to answer a hypothetical question which included this fact assumed to be found by the jury: "that [defendant] cut the cast, opened it, visualized the wound, which had no appearance of infection."

2. **Witnesses § 8— cross-examination of defendants—credibility questioned—evidence of reputation properly admitted**

Where both defendants testified and each was cross-examined extensively by plaintiff's counsel, obviously for the purpose of attempting to cast doubt upon the truthfulness of their testimony, evidence of defendants' general reputation as bearing on their credibility as witnesses was admissible; moreover, plaintiff's objections to the evidence of defendants' reputation came too late where fifteen witnesses testified with respect to reputation before defendant made objection.

APPEAL by plaintiff from *Fountain, Judge.* Judgment entered 30 December 1975, in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 7 December 1977.

This action was instituted in February 1975 to recover hospital and medical expenses, loss of earnings and earning capacity, and other damages allegedly resulting from the negligence of defendants in treating plaintiff's broken arm. In May 1967, when plaintiff was 13 years of age, he suffered a compound fracture of both bones in his left forearm when he fell upon his outstretched arm upon completing a pole vaulting. The original complaint alleged an expenditure of some $15,000 for hospital and medical expense. By amendment this figure was reduced to approximately $750, the amount expended by the plaintiff since his eighteenth birthday.

Prior to trial, plaintiff filed a "stipulation and motion" by which he stipulated that each of the defendants had an excellent reputation, both personally and professionally, and moved that an order be entered "recognizing that plaintiff has stipulated to the excellent reputation, both personally and professionally, of all three of the defendants, and that that so-called issue is not involved in the case; and restraining the defendants from calling or offering witnesses before the jury to testify as to the character or reputation of the defendants or either of them." The court denied the motion. The jury answered the first issue in favor of the defendants. Plaintiff appeals, assigning as error the denial of the

motion that no character evidence be admitted and the hypothetical question asked by defendants of their expert witnesses.

Eugene H. Phillips and Goldberg and Anderson, by Frederick D. Anderson, for plaintiff appellant.

Marshall, Williams, Gorham and Brawley, by Lonnie B. Williams, for defendant appellees.

MORRIS, Judge.

Although the record caption carries the name of Dr. Charles L. Nance, Jr., as a defendant, the court allowed a motion to dismiss as to him at the end of plaintiff's evidence and no objection was noted nor exception taken to this action of the court.

The Record indicates that this trial was begun on 15 December 1975 and was concluded on 30 December 1975. The Record before us contains only those excerpts and portions of the evidence which plaintiff feels is pertinent to the challenged portion of the hypothetical questions and those portions of the testimony and proceedings pertinent to the character evidence. We assume, as we must, that all of the relevant testimony is before us. Defendants do not challenge this but do suggest that the 30-day period available to them after service of the Record on Appeal was totally insufficient to allow them to obtain a transcript and narrate the testimony which the reporter (according to orders obtained by appellant for extensions of time) estimated would consume not less than 2,000 pages.

[1] Plaintiff's first assignment of error is directed to the court's overruling plaintiff's objection to the hypothetical question posed to defendants' expert witnesses. The question posed to Dr. Donald David Getz included this fact assumed to be found by the jury: "that Dr. Dorman cut the cast, opened it, visualized the wound, which had no appearance of infection." The hypothetical questions posed to Dr. Walter F. Weis, Dr. Samuel Arthue Sue, Jr., and Dr. Charles Nance all contained an almost identical fact: "Dr. Dorman cut the cast and opened it to some extent and saw the wound, which had no appearance of infection." Plaintiff contends that this assumed fact was not in evidence.

In *Ingram v. McCuiston*, 261 N.C. 392, 399-400, 134 S.E. 2d 705, 711 (1964), the Court, speaking through Justice Sharp, now Chief Justice, said:

> "Under our system the jury finds the facts and draws the inferences therefrom. The use of the hypothetical question is required if it is to have the benefit of expert opinions upon factual situations of which the experts have no personal knowledge. . . .
>
> To be competent, a hypothetical question may include only facts which are already in evidence or those which the jury might logically infer therefrom. *Jackson v. Stancil*, 253 N.C. 291, 116 S.E. 2d 817; Stansbury, N.C. Evidence, s. 137 (2d Ed. 1963) and cases therein cited."

Applying the foregoing criteria for competency to the evidence furnished by plaintiff, we conclude that the court correctly overruled plaintiff's objection. Portions of the evidence, we think, are sufficient to place before the jury facts from which the jury could logically infer that the wound had no appearance of infection when the cast was split by Dr. Dorman on Friday, 2 June. Dr. Dorman was asked whether he examined the wound on 2 June. He replied that he did. He was then asked how he examined the wound. He answered: "When the cast was split, and then it was opened, I stated in the nurse's notes, a small amount. When this happened I split the cast on the ulna side as I indicated with my hand. When I split the cast I also split the cotton that is under the cast and I would have to see the wound." He further testified that, although he did not actually recall seeing the wound and did not split the cast for that purpose, "it would have been unavoidable that I could not have seen the wound." Dr. Dorman stated that he split the cast from the distal portion of the cast, which would have extended down to the junction of the small finger in the hand, along the ulna side of the cast up to above the incision; that it would have to be split above the area of the injury so that when the plaintiff's arm was put down from its raised position it would not swell. He further testified that he did not remember exactly what happened, but if he did not see anything unusual he would not necessarily have recorded it, but if he found something unusual he would have recorded it, and "[o]n Friday, June 2nd, the wound was not opened and no culture of any type was done. There was no reason to do that. No blood

laboratory work was done and no wimalysis. I saw no reason to do any of these tests. I didn't see any indication for doing any of these procedures. There was no indication of infection, in my opinion."

Dr. Craven testified that the wound could be seen "adequately" through the slit in the cast; that the nurse, on Saturday afternoon, reported that she had seen some blisters on his arm; that he investigated, saw the blisters where the cast had been cut, spread the cast a little wider, and the wound did not appear to be acutely inflamed or require any further treatment. Having seen the wound, he was very well reassured that it was not obviously infected.

It is clear that there was ample evidence that Dr. Dorman "cut the cast and opened it to some extent". There was also ample evidence from which the jury could logically infer that he "saw the wound, which had no appearance of infection". This assignment is overruled.

[2] Plaintiff's only other assignment of error is that "[t]he court erred in permitting approximately 30 witnesses to the good reputation of the defendants to either testify, or to be tendered to testify, or to have their names announced to the jury, the only effect of which was to prejudice the plaintiff's case with the jury, since reputation was not in issue, the plaintiff having theretofore stipulated to the excellent reputation of each defendant."

Here Nurse Jordan, who testified for plaintiff, testified on cross-examination without objection with respect to defendant Dorman's reputation. Drs. Weis and Sue, expert witnesses for defendant, also testified as to reputation without objection. Drs. James and Nicholson testified, without objection, as to reputation, and defendants then tendered seven doctors who would testify to the same facts. There was no objection. Defendants then put on three more character witnesses, two of whom were nurses, without objection. Defendants then put on John Newton to testify with respect to Dr. Dorman's reputation as an orthopedic surgeon. Plaintiff asked for a *voir dire* examination, but none was had. It developed that the witness was an amputee and had been for two years. Plaintiff did not object. He did, however, object to the testimony of the last two witnesses as to Dr. Dorman's reputation as an orthopedic surgeon. The objections were over-

ruled. On appeal, plaintiff contends that reputation and skill were not at issue. Plaintiff alleges that defendants did not properly treat his broken arm. Defendants deny that their treatment was in any way negligent.

Here both defendant Dorman and defendant Craven testified and each was cross-examined extensively by plaintiff's counsel, obviously for the purpose of attempting to cast doubt upon the truthfulness of their testimony. "Where a party testifies, it is competent to show his general reputation as bearing on his credibility as a witness. (Citations omitted.)" *Lorbacher v. Talley*, 256 N.C. 258, 260, 123 S.E. 2d 477, 479 (1962), and exclusion of evidence offered for such purpose is prejudicial error. *Wells v. Bissette*, 266 N.C. 774, 147 S.E. 2d 210 (1966), and cases there cited. Particularly is this true where the credibility of his testimony is challenged. Not until the last two witnesses testified did plaintiff interpose objection.

We agree that in this case an unusually large number of witnesses was allowed to testify as to reputation. However, "[t]he number of persons that a party who testifies in a civil action, such as in the instant cases, will be permitted to call to the witness stand to testify as to his general reputation as bearing on his (the party's) credibility as a witness, is necessarily a matter which rests in a large measure in the sound discretion of the trial judge. The rationale of such rule is to keep the scope and volume of such testimony within reasonable bounds. *Gibson v. Whitton*, 239 N.C. 11, 17, 79 S.E. 2d 196, 201." *Wells v. Bissette*, *supra*, 266 N.C. at 777, 147 S.E. 2d at 213. Perhaps this case comes very close to failing to keep the scope and volume of such testimony within reasonable bounds. However, plaintiff has failed to object in apt time. His objections to the testimony of the last two witnesses comes when the horse is out of the barn. Nor has he shown any abuse of discretion.

No error.

Judges HEDRICK and ARNOLD concur.

MABLE A. MEACHEM v. MELVIN H. BOYCE

No. 7726SC291

(Filed 7 March 1978)

1. **Estoppel § 5.2; Husband and Wife § 5.1— entirety property—conveyance by wife—divorce—estoppel**

During coverture a spouse is not estopped from denying the validity of a purported conveyance of entirety property in which the other spouse failed to join, but when the restriction of coverture is removed by death or divorce, estoppel principles are triggered.

2. **Estoppel § 5.2; Husband and Wife § 5.1—entirety property—conveyance by wife—husband's judgment against grantee—divorce—estoppel**

Where the wife purportedly conveyed entirety property to a third party during coverture without the joinder of her husband, the husband obtained a judgment in an action against the third party declaring the wife's deed to the third party "void," and the wife subsequently obtained a divorce from the husband, the effect of the judgment in the husband's action against the third party was to declare the wife's deed "inoperative" to convey the property and to affect the husband's rights as a tenant by the entirety in the property, and the judgment had no legal effect on the third party's rights of estoppel against the wife which were triggered upon her divorce from the husband.

3. **Estoppel § 5.2— entirety property—conveyance by wife—divorce—estoppel—right of wife to seek partition**

Where a wife's purported conveyance of entirety property to a third party was inoperative because the husband did not join therein, and the wife subsequently obtained a divorce from the husband, the wife's interest in the property as a tenant in common after the divorce was unaffected by the third party's unasserted right of estoppel against the wife because of her conveyance to him, and she was entitled to maintain an action for partition of the property.

4. **Partition § 3.2; Estoppel § 5.2— entirety property—conveyance by wife—divorce—partition—grantees of wife as necessary parties**

The trustee in a deed of trust and the grantee in a deed to whom a wife conveyed entirety property were necessary parties in an action for partition brought by the wife as a tenant in common after she obtained a divorce from the husband, since unasserted estoppel rights of the trustee and grantee against the wife could be extinguished by the partition sale and could affect the price received at the sale.

APPEAL by respondent from *Griffin, Judge.* Judgment entered 7 February 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 2 February 1978.

Meachem v. Boyce

Special proceeding wherein Mable A. Meachem filed a petition for partition and sale of a certain tract of land located in Charlotte, North Carolina, and allegedly owned by the parties as tenants in common. On 21 June 1976 the Assistant Clerk of Superior Court entered judgment for petitioner. The respondent appealed to the Superior Court. At the hearing in Superior Court the respondent filed a motion seeking joinder of Otto D. Grier, North Carolina National Bank, and Carl W. Howard, trustee, as necessary parties pursuant to Rule 19(a) of the North Carolina Rules of Civil Procedure. At the conclusion of the hearing the court made the following pertinent findings of fact:

The respondent and petitioner were formerly husband and wife. By deed dated 2 November 1973 the tract of land involved in this controversy was conveyed to them as tenants by the entirety. On 10 April 1975 the petitioner executed a deed of trust which was duly recorded purportedly conveying the land to Carl W. Howard as trustee for North Carolina National Bank to secure a loan to petitioner of $7,915.20. On 9 October 1975 petitioner executed a deed which was duly recorded purportedly conveying the same land in fee simple to Otto D. Grier for which Grier paid $3,500.00 and assumed two mortgages on the property. Thereafter, respondent instituted suit against Grier to obtain possession of the property and to recover rent for Grier's occupation of the premises. Judgment was entered in the prior suit on 13 February 1976 in which the deed purportedly conveying the property to Grier was declared void. Grier was ordered to vacate the premises and to pay rent for the period of occupation. On 10 May 1976 the petitioner obtained an absolute divorce from respondent.

On the basis of the facts found, the Superior Court concluded that the parties to this action are tenants in common of the subject property; that the prior judgment declaring the deed between petitioner and Otto D. Grier void is binding on the Superior Court in the present action "and therefore said deed has no legal effect in these proceedings," and the petitioner and respondent "are the only parties having a legal interest in the premises"; that petitioner is entitled to partition, but that since an actual partition would result in injury to the parties, a sale of the property is necessary; and "that since the parties hereto are

now tenants in common in the aforesaid property the Deed of Trust executed by . . . [petitioner] to the North Carolina National Bank has ripened into a valid lien by estoppel as to the interest of . . . [petitioner] in the aforesaid property." The court then ordered that the property be sold and the proceeds be divided equally between petitioner and respondent, and that North Carolina National Bank have a lien on petitioner's share of the proceeds to the extent of the unpaid balance on the deed of trust; and that the respondent's motion for joinder of necessary parties be denied. Respondent appealed.

Rose & Bosworth, by William S. Rose, Jr. for petitioner appellee.

Tucker, Moon and Hodge, by Travis W. Moon, for respondent appellant.

HEDRICK, Judge.

Respondent, in his first, second and fourth assignments of error, challenges the trial court's findings of fact and conclusions that petitioner owns an interest in the property and is entitled to a sale in lieu of partition, G.S. 46-22. Specifially, respondent argues that by established principles of estoppel petitioner's interest in the subject property inured to the benefit of Otto D. Grier upon her divorce from respondent. Petitioner contends that the prior judgment of District Court, declaring the deed from petitioner to Otto D. Grier to be void, extinguished any right of estoppel which Grier might have asserted; and therefore, the trial court was correct in concluding that petitioner is a tenant in common of the property.

[1] A well-known axiom of common law is that property owned by a husband and wife as tenants by the entirety cannot be conveyed or encumbered without the joinder of both spouses. Webster, Real Estate Law in North Carolina § 114 (1971). It is also established law that a grantor who is unable to convey a valid title to property at the time of conveyance is estopped from denying the validity of the deed when he subsequently acquires the right to convey it. *Morrell v. Building Management*, 241 N.C. 264, 84 S.E. 2d 910 (1954). Thus, during coverture a spouse is not estopped from denying the validity of a purported conveyance of

tenancy by the entirety property in which the other spouse failed to join. *Harrell v. Powell*, 251 N.C. 636, 112 S.E. 2d 81 (1960). However, when the "restriction [of coverture] is removed by death or divorce" estoppel principles are triggered. *Harrell v. Powell, supra* at 640, 112 S.E. 2d at 84. *See also Council v. Pitt*, 272 N.C. 222, 158 S.E. 2d 34 (1967). In *Harrell v. Powell, supra* at 641, 112 S.E. 2d at 85, the rule was stated as follows: "[W]e see no reason why the principles of estoppel should not apply to the wife . . . with respect to an estate by the entirety, where she has conveyed to a third party during coverture without the joinder of her husband and has survived the husband. After the death of the husband all disabilities are removed and she is a *feme sole* for all purposes and bound by her contracts." Nothing else considered, in the present case, upon the divorce of the respondent, the petitioner would be estopped from denying her coveyances to Carl W. Howard, trustee for North Carolina National Bank, and to Otto D. Grier.

[2] The trial court held and the petitioner contends that the judgment in the case of *Melvin H. Boyce v. Otto D. Grier* (No. 75CVD8979) precludes the application of estoppel principles. In that judgment which was entered on 13 February 1976 the court concluded that "[t]he deed from Mabel [sic] A. Boyce to the defendant [Otto D. Grier] recorded in Book 3793 at page 447 in the Mecklenburg Public Registry is void by reason of the failure of the plaintiff herein [respondent] to adjoin [sic] in the execution thereof." North Carolina case law seems to support the trial court's conclusion in the previous judgment that the deed was "void." Our Supreme Court has repeatedly referred to deeds purportedly conveying the separate property of the wife without the written assent of the husband as "void" deeds. *See Buford v. Mochy*, 224 N.C. 235, 29 S.E. 2d 729 (1944); *Harrell v. Powell, supra.* In *Harrell* the Court pointed out an analogy between such deeds and those conveying tenancy by the entirety property without joinder of a spouse: "[T]he disability of the wife is substantially the same in the two situations. In estates by the entirety the husband has the same disability . . . as the wife." *Harrell v. Powell, supra* at 640, 112 S.E. 2d at 84. In each case while the deed was described as "void," it was held sufficient to establish a valid contract to convey. An important distinction is noted in 28 Am. Jur. 2d, *Estoppel and Waiver*, § 8, p. 605, as follows:

> A distinction seems to exist, however, between deeds which are absolutely void because of an inherent and enduring illegality and those which are "invalid" in the sense that some defect renders them inoperative as deeds. A deed which is invalid in the sense that it is inoperative may nevertheless under some circumstances be held operative as a contract, and, where the invalidity arose from an inability under the law to convey in the attempted capacity, may be held to estop the grantor from setting up an after-acquired title to the premises that were previously attempted to be conveyed.

This terminology was employed by our Supreme Court in *Cruthis v. Steele*, 259 N.C. 701, 703, 131 S.E. 2d 344, 346 (1963), where it is stated that "a deed which is invalid in the sense that it is inoperative may nevertheless under some circumstances be held operative as a contract." In any event, we think that the trial judge's conclusion in the judgment in the previous case between respondent and Grier, merely determined the rights of the parties to that action at that point in time, and as such, was not addressed to Grier's inchoate rights of estoppel. According to that judgment, the deed was *inoperative* to convey the property to Grier and to affect the rights of respondent as a tenant by the entirety who had not joined in the conveyance. Viewed in this light, the judgment declaring the deed "void" has no legal effect on Grier's rights of estoppel which were triggered upon the divorce of respondent and appellant.

[3] It is clear, then, that any rights accruing to Grier from the deed from petitioner conveying the subject property remain intact. The question which emerges from the foregoing analysis is whether the petitioner lost any right, title and interest in the subject property by the application of estoppel when she obtained a divorce from respondent. The rationale underlying estoppel has been articulated as follows:

> The purported deed is a contract to convey, and while the husband is alive the obligation of the contract can be enforced only by an action for damages—the reason being that the court cannot require specific performance because it cannot compel the husband to give his written assent. After the death of the husband the obstacle to specific performance is removed, and equity will declare the contract effective as a

> deed under the maxim "equity regards as done that which ought to be done."

Cruthis v. Steele, supra at 703, 131 S.E. 2d at 346. *See also Harrell v. Powell, supra.* Thus, in order to establish a right to estoppel the grantee of the prior defective conveyance must establish that the essential ingredients of a contract were present. *Cruthis v. Steele, supra.* Assuming that he could do so, he would then be entitled to specific performance of the contract founded on the deed. However, the first grantee's rights of estoppel cannot defeat the rights of a purchaser for value who has acquired title through a valid conveyance and recorded it prior to the first grantee's assertion of his rights of estoppel. *Door Co. v. Joyner*, 182 N.C. 518, 109 S.E. 259 (1921); Webster, Real Estate Law in North Carolina § 202 (1971). *Accord, Tunney v. Champion*, 91 N.J. Super. 27, 218 A. 2d 899 (1966).

[4] We are in agreement with petitioner that her interest in the land is unaffected by Grier's unasserted right of estoppel. Therefore, as a tenant in common in the subject property she was entitled to bring this proceeding for partition. However, respondent also assigns as error the denial of his motion for joinder of Otto D. Grier, North Carolina National Bank, and Carl W. Howard, trustee, as parties to the proceeding.

The law regarding joinder of necessary parties under Rule 19(a) has been stated as follows:

> The term "necessary parties" embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy. [Citation omitted.] A sound criterion for deciding whether particular persons must be joined in litigation between others appears in this definition: Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties of the suit can be determined. [Citation omitted.]

Assurance Society v. Basnight, 234 N.C. 347, 352, 67 S.E. 2d 390, 394-5 (1951); *Wall v. Sneed*, 13 N.C. App. 719, 724, 187 S.E. 2d 454, 457 (1972). In short, the interest, if any, which Grier could claim in the subject property flows from the deed which may or may not be enforceable as a contract to convey. This interest is personal

to Grier and cannot be asserted by the respondent. Left unasserted, his right could be extinguished by the partition sale ordered by the trial court. On the other hand, Grier's unasserted right, if any, could affect the amount which a prospective purchaser would be willing to pay at a partition sale. In that event those entitled to the proceeds could be adversely affected by Grier's absence in the proceeding. Thus, we are compelled to conclude that Grier's presence in this proceeding is not only desirable but necessary in order to avoid prejudice and finally determine the rights of the parties to this proceeding.

What has heretofore been said with respect to Grier as the grantee of the deed from petitioner is also applicable to Howard as trustee on the deed of trust securing the indebtedness of petitioner to North Carolina National Bank. Thus, it is also necessary that Howard, as trustee, and North Carolina National Bank be made parties to this proceeding.

For the reasons stated, the judgment appealed from is vacated and the cause is remanded to the Superior Court for the entry of an order joining all necessary parties to this proceeding, and for further proceedings to determine the rights of all parties.

Vacated and remanded.

Judges BRITT and WEBB concur.

STATE OF NORTH CAROLINA v. JAMES A. BETHEA

No. 7714SC796

(Filed 7 March 1978)

1. **Criminal Law § 84; Narcotics § 3.1— drug rehabilitation program—evidence from informant—violation of federal regulations—suppression not required**

Although officers may have violated federal regulations prohibiting the retention of informants by law enforcement officers in federally assisted drug treatment programs when they used an outpatient at a drug rehabilitation center to purchase methadone from another outpatient while on the premises of the treatment center, suppression of the evidence thereby obtained was not required since the purpose of the regulations is to insure the confidentiality of the records of patients in the drug treatment programs, and evidence obtained

by the use of an informant in this case did not include any confidential records of the defendant. 21 U.S.C. 1175; 42 C.F.R. § 2.19(b).

2. Criminal Law § 81— best evidence rule—collateral matter

In this prosecution for possession with intent to sell and sale of the controlled substance methadone, the best evidence rule was not violated by an officer's testimony describing the label on the bottle containing the methadone which bore defendant's name and the name of a doctor, since the officer's testimony, in conjunction with the doctor's testimony, tended to explain how defendant came into possession of the methadone and was only collateral to the primary issues of defendant's possession and sale of the drug.

APPEAL by defendant from *McKinnon, Judge*. Judgment entered 2 June 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 31 January 1978.

Defendant was charged in a two-count bill of indictment, proper in form, with possession with intent to sell and deliver, and sale and delivery of a controlled substance, to wit: methadone. Upon the defendant's plea of not guilty to each charge, the State offered evidence tending to show the following:

John Prillaman is an undercover narcotics investigator for the State Bureau of Investigation. During the summer of 1976 Prillaman was assigned to Durham County. On 14 July 1976 Prillaman met David Gillis at the Durham Drug Rehabilitation Center to purchase some drugs. Gillis informed Prillaman that the defendant who was standing nearby had some methadone in his possession. At Prillaman's request Gillis approached the defendant, and a short time later Prillaman saw the defendant deposit a bottle containing orange liquid in Gillis' pocket. Immediately thereafter Prillaman saw Gillis hand the defendant some money. Gillis then joined Prillaman and told him that because the defendant had insisted upon the return of his bottle, it would be necessary to transfer the liquid to another container. Prillaman and Gillis then poured the liquid from the defendant's bottle into a bottle which they found in Gillis' car. The bottle was later turned over to a chemist of the State Bureau of Investigation. The liquid was analyzed and found to be methadone. The defendant was arrested on 21 September 1976.

The defendant offered evidence tending to show the following: During the summer of 1976 the defendant and Gillis were both out-patients at the drug rehabilitation center and both were

receiving methadone treatments. On 14 July 1976 the defendant walked outside after receiving his prescribed dosage of methadone and was approached by Gillis. Gillis, who had attempted to sell drugs to defendant on prior occasions, proposed that the defendant sell his methadone. The defendant refused to do so and took the methadone home with him.

The jury found the defendant guilty of each charge. From a judgment imposing a sentence of 4 years imprisonment, defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Alan S. Hirsch, for the State.

Jordan & Harkins, by Randall A. Jordan and Harry H. Harkins, Jr., for the defendant appellant.

HEDRICK, Judge.

[1] In his first assignment of error defendant contends that the trial court erred in denying his motion to suppress the evidence pertaining to the sale of methadone. He argues that the evidence was obtained in violation of the Drug Abuse Office and Treatment Act of 1972, 21 U.S.C. 1101, *et seq.* The pertinent statute, 21 U.S.C. 1175, provides as follows:

> *Confidentiality of patient records*
>
> (a) Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e), be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.
>
> . . .
>
> (c) Except as authorized by a court order granted under subsection (b)(2)(C) of this section, no record referred to in subsection (a) may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient.

. . .

(f) Any person who violates any provision of this section or any regulation issued pursuant to this section shall be fined not more than $500 in the case of a first offense, and not more than $5,000 in the case of each subsequent offense.

The regulations promulgated by the Secretary of Health, Education and Welfare pursuant to the authority conferred by 21 U.S.C. 1175(g) expressly prohibit the retention of informants by law enforcement officers in a drug treatment program. 42 C.F.R. § 2.19(b).

In the present case the parties stipulated to the following facts:

[T]hat . . . [the alleged sale] took place on the grounds of the Durham Drug Rehabilitation Center; that the agents of the State Bureau of Investigation were on the grounds of the Drug Rehabilitation Center; that these agents retained one David Gillis to set up this alleged sale with the defendant in this case, Mr. James Bethea.

That Mr. Gillis entered into a transaction with Mr. Bethea and that Mr. Gillis then reported back to the agents of the S.B.I. concerning information that stemmed from this transaction; the agents were on the grounds of the facility.

The defendant argues that these facts reflect a clear violation of the above regulations, and thus the evidence obtained therefrom must be excluded in order to further the objectives of the statute. Assuming *arguendo* that the retention of Gillis by S.B.I. agents to engage the defendant in a sale of methadone was a violation of the cited regulations, we are of the opinion that the evidence was properly admitted.

In *Armenta v. Superior Court of Santa Barbara County*, 61 Cal. App. 3d 584, 132 Cal. Rptr. 586 (1976), the same argument was urged by a defendant in a similar factual setting. The California court after finding a violation of the regulation thoroughly explored the legislative history of 21 U.S.C. 1175. The court then reasoned that the primary concern of Congress as reflected in the statute itself and the regulations thereunder was to insure the confidentiality of records maintained in federally-funded drug

treatment programs. The regulation proscribing the use of informants was predicated on the premise that the most effective means of blocking access to confidential records was to prohibit the use of such informants altogether. It follows that the regulation is only secondarily concerned with direct transactions between a patient and an informant in which a confidential record is not a part. The court concluded that only confidential records obtained in violation of 21 U.S.C. 1175 were intended to be subject to exclusion. Enforcement of the ban against the use of informants can better be accomplished by the means provided in 21 U.S.C. 1175(f).

We find ourselves in total agreement with the reasoning of the California court in *Armenta.* Since the evidence obtained by the use of informants in the present case did not include any confidential records of the defendant, we hold that the trial court properly denied the defendant's motion to suppress.

[2] The defendant also contends that the trial court's admission of testimony describing the label on the bottle containing the orange liquid violated the best evidence rule. The State witness, S.B.I. Agent Prillaman, testified on direct examination that he "observed the defendant place a plastic bottle, sort of off-white in color, containing an orange liquid, into the rear pants pocket of Gillis"; that after handing defendant some money, Gillis joined Prillaman and told him that the defendant needed his bottle; and that the two men went to Gillis' car to transfer the liquid to another bottle. Prillaman was permitted to testify over the defendant's objection that a label on the bottle which Gillis had given him provided "the name, 'Bethea,' . . . 'James,' the date, 7-14-76; underneath that was 'Dr. Rader.' " Dr. Rader, a defense witness, was permitted to testify over the defendant's objection on cross examination that a bottle with the above described label "would indicate a take-home bottle of methadone" prescribed to the named patient.

The best evidence rule requires a party seeking to prove the contents of a writing to produce the writing itself or to excuse its nonproduction. 2 Stansbury's North Carolina Evidence § 190, at 99 (Brandis Rev. 1973). However, the rule is inapplicable when a writing is only collaterally involved in the case. 2 Stansbury's North Carolina Evidence § 191 (Brandis Rev. 1973).

The defendant cites our decision in *State v. Anderson*, 5 N.C. App. 614, 169 S.E. 2d 38 (1969), *on retrial*, 9 N.C. App. 146, 175 S.E. 2d 729 (1970), as authority for his position. In that case according to the State's evidence the defendant had abducted the prosecutrix and her child companion and had handed a note to the prosecutrix which read: "Keep quiet, don't say anything to the child. Give me what I want or I'll kill you." The defendant was charged with assault with intent to commit rape, and at trial the State, without producing the note itself, was allowed to prove its contents by parol testimony. Reasoning that "[t]he contents of the note were a vital part of the State's evidence in showing the intent of defendant," this Court held that the best evidence rule was applicable and that the defendant was entitled to a new trial. *State v. Anderson, supra* at 616, 169 S.E. 2d at 40.

In the present case Agent Prillaman saw the defendant place a bottle containing orange liquid in Gillis' pocket. Soon thereafter in Gillis' car he saw the same bottle and read the label affixed on it. Prillaman's testimony describing the label bearing defendant's name in conjunction with Dr. Rader's testimony explaining the effect of such a label tended to explain how the defendant came into possession of the methadone. It is our opinion that such evidence was collateral to the primary issues of defendant's possession and sale of the drug. *In re Potts*, 14 N.C. App. 387, 188 S.E. 2d 643 (1972), *cert. denied*, 281 N.C. 622, 190 S.E. 2d 471 (1972). In this regard we think *Anderson* is clearly distinguishable. We hold that the best evidence rule is not applicable to the evidence offered by the State and allowed by the trial court.

The defendant received a fair trial free from prejudicial error.

No error.

Judges BRITT and WEBB concur.

PAUL O. PERRY, EMPLOYEE, PLAINTIFF v. HIBRITEN FURNITURE COMPANY, EMPLOYER; LIBERTY MUTUAL INSURANCE CO., CARRIER; DEFENDANTS

No. 7724IC279

(Filed 7 March 1978)

1. **Master and Servant § 69— workmen's compensation—finding as to maximum recovery—sufficiency of evidence**

The Industrial Commission did not err in finding that plaintiff had reached maximum recovery on a specified date, though there was evidence that plaintiff was still suffering pain in his back and legs, that his doctor recommended further treatment to relieve the pain, and that another doctor was of the opinion that further surgery *might* help reduce pain, since it was the opinion of both doctors that after an adequate healing period plaintiff's condition had stabilized by the specified date.

2. **Master and Servant § 72— partial disability—no consideration of loss of wage-earning power**

Plaintiff's contention that the Industrial Commission erred in finding that he had a 50% permanent partial disability of the back because all the evidence established that plaintiff was unable to perform any common labor and because the true measure of disability is not the degree of physical impairment but the degree by which ability to earn wages has been diminished is without merit, since, under G.S. 97-31, a disability is made compensable without regard to the loss of wage-earning power and in lieu of all other compensation.

APPEAL by plaintiff from order of North Carolina Industrial Commission entered 20 December 1976. Heard in the Court of Appeals 1 February 1978.

Plaintiff received a back injury while working for defendant-employer. The Industrial Commission held the injury compensable and directed payment of compensation to plaintiff for temporary total disability until such time as it might be determined that plaintiff had reached maximum improvement or until the end of the healing period. At the hearing before Deputy Commissioner Shuford to determine permanent disability and the rate of compensation, plaintiff's testimony tended to show that he had an eighth grade education, leaving school to work as a common laborer, and beginning work for defendant-employer eight years before the accident on 17 April 1973. As a result of the accident, he constantly had pain in his back and legs and could not lift any weight. Medical testimony tended to show that Dr. Ted Walker performed an operation for ruptured discs in August 1975. (Plain-

tiff had his first spinal operation in January 1974, by a Dr. Williams, who did not appear as a witness.) It was his opinion that plaintiff reached maximum improvement in January or March 1976; that plaintiff had 75% loss of use of his back and 50% partial permanent disability. Dr. McBryde examined plaintiff on 20 February 1976; it was his opinion that plaintiff had permanent partial disability within the range of 25% to 35%, that he could never do any hard work. It was also his opinion that surgery "might, perhaps, be of some benefit in reducing the level of pain." Dr. D. G. Joyce testified that he examined plaintiff on 24 March 1976 and found that maximum improvement had been reached on that date, that plaintiff had a permanent partial disability of 35% of the back and that plaintiff would be unable to do any strenuous physical activity. It was his opinion that plaintiff had poor results from the two lumbar laminectomies in that there were bony encroachments.

The Deputy Commissioner found that plaintiff reached maximum improvement on 25 March 1976 and that he had a fifty percent permanent partial disability of his back. The Commissioner concluded that the 50% partial permanent disability was compensable at the rate of $56.00 per week for a period of 150 weeks beginning 25 March 1976, pursuant to G.S. 97-31(23) and awarded same to plaintiff, along with additional amounts to cover uncompensated medical expenses and attorney's fees. Plaintiff appealed to the Full Commission which affirmed the Deputy Commissioner. Plaintiff appeals.

Finger, Watson & Di Santi by C. Banks Finger and Anthony S. Di Santi for plaintiff appellant.

Hedrick, Parham, Helms, Kellam & Feerick by Edward L. Eatman, Jr. for defendant appellees.

CLARK, Judge.

The plaintiff has grouped his assignments of error into two arguments: that the Commission erred in finding as fact that, first, plaintiff reached maximum improvement on 25 March 1976, and, second, plaintiff had a 50% permanent partial disability of the back.

[1] The argument that plaintiff had not reached maximum improvement on 25 March 1976 is based on the medical evidence that on that date he was suffering pain in the back and legs, that Dr. Waller (the treating orthopedist) recommended "further treatment for the purpose to attempt to relieve him of his leg pain," and that Dr. McBryde (the consulting orthopedist) was of the opinion that surgery *might* help reduce pain. Plaintiff contends that this evidence establishes that the healing period had not reached a point of stabilization because there was still the possibility of improvement with further treatment or another operation. A recent decision of this Court, in a case with factual circumstances somewhat similar to the case before us, defined "healing period" as follows:

> "The healing period, within the meaning of G.S. 97-31, is the time when the claimant is unable to work because of his injury, is submitting to treatment, which may include an operation or operations, or is convalescing. . . . This period of temporary total disability contemplates that eventually there will be either complete recovery, or an impaired bodily condition which is stabilized. . . . When the claimant has an operation to correct or improve the impairment resulting from his injury, the healing period continues after recovery from the operation until he reaches maximum recovery. The healing period continues until, after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established. . . ." *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 288, 229 S.E. 2d 325, 328 (1976).

It is noted that Dr. Waller did not specify the treatment which would relieve pain, and that Dr. McBryde felt that further surgery *might* reduce pain, but it was the opinion of both physicians that after an adequate healing period the claimant's condition had stabilized by 25 March 1976. It is further noted that though Dr. Joyce, defendants' witness, felt something should be considered to relieve claimant's pain, he didn't have anything to offer. The *Crawley* case and the case *sub judice* are factually similar in that both claimants sustained back injuries, had spinal operations, continued to have pain after stabilization following the healing period, and there was medical opinion that another operation could *possibly* alleviate pain. It is significant, first, that the improvement was *possible* with another operation, and, second,

that plaintiff rejected another operation. In view of the mere possibility that another (third) operation would improve his condition, the plaintiff was fully justified in his rejection, but having so elected he is not in position to argue convincingly that he has not reached maximum improvement. Nor is maximum recovery deferred by plaintiff's inability to return to his prior occupation. We find no error in the Commission's finding that maximum recovery was reached on 25 March 1976, it being supported by competent evidence.

[2] Plaintiff's argument that the Commission erred in finding that he has a 50% permanent partial disability of the back is based on the contention that all the evidence establishes that claimant is unable to perform any common labor, and that the true measure of disability is not the degree of physical impairment but the degree by which ability to earn wages has been diminished. Plaintiff's argument has some support in the Georgia cases on which he relies, but in this State G.S. 97-31 sets out a strict and exclusive compensation scheme, and G.S. 97-31(23), relating to back injury, provides:

> "For the total loss of use of the back, sixty-six and two-thirds percent (66 2/3%) of the average weekly wages during 300 weeks. The compensation for partial loss of use of the back shall be such proportion of the periods of payment herein provided for total loss as such partial loss bears to total loss, except that in cases where there is seventy-five per centum (75%) or more loss of use of the back, in which event the injured employee shall be deemed to have suffered 'total industrial disability' and compensated as for total loss of use of the back."

Though "disability" signifies an impairment of wage-earning capacity rather than a physical impairment [G.S. 97-2(9)], this signification does not establish impairment of wage-earning capacity as the measure of compensation. *Loflin v. Loflin*, 13 N.C. App. 574, 186 S.E. 2d 660, *cert. den.* 281 N.C. 154, 187 S.E. 2d 585 (1972). Under G.S. 97-31 a disability is deemed to continue after the healing period of employee's injuries and is made compensable without regard to the loss of wage-earning power and in lieu of all other compensation. The opinions of the three orthopedist witnesses varied from 35% to 50% permanent partial

disability, though the treating physician did testify that there was a 75% physical loss of use of the back. The Commission's finding of 50% partial permanent disability of the back is supported by competent evidence, and we find no error.

The order appealed from is

Affirmed.

Judges VAUGHN and ERWIN concur.

STATE OF NORTH CAROLINA v. RONALD L. SUMMERLIN

No. 778SC750

(Filed 7 March 1978)

1. **Searches and Seizures § 11— warrantless search of vehicle**

A warrantless search of a vehicle capable of movement out of the location or jurisdiction may be conducted by officers when they have probable cause to search and exigent circumstances make it impracticable to secure a search warrant.

2. **Searches and Seizures § 11— warrantless search of vehicle—probable cause—exigent circumstances**

Air Force security policemen had probable cause to search defendant's car for marijuana where defendant, a civilian, offered to sell marijuana to an off-duty security policeman on the air base and showed him marijuana in defendant's car, and the off-duty policeman relayed this information in detail to the officers who conducted the search, and exigent circumstances justified a search of defendant's car without a warrant since defendant most certainly would have attempted to flee the boundaries of the base and to destroy the marijuana if he discovered that he was being observed by base authorities.

APPEAL by defendant from *Browning, Judge.* Judgment entered 17 May 1977 in Superior Court, WAYNE County. Heard in the Court of Appeals 18 January 1978.

Defendant was indicted for felonious possession of marijuana. Prior to his arraignment, defendant moved to suppress evidence obtained from a search of his automobile. At this time, a voir dire hearing was held, and the undisputed material facts elicited from the State's witnesses tended to show the following:

On 13 December 1976, Airman Metz, an off-duty member of the Air Force Security Police at Seymour Johnson Air Force Base, was approached by defendant at a recreation center on the base. Defendant asked Metz if he would like to buy "an ounce". Metz replied in the negative, and defendant repeated the question, to which Metz replied yes, but that he would have to call a friend to get the money. Metz asked to inspect that which defendant proposed to sell to him. Defendant took Metz to his car at the rear of the recreation center and the two of them got into the front seat. Defendant showed Metz a large white baggie containing four or five ounces of marijuana in separate, smaller plastic bags. Metz told defendant "he had a deal" and that he (Metz) would have to go and call his friend to get some money. Metz and defendant returned to the recreation center.

Metz next contacted the security desk and talked to an Airman Steinour, relating to him these occurrences. The information was relayed by Steinour to Security Policeman Doherty. Sgt. Doherty went to the recreation center and met with Metz who again related the details and pointed out the defendant to Sgt. Doherty. Sgt. Doherty then went outside to defendant's car and looked through the back window, seeing a blue denim jacket on the back seat. Sgt. Doherty contacted Sgt. Forsythe, a Security Police Investigator, met him outside of the recreation center, and related the details of the situation to him. Sgt. Forsythe went inside the recreation center and contacted Metz, who again related the details of the case. Sgt. Forsythe then telephoned the base commander, Col. Brimm, explained to him the situation, and requested authorization to search defendant's vehicle. Col. Brimm gave verbal authorization for the search at that time.

At some point thereafter, Metz returned with defendant to the car, at which time Sgt. Forsythe and Sgt. Doherty approached the car, told defendant they had an authorization from the base commander to search the car, and proceeded to conduct the search. They removed the denim jacket and found therein the white plastic bag containing the marijuana.

Later in the evening following the search, Sgt. Forsythe caused to be prepared a written authorization to search defendant's vehicle, which was signed the next morning by Col. Brimm.

Certain Air Force Regulations governing search and seizure were tendered by the State for the court's consideration on voir dire.

Defendant presented no evidence at the hearing. At the close of the State's evidence, the trial court made findings of fact, concluded that "the search, pursuant to Air Force Regulations, was not unreasonable and is constitutionally permissible under the Fourth Amendment of the Constitution of the United States and the Constitution of the State of North Carolina" and that "the search does not violate the general statutes of North Carolina in that the general statutes permit constitutionally permissible searches and seizures under North Carolina General Statute 15A-231." The trial court therefore denied defendant's motion to suppress. Defendant elected to enter a plea of guilty to the charge contained in the indictment and to appeal from the denial of his motion to suppress, pursuant to G.S. 15A-979(b).

Attorney General Edmisten, by Assistant Attorney General Acie L. Ward, for the State.

Hulse and Hulse, by Herbert B. Hulse, for defendant appellant.

MORRIS, Judge.

As a preliminary matter, we note that the record does not indicate that defendant's pretrial motion to suppress was made in writing and served upon the State, as required by G.S. 15A-977. This omission was not raised by the State at the hearing in superior court or before this Court and no question with respect to it is before us. We simply take this opportunity to call to the attention of the practicing bar the procedural requirements of the Criminal Procedure Act. G.S. Chapter 15A.

Defendant brings forth three assignments of error in a single argument, to wit: that the search of defendant's car was unconstitutional and in contravention of the North Carolina General Statutes in that the verbal authorization to search issued by the base commander was based upon unsworn and hearsay information, thus the search was conducted without a valid search warrant; and that there were no exigent circumstances to justify a warrantless search of defendant's automobile. We disagree.

For the purposes of this opinion, we will consider the search in question to have been a warrantless search, since no warrant was issued by anyone authorized to issue warrants under G.S. 15A-243. We need not consider whether there was a proper warrant issued by military authorities for a search by military personnel of a vehicle on a military base.

G.S. 15A-231 provides as follows:

> "Constitutionally permissible searches and seizures which are not regulated by the General Statutes of North Carolina are not prohibited."

Warrantless searches of automobiles and seizures of contraband therefrom without consent are not *per se* regulated by the North Carolina General Statutes. If the warrantless search and seizure in the instant case was constitutionally permissible, it must necessarily pass muster under G.S. 15A-231.

[1] No citation is necessary for the well-recognized principle that, as a general rule, a valid search warrant must accompany every search or seizure. However, there are several exceptions to this general rule. One such exception, applicable to this case, is that a warrantless search of a vehicle capable of movement out of the location or jurisdiction may be conducted by officers when they have probable cause to search and exigent circumstances make it impracticable to secure a search warrant. *Carroll v. U.S.*, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280, 39 A.L.R. 790 (1925); *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975, *reh. den.* 400 U.S. 856, 27 L.Ed. 2d 94, 91 S.Ct. 23 (1970); *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973).

[2] Defendant argues that there were no exigent circumstances sufficient to justify a warrantless search of his automobile in that the Security Policemen on the scene had no reason to believe defendant was about to drive the car away, and the opportunity to search was not fleeting. Defendant argues that the instant case is governed by *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022, *reh. den.* 404 U.S. 874, 30 L.Ed. 2d 120, 92 S.Ct. 26 (1971). *Coolidge*, however, is distinguishable. In that case, the defendant, Coolidge, knew that he was a suspect, had been cooperative with police during the investigation, and had had ample opportunity to destroy any incriminating evidence

in his car. There was no suggestion that, on the night of the search, the car was being used for any illegal purpose, and it was regularly parked in defendant's driveway. There was no indication that Coolidge meant to flee. Also, the objects sought by police were neither stolen nor contraband nor dangerous. On these facts, the Court felt that the opportunity to search was hardly "fleeting".

In the instant case, common sense dictates that defendant, a civilian at what was evidently a public area on a military base, would have attempted to flee the boundaries of the base had he realized that he was being observed by base authorities. Assuming the existence of probable cause, the object of the search was contraband and the car was being used for an illegal purpose at the time of the search. Given the opportunity, defendant most certainly would have attempted to destroy the marijuana. Given all of these circumstances, we hold that, due to the exigent circumstances, the warrantless search and seizure in question was not unreasonable if based on probable cause.

Defendant does not attempt to argue that probable cause to search was lacking in this case. The crime, possession of marijuana, was committed in the presence of a Security Policeman, Metz, who had received training in the recognition of marijuana. Metz relayed in detail his observations to his superiors. This information, which was the basis for the search conducted by them, clearly constituted probable cause for the search and seizure.

The trial judge correctly denied defendant's motion to suppress.

Affirmed.

Judges CLARK and MITCHELL concur.

LISA J. MATTHEWS, BY HER GUARDIAN AD LITEM, RUTH S. BRALLEY v. DALE RAY LINEBERRY AND DELMAR R. LINEBERRY

No. 7723SC211

(Filed 7 March 1978)

1. **Damages § 17— absence from school—taking course over—instructions proper**

In an action to recover for personal injuries sustained by plaintiff in an automobile accident, the trial court did not err in instructing the jury that it could consider plaintiff's loss of time from school and repeating a school course in physical education in determining damages.

2. **Damages § 17— jury instructions—maximum and minimum amount stated—no prejudice**

In an action to recover for personal injuries sustained by plaintiff in an automobile accident, defendants were not prejudiced by the trial court's instruction to the jury that they could find the amount of damages to be anywhere from one cent to twenty thousand dollars, since the jury awarded plaintiff damages of only $3500 and the jury's verdict was fully supported by the evidence.

3. **Appeal and Error § 38— conference to settle record on appeal—issue not before court on appeal**

Defendants' contention that the trial court erred in instructing on the quantum of proof required by inadvertently interchanging the words "quantity" and "quality" was not before the court on appeal, since that issue was determined adversely to defendants by the trial court at the conference to settle the record on appeal.

APPEAL by defendants from *Seay, Judge*. Judgment entered 8 November 1976 in Superior Court, YADKIN County. Heard in the Court of Appeals 17 January 1978.

The plaintiff instituted this civil action on 13 February 1976, alleging that she had been injured in a collision while riding as a guest passenger in the automobile owned by the defendant, Delmar R. Lineberry, and being operated by his son, the defendant Dale Ray Lineberry. The plaintiff's injuries were alleged to have been caused by the negligence of the defendant, Dale Lineberry. The defendants filed an answer denying the allegations of negligence.

At the trial of the case, the jury returned a verdict in favor of the plaintiff in the amount of $3,500.00. From a judgment for the plaintiff, the defendants appealed.

Finger, Park & Parker, by M. Neil Finger, Daniel J. Park, and Raymond A. Parker, for the plaintiff appellee.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and William C. Raper, for the defendant appellants.

ERWIN, Judge.

The plaintiff's evidence presented at the trial tends to show that the minor plaintiff was attending school on the date of the accident, 7 September 1974, and was not able to go back to school for approximately 13 days after the accident, because she could not walk and stayed home in bed. The plaintiff was not able to participate in any physical education classes. "I couldn't do some of the activities." The plaintiff had pain in her knee, dropped her physical education classes for the year, and repeated them the following school year.

[1] In part, the trial court instructed the jury as follows with reference to damages:

> "Damages for personal injury include such amount as you find by the greater weight of the evidence is fair compensation to the Plaintiff for loss of her time from school, and for repeating the course in physical education; and, in determining this amount, you should consider the evidence as to the loss of her time from school, and that which would be involved in repeating the course in physical education."

The defendants contend that the trial court erred in instructing the jury that it could consider the plaintiff's loss of time from school and repeating a school course in physical education where there was no evidence of any monetary loss or other damages relating thereto, or that the court erred, in that, the charge complained of amounted to instructions on an abstract principle of law not supported by the evidence and was, therefore, prejudicial and erroneous.

We do not agree with the defendants' contentions. The assessment of damages must, to a large extent, be left to the good sense and fair judgment of the jury, subject, of course, to the discretionary power of the judge to set its verdict aside, when in his opinion equity and justice so require. *See Walston v.*

Greene, 246 N.C. 617, 99 S.E. 2d 805 (1957), followed in *Brown v. Moore*, 286 N.C. 664, 213 S.E. 2d 342 (1975).

25 C.J.S. Damages, § 28 pp. 684-691 states the following regarding uncertainty of damages:

> "The rule as to the recovery of uncertain damages generally has been directed against uncertainty as to fact or cause of damage rather than uncertainty as to measure or extent. In other words, the rule against uncertain or contingent damages applies only to such damages as are not the certain results of the wrong, and not to such as are the certain results but uncertain in amount.
>
> In many cases, although substantial damages are established, their amount is, in so far as susceptible of pecuniary admeasurement, either entirely uncertain or extremely difficult of ascertainment; in such cases plaintiff is not denied all right of recovery, and the amount is fixed by the court or by the jury in the exercise of a sound discretion under proper instructions from the court. This is particularly true of torts, especially those resulting in personal injuries; . . .
>
> So, in cases of tort, where there are elements of certainty as to a part only of the damages which have resulted, leaving it apparent that there are actual damages beyond what can be thus accurately measured, plaintiff's recovery is not limited to only as much as can be measured with certainty."

We feel the evidence presented was sufficient to remove the uncertainty, and the charge was proper upon such evidence.

[2] The trial court further instructed the jury:

> "If you answer this issue in any amount, you should award such damages as you find from the evidence and by the greater weight of the evidence is fair compensation for any damage the minor Plaintiff has sustained as a proximate result of the Defendant's negligence. That amount may be anywhere from one cent ($.01) to twenty thousand dollars ($20,000.00), just as you find the facts or the evidence to warrant, applying thereto the law as given to you by the Court."

The defendants contend that this portion of the charge was prejudicial, erroneous, and amounted to an impermissible comment on the evidence. In addition, the defendants contend that there was absolutely no evidence presented at the trial which established a basis for the portion of the charge relating to $20,000.00, and that portion of the charge tends to suggest to the jury that the sum of $20,000.00 was a proper award.

We note that $20,000.00 was the amount which plaintiff alleged in her complaint she was entitled to recover and was the amount for which she sought to recover judgment. If it be conceded that it was error for the judge to mention this figure in the charge, *Kuyrkendall v. Dept. Store*, 5 N.C. App. 200, 167 S.E. 2d 833 (1969), nevertheless in this case, there has been no showing that such error was sufficiently prejudicial to warrant awarding a new trial. The jury returned verdict for plaintiff for only $3,500.00, a fact which clearly indicates that the jury could not have been unduly influenced by the single reference which the judge made in his charge to the figure of $20,000.00. The burden was on the appellants not only to show error but to show that the alleged error was prejudicial. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967). This, the appellants have failed to do on the present record. Appellants have failed to narrate in the record all of the evidence bearing on the extent of the damages suffered by the plaintiff, but references made to this evidence in portions of the Court's charge to which no exception was taken would indicate that the jury's verdict was fully supported by the evidence. In our opinion, and we so hold, appellants have failed to demonstrate on this record that they suffered sufficiently prejudicial error from the Court's single reference in its charge to the sum of $20,000.00 to justify our awarding a new trial.

[3] The defendants contend that the trial court further instructed the jury as follows:

> "The greater weight of the evidence does not refer to the quality but to the quantity and the convincing force of the evidence. . . ."

The record also reveals that at the time the case was settled on appeal that the trial judge indicated to attorneys for the plaintiff and defendants that he had not inadvertently interchanged the words "quality" and "quantity" earlier in the charge. Neither

counsel for the plaintiff nor counsel for the defendants could recall that such error was made.

The record reveals the following:

> "At the conference to settle the record on appeal, the question arose as to whether or not the trial Judge, Judge Seay, had inadvertently interchanged the words, 'quality' and 'quantity' earlier in his charge in regards to the quantum of proof and as to whether or not he had been advised of same by the Court reporter. Judge Seay stated that he did not recall any such error or transposing, nor did Counsel for the Plaintiff nor Counsel for the Defendant.
>
> Further at the conference to settle the record on appeal, the Judge stated he did not transpose the words 'quality' and 'quantity' but defined the term greater weight of the evidence 'does not refer to the quantity but to the quality and the convincing force of the evidence, and it means you must be persuaded, considering all the evidence, that the necessary facts are more likely than not to exist.' "

We hold that this assignment of error has been settled by the trial court against the defendants, and therefore, it is not before us.

The judgment appealed from is

Affirmed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES TESENAIR

No. 7727SC872

(Filed 7 March 1978)

1. Indictment and Warrant § 12.2; False Pretense § 2— amendment of indictment—date of offense

The trial court did not err in ordering that an indictment for obtaining property by false pretense be amended to allege that the offense occurred on 18 November 1976 instead of 18 November 1977, a date subsequent to the

trial, since (1) time was not of the essence of the crime charged, and by virtue of G.S. 15-155 it was not necessary to correct the obvious clerical error in stating the time of the offense in the indictment, (2) the change effected no substantial alteration in the charge set forth in the indictment and therefore was not an amendment prohibited by G.S. 15A-923(e), and (3) neither the mistake in the date originally alleged nor its correction by the court hampered defendant in presenting his defense that he made no false representation.

2. False Pretense § 3.1— variance as to date of offense

There was no fatal variance between an indictment alleging an offense of obtaining property by false pretense occurred on 18 November and evidence that defendant opened an account by misrepresenting his identity on 14 October since (1) time was not of the essence of the offense charged, and (2) the evidence showed defendant received goods as a result of his false pretense on 14 October, 2 November and 18 November, one being the exact day alleged in the indictment.

3. False Pretense § 3.1— obtaining goods on credit by misrepresenting identity

The crime of obtaining property by means of a false pretense may be committed when one obtains goods on credit by a wilful misrepresentation of his identity, quite apart from any intention of the defendant ultimately to pay or not to pay.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 23 June 1977 in Superior Court, GASTON County. Heard in the Court of Appeals 8 February 1978.

Defendant was tried on his plea of not guilty to an indictment charging him with obtaining property by means of a false pretense, a violation of G.S. 14-100.

The State presented evidence to show: Defendant James Tesenair approached Frank L. Rhyne at Rhyne's Decorative Center, Inc., introducing himself as Boyce Tesenair. Defendant told Rhyne that he was going to establish a painting business and that he wanted to make arrangements for purchasing paint and supplies on credit. Rhyne then checked with the Credit Bureau and discovered that Boyce Tesenair had a good credit rating. Based upon that information, Rhyne permitted defendant to purchase paint and supplies on credit. Defendant received goods from Rhyne's Decorative Center on 14 October, 2 November, and 18 November 1976. Pursuant to defendant's instructions, bills for the merchandise were addressed to Tesenair Painting.

Boyce Tesenair is defendant's brother, and he testified that he did not give defendant permission to use his name to open the

charge account at Rhyne's Decorative Center. In fact, Boyce knew nothing about the matter until he received a phone call from either Mr. Rhyne or Mr. Rhyne's son informing him that he owed them some money.

Defendant testified, admitting he purchased the goods on credit and failed to pay for them, but denying he misrepresented his identity.

The jury found defendant guilty as charged. From judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Associate Attorney Lucien Capone III for the State.

Harris and Bumgardner by Don H. Bumgardner for defendant appellant.

PARKER, Judge.

[1] Defendant first assigned error to the court's action in ordering a correction made in the bill of indictment. The indictment was returned as a true bill on 2 May 1977. Defendant's trial took place on 23 June 1977. Early in the presentation of the State's evidence it was discovered that the indictment erroneously alleged that the offense occurred on 18 November 1977, a date subsequent to the trial. The district attorney called this mistake to the court's attention and informed the court that the correct date was 1976 rather than 1977. Thereupon the court ordered that the bill be amended to read 1976 instead of 1977. In this there was no error.

G.S. 15-155 contains the following:

> No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed . . . for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened . . . .

Here, time was not of the essence of the offense charged. By virtue of G.S. 15-155 it was not necessary to correct the obvious clerical error in stating the time of the offense in the bill of indictment. Although not necessary, the correction was, nevertheless, proper. The change effected no substantial alteration in the charge set forth in the indictment and therefore was not an amendment prohibited by G.S. 15A-923(e). *State v. Carrington*, 35 N.C. App. 53, 240 S.E. 2d 475 (1978). Defendant could not possibly have been prejudiced either by the mistake in the date as originally alleged in the indictment or by the court's action in ordering its correction. No statute of limitations was involved and defendant did not rely on an alibi. From his own testimony it is apparent that he was completely aware of the nature of the charge against him and the dates on which the transactions giving rise to the charge occurred. His defense was that he had never misrepresented his identity, and neither the mistake in the date alleged in the bill nor its correction by the court in any way hampered him in presenting that defense. *See State v. Hawkins*, 19 N.C. App. 674, 199 S.E. 2d 746 (1973); *State v. Lilley*, 3 N.C. App. 276, 164 S.E. 2d 498 (1968). Defendant's first assignment of error is overruled.

[2] Defendant next assigns error to the denial of his motion to dismiss made at the close of the evidence. In support of this assignment he first contends there was a fatal variance between the allegation in the indictment, whether as originally stated or as corrected, as to the time of the commission of the offense and the State's proof in that regard. He points out that the indictment alleged the offense occurred on 18 November, while the State's evidence showed the account was opened on 14 October. We find no fatal variance. As already pointed out, time was not of the essence of the offense charged. Moreover, the evidence showed that defendant received goods as a result of his false pretense on three separate occasions (14 October, 2 November and 18 November), one being the exact day of the month alleged in the indictment.

[3] Defendant's second contention in support of his assignment of error directed to the denial of his motion to dismiss is that there was insufficient evidence to show an intent on his part to defraud. He argues that at most the evidence shows no more than that he failed to fulfill a promise to pay in the future and that

there was insufficient evidence to show that when he obtained the goods he did not intend to pay for them. These arguments overlook the significance of the evidence that defendant obtained goods on credit by a deliberate misrepresentation of his identity. The crime of obtaining property by means of a false pretense is committed when one obtains a loan of money by falsely representing the nature of the security given, *State v. Roberts*, 189 N.C. 93, 126 S.E. 161 (1925), or by falsely representing that the property pledged as security is free from liens. *State v. Howley*, 220 N.C. 113, 16 S.E. 2d 705 (1941); *See* Annot., 24 A.L.R. 397 (1923), *supplemented in* 52 A.L.R. 1167 (1928). In *State v. Roberts, supra*, conviction was sustained even though there was evidence that a substantial portion of the loan had in fact been repaid, and, as a number of the cases noted in the above cited annotations point out, the crime is committed even though the borrower who obtained the loan by means of the false representation may have intended to repay and may even have honestly believed that he would be able to repay. In accord with the rationale of these cases, we hold that the crime of obtaining property by means of a false pretense may be committed when one obtains goods on credit by a wilful misrepresentation of his identity, quite apart from any intention of the defendant ultimately to pay or not to pay. Thus, even if defendant in this case intended to pay for the goods and had a reasonable belief in his ability to pay, the jury could nevertheless find that the requisite intent to defraud existed when he obtained goods on credit by means of the false pretense. The decision of a merchant to extend credit ordinarily turns upon his evaluation of the financial status and history of the applicant. A misrepresentation of identity of the credit applicant, such as that shown by the State's evidence in this case, deprives the merchant of his usual basis for making a rational decision as to the credit risk involved and may lead him to part with his goods in exchange for an unacceptable risk. Defendant's assignment of error directed to the denial of his motion to dismiss is overruled.

The previous discussion also disposes of defendant's contention that the judge should have instructed the jury that a verdict of guilty would be proper only upon a finding that defendant intended to obtain the goods without paying for them.

In defendant's trial and in the judgment entered we find

No error.

Judges MARTIN and ARNOLD concur.

NORTHEAST MOTOR COMPANY, INC., T/A HAPPY STORE #102 PETITIONER v. N. C. STATE BOARD OF ALCOHOLIC CONTROL RESPONDENT

No. 7710SC329

(Filed 7 March 1978)

Criminal Law § 23; Intoxicating Liquor § 2.3— plea bargain agreement not binding on State ABC Board

The State Board of Alcoholic Control was not estopped to suspend petitioner's ABC permits for knowingly selling beer to a minor by a plea bargain agreement in a criminal action against petitioner's employee based on his sale of beer to the minor in which the State agreed "that it will not take any further action by way of hearing before any court, board, or agency for any action arising out of this transaction against" petitioner or its employee, since (1) the assistant district attorney who entered the agreement was without authority to bind the State's boards and agencies in the exercise of their administrative discretion without their consent, and (2) petitioner's employee, not petitioner, agreed to forego his constitutional rights in reliance on the assistant district attorney's promises and only he can properly complain of any breach of that agreement.

APPEAL by petitioner from *Clark, Judge.* Judgment entered 14 March 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 8 February 1978.

This appeal arises out of proceedings instituted by respondent Board of Alcoholic Control against petitioner Happy Store No. 102 as a result of an alleged violation of the State alcoholic beverage control laws. On 24 May 1976, petitioner was notified to appear for a hearing before a hearing officer of the Board to show cause why its ABC permits should not be revoked or suspended for the following violation: (1) Knowingly selling malt beverages to a minor (person under 18 years of age), upon its licensed premises.

At the hearing, ABC Officer Danny Dilda testified that on 8 November 1975 he observed petitioner's employee George Holloway sell two six packs of beer to Joseph Scott Vickers, a

minor, upon petitioner's licensed premises. On cross-examination of Dilda, evidence was elicited showing that a criminal action had been brought against Holloway based on his sale of beer to the minor. To this charge, Holloway had entered a plea of *nolo contendere* in Superior Court pursuant to a plea bargain which provided, in pertinent part, that "the State further agrees that it will not take any further action by way of hearing before any court, board, or agency for any action arising out of this transaction against [Holloway or petitioner]." ABC Officer Dilda further testified that he had been present in court at the time of the plea bargaining, but that he had explicitly refused to agree to the condition prohibiting further action against petitioner. Finding that petitioner had in fact committed the alleged violation, the hearing officer recommended temporary suspension of petitioner's ABC permits.

Respondent Board reviewed the recommendation of the hearing officer and approved his findings of fact, ordering that petitioner's ABC permits be suspended for 15 days.

On 3 September 1976, petitioner filed a petition in Superior Court asking that the Board's proceedings and order be reviewed. The petition was granted and upon hearing, the court affirmed respondent Board's order. Petitioner appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General James Wallace, Jr., for the State.

James, Hite, Cavendish & Blount, by Robert D. Rouse III, for the petitioner.

MARTIN, Judge.

Petitioner's sole contention is that respondent Board of Alcoholic Control should have been estopped from instituting the subject proceedings against petitioner by reason of the plea bargaining agreement entered into in the related criminal action against Holloway. That agreement, entered into by the assistant district attorney and petitioner's employee Holloway, purported to prohibit the State from taking "any further action by way of hearing before any court, board, or agency" against either Holloway or petitioner. Thus, the issue presented by this appeal is whether the hereinabove quoted provision of the plea bargain-

ing agreement was binding on the respondent Board of Alcoholic Control. We are of the opinion that it was not.

At the outset, we note that our Supreme Court has recognized the emergence of "plea bargaining" as a major component of the administration of criminal justice. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976). However, the courts of this State have yet to confront the question of the scope and effect of plea bargaining agreements.

In *Santobello v. New York*, 404 U.S. 257, 30 L.Ed. 2d 427, 92 S.Ct. 495 (1971), the United States Supreme Court directed its attention to the disposition of criminal charges by agreement between the prosecutor and the accused and stated:

> "This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

Clearly, the Court's conclusion in *Santobello* is predicated upon the defendant's surrender of fundamental constitutional rights—effectuated by the entry of a plea of guilty or *nolo contendere*—in reliance upon the prosecutor's promise. *See Brady v. United States*, 397 U.S. 742, 25 L.Ed. 2d 747, 90 S.Ct. 1463 (1970). Thus, when a prosecutor fails to fulfill promises made to the defendant in negotiating a plea bargain, the defendant's constitutional rights have been violated and he is entitled to relief. *Santobello v. New York, supra.* And the same is true even when the promises are not within the power of the prosecutor to make, and hence, are unfulfillable. *Palermo v. Warden, Green Haven State Prison*, 545 F. 2d 286 (2d Cir. 1976); *United States v. Hammerman*, 528 F. 2d 326 (4th Cir. 1975).

These cases focus on and firmly establish the necessity of according relief to the defendant when the prosecution breaches the plea bargaining agreement. In this result we concur. However, in the instant case we are not confronted by a defendant who, hav-

ing entered a plea bargaining agreement, seeks relief for the breach thereof. Rather, we have before us a petitioner who was *not* a party to the plea bargaining agreement entered into by defendant Holloway and the assistant district attorney. Even so, our petitioner seeks to enforce a provision of that agreement which purports to bind respondent Board of Alcoholic Control—also not a party to the plea bargaining agreement in question.

Based on these differences, which we believe substantially distinguish the instant case from those previously cited, we are unable to find that petitioner is entitled to the relief it seeks—specific performance of the provision purporting to bind respondent Board of Alcoholic Control. In the first instance, we are of the opinion that the assistant district attorney was without authority to bind the State's boards and agencies in the exercise of their administrative discretion without their consent. Respondent Board of Alcoholic Control is one of many independent quasi-adjudicative boards and agencies within the Executive Department. As such, it occupies an exclusive role within the framework of the state administration of justice and must remain free from hierarchal intrusion in the exercise of its administrative discretion. In so deciding, we expressly do not reach the questions of whether, and in what manner, an independent board or agency can bind itself to such an agreement in a criminal proceeding to which it is not a party.

Finally, conceding that even the breach of an unauthorized promise entitles a defendant to relief, *Palermo v. Warden, Green Haven State Prison, supra*, we cannot find that the breach of the provision purporting to bind the respondent Board entitles petitioner to any relief. Petitioner's employee Holloway, not petitioner, agreed to forego his constitutional rights in reliance on the assistant district attorney's promises. *Santobello v. New York, supra.* Only he can now be heard to complain.

In the lower court's order affirming respondent Board's suspension of petitioner's ABC permits, we find no error.

Affirmed.

Judges PARKER and ARNOLD concur.

RALPH STACHON & ASSOCIATES, INC. v. GREENVILLE BROADCASTING COMPANY, INC.

No. 773DC248

(Filed 7 March 1978)

1. **Appeal and Error § 28.1— findings of fact—failure to make exception—findings not reviewed on appeal**

Questions as to sufficiency of service of process and whether or not plaintiff was required to comply with G.S. 55-154(a) were not properly before the Court of Appeals where the trial court made findings of fact with respect to those questions and defendant made no exceptions to those findings.

2. **Bills and Notes § 19— defense of failure of consideration—summary judgment improper**

In an action to recover on a promissory note and a "creative business agreement," the trial court erred in granting summary judgment for plaintiff since defendant raised a genuine issue of material fact, supported by its affidavit and deposition, as to whether there was a failure of consideration for the note sued upon.

APPEAL by defendant from *Whedbee, Judge.* Judgment entered 8 December 1976 in District Court, PITT County. Heard in the Court of Appeals 20 January 1978.

Plaintiff brought this civil action alleging that defendant was indebted to it on a promissory note in the amount of $2,409.00, payable monthly, and on a "creative business agreement" in the amount of $960.00, payable monthly. Defendant answered, denying its indebtedness on the note and agreement, alleging payment of $2,500.00 to be credited as against the note and failure of consideration. Defendant filed a counterclaim alleging plaintiff had seriously damaged its reputation and goodwill in the Greenville area, and loss of income by reason of plaintiff's conduct. Plaintiff moved for summary judgment on the note, which was allowed, and defendant appealed.

James, Hite, Cavendish & Blount, by Robert D. Rouse III, for plaintiff appellee.

Lanier & McPherson, by Dallas W. McPherson, and Underwood & Manning, by Samuel J. Manning, for defendant appellant.

ERWIN, Judge.

[1] Defendant appellant presents one question for our determination: "Did the trial court err in granting plaintiff's motion for summary judgment on the grounds that there were genuine issues of material fact, and that the plaintiff was not entitled to judgment as a matter of law . . . ?" Defendant contends that the following issues of material fact existed: (1) whether plaintiff had standing to bring suit in North Carolina as a foreign corporation without first obtaining a certificate of authority as required by G.S. 55-154(a); (2) whether defendant had been properly served with process and therefore whether the court had jurisdiction over the person of defendant; (3) whether there was a failure of consideration for the note and "creative business agreement"; (4) whether plaintiff damaged the reputation and goodwill of defendant as alleged in its counterclaim.

Plaintiff's complaint alleged that it was ". . . a foreign corporation transacting business in the State of North Carolina." The original summons was directed to one Paul Vaughan. Defendant filed in apt time its motion to dismiss based on G.S. 55-154(a) and G.S. 1A-1, Rules 12(b)(2) and 12(b)(4), maintaining that plaintiff lacked standing in that it was a foreign corporation transacting business in the State without permission and that the court had no jurisdiction in that defendant had not been properly served with process. Thereafter, plaintiff caused an alias and pluries summons to issue, directed to "Ralph A. Gardner, as officer, director, or managing agent for Greenville Broadcasting Company, Inc." which was served. The trial court entered an order dismissing defendant's motion and allowing plaintiff to amend its complaint to allege simply "that the plaintiff is a foreign corporation."

To the entry of this order, defendant did not except. In the summary judgment before us, the trial court found that the complaint was served upon defendant, Greenville Broadcasting Company, Inc. To this finding of fact, defendant did not except. The Supreme Court has held where no exception has been taken to the finding of fact, such findings are presumed to be supported by competent evidence and are binding on appeal. *Insurance Co. v. Trucking Co.*, 256 N.C. 721, 125 S.E. 2d 25 (1962); *Schloss v. Jamison*, 258 N.C. 271, 128 S.E. 2d 590 (1962). This Court has held likewise in *Pegram-West, Inc. v. Homes, Inc.*, 12 N.C. App. 519,

184 S.E. 2d 65 (1971). On the record we hold that the questions of service of process and whether or not plaintiff must comply with G.S. 55-154(a) are not properly before us.

[2] Plaintiff moved for summary judgment on its behalf pursuant to Rule 56 and filed affidavit of plaintiff's assistant treasurer, who stated that defendant had made no payments on the note or under the "creative business agreement" and that plaintiff was not "doing business" in North Carolina, and was therefore not required to comply with G.S. 55-154(a). Defendant filed an answer to plaintiff's motion, along with an affidavit of its general manager, stating that he entered into a contract with defendant to sell advertising accounts to different advertisers; that defendant was to pay a certain amount to plaintiff for these contracts; that plaintiff represented that it had contracted with five such advertisers, but in fact, plaintiff failed to obtain proper contracts with three of the advertisers; and that defendant had paid plaintiff in full under the "creative business agreement." In a deposition, defendant's general manager stated that the amount due under the "creative business agreement" was included in the note; that no payments had been made on either the agreement or the note; and that payments on the note were not made because plaintiff did not fulfill its obligations under the "creative business agreement."

We agree with defendant that there exists a genuine issue of material fact as to whether there was failure of consideration for the note sued upon. This action is between the payee and the maker of the alleged note. As between the original parties to a note, it is competent to show by parol evidence that there was a failure of consideration, 2 N.C. Index 3d, Bills and Notes § 19; *Mills v. Bonin*, 239 N.C. 498, 80 S.E. 2d 365 (1954), and as between them, failure of consideration is a defense. *Mills v. Bonin, supra*; *Perry v. Trust Co.*, 226 N.C. 667, 40 S.E. 2d 116 (1946). Even if plaintiff could be shown to be a holder in due course, it has clearly "dealt" with defendant and would not take the note free of such defense. G.S. 25-3-305(2). Clearly one not a holder in due course takes subject to the defense. G.S. 25-3-306(c); G.S. 25-3-408. Partial failure of consideration is a pro tanto defense. G.S. 25-3-408. *See also Mozingo v. Bank*, 31 N.C. App. 157, 229 S.E. 2d 57 (1976), *cert. denied*, 291 N.C. 711, 232 S.E. 2d 204 (1977).

In *Commercial Credit Corp. v. McCorkle*, 19 N.C. App. 397, 198 S.E. 2d 736 (1973), this Court held at p. 398,

> "The trial court, upon motion for summary judgment under Rule 56, should not undertake to resolve an issue of credibility. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101. In this case plaintiff alleges defendant is indebted to plaintiff; defendant denies the allegation. Where a defendant denies the existence of the debt alleged, unless admissions by defendant clearly show that his denial of the debt is utterly baseless in fact, defendant's denial raises a genuine issue as to a material fact. Where a genuine issue as to a material fact is raised, summary judgment is improper. *See* G.S. 1A-1, Rule 56(c). In this case defendant's admission that he executed the Transfer of Interest Agreement does not render his denial of the debt to be baseless. From the pleadings alone, it cannot be determined as a fact that defendant owes the plaintiff a sum of money in any amount."

We hold that the defendant raised a genuine issue of material fact, supported by its affidavit and deposition in response to the plaintiff's motion for summary judgment on the issue of whether or not the note in question is due and payable. We do not agree with the trial court's finding that the denial of the debt was baseless. Our holding makes it unnecessary for us to address the fourth issue raised by defendant, namely, whether material issues of fact exist as to the allegations in defendant's counterclaim. The summary judgment does not directly purport to adjudicate the counterclaim adversely to defendant.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

Judges BRITT and VAUGHN concur.

Hensley v. Caswell Action Committee

ALEX HENSLEY, FATHER; CHRISTINE A. HENSLEY, MOTHER; ALEX HENSLEY, GUARDIAN AD LITEM FOR CYNTHIA GAYLE HENSLEY, SISTER, AND CHRISTOPHER DAVID HENSLEY, BROTHER OF DALE BRISCOE HENSLEY, DECEASED, EMPLOYEE, PLAINTIFFS v. CASWELL ACTION COMMITTEE, INC., EMPLOYER; MARYLAND CASUALTY COMPANY, CARRIER, DEFENDANTS

No. 7717IC326

(Filed 7 March 1978)

1. **Master and Servant § 94.4— workmen's compensation—scope of ordered rehearing**

Where an order of the Full Commission ordered a rehearing as to the wages from which compensation was to be computed, the hearing officer did not err in refusing to allow defendants to offer additional evidence on the question of compensability.

2. **Master and Servant § 55.5— workmen's compensation—death by drowning—accident not arising out of employment**

The death of an employee of a sanitary district by drowning while he was attempting to wade across a reservoir so that he could cut weeds from the bank at the other side of the reservoir did not arise out of his employment where the employee had been instructed not to go into the water.

Judge MARTIN dissents.

APPEAL by defendants from the Full Commission of the North Carolina Industrial Commission. Opinion and award filed on 8 February 1977. Heard in the Court of Appeals 8 February 1978.

Dale Briscoe Hensley died by drowning on 30 June 1975. On the day of his death he was employed by the Caswell Action Committee, Inc. and was working for the Caswell Sanitary District. He and two others, Robert A. Scott and James Long, were using a sling blade and a bush axe to cut weeds on the banks of a reservoir. About noon the three boys discovered that they had missed a spot on the other side of the reservoir, and Long and Hensley began to wade across the reservoir to reach the area. The two who were crossing the lake called Scott "chicken" because he refused to go with them. In the process of crossing the reservoir, young Hensley stepped in a deep hole and drowned.

The plaintiff brought this action to recover compensation provided for under the Workmen's Compensation Act (G.S. 97.1 *et seq.*).

At the first hearing before Deputy Commissioner Roney, Scott testified on cross-examination by defendants that the three

boys had been told not to go into the water. On redirect examination, however, he stated they were not told specifically not to cross the lake in the course of their work. James Long testified that he had not been told to stay out of the water. Aaron Wilson, employee of the Yanceyville Sanitary District, who assigned work to the three youths, testified for defendants that all three of the boys had been instructed not to go into the lake.

Deputy Commissioner Roney found that decedent's accidental death arose out of and in the course of his employment and awarded, under the Workmen's Compensation provisions, death benefits to Hensley's next of kin. On 13 May 1976, the Full Commission ordered the case to be heard again. Deputy Commissioner Christine Y. Denson heard the case on the question of the amount of the award and her opinion and award were affirmed with amendments by the Full Commission on 8 February 1977. Defendants appealed.

Blackwell & Farmer, by R. Lee Farmer, for plaintiff appellees.

Teague, Johnson, Patterson, Dilthey & Clay, by I. Edward Johnson, for defendant appellants.

ARNOLD, Judge.

[1] The first order of the Full Commission of the Industrial Commission regarding this case directed that it be placed on the docket for rehearing. Defendants argue that Deputy Commissioner Denson erred at this rehearing in refusing to allow defendants to offer additional evidence on the question of compensability. We cannot agree. The order of 13 May 1976, stated:

> "Defendants say and contend that the Hearing Commissioner erred in finding as a fact and concluding as a matter of law that parents of the deceased were entitled to maximum compensation benefits for the reason that at the initial hearing plaintiffs and defendants stipulated an average weekly wage of $40.10.
>
> "Counsel for defendants says and contends that in the absence of such a stipulation and if he had been on notice that the Commission was not bound by such a stipulation, he

would have placed in evidence certain facts surrounding the employment.

"To the end that the record may be complete and that all parties might have an opportunity to offer evidence in regard to this issue,

"IT IS THEREUPON ORDERED that this case be, and the same is hereby, placed on the docket to be heard when reached in Yanceyville to take such testimony as either side desires to offer bearing on the question of the rate at which compensation shall be paid as provided under G.S. 97-2(5) in the event compensability is ultimately found herein.

"The Opinion and Award of Deputy Commissioner Roney is hereby vacated and set aside. The Hearing Commissioner who next hears the case in Yanceyville shall decide same based on the record in its entirety, including but not limited to the wage testimony taken before him."

It seems clear that while the deputy commissioner was to decide the case in its entirety the order directed her to take testimony only as to the wages from which compensation was to be computed. Her failure to take more evidence was, therefore, not error.

[2] Defendant's next argument is that the Commission erred in concluding as a matter of law that young Hensley died as a result of an accident arising out of and in the course of his employment with defendant employer. We are compelled to agree that the accident did not arise out of decedent's employment with defendant employer.

An accident arises out of employment if there exists a causal relation between the accident and the employment. There is such a causal relationship when the duties of the employment require the employee to be in a place at which he is exposed to a risk of injury to which he would not otherwise be subject and, while there, he is injured by an accident due to the peculiar hazard of that location. *See, e.g. Stubberfield v. Construction Co.*, 277 N.C. 444, 177 S.E. 2d 882 (1970).

At the second hearing, Deputy Commissioner Denson found as fact:

"3. Before decedent and the other two boys began working at the reservoir, Mr. Wilson told them not to cross the lake in the water because he didn't want them to get hurt. He did not give them that instruction about any particular part of the lake."

In *Morrow v. Highway Commission*, 214 N.C. 835, 199 S.E. 265 (1938), decedent was employed to paint a bridge over the Catawba River. Contrary to the instructions of his supervisor, decedent entered the river to retrieve a paint brush and drowned. Denial of that claim was affirmed per curiam by our Supreme Court on the ground that the injury "did not arise out of the employment."

Morrow v. Highway Commission, supra, is not reasonably distinguishable from this appeal and compels denial of the claim for compensation. Decedent was not in a place where the duties of his employment required him to be. In fact, his supervisor specifically directed him not to go into the water.

Evidence does not support the Commission's conclusion of law that decedent died as a result of an injury arising out of and in the course of his employment. The award is

Reversed.

Judge PARKER concurs.

Judge MARTIN dissents.

STATE OF NORTH CAROLINA v. JERRY RAYMOND CRAIG

No. 7714SC814

(Filed 7 March 1978)

Homicide § 12— indictment charging murder—conviction for assault upon female improper

An indictment for murder could not support a conviction of assault upon a female since the indictment did not allege one of the essential elements of the crime of assault upon a female, that defendant was a male and the victim was a female.

State v. Craig

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 8 April 1977, in Superior Court, DURHAM County. Heard in the Court of Appeals 1 February 1978.

Defendant and Dolly Scott were charged in separate indictments with the murder of Francine Scott, an infant, on 3 December 1976. Dolly Scott, not involved in this appeal, was convicted of second-degree murder. Defendant was convicted of assault on a female and appeals from judgment imposing jail term of two years.

The testimony of a surgeon and two medical examiners for the State tended to show that Francine Scott was brought to a hospital and promptly an operation was performed which revealed that she had a subdural hematoma and torn veins around the brain, that a blood clot was removed but she died on the operating table. It was found that she had various bruises and abrasions on her hips, back, and head, lesions caused by cigarette burns, a forearm fracture about a week old, that the pattern of her injuries was consistent with the battered child syndrome, and that the fatal head injury had been caused by a trauma from one blow with a blunt instrument.

A Durham City Policeman testified that Dolly Scott, after warning and waiver by her of *Miranda* rights, made a statement that defendant was her boyfriend and lived with her and her daughter Francine; that on Friday (26 November 1976) she beat Fran once with a belt and again with a hard afro comb; on Saturday morning she again beat Fran with a belt for wetting the bed; she cleaned Fran, put her on the bed and again beat her with the belt, and continued to whip her until she fell off the bed. On Monday morning Fran threw a glass bowl on the floor, which made her (Dolly) mad, so she hit Fran twice with a wooden bed slat. On Tuesday morning she lifted Fran from the bed and threw her on the floor. On Wednesday Fran acted like she was hurting. On Thursday morning Fran fell out of the car. On Friday Fran poured washing powder on the floor, so she again beat her with a belt; about noon Fran began having trouble getting her breath, so defendant called an ambulance.

Ronald Martin, age 15, testified that he often visited in the home of Dolly Scott and defendant and had on several occasions found Fran shut up in the closet and tied to a bed post; that he

had seen defendant whip Fran with a belt on several occasions, the last time on 2 December 1976.

Defendant offered no evidence.

The trial court submitted to the jury the offenses of voluntary manslaughter, involuntary manslaughter, and assault upon a female.

Attorney General Edmisten by Assistant Attorney General Elizabeth C. Bunting for the State.

B. Frank Bullock for defendant appellant.

CLARK, Judge.

The one issue raised by this appeal is whether the indictment for murder supports the conviction of the crime of assault upon a female.

It is established in the criminal law that the greater crime includes the lesser, so that where an offense is alleged in an indictment, and the jury acquits as to that one, it may convict of the lesser offense when the charge is inclusive of both offenses. *State v. Williams*, 185 N.C. 685, 116 S.E. 736 (1923); *State v. Fritz*, 133 N.C. 725, 45 S.E. 957 (1903). G.S. 15-170 provides for the conviction of a crime of a lesser degree than the crime charged and for an attempt to commit the crime charged or crime of lesser degree. G.S. 15-169 provides for conviction of assault against the person as a lesser offense of a charge for rape "or any felony whatsoever, when the crime charged includes an assault against the person. . . ."

G.S. 14-33(b) treats the assault upon a female offense by providing in pertinent part that "any person who commits any assault . . . is guilty of a misdemeanor punishable by a fine, imprisonment for not more than two years, or both . . . if . . . he . . . (2) Assaults a female, he being a male person over the age of 18 years; . . ."

The essential elements of the assault upon a female crime are (1) assault and (2) upon a female person by a male person. It has been held that G.S. 14-33 merely prescribes the punishment, that the charge need not allege that defendant was over 18 years of age because it is not an essential element of the crime, and that if

defendant does not rebut the presumption that he is over 18 years of age, then the defendant may be sentenced to a larger term of imprisonment upon conviction of assault upon a female. *State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977); 1 Strong's N.C. Index, Assault & Battery, § 7, p. 475. Thus, assault upon a female has been held to be a lesser offense of the charged crime of rape, or assault with intent to rape. *State v. Courtney*, 248 N.C. 447, 103 S.E. 2d 861 (1958); *State v. Morgan*, 225 N.C. 549, 35 S.E. 2d 621 (1945); *State v. Kiziah*, 217 N.C. 399, 8 S.E. 2d 474 (1940); *State v. Williams*, 185 N.C. 685, 116 S.E. 736 (1923); *State v. Jones*, 181 N.C. 546, 106 S.E. 817 (1921); *State v. Lance*, 166 N.C. 411, 81 S.E. 1092 (1914).

An essential element of the assault upon a female crime is that of sex—that defendant is a male and the victim a female. In *State v. Barham*, 251 N.C. 207, 110 S.E. 2d 894 (1959), it was held that a warrant charging that defendant, being a male person over 18 years of age, assaulted a named person without specifying the sex of such person, does not charge an assault upon a female, notwithstanding that the person named is a female. However, a charge of rape or assault with intent to rape does not ordinarily allege specifically that defendant is male and the victim female; apparently, this is assumed from the nature of the sex offense charged. There can be no such assumption when the indictment charges murder, in the form prescribed by G.S. 15-144, as in the case *sub judice*. All of the necessary elements of assault upon a female are not accurately alleged in the regular form indictment charging murder. See *State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977). In *State v. Rorie*, 252 N.C. 579, 114 S.E. 2d 233 (1960), the indictment charged voluntary manslaughter, in the form prescribed by G.S. 15-144, and defendant was convicted of assault with a deadly weapon. It was held that since the character of the weapon used by defendant was not averred, the indictment would not support the verdict, that the indictment for murder or manslaughter should have been so drawn as necessarily to include an assault with a deadly weapon, or should include a separate count to that effect.

We conclude that because the indictment for murder did not contain allegations to include the necessary elements of the crime of assault upon a female, the indictment does not support the verdict. We vacate the judgment and dismiss the cause. The District Attorney may proceed against the defendant if he so elects, with,

a proper charge of assault on a female, or such other charge as he deems appropriate.

Vacated and dismissed.

Judges VAUGHN and ERWIN concur.

STATE OF NORTH CAROLINA v. SAMUEL WILSON III

No. 7726SC686

(Filed 7 March 1978)

Criminal Law §§ 75.10, 177.2— in-custody statements—absence of finding as to waiver of counsel—remand for hearing

The trial court erred in the admission of defendant's in-custody statements without a specific finding as to whether defendant voluntarily waived his right to counsel at the in-custody interrogation where the *voir dire* evidence concerning defendant's waiver of counsel was conflicting, and the case is remanded to the superior court for a hearing to determine the question of waiver. If the presiding judge determines that defendant did not voluntarily waive his right to counsel during the interrogation, he should enter an order setting aside defendant's conviction and granting him a new trial.

APPEAL by defendant from *Friday, Judge.* Judgment entered 14 April 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 January 1978.

Defendant was indicted for felonious possession of heroin with intent to sell and deliver, to which he entered a plea of not guilty.

At trial the State's evidence tended to show that Officer H. F. Frye saw defendant, whom he recognized, exit from an automobile carrying an aluminum foil package in his hand. As defendant began to run down a street between some apartment buildings, Officer Frye called him by name, gave chase, and observed defendant drop the aluminum foil package into a garbage can. Officer Frye retrieved the package and observed that it contained a large number of smaller aluminum foil packages. It was stipulated at trial that the substance inside of these packages was heroin. Officer Frye arrested defendant at the scene.

The State introduced evidence of a statement made by the defendant to Officer Frye to the effect that the heroin belonged to defendant. Before Officer Frye testified as to defendant's statement, a *voir dire* hearing was held. Evidence offered by the State at the *voir dire* established that defendant was advised of his constitutional rights and indicated that he understood them and was willing to talk to Officer Frye. Defendant offered evidence on *voir dire* tending to show that he had demanded to see his attorney and had refused to talk.

At the close of the *voir dire*, the trial court made findings of fact and concluded that defendant's statement was made freely and voluntarily.

Defendant was found guilty of possession of heroin and sentenced to imprisonment. Defendant has appealed his conviction to this Court.

Attorney General Edmisten, by Assistant Attorney General William Woodward Webb, for the State.

Paul J. Williams, for the defendant.

BROCK, Chief Judge.

By his first assignment of error defendant challenges the admissibility of the testimony of Officer Frye concerning the statement made to Frye by the defendant. Defendant contends that the only evidence presented at *voir dire* as to defendant's waiver of counsel indicated that he had requested the presence of counsel and therefore had failed to waive his right to counsel. Thus, argues defendant, the trial court erred in finding that his statement was freely and voluntarily given.

Defendant's assignment of error is sustained for the reason that the trial judge failed to make a finding of fact that defendant had waived his right to the presence of counsel before admitting Officer Frye's testimony. The recent case of *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976) is directly on point. In that case, as in the instant case, the trial judge found that the defendant had been fully informed of his *Miranda* rights. However, in *Biggs*, as in the instant case, the trial judge had failed to make any findings of fact with respect to waiver of counsel. Due to conflicting

evidence on *voir dire*, such failure was held to constitute prejudicial error. In the language of our Supreme Court:

> ". . . when the State seeks to offer in evidence a defendant's in-custody statements, made in response to police interrogation and in the absence of counsel, the State must affirmatively show not only that the defendant was fully informed of his rights but also that he knowingly and intelligently waived his right to counsel. *State v. White*, 288 N.C. 44, 215 S.E. 2d 557 (1975); *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972). When the *voir dire* evidence regarding waiver of counsel is in conflict, the trial judge *must* resolve the dispute and make an express finding as to whether the defendant waived his constitutional right to have an attorney present during questioning." 289 N.C. at 531, 223 S.E. 2d at 377.

In the present case, Officer Frye testified that he read defendant his *Miranda* rights, and that defendant affirmatively indicated that he understood his rights and that he was willing to talk to Officer Frye. There was no other evidence that defendant had made an oral or written waiver of his right to counsel. Defendant, on the other hand, testified that he had refused to talk and had requested that he be allowed to see his attorney. "Under these circumstances it was incumbent upon the judge to make an express finding in this regard, and his failure to do so rendered the admission of the defendant's inculpatory statements . . . erroneous." *State v. Biggs*, *id.* In view of the record in this case, we cannot say that the error as noted herein was harmless beyond a reasonable doubt. Therefore we find prejudicial error in the failure of the trial judge to find facts sufficient to resolve the controverted issue of whether defendant voluntarily waived his right to counsel during the interrogation by Officer Frye. However, we do not find it necessary to order a new trial because the question of the waiver or non-waiver of counsel can be determined by the trial court on remand for that purpose. *See State v. Byrd*, 35 N.C. App. 42, 240 S.E. 2d 494 (1978); *State v. Moses*, 25 N.C. App. 41, 212 S.E. 2d 226 (1975); *State v. Ingram*, 20 N.C. App. 35, 200 S.E. 2d 417 (1973); *State v. Roberts*, 18 N.C. App. 388, 197 S.E. 2d 54 (1973), *cert. denied*, 283 N.C. 758 (1973), *rev'd in part on other grounds*, 286 N.C. 265, 210 S.E. 2d 396 (1974); *State v. Martin*, 18 N.C. App. 398, 197 S.E. 2d 58 (1973).

We have examined defendant's remaining assignments of error and find that they involve matters which rest largely in the discretion of the trial judge, and we find no showing of harmful prejudice.

This case is remanded to the Superior Court, Mecklenburg County, where a judge presiding over a criminal session will conduct a hearing after due notice, and with defendant and counsel present to determine whether defendant voluntarily waived his right to counsel during the custodial interrogation by Officer Frye.

If the presiding judge determines that defendant did not voluntarily waive his right to counsel during the custodial interrogation, he will make his findings of fact and conclusions and enter an order vacating the judgment appealed from, setting aside the verdict, and ordering a new trial for defendant. If the presiding judge determines that the defendant did voluntarily waive his right to counsel during the custodial interrogation, he will make his findings of fact and order commitment to issue in accordance with the judgment appealed from dated 14 April 1977.

No error in the trial except on the issue of whether the defendant voluntarily waived his right to counsel during the custodial interrogation.

Remanded with instruction.

Judges VAUGHN and ERWIN concur.

DELMAR F. WHITE v. NORTH CAROLINA BOARD OF PHARMACY

No. 7710SC372

(Filed 7 March 1978)

1. Physicians, Surgeons and Allied Professions § 6.2— pharmacist—license revocation hearing—competency of evidence

Petitioner's contention that G.S. 143-318 applied to the hearing at which his license to practice pharmacy was revoked is correct, but his contention that his hearing was tainted with evidence which should not have been admitted is without merit, since the findings of fact made by the Board did not rely upon that evidence to which petitioner excepted, and the Board's conclusions were based upon facts supported by competent evidence.

2. Physicians, Surgeons and Allied Professions § 6.2— pharmacist—license revocation hearing—failure to keep records—sufficiency of evidence

Evidence of petitioner's guilty plea in federal court to a charge of knowingly and unlawfully refusing to keep an accurate record of controlled substances in his possession was competent evidence which supported the Board's conclusion that petitioner wilfully failed to comply with the law governing the practice of pharmacy.

APPEAL by petitioner from *Bailey, Judge.* Judgment entered 17 December 1976, in Superior Court, WAKE County. Heard in the Court of Appeals 10 February 1978.

On 26 November 1975 the North Carolina Board of Pharmacy (hereinafter Board) entered an order revoking petitioner's license to practice pharmacy. The Board had held an administrative hearing on 18 November 1975 and, at the conclusion of the hearing, found that on two separate occasions in 1974 petitioner was audited by agents of the Federal Drug Enforcement Administration; that, on the first occasion petitioner was unable to account for 3,178 tablets of morphine sulfate with atropine, and on the second occasion he was unable to account for 76 tablets of morphine; that petitioner entered a plea in federal court of guilty for "knowingly and unlawfully" refusing to keep an accurate record of morphine sulfate; that petitioner was sentenced to one year imprisonment, but that the sentence was suspended and petitioner was placed on probation for five years. The Board concluded that petitioner had wilfully failed to comply with both state and federal law governing the practice of pharmacy, and ordered that his license to practice be revoked.

Petitioner sought judicial review and the Superior Court of Wake County made findings of fact and conclusions of law upholding the Board's actions. Petitioner appealed.

Murdock, Jarvis & LaBarre, by David Q. LaBarre, for petitioner appellant.

Bailey, Dixon, Wooten, McDonald & Fountain, by Kenneth Wooten, Jr., for respondent appellee.

ARNOLD, Judge.

[1] G.S. 90-65(a)(7) provides, *inter alia,* that the Board of Pharmacy may, after due notice and a hearing, revoke any license

issued by it to any pharmacist for his "[w]illful failure to comply with the laws governing the practice of pharmacy and the distribution of drugs." Pursuant to this provision a hearing was held and petitioner's license was revoked. Petitioner, however, contends that the Board of Pharmacy is governed by the rules of evidence contained in G.S. 143-318, that his hearing was tainted with evidence which should not have been admitted, and that the order revoking his license was prejudiced thereby.

We agree with the petitioner that G.S. 143-318 applies to the hearing at which his license was revoked. Our statutes concerning the practice of pharmacy, G.S. 90-53 *et seq.*, do not specifically deal with what rules of evidence are applicable to hearings under G.S. 90-65. The Uniform Revocation of Licenses, G.S. 150-9 *et seq.*, which was effectively repealed after the hearing in question, defined "board" to exclude the North Carolina Board of Pharmacy (G.S. 150-9). Hence, we look to G.S. 143-318 for the rules of evidence to apply in administrative proceedings before the Board of Pharmacy.

G.S. 143-318(1) reads:

> "Incompetent, irrelevant, immaterial, unduly repetitious, and hearsay evidence shall be excluded. The rules of evidence as applied in the superior and district court divisions of the General Court of Justice shall be followed."

Before the introduction of any evidence petitioner moved for and was granted a blanket objection to all the evidence and its competency. He now complains that evidence containing hearsay and opinion was repeatedly allowed. An obvious disadvantage of such blanket objections is presented in the instant case. It was after the fact that petitioner went through the record and noted evidence which he now claims to have been erroneously admitted. He failed to call the Board's attention to such testimony by objecting when the evidence was presented. Hence the Board was not called upon to disregard evidence that may have been prejudicial.

In any event, the findings of fact made by the Board do not rely upon that evidence to which petitioner excepts. Findings of fact were made concerning the audits of petitioner's stock of morphine sulfate and petitioner's guilty plea in the United States

District Court for the Middle District of North Carolina. Evidence of the audits came in without objection. The guilty plea was stipulated to by counsel. Assuming that incompetent evidence was admitted by the Board we can find no prejudice to petitioner. The Board's conclusions were based upon facts supported by competent evidence.

[2] We next address petitioner's argument that the Board's conclusion that petitioner "wilfully" failed to comply with both state and federal laws governing the practice of pharmacy is not supported by competent evidence. This argument fails. Evidence of petitioner's guilty plea in federal court is competent evidence which supports the Board's conclusion that petitioner "wilfully" failed to comply with the law. The federal indictment to which petitioner pled guilty reads, in part, that petitioner

> "did knowingly and unlawfully refuse and fail to keep a complete and accurate record of morphine sulfate, one-quarter (1/4) grain, and atropine one one-fiftieth (1/150th) grain tablets, the principal ingredient of which is morphine, a Schedule II Controlled Substance, which tablets were received, sold, delivered, dispensed, distributed, possessed and otherwise disposed of at and by Mebane Drug Company during the period aforesaid, as required by Title 21, United States Code, Section 827(a)(3), and 21 CFR 1304.21 and 1304.24 in that the available records of Mebane Drug Company showed a shortage of approximately 3,254 tablets representing an unaccounted-for shortage of approximately nineteen percent (19%) of the total accountability; in violation of Title 21, United States Code, Section 842(a)(5)."

Moreover, contrary to petitioner's assertion, evidence of the guilty plea supports the Board's finding that petitioner violated state law as set forth in Chapter 90, Article 5 of the General Statutes. G.S. 90-104, at the time of petitioner's hearing, read as follows:

> "Each registrant or practitioner manufacturing, distributing, or dispensing controlled substances under this Article shall keep records and maintain inventories in conformance with the record-keeping and the inventory requirements of the federal law and shall conform to such rules and

regulations as may be promulgated by the North Carolina Drug Authority."

Judgment of Superior Court affirming the 26 November 1975 order of the North Carolina Board of Pharmacy is accordingly

Affirmed.

Judges PARKER and MARTIN concur.

JANE P. BURKE v. GEORGE F. HARRINGTON

No. 7726SC353

(Filed 7 March 1978)

Jury § 1.1; Partition § 3— partition proceeding—issue as to quality of title—jury trial

Where plaintiff sought partition of property formerly held by the parties as tenants by the entirety on the ground that she had obtained a divorce from defendant in Florida and was entitled to partition as a tenant in common, and defendant alleged that the Florida divorce was invalid because plaintiff was not legally domiciled in Florida at the time the divorce action was instituted and the decree rendered and requested a trial by jury, the trial court erred in denying defendant a trial by jury and in hearing the matter without a jury, since defendant properly raised an issue as to the quality of plaintiff's title and was entitled to have a jury decide that issue.

APPEAL by defendant from *Friday, Judge.* Judgment entered 27 January 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 February 1978.

This cause began as a special proceeding to have certain lands sold for partition. In her petition plaintiff alleged that she and defendant were previously married, that while they were married they acquired the subject real estate as tenants by the entirety, that she had obtained an absolute divorce from defendant in Florida, that she and defendant now own the property as tenants in common, and that she is entitled to have the property sold and the proceeds divided between them.

Defendant filed answer admitting that he and plaintiff were married to each other and that they acquired the subject proper-

ty as tenants by the entirety. He also alleged that plaintiff left North Carolina and moved to Florida where she purportedly obtained a divorce from him; that the purported divorce was invalid for the reason that plaintiff was not legally domiciled in the state of Florida at the time the divorce action was instituted and the decree rendered; that plaintiff and defendant are still married to each other; that they hold title to the subject property as tenants by the entirety, therefore, plaintiff is not entitled to have the same sold for partition.

Defendant filed a request for trial by jury and, pursuant to his motion, the cause was transferred to the civil issue docket.

When the cause came on for trial defendant insisted on a jury trial. The court proceeded to hear the matter without a jury, found facts as contended by plaintiff and entered judgment declaring that the parties own the property as tenants in common and that plaintiff is entitled to have the same partitioned.

Defendant appealed.

Levine & Goodman, by Sol Levine, for plaintiff appellee.

Curtis and Millsaps, by Joe T. Millsaps, for defendant appellant.

BRITT, Judge.

Defendant contends first that the trial court erred in denying him a jury trial. We agree with this contention.

Defendant argues that he properly raised an issue of fact with respect to the validity of the Florida divorce; specifically, that plaintiff was not legally domiciled in Florida at and before the time the divorce action was insitituted and the decree was rendered.

Although a partition proceeding is usually within the jurisdiction of the clerk of the superior court, when "issues of fact" are joined before the clerk, the cause must be transferred to the superior court for trial. G.S. 1-174. It is true that in some instances where a petitioner's title is not challenged, *i.e.*, where the petitioner asks that the land be sold for partition and a respondent asks that the land itself be divided, the clerk passes upon

the question initially and a dissatisfied party may appeal to the judge.

It is well settled, however, that where a petitioner's title is denied and a respondent pleads sole ownership, the cause must be transferred to the superior court for trial as other civil actions. *Bailey v. Hayman*, 222 N.C. 58, 22 S.E. 2d 6 (1942), and cases therein cited. We think the same rule applies in the case at hand since defendant denies the title claimed by plaintiff, thereby raising a question or issue as to the quality of plaintiff's title.

The quality of plaintiff's title depends on the validity of her divorce. "No valid divorce can be decreed by the courts of a state in which neither party is domiciled." 5 Strong's N.C. Index 3d, Divorce and Alimony § 1.1, pp. 237-38. Jurisdiction of the marital status exists only when one of the parties is a resident of the state in which the divorce action is instituted, and for this purpose residence means domicile. *Ibid.* residence and domicile are not convertible terms as a person may have his residence in one place and his domicile in another. "Residence simply indicates a person's actual place of abode, whether permanent or temporary. Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence." *Hall v. Board of Elections*, 280 N.C. 600, 605, 187 S.E. 2d 52 (1972).

We agree with defendant's argument that he properly raised the issue of whether plaintiff was legally domiciled in Florida at the time she obtained her divorce and that he was entitled to have a jury decide the issue. While plaintiff presented sufficient evidence to make out a prima facie case, domicile is a fact that has to be proven and this may be done by direct and circumstantial evidence. "A person's testimony regarding his intention with respect to acquiring a new domicile or retaining his old one is competent evidence, but it is not conclusive of the question. 'All of the surrounding circumstances and the conduct of the person must be taken into consideration.' (Citations.)" *Hall v. Board of Elections, supra*, page 609.

The record discloses that at one point in the trial proceedings the able trial judge alluded to *Donnell v. Howell*, 257 N.C. 175, 125 S.E. 2d 448 (1962), as an authority for his denying defendant a jury trial. Although certain legal principles declared in *Donnell* on

the question of legality of out-of-state divorces are relevant to the case at hand, it is noted that the controversy in that case was submitted on facts stipulated by the parties and those found by *the judge.*

There is further indication that the trial court might have relied on *In Re Estate of Finlayson*, 206 N.C. 362, 173 S.E. 902 (1934), in holding that defendant was not entitled to a jury trial. That case involved the question of domicile of the decedent for purpose of determining where his will should be probated. The clerk found facts, made a determination and appeal was taken to the judge.

We think it is easy to distinguish *Finlayson* from this case. A clerk of the superior court serves as the judge of probate and then has many other duties assigned to him by statute. It appears that in most cases involving his position as judge of probate—appointment and removal of fiduciaries, approval of accounts, etc.,—he conducts hearings, makes determinations and appeals are taken to the judge. In partition proceedings the clerk's role is different. When an answer is filed denying the quality or quantity of title claimed by the petitioner, the clerk conducts no hearing, makes no determinination of the controversy, but merely transfers the cause to the civil issue docket for trial "as other civil actions". *Bailey v. Hayman, supra.*

In view of our holding above, we find it unnecessary to pass upon the other questions raised in appellant's brief as they might not arise at the retrial of this cause. However, we do state that in our opinion some of the documentary evidence introduced by plaintiff, particularly the affidavits, was not admissible in that it did not comport with G.S. 1A-1, Rule 44, and other applicable statutes.

For the reasons stated, the judgment appealed from is reversed and this cause is remanded to the superior court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges HEDRICK and WEBB concur.

DANIEL E. McKAY v. CITY OF CHARLOTTE AND COUNTY OF MECKLENBURG

No. 7726SC374

(Filed 7 March 1978)

Municipal Corporations § 16.1— flag bracket on sidewalk—tripping of pedestrian —no contributory negligence

In an action to recover for injuries sustained by plaintiff when he tripped and fell over a flag bracket placed against a light pole by defendant city's employees, evidence was insufficient to disclose contributory negligence as a matter of law since the flag bracket over which plaintiff tripped was not an obvious defect or common obstruction whose presence on the sidewalk should have been anticipated, and there was evidence that the flag bracket was behind the light pole and thus almost completely obstructed from plaintiff's view except for the cross-member over which he tripped.

APPEAL by defendant City of Charlotte from *Howell, Judge.* Judgment entered 25 January 1977 in Superior Court, MECKLENBURG County. Heard in the court of Appeals 10 February 1978.

Plaintiff instituted this action to recover for injuries sustained as a result of the alleged negligence of defendants acting through their employees.

Defendants filed answer denying liability and setting out the contributory negligence of plaintiff as an affirmative defense.

Plaintiff's evidence tended to show that on 13 May 1975, plaintiff parked his car on South Tryon Street intending to walk to a nearby restaurant. He got out of his car, walked behind it and stepped onto the sidewalk. After taking one or two steps on the sidewalk, plaintiff tripped and fell over a metal flag bracket which had been placed against a light pole.

On the same date, M. A. Eastwood, a member of the Charlotte Fire Department acting within the course and scope of his employment for defendant City of Charlotte, was supervising the installation of bicentennial flags on Tryon Street in preparation for the celebration of the 200th anniversary of the Mecklenburg Declaration of Independence. As part of this operation, Eastwood distributed metal frames or "flag brackets" along the street where bicentennial flags were to be displayed. These flag

brackets were leaned against the light pole until a crew came along to attach them to the poles.

On the morning in question, Eastwood leaned flag brackets against certain light poles on South Tryon Street and left before the brackets were attached. Each bracket consisted of three flag sockets attached to a one-inch wide piece of strap steel four feet in length. Two cross-members of the same material and width, one at each end, ran perpendicular to the central piece. Plaintiff's foot struck the lower horizontal cross-member causing him to fall and the bracket to fall on top of him. Plaintiff's ankle, leg and back were injured.

Plaintiff testified that he has no visual impairment, the weather was clear and there was nothing obstructing his view. He further testified that the bracket was freshly painted white and the sidewalk was dark gray.

Defendants presented no evidence.

The trial court allowed defendant County's motion for directed verdict, but denied the same as to defendant City. On the issue of defendant City's negligence, the jury answered affirmative; no contributory negligence on the part of plaintiff was found and judgment was entered for plaintiff. Defendant City appealed to this Court.

Wardlow, Knox & Knox, by H. Edward Knox and John S. Freeman; Rose & Bosworth, by William S. Rose, Jr., for the plaintiff.

Jones, Hewson & Woolard, by Harry C. Hewson, for the City of Charlotte.

MARTIN, Judge.

Defendant assigns as error the trial court's denial of its motions for a directed verdict and for judgment notwithstanding the verdict. Its sole contention with respect thereto is that plaintiff's evidence establishes his contributory negligence as a matter of law. We cannot agree.

In support of this contention, defendant cites and relies upon a series of "trip and fall" cases involving defects and obstructions on city sidewalks where the courts found the respective

plaintiffs contributorily negligent as a matter of law. *See Hedrick v. Akers*, 244 N.C. 274, 93 S.E. 2d 160 (1956); *Watkins v. Raleigh*, 214 N.C. 644, 200 S.E. 424 (1939); *Burns v. Charlotte*, 210 N.C. 48, 185 S.E. 443 (1936); *McClellan v. Concord*, 16 N.C. App. 136, 191 S.E. 2d 430 (1972). These cases stand generally for the proposition that a person is under a duty to discover and avoid defects and obstructions which are visible, obvious and discoverable in the exercise of due care. The underlying rationale of these decisions is that "obvious" defects such as cracks and holes in the pavement and "useful" obstructions such as fire hydrants and utility poles are common and normal obstacles which a person using the sidewalk is required to anticipate and look out for. *Hedrick v. Akers, supra,* and *McClellan v. Concord, supra.*

In the instant case, however, the flag bracket over which plaintiff tripped was not an obvious defect or common obstruction whose presence on the sidewalk should have been anticipated. Moreover, from the evidence presented, we cannot find as a matter of law that in the exercise of due care plaintiff should have seen the flag bracket.

It is well established that a directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to plaintiff establishes his negligence so clearly that *no other reasonable inference or conclusion may be drawn therefrom. Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976).

The testimony adduced at trial was unclear as to whether the flag bracket was between the light pole and the curb, or was placed against the light pole opposite the side from which plaintiff approached. Thus, taken in the light most favorable to plaintiff, the evidence supports the inference that the flag bracket was behind the light pole and hence, almost completely obstructed from plaintiff's view except for the cross-member over which plaintiff tripped. On this evidence, we cannot say that reasonable minds could conclude *only* that plaintiff should have seen the flag bracket. Therefore, the evidence does not establish contributory negligence as a matter of law and the case was properly submitted to the jury.

The trial court's denial of defendant City of Charlotte's motion for a directed verdict and for judgment notwithstanding the verdict is affirmed.

Affirmed.

Judges PARKER and ARNOLD concur.

LUTHER PERRY DENNING v. DAVID H. LEE

No. 7711SC331

(Filed 7 March 1978)

1. **Malicious Prosecution § 1— elements of malicious prosecution**

To establish a cause of action for malicious prosecution, the plaintiff must show: (1) that defendant instituted or procured the institution of a criminal prosecution against him; (2) that such was without probable cause; (3) that the prosecution was with malice; and (4) that the prosecution was terminated in the plaintiff's favor.

2. **Malicious Prosecution § 13.2— evidence of collateral purpose—malice—absence of probable cause**

Plaintiff's evidence was sufficient for the jury in a malicious prosecution action where his evidence tended to show that defendant obtained a warrant charging plaintiff with assault on defendant's nephew, the assault charge was dismissed when defendant twice failed to appear in court, and defendant obtained the warrant against plaintiff in an effort to force plaintiff to pay medical expenses incurred by defendant's nephew as a result of injuries received while on plaintiff's property, the evidence of defendant's "collateral purpose" in prosecuting plaintiff being sufficient for the jury to find malice and the absence of probable cause.

APPEAL by plaintiff from *Gavin, Judge*. Judgment entered 2 February 1977 in Superior Court, HARNETT County. Heard in the Court of Appeals 8 February 1978.

This is a malicious prosecution action. The defendant answered plaintiff's complaint, denying liability. At the trial, plaintiff's evidence tended to show that: plaintiff is co-administrator of the estate of Mary C. Bryan; on or about the date in question the estate owned certain real property which adjoined real property owned by defendant; plaintiff's son lived

with his wife and child on the Mary C. Bryan property; a path led from a road across the Bryan estate to defendant's property; because traffic on the path bothered plaintiff's son, plaintiff on or about 27 April 1975 erected eight poles across the path; at a different point on the path, plaintiff also erected two poles connected by a chain and sign; on about the same date, Earl Harris, age 15, drove a motorbike down the path, collided with the chain, and sustained injuries; at some time after this accident, plaintiff told defendant that he would not pay any of the medical bills associated with the injuries to Earl Harris; and a controversy developed over the boundary location between the Bryan estate property and defendant's property.

The plaintiff's evidence further tended to show that: on 3 July 1975, upon the advice of his sister, Joyce Harris, defendant went to the magistrate's office and obtained a warrant charging plaintiff with assault, on which the plaintiff was arrested; on 18 July 1975 and again on 1 August 1975, defendant failed to appear in court on the warrant, and the criminal proceeding was dismissed by the State. At the close of plaintiff's evidence, defendant moved for a directed verdict. From an order allowing defendant's motion, plaintiff appeals.

Doffermyre & Rizzo, by L. Randolph Doffermyre III, for plaintiff appellant.

Stewart and Hayes, by Gerald W. Hayes, Jr., for defendant appellee.

ERWIN, Judge.

The plaintiff's sole assignment of error is that the trial court erred in allowing the defendant's motion for a directed verdict and in signing and entering its judgment. We agree. The grounds for the motion were that plaintiff had failed to show malice and lack of probable cause and that the warrant was defective. It is well settled that on a motion by a defendant for a directed verdict under Rule 50(a), the court must consider the evidence in the light most favorable to the plaintiff and may grant such motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971).

[1] To establish a cause of action for malicious prosecution, the plaintiff must show: (1) that defendant instituted or procured the institution of a criminal prosecution against him; (2) that such was without probable cause; (3) that the prosecution was with malice; (4) that the prosecution was terminated in the plaintiff's favor. *Mooney v. Mull*, 216 N.C. 410, 5 S.E. 2d 122 (1939); *Falkner v. Almon*, 22 N.C. App. 643, 207 S.E. 2d 388 (1974). Counsel stipulated as to elements (1) and (4), and those elements need not detain us further.

In *Dickerson v. Refining Co.*, 201 N.C. 90, 159 S.E. 446 (1931), Chief Justice Stacy stated:

> "Evidence that the chief aim of the prosecution was to accomplish some collateral purpose, or to forward some private interest, *e.g.*, to obtain possession of property, or to enforce collection of a debt, and the like, is admissible, both to show the absence of probable cause and to create an inference of malice, and such evidence is sufficient to establish a prima facie want of probable cause (citations omitted).
>
> The reason for holding that proof of a collateral purpose is sufficient to make out a prima facie want of probable cause, is based upon the hypothesis that a person, bent on accomplishing some ulterior motive, will act upon much less convincing evidence than one whose only desire is to promote the public good." 201 N.C. at 95.

See also Cook v. Lanier, 267 N.C. 166, 147 S.E. 2d 910 (1966).

The plaintiff called the defendant, David H. Lee, and his sister, Joyce Harris, to testify, and portions of their testimony are set out below:

David H. Lee—

Q. "Now, when did your sister tell you to take out the warrant?"

A. "Well, when Luther Perry Denning made the comment to me and the Mary Bryan Estate that he won't paying nary damn cent on the hospital or doctor . . . so then we proceeded to take out the warrant."

Joyce Harris—

Q. "What motivated you to tell your brother to take out a warrant?"

A. "Because he had told me that he had heard Luther Perry say that he wasn't going to pay a damn cent of hospital or for the doctor's or emergency room or anything like that and I said I think Luther Perry should pay some how or another."

Q. "And is this the reason you said, take out a warrant, so that it could help you in obtaining payments of medical bills?"

A. "Yes sir."

[2] There was also evidence that the defendant had become quite agitated over the boundary dispute. Further, more than two months elapsed following the injuries to Earl Harris before the defendant sought to bring criminal charges. It appears to us that there was strong evidence of a "collateral purpose" in defendant's bringing the criminal prosecution, creating a "prima facie want of probable cause."

In *Cook v. Lanier, supra,* Chief Justice Parker observed:

"Of course a *prima facie* showing does not necessarily mean that the plaintiff is entitled to recover. *It is sufficient to carry the case to the jury* (emphasis added and citation omitted), and it is for the jury to say whether or not the crucial and necessary facts have been established." (Citations omitted.) 267 N.C. at 171.

Nor do we agree with the defendant's contention that the warrant was "defective" and therefore could not be made the basis of a malicious prosecution action. The defendant cites *Moser v. Fulk,* 237 N.C. 302, 74 S.E. 2d 729 (1953) in support of this argument. However, that case involved a warrant void on its face. Here the warrant was sufficient to charge the plaintiff with assault under G.S. 14-33(b)(1).

We hold that the plaintiff made a sufficient showing to carry his case to the jury and that it was error to grant the defendant's motion for a directed verdict.

Reversed and remanded.

Judges VAUGHN and MITCHELL concur.

JAMES A. BRIDGER, JR. v. JOHN MANGUM

No. 7710SC229

(Filed 7 March 1978)

Contracts § 18— contract with individual—no substitution of corporation

A contract for the performance of engineering services was initially made with defendant individually, and, in the absence of a mutual agreement to remove the liability from defendant and place it on defendant's corporation, defendant remained individually liable on the contract.

APPEAL by defendant from *Donald L. Smith, Judge.* Judgment entered 3 December 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 18 January 1978.

Plaintiff, a consulting engineer, instituted this civil action to recover from defendant the sum of $7,525 allegedly due for services performed in connection with the development of the Ponderosa Subdivision in Wake County. The case was tried without a jury.

The uncontradicted evidence showed that after preliminary negotiations, defendant retained plaintiff to do engineering work on the Ponderosa Subdivision in 1972. The work included, among other things, development of a water system. Plaintiff sent defendant a bill for his services in the amount of $7,722, and defendant paid that bill in September 1972. Plaintiff performed further services in connection with the subdivision and sent defendant a bill, dated 6 September 1974, in the amount of $9,025. A $1500 payment was made on the indebtedness, and defendant testified that this payment was made by check from Mangum Construction Co., Inc.

The existence of the debt was not contested at trial. The crucial issue raised by the evidence was whether the defendant was individually liable for the debt. Defendant sought to show that he was not liable because plaintiff's contract was only with

defendant's corporation. Sitting without a jury, the court found that defendant was personally liable and entered judgment in favor of plaintiff in the amount of $7,525, plus interest and costs. Defendant appealed.

Vaughan S. Winborne for plaintiff appellee.

Ernest E. Ratliff for defendant appellant.

PARKER, Judge.

The only assignment of error defendant presents and argues in his brief is based on his exception to the judgment. His remaining assignment of error is deemed abandoned. Rule 28(a), North Carolina Rules of Appellate Procedure. Therefore, the sole question presented on this appeal is "whether the judgment is supported . . . by the findings of fact and conclusions of law." Rule 10(a), North Carolina Rules of Appellate Procedure.

In its judgment, the court concluded that plaintiff initially contracted with defendant as an individual, and defendant does not challenge this conclusion. The court also found that defendant, individually, paid plaintiff's bill for work done on the first phase of the project. Plaintiff continued his performance of the contract, working on the project as it moved into its later phases.

It is a fundamental principle of contract law that a contract requires the mutual consent or agreement of the parties. *Baker v. Lumber Co.*, 183 N.C. 577, 112 S.E. 241 (1922). For defendant to remove himself from the contract and substitute his corporation as a party to the contract requires the consent of plaintiff, who is the other party to the contract. *See Joyner v. Pool*, 49 N.C. 293 (1857). However, the court specifically found as a fact that "[t]he Defendant did not inform the Plaintiff that the corporation or anyone else would be responsible for the work involved in the contract." Since plaintiff was not informed of and did not consent to any change in the parties to the contract, we agree with the court's conclusion that defendant is personally liable for all sums due pursuant to the contract.

In his brief, defendant's argument focuses on plaintiff's knowledge that defendant had formed a corporation. Though perhaps relevant to the inquiry, plaintiff's knowledge of defendant's incorporation does not establish that the contract was with

the corporation. The contract was initially made with defendant individually, and in the absence of a mutual agreement to remove the liability from defendant and place it on the corporation, it is of no consequence that plaintiff was aware that defendant had incorporated. Accordingly, the judgment is

Affirmed.

Judges MARTIN and ARNOLD concur.

ARMEL MANAGEMENT CORPORATION v. WILLIAM H. STANHAGEN

No. 7726SC311

(Filed 7 March 1978)

1. **Uniform Commercial Code § 78; Mortgages and Deeds of Trust § 32— promissory note—no purchase money transaction**

In an action to recover on a promissory note, G.S. 45-21.38 was inapplicable and the trial court properly granted summary judgment for plaintiff where the evidence clearly disclosed that the transaction between plaintiff and defendant with respect to the promissory note was not a purchase money transaction within the meaning of the statute.

2. **Attorneys at Law § 7.4— attorney fees—provision in note—summary judgment proper**

In an action to recover on a promissory note, the trial court properly entered summary judgment for plaintiff as to attorney fees where the evidence disclosed that the note provided that an attorney's fee of 10% of the amount of the note would be paid as provided in G.S. 6-21.2, and plaintiff notified defendant that it intended to enforce the provisions relating to attorney fees as provided in G.S. 6-21.2(5).

APPEAL by defendant from *Griffin, Judge.* Judgment entered 18 March 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 February 1978.

Civil action by plaintiff, Armel Management Corporation against defendant, William H. Stanhagen, on a promissory note for $60,000. Defendant filed an answer in which he admitted execution of the note but pled G.S. 45-21.38 in bar of plaintiff's claim, alleging that the note represented the balance due on a

purchase money deed of trust. Plaintiff moved for summary judgment. The following facts are established by the record:

On 30 April 1974 the defendant purchased two tracts of land from the Charlotte Downtown Motel Associates, a limited partnership. On the same day the defendant purchased a leasehold interest in certain real property from the plaintiff and executed a promissory note for the purchase price. As security for the note the defendant executed a deed of trust conveying the two tracts of land previously purchased from Charlotte Downtown Motel Associates to William E. Underwood, Jr., trustee for the plaintiff. The defendant defaulted on the note.

The trial court entered summary judgment for the plaintiff in the amount of $60,000 plus interest and attorney's fees. The defendant appealed.

Bradley, Guthery, Turner & Curry, by Paul B. Guthery, Jr., for plaintiff appellee.

Lindsey, Schrimsher, Erwin, Bernhardt & Hewitt, by Lawrence W. Hewitt, for the defendant appellant.

HEDRICK, Judge.

[1] North Carolina General Statute 45-21.38 in pertinent part provides:

> *Deficiency judgments abolished where mortgage represents part of purchase price.*—In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, . . . to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: . . . .

The defendant contends in his sole assignment of error that summary judgment was inappropriate because the record disclosed a genuine issue as to "whether the transaction entered into be-

tween Plaintiff and Defendant evidenced by the note and deed of trust was a purachase money transaction," which would trigger the application of G.S. 45-21.38.

In *Dobias v. White*, 239 N.C. 409, 412, 80 S.E. 2d 23, 26 (1954), Justice Ervin stated that "a deed of trust is a purchase money deed of trust only if it is made as a part of the same transaction in which the debtor purchases land, embraces the land so purchased, and secures all or part of its purchase price." *See also Childers v. Parker, Inc.*, 274 N.C. 256, 162 S.E. 2d 481 (1968). In the present case the record affirmatively discloses that the property embraced in the deed of trust was not the same property purchased by the defendant from plaintiff. Thus, the transaction between plaintiff and defendant with respect to the promissory note was not a purchase money transaction within the meaning of the statute, and G.S. 45-21.38 has no application to this case. The trial court correctly entered summary judgment for the plaintiff as to the note.

[2] The defendant in his answer denied that plaintiff was entitled to collect attorney's fees and alleged that the plaintiff had failed to comply with the statute governing the collection of attorney's fees. However, the record affirmatively discloses that the note provided that an attorney's fee of 10% of the amount of the note would be paid as provided in G.S. 6-21.2, and the record further discloses that the plaintiff notified the defendant that it intended to enforce the provisions relating to attorney's fees as provided in G.S. 6-21.2(5). While the plaintiff filed an affidavit in support of its motion for summary judgment showing compliance with G.S.6-21.2(5) with respect to attorney's fees, the defendant failed to offer any evidence in opposition to the motion in this regard. Thus, the court correctly entered summary judgment for plaintiff as to attorney's fees.

Affirmed.

Judges VAUGHN and ERWIN concur.

STATE OF NORTH CAROLINA v. ROY RICHARD KEETER

No. 7729SC854

(Filed 7 March 1978)

Larceny § 9— inability of jury to reach verdict on breaking or entering charge— absence of charge on value of stolen property—verdict treated as guilty of misdemeanor larceny

Where, in a prosecution for felonious breaking or entering and felonious larceny, the trial court charged only on felonious larceny after a breaking or entering and failed to charge that the jury could find defendant guilty of felonious larceny if it found the value of the property taken exceeded $200.00, and the jury was unable to reach a verdict on the breaking or entering charge, the trial court could not properly accept a verdict of guilty of felonious larceny, and the jury's verdict must be treated as a verdict of guilty of misdemeanor larceny.

APPEAL by defendant from *Martin, Harry C., Judge.* Judgment entered 6 May 1977 in Superior Court, HENDERSON County. Heard in the Court of Appeals 7 February 1978.

Defendant was tried for feloniously breaking or entering the Southern Agricultural Insecticide, Inc. warehouse in Hendersonville and felonious larceny of fertilizer valued at more than $200.00 after having broken and entered the said warehouse. Both charges were submitted to the jury.

In his charge, Judge Martin correctly instructed the jury as to what they would have to find to convict the defendant of felonious larceny after breaking or entering. He did not instruct them they could find the defendant guilty of felonious larceny if they were satisfied beyond a reasonable doubt the property taken was worth more than $200.00. The jury was unable to reach a verdict on the charge of felonious breaking or entering, but returned a verdict of guilty of felonious larceny. The court accepted the verdict of guilty of felonious larceny and in its discretion withdrew a juror and declared a mistrial as to the felonious breaking or entering charge.

From a prison sentence of 24 months with a recommendation for work release, the defendant has appealed.

Attorney General Edmisten, by Associate Attorney Robert W. Newsome III, for the State.

Hamlin, Potts, Averette & Barton, by H. Paul Averette, Jr., for defendant appellant.

WEBB, Judge.

Our courts have repeatedly held that where a defendant is tried for breaking or entering and felonious larceny and the jury returns a verdict of not guilty of felonious breaking or entering and guilty of felonious larceny, it is improper for the trial judge to accept the verdict of guilty of felonious larceny unless the jury has been instructed as to its duty to fix the value of the property stolen; the jury having to find that the value of the property taken exceeds $200.00 for the larceny to be felonious. *State v. Jones*, 275 N.C. 432, 168 S.E. 2d 380 (1969); *State v. Teel*, 20 N.C. App. 398, 201 S.E. 2d 733 (1974); *see also State v. Cooper*, 256 N.C. 372, 124 S.E. 2d 91 (1962); *State v. Holloway*, 265 N.C. 581, 144 S.E. 2d 634 (1965); *State v. Lilly*, 25 N.C. App. 453, 213 S.E. 2d 418 (1975). The above cited cases also stand for the proposition that although the judgment of felonious larceny must be vacated where no instructions were given on value, the verdict will stand, and the case is to be remanded for entering a sentence consistent with a verdict of guilty of misdemeanor larceny.

We are presented with the question of whether the rule of *State v. Jones, supra*, should be extended to the case at bar. That is, whether a case in which the jury is unable to reach a verdict on a charge of felonious breaking or entering precludes the acceptance of a guilty verdict of felonious larceny. We hold that *Jones* does apply. As we read the *Jones* case, if the jury does not find the defendant guilty of felonious breaking or entering, it cannot find him guilty of felonious larceny based on the charge of felonious breaking or entering.

We note that the court imposed a sentence which was not in excess of what could have been imposed for a conviction of misdemeanor larceny. Nevertheless, since the sentence was imposed on the basis of a conviction of felonious larceny, we hold that it must be vacated.

The verdict will not be disturbed. The judgment is vacated and the case is remanded to the Superior Court of Henderson County for the pronouncement of a judgment herein as upon a verdict of guilty of misdemeanor larceny.

Judges BRITT and HEDRICK concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 MARCH 1978

ROGERS v. ROGERS No. 7710DC306	Wake (74CVD4806)	Affirmed
STATE v. ALLEN No. 775SC738	New Hanover (77CR3049)	No Error
STATE v. EDWARDS No. 7717SC818	Surry (76CR8487)	No Error
STATE v. MURCHISON No. 7715SC856	Chatham (76CRS6295)	No Error
STATE v. PINYAN No. 7730SC830	Jackson (77CR70)	No Error
STATE v. SHEPPARD No. 7722SC870	Davie (77CRS710) (77CRS711) (77CRS712)	No Error
STATE v. WALKER No. 7721SC853	Forsyth (77CR6650)	No Error
STATE v. WORTH No. 7716SC901	Scotland (76CR7322) (76CR7327)	Appeal Dismissed
THOMPSON v. THOMPSON No. 7719DC258	Cabarrus (76CVD177)	Affirmed

NORTH CAROLINA AUTOMOBILE RATE ADMINISTRATIVE OFFICE, NATIONWIDE MUTUAL INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, UNITED STATES FIRE INSURANCE COMPANY, UNITED STATES FIDELITY AND GUARANTY COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, SAINT PAUL FIRE AND MARINE INSURANCE COMPANY, SHELBY MUTUAL INSURANCE COMPANY, AND AMERICAN MOTORISTS INSURANCE COMPANY PETITIONERS v. JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE FOR THE STATE OF NORTH CAROLINA, RESPONDENT

No. 7710SC73

(Filed 21 March 1978)

1. **Insurance § 79.1— change in medical payment rates—order prohibiting use of standard rule of application—jurisdiction of superior court**

The Superior Court of Wake County had subject matter jurisdiction under G.S. 58-9.3(a) of a petition for review of an order of the Commissioner of Insurance prohibiting the Automobile Rate Office from implementing reduced automobile medical payments rates in accordance with its standard rule of application of rate changes, and the Superior Court acted within the scope of its powers in setting aside that order although it was included in an order approving a change in rates, as to which the Superior Court lacked subject matter jurisdiction.

2. **Insurance § 79.1— reduction in automobile medical payments rates—rule of application—arbitrary order by Commissioner of Insurance**

The Commissioner of Insurance acted arbitrarily and in excess of his statutory authority in entering an order prohibiting the Automobile Rate Office from implementing a reduction in automobile medical payments insurance rates in accordance with its standard rule of application of rate changes where he entered the order without prior notice, without hearing, and without supporting evidence.

APPEAL by respondent Commissioner of Insurance from *Smith (Donald L.), Judge*. Judgment entered 20 December 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 26 October 1977.

On 1 July 1971 the North Carolina Automobile Rate Administrative Office (Rate Office) filed with former Commissioner of Insurance Edwin S. Lanier a proposed revision of automobile medical payments insurance rates for private passenger automobiles reflecting a rate level decrease of 12.3%. The proposed decrease was based on statistical data for 1968 and 1969 and on the private passenger bodily injury liability insurance rates then in effect. (Because of the similarity in hazard, medical payments insurance premium rates are determined by reference to bodily injury liability insurance rates, the medical payments in-

surance premium base rate being the sum of 10% of the base rate for bodily injury liability insurance plus a constant which is calculated in such a way that the total medical payments charges produce the required premium revenue.)

On 20 December 1972 the Rate Office filed a supplement to its 1 July 1971 Filing to reflect revisions which had been approved by Commissioner Lanier on 4 December 1972 in the private passenger automobile bodily injury liability rates upon which the medical payment insurance rates were determined. The supplemental filing proposed a rate level decrease of 14.4% instead of 12.3% and further proposed that the revised rates go into effect concurrently with the revised private passenger automobile rates which had been approved by Commissioner Lanier on 4 December 1972. No action was taken on the 1 July 1971 Filing or the 20 December 1972 supplement thereto by Commissioner Lanier, and these were still pending in the Department of Insurance when John R. Ingram took office as Commissioner of Insurance in January 1973.

During 1973 Commissioner Ingram took no action on the pending proposals by the Rate Office for decreases in rates for automobile medical payments insurance. On 18 January 1974, without notice or hearing, he issued an order approving effective 1 February 1974 the 12.3% rate level decrease as had been proposed in the original Rate Office Filing of 1 July 1971. In a letter to the Commissioner dated 22 January 1974, Mr. Paul L. Mize, General Manager of the Rate Office, called Commissioner Ingram's attention to the fact that, because automobile medical payments insurance rates are to some extent dependent upon automobile liability insurance rates and because the letter had been twice revised since the 1 July 1971 Filing had been submitted, implementing the revised medical payments rate tables on the basis of current bodily injury liability rates would have the effect of producing an overall rate level reduction of 16.4% in lieu of the 12.3% reduction indicated in the original 1971 filing. This letter also proposed the following rule of application for the new rates:

> The new medical payments rates for private passenger cars, for private passenger types rated under the Commercial Automobile Manual and for related miscellaneous

classifications will become effective February 1, 1974 in accordance with the following rule of application:

> These changes are applicable to all new and renewal policies written on or after February 1, 1974 and to all policies written before February 1, 1974 which will become effective on or after April 1, 1974. No policy effective prior to February 1, 1974 shall be endorsed or cancelled and rewritten to take advantage of or to avoid the application of these changes except at the request of the insured and at the customary short rate changes as of the date of such request, but in no event prior to February 1, 1974.
>
> EXCEPTION FOR EXPERIENCE RATED POLICIES. These changes are applicable as of the experience rating date to all policies to which an experience rating modification which becomes effective on or after April 1, 1974 is to apply and may not be applied to such policies prior to the experience rating date. As respects any policy to which an experience rating modification applies which becomes effective prior to April 1, 1974, these changes may not be applied until the first experience rating date after April 1, 1974.

The Commissioner replied with a letter dated 23 January 1974 notifying the Rate Office that the rate level reduction of 16.4% would be approved but that the rule of application was not acceptable. In accord with that letter the Commissioner issued an addendum to his 18 January order approving the 16.4% decrease and ordering into effect a rule of application different from the one submitted by the Rate Office. This addendum, dated 29 January 1974, ordered:

> That the premium rates for automobile medical payments insurance shown in the Revised Rate Tables, reflecting an adjusted overall rate level reduction of 16.4% in place of the 12.4% (sic) shown in this filing, are approved effective February 1, 1974 and are to be applicable to all new and renewal policies effective on or after said date, except that any policy written before February 1, 1974, and effective on or after February 1, 1974, but effective before April 1, 1974, may be written at the medical payment insurance rates heretofore in effect, but only if a credit equal to the difference in the old rate and the new rate is given at renewal time; or if such policy is not renewed, only if a refund equal

to the difference in the old rate and the new rate is made when such policy is terminated.

On 1 February 1974 the Rate Office and certain member insurance companies filed their petition in the Superior Court in Wake County pursuant to G.S. 58-9.3 seeking reversal of Commissioner Ingram's orders of 23 January 1974 and 29 January 1974 insofar as they prohibited the Rate Office from implementing and placing into effect the reduction in automobile medical payments insurance rates in accordance with the standard rule of application maintained by the Rate Office. In connection with their petition, the petitioners moved for a temporary restraining order and for a preliminary injunction to enjoin Commissioner Ingram from enforcement of his orders of 23 January 1974 and 29 January 1974 with respect to the manner of implementation of the rate decrease and from taking any action to prevent the Rate Office from implementing such rate change in accordance with its standard rule of application.

Following issuance of a temporary restraining order on 1 February 1974, petitioners' motion for a preliminary injunction came on for hearing before Judge James H. Pou Bailey. After the hearing, Judge Bailey on 8 February 1974 issued a preliminary injunction pending final determination of this action enjoining the Commissioner from preventing the Rate Office from implementing and placing into effect the reduced automobile medical payments insurance rates in accordance with the standard rule of application as set forth in the letter of the Rate Office dated 22 January 1974. Following the issuance of this preliminary injunction, the Rate Office implemented and placed into effect the 16.4% rate reduction for medical payments insurance rates, effective 1 February 1974, in accordance with its standard rule of application as set out in its letter of 22 January 1974.

On 8 February 1974 respondent Commissioner filed his answer to the petition for review, a further answer and defense, and a motion to dismiss. On 9 July 1976 he filed a further motion to dismiss on grounds that the Superior Court of Wake County lacks subject matter jurisdiction. The case was heard before Judge Donald L. Smith at the 13 December 1976 Civil Session of Superior Court in Wake County, being heard on the pleadings, interrogatories, deposition, and the record in this matter.

The record shows the following: The rule of application submitted by the Rate Office was adopted by its Governing Committee in 1956 and has been the method of implementing insurance rate changes since that date. This rule of application is designed to minimize administrative and clerical work in implementing rate changes. It is common practice in the insurance industry for automobile insurance policies to be issued prior to their effective date. When a rate change is announced and becomes effective after a policy is issued but before the effective date of the policy, the question arises as to whether the policy must be altered to reflect the rate change or whether the policy can be put into effect as it was written. If a policy is issued no more than sixty days prior to its effective date, the standard rule of application generally eliminates the necessity of rewriting or reissuing the policy by permitting the policy to go into effect at its old rate unless the policyholder requests otherwise. This rule has the effect of protecting the policyholder from insurance rate increases occurring after the policy is issued if the policy is issued no more than sixty days prior to its effective date, but it permits the policyholder, if he so requests, to take advantage of rate decreases occurring after the policy is issued but before the policy's effective date. In the case of experience rated policies, the standard rule of application provides a time delay within which the policies may become effective without being subject to the rate change. This delay prevents the necessity of rerating risks or amending policies which have already been rated under experience rating modifications based on the existing rate level.

On the other hand, the rule of application which the Commissioner ordered into effect by his 29 January 1974 addendum to his 18 January 1974 order required the revised rate to apply to all policies which would become effective on or after the effective date of the rate change, regardless of when the policy was written or issued. The rate change in this case was a decrease, and if a policy was issued prior to the effective date of the rate change but written at the old rate, this rule would require the insurance companies to give the policyholder a credit at renewal time equal to the difference between the old and the new rates. If the policyholder did not renew the policy, the rule would require the insurer to make a refund when the policy was terminated.

Affidavits submitted by petitioners indicate that the cost of implementing the Commissioner's rule of application would exceed the amount of benefit to policyholders. The average rate decrease would be approximately one dollar for a six-month insurance policy and two dollars for a twelve-month policy. Renewal policies are normally prepared thirty to sixty days in advance of their effective date, and the rule of application ordered by the Commissioner would require insurance agents to review a substantial number of policies already issued in order to provide credits or refunds. Estimates of the administrative and clerical costs involved in making the refunds and credits ranged between $2.00 and $3.50 per policy.

Following the hearing, the court entered judgment making findings of fact and conclusions of law. Finding of Fact No. 4, to which no exception was noted, is as follows:

> 4. The rule of application set out in the Rate Office letter of January 22, 1974, is in accordance with the standard rule of application adopted by the Governing Committee of the Rate Office in June of 1956 which has been maintained and consistently used by the Rate Office in the implementation of automobile liability insurance rates including automobile liability medical payments insurance. It is common practice for policies of automobile liability insurance and medical payments insurance to be issued prior to the effective date of the policy. By providing a time interval within which policies written prior to the effective date of a rate revision may become effective after such date without the rate change being applicable to such policy, the standard rule of application eliminates the necessity for reissue or amendment to existing policies and the necessity of making premium adjustments to the policyholders for existing policies. In the case of experience rated policies, the standard rule of application prevents the necessity of rerating risks or amending policies which have already been rated under experience rating modifications based on the existing rate level.

The court concluded as matters of law that the Superior Court had jurisdiction of this case under G.S. 58-9.3; that issuance by the Commissioner of his order of 29 January 1974 changing the

rule maintained by the Rate Office for the implementation of changes in automobile insurance rates without notice, hearing, or any supporting evidence, was unlawful; and that to the extent the order would require petitioners to place the reduced rates into effect as to existing insurance policies entered into prior to 1 February 1974 to go into effect subsequent to that date, it contravenes Art. I, Sec. 19 of the State Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution. On its findings of fact and conclusions of law the court adjudged that the Commissioner's order of 29 January 1974 be vacated insofar as it prohibits the Rate Office from implementing and placing into effect the reduction in automobile medical payments insurance rates in accordance with the standard rule of application maintained by the Rate Office.

From this judgment, the respondent Commissioner appealed.

Allen, Steed and Allen, by Thomas W. Steed, Jr.; Broughton, Broughton, and Boxley, by Melville Broughton, Jr.; Sanford, Cannon, Adams & McCullough by Charles C. Meeker for petitioners appellees.

Attorney General Edmisten by Isham B. Hudson, Jr., Assistant Attorney General, for respondent appellant.

PARKER, Judge.

[1] The initial question presented by this appeal is whether the Superior Court had subject matter jurisdiction of the petition for review under G.S. 58-9.3. We hold that it did. As pertinent to that question, G.S. 58-9.3(a) and G.S. 58-9.4 provide:

> G.S. 58-9.3. *Court review of orders and decisions.*—(a) Any order or decision made, issued or executed by the Commissioner, except an order to make good an impairment of capital or surplus or a deficiency in the amount of admitted assets and except an order or decision that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest or that a classification assignment is unwarranted, unreasonable, improper, unfairly discriminatory, or not in the public interest, shall be subject to review in the Superior Court of Wake County on

petition by any person aggrieved filed within 30 days from the date of the delivery of a copy of the order or decision made by the Commissioner upon such person.

G.S. 58-9.4. *Court review of rates and classification.*—Any order or decision of the Commissioner that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest or that a classification or classification assignment is unwarranted, unreasonable, improper, unfairly discriminatory or not in the public interest may be appealed to the North Carolina Court of Appeals by any party aggrieved thereby.

Appellant Commissioner contends that the decision which petitioners sought to have reviewed in this case was one in which he found the premium rates charged for automobile medical payments insurance to be excessive and that therefore the Superior Court had no jurisdiction under G.S. 58-9.3(a) to review his decision, review of such an order being only by direct appeal to the Court of Appeals under G.S. 58-9.4. The fallacy in this contention lies in its major premise. Petitioners have never sought review of the portion of the Commissioner's order finding the rates excessive. Indeed, it was the petitioner Rate Office, not the Commissioner, which initiated the proceeding for the reduction in rates with its filing of 1 July 1971 proposing a rate level decrease of 12.3%. When, more than two and a half years later, the Commissioner approved the 12.3% decrease by his order issued 18 January 1974, it was the petitioner Rate Office which called his attention to the fact that, because of revisions which had occurred since the original filing in the private passenger automobile bodily injury liability rates to which the medical payments insurance rates were to some extent related, the rate level decrease in the medical payments insurance rates should be 16.4% rather than 12.3%. The Commissioner then issued an addendum to his 18 January 1974 order to approve the 16.4% decrease. The petitioners have never excepted to or in any manner sought to question the portion of the Commissioner's decision and order finding the premium rates excessive and approving the 16.4% decrease. Their only challenge has been to the portion of his order in which, without notice or hearing, he abruptly directed that petitioners could not follow in this case the standard

rule of application for placing into effect changes, whether increases or decreases, in insurance premium rates. That decision by the Commissioner is not such a decision as is described in G.S. 58-9.4, nor does it fall within any of the categories excepted from review by petition to the Superior Court in Wake County under G.S. 58-9.3(a). The argument in appellant's brief that the Commissioner's decision changing the rule of application should be "interpreted to mean that rates were excessive with respect to any and all policies bearing an effective date of February 1, 1974 or thereafter" is singularly unpersuasive in view of the Commissioner's long and unexplained delay in taking any action on the pending filing requesting approval of a decrease in rates. We hold that the Superior Court properly exercised subject matter jurisdiction under G.S. 58-9.3(a) in this case.

Appellant next contends that, even if the Superior Court had subject matter jurisdiction under G.S. 58-9.3 of the matters presented in the petition for review in this case, that statute did not give the Superior Court power "to modify the Commissioner's decisions by affirming in part and reversing in part." G.S. 58-9.3(c) provides that "[t]he trial judge shall have jurisdiction to affirm or to set aside the order or decision of the Commissioner and to restrain the enforcement thereof." In this case the trial court did set aside and restrain the enforcement of the only order or decision of the Commissioner which was brought before it for review, being the order or decision of the Commissioner that the petitioners could not in this case follow the standard rule of application for placing rate changes into effect. The order or decision would not have been reviewable by direct appeal to this Court under G.S. 58-9.4. *See Com'r of Insurance v. Insurance Co.*, 28 N.C. App. 7, 220 S.E. 2d 409 (1975). The Commissioner could not insulate it from any judicial review simply by including it in an order approving a change in rates, as to which the Superior Court would have lacked subject matter jurisdiction. We hold that the Superior Court acted within the scope of its powers as granted to it by G.S. 58-9.3.

[2] The question remains whether the Superior Court was correct in setting aside and restraining enforcement of the Commissioner's decision in which he attempted to change the standard rule of application in this case. We hold that it was and accordingly affirm.

The judgment of the Superior Court contains the following among the conclusions of law:

> There is no evidence in the record and, in fact, it is conceded by counsel for all parties, that the Commissioner's Order of January 29, 1974, was entered without notice or hearing or any supporting evidence whatsoever. The issuance of an order by the Commissioner changing or preventing application of the rule maintained by the Rate Office for the implementation of changes in automobile insurance rates without notice, hearing or any supporting evidence, is in excess of his statutory authority under Chapter 58 of the General Statutes and is unlawful.

The appellant filed an exception to this conclusion "except that part thereof which finds or concludes that the Commissioner afforded the petitioners no notice and hearing prior to the entry of the orders complained of." Appellant made this exception the basis of an assignment of error. However, appellant did not present or discuss this assignment of error or the exception on which it is based in his brief, and any question intended to be raised thereby is deemed abandoned. Rule 28(a), N.C. Rules of Appellate Procedure. In any event, the record before us fully supports the finding that the Commissioner's order in which he sought to prevent in this case the application of the long standing rule of the Rate Office for implementing changes in insurance premium rates was entered without prior notice, without hearing, and without supporting evidence. In so doing the Commissioner acted arbitrarily and in excess of his statutory authority. It should be noted that had the rate change been an increase rather than a decrease, the method of implementing the change which the Commissioner sought to impose in this case as compared with the standard rule of application adopted and maintained by the Rate Office would have worked to the detriment of policyholders to whom policies had been issued prior to 1 February 1974 to become effective on or after that date. The rate change here involved was a decrease rather than an increase, but even so, evidence submitted by the petitioners at the hearing in the Superior Court held prior to issuance of the preliminary injunction reveals that the benefits to individual policyholders which would result from application of the Commissioner's decision as compared with the results from application of the standard rule

would be minimal, while the cost to the petitioner insurance companies would be very substantial indeed, the total cost to the companies exceeding the total benefits to all affected policyholders by a wide margin. The Commissioner acted without receiving any evidence on these matters. Adoption of the rule which he sought to impose in the face of such evidence would have been arbitrary and capricious. It was all the more so because he acted without affording any interested party the opportunity to present such evidence.

Since we hold that the Commissioner in this case exceeded his statutory authority, we need not consider and do not pass upon the question, discussed in the briefs of the parties, of whether in addition he also violated constitutional rights of the appellees. For the reasons above noted the judgment of the Superior Court here appealed from is

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND RUFUS L. EDMISTEN, ATTORNEY GENERAL v. MEBANE HOME TELEPHONE COMPANY

No. 7710UC349

(Filed 21 March 1978)

1. Telecommunications § 1.6; Utilities Commission § 6— telephone company— property used and useful in providing service

Finding by the Utilities Commission that petitioner telephone company had excess plant investment consisting of 1000 lines and terminals which was not used and useful in rendering telephone service and which should therefore be excluded in arriving at the rate base was supported by substantial, competent evidence where such evidence tended to show that the decision to expand petitioner's central office capacity was made by the management of the company in 1973; in September of that year an order was placed for central office equipment consisting of 5500 new lines; the decision to expand was made because the economy was thriving and an influx of new industries was anticipated; the petitioner used a growth rate of 400 main stations per year in planning the capacity of the new central office, but there was no historical support for a growth rate that high; after the order was placed the economy

began to decline and public needs failed to meet the expected growth rate; and petitioner was given the opportunity to modify its order to 4500 lines but decided that the insignificant savings to be derived from dropping 1000 lines from the order was offset by the reduced price at which the lines could be purchased as a part of the larger order.

2. **Telecommunications § 1.4; Utilities Commission § 6— telephone company—fair value—debt-equity ratio**

In determining the fair market value of a telephone company's property, the Utilities Commission did not err in using a weighting process based on a debt-equity ratio, since the Commission took into consideration each of the indicators of fair value stated in G.S. 62-133(b)(1).

3. **Telecommunications § 1.8; Utilities Commission § 6— telephone company—fair rate of return**

Finding by the Utilities Commission that a return of 14.76% on original cost common equity would be fair and reasonable to a telephone company was supported by competent evidence where the evidence tended to show that the Commission arrived at that particular rate by considering the cost of equity capital, and the cost of equity capital was determined by using the cost of equity of larger telephone companies as a starting point, taking into consideration the differences and adjusting accordingly.

APPEAL by petitioner from order of the North Carolina Utilities Commission entered 4 March 1977. Heard in the Court of Appeals 9 February 1978.

Mebane Home Telephone Company is a public utility based in Mebane, North Carolina, providing telephone service for parts of Alamance and Orange Counties, an area encompassing 150 square miles. On 13 August 1976 the company filed a petition with the Utilities Commission proposing rate increases for its services. Beginning on 4 January 1977 the Commission held a public hearing to consider the petition, and the Attorney General was recognized as an intervenor on behalf of the consuming public. Subsequent to the hearing the Commission made findings of fact which are summarized and quoted as follows:

The local service rates currently charged by the petitioner were established by the Commission on 9 March 1966. The proposed increase in rates would produce $340,061 in additional revenues for petitioner. At present the petitioner provides adequate service to its customers.

5. That as of December 31, 1976, the Company had excess plant investment consisting of 1,000 lines and terminals

amounting to $175,639, which was not used and useful in rendering telephone service.

. . .

10. That the fair value of Mebane Home's plant used and useful in providing telephone service in North Carolina should be derived by giving 9/10 weighting to the reasonable original cost less depreciation of Mebane Home's plant in service and 1/10 weighting to the depreciated replacement cost of Meband Home's plant. Using this method, with the depreciated original cost of $3,946,594 and the depreciated replacement cost of $4,244,361, the Commission finds that the fair value of Mebane Home's utility plant in North Carolina is $3,976,371. This fair value includes a reasonable fair value increment of $29,777.

11. That the fair value of Mebane Home Telephone Company's plant in service to its customers in North Carolina at the end of the test year of $3,976,371, plus the reasonable allowance for working capital of $73,355 and the investment in Rural Telephone Bank Class B stock of $118,500, yields a reasonable fair value of Mebane Home's property in service to North Carolina customers of $4,168,226.

. . .

17. That the Company's proper embedded cost of total debt is 3.56%. The fair rate of return which should be applied to the fair value rate base is 4.40%. This return on Mebane Home's fair value property of 4.40% will allow a return on fair value equity of 13.80% after recovery of the embedded cost of debt. A return of 13.80% on fair value equity results in a return of 14.76% on original cost common equity.

In order for the petitioner to realize a fair return of 4.40% it should be allowed an increase in annual revenues of $151,135, "based upon the fair value of its property and reasonable test year operating revenues and expenses as heretofore determined."

On the basis of these findings the Commission submitted a schedule of rates and charges which would generate the $151,135 in additional annual revenues. From an order granting to the petitioner the limited rate increases, the petitioner appealed.

Boyce, Mitchell, Burns & Smith, by F. Kent Burns and James M. Day, for Mebane Home Telephone Company, appellant.

Attorney General Edmisten, by Special Deputy Attorney General Robert P. Gruber, for the Using and Consuming Public, appellee.

Commission Attorney Edward B. Hipp and Associate Commission Attorney Antoinette R. Wike, for North Carolina Utilities Commission.

HEDRICK, Judge.

Under Chapter 62 of the North Carolina General Statutes the Utilities Commission is vested with the authority to establish rates for public utilities "as shall be fair both to the public utility and to the consumer." G.S. 62-133(a). At any preceeding in consideration of a rate proposal by a public utility, "the burden of proof shall be upon the public utility to show that the changed rate is just and reasonable." G.S. 62-134(c). The decision of the Commission will be upheld by this Court on appeal unless it is assailable on one of the grounds enumerated in G.S. 62-94(b).

[1] By its first assignment of error the petitioner contends that the finding of the Commission that "the Company had excess plant investment consisting of 1,000 lines and terminals" which should be excluded from the determination of original cost, replacement cost and fair value was not supported by competent evidence and was therefore arbitrary and capricious. The decision to expand its central office capacity to its present level was made by the management of the company in 1973. Pursuant to this decision, in September of 1973 an order was placed for central office equipment consisting of 5,500 new lines. The petitioner argues that this decision was reasonable in light of the following conditions which prevailed at the time it was made:

In 1973 a thriving economy accompanied by an influx of new industries prompted a projected growth rate by the company of 400 main stations per year. Based on this growth rate and an engineering interval of 24-28 months the company determined that 5,500 new lines would be needed in the near future. However, shortly after the placement of the order the economy began to decline and public needs failed to meet the expected

growth rate. The petitioner was given the opportunity to modify its order to 4,500 lines but decided that the insignificant savings to be derived from dropping 1,000 lines from the order was offset by the reduced price at which the lines could be purchased as a part of the larger order.

The Commission's finding of excessive investment was based on the following testimony of its staff investigator, Benjamin R. Turner, Jr.:

> [B]ased on a forecasted growth rate of 250 main stations per year and a reasonable engineering interval for new additions of one year, the new Crossreed ESC-1 PL2 Electronic Switching Center is equipped with an excess plant margin equal to 1,000 lines which is not used and useful in providing telephone service. This is equal to an excess plant investment of $151,000. The Company used a growth rate of 400 main stations per year in planning the capacity of the new central office. At the time the Company was planning construction of the new central office, the annual growth rate was equal to 265 main stations, new housing developments were planned and Mebane was generally regarded as a good location for new business; however, these factors do not justify a growth rate of 400 main stations per year. Particularly because there is no historical support for growth rate that high. For example, the annual growth rate was 156 in 1968, 130 in 1969, 111 in 1970, 163 in 1971, 265 in 1972, and 161 in 1973. The highest growth occurred in 1972 the year before the order for the new central office was placed. The order was placed in September 1973 after the growth rate had fallen to a level of 161 new main stations per year. This should have been an indication to the Company that the forecasted growth rate of 400 main stations per year was in need of a downward adjustment.
>
> It is interesting to note that after the order was placed the growth rate continued to decline and yet no adjustment was made in the planned capacity of the new central office.
>
> . . .
>
> As to why a one year interval was used in computing excess margin in this case, additions to the Stromberg-Carlson

> ESC-1 PL2 central office require a maximum of 10 weeks to engineer and an additional 30 weeks for installation after receipt of the order. Based on these factors, a maximum reasonable engineering period for additions to an office of this type should be one year.

The principles guiding our review of the Commission's findings were thoroughly discussed in *State ex rel. North Carolina Utilities Commission v. General Telephone Co.*, 281 N.C. 318, 352-3, 189 S.E. 2d 705, 727 (1972):

> [A] public utility is under a present duty to anticipate, within reason, demands to be made upon it for service in the near future. [Citations omitted.] Substantial latitude must be allowed the directors of the utility in making the determination as to what plant is presently required to meet the service demand of the immediate future, since construction to meet such demand is time consuming and piecemeal construction programs are wasteful and not in the best interests of either the ratepayers or the stockholders. [Citations omitted.] However, Commission action deleting excess plant from the rate base is not precluded by a showing that present acquisition or construction is in the best interests of the stockholders. The present ratepayers may not be required to pay excessive rates for service to provide a return on property which will not be needed in providing utility service within the reasonable future.

Assuming that the purchase of the additional 1,000 lines represented a savings to the stockholders, the evidence is sufficient to support the Commission's finding that the excess plant investment was "not used and useful in rendering telephone service." Thus, "[t]he Commission's determination, supported by substantial evidence, may not properly be set aside by the reviewing court merely because a different conclusion could have been reached upon the evidence." *State ex rel. North Carolina Utilities Commission v. General Telephone Co., supra* at 354, 189 S.E. 2d at 728.

[2] Petitioner's second assignment of error challenges the Commission's determination of the fair value of the company's property. In determining the fair value of the petitioner's property, the Commission utilized a weighting process based on the debt-equity

ratio of the capital structure of the company which gave "9/10 weighting to the reasonable original cost less depreciation of Mebane Home's plant in service and 1/10 weighting to the depreciated replacement cost of Mebane Home's plant." The petitioner contends that the Commission erred in its "blind application of a predetermined formula" which has no relation to the fair value of the property and permits only minimal consideration of replacement cost.

According to G.S. 62-133(b)(1) "the fair value of the public utility's property used and useful in providing the service rendered to the public" should be ascertained by the Commission with due consideration to the original cost less depreciation, the replacement cost, and any other relevant factors. Upon review of the Commission's determination we must defer to the expertise of that administrative body as to the credibility and import of the evidence presented. *State ex rel. North Carolina Utilities Commission v. Virginia Electric & Power Co.*, 285 N.C. 398, 206 S.E. 2d 283 (1974). This Court will not upset the Commission's conclusions "merely because it would have given a different weight to each of the indicators of 'fair value.'" *State ex rel. North Carolina Utilities Commission v. Duke Power Co.*, 285 N.C. 377, 390, 206 S.E. 2d 269, 278 (1974). "But if it is clear from the record that the Commission reached its finding of 'fair value' by disregarding or giving 'minimal' consideration to one of the . . . factors, its finding of the ultimate fact of 'fair value' may be set aside by the court on the ground of error of law in such ascertainment." *State ex rel. North Carolina Utilities Commission v. General Telephone Co., supra* at 358-9, 189 S.E. 2d at 731.

In the present case the Commission included in its order the rationale underlying its use of the debt-equity ratio in computing the fair value of the property. The Commission concluded that in order to take into account "the degree to which the Company should be compensated for inflation" it is necessary to weight original cost and replacement cost roughly correspondent with the debt and equity portions of the capital structure. We think that the debt-equity ratio was a relevant factor to be taken into consideration and injected into the weighting process. The order of the Commission reflects due consideration of each of the indicators of fair value. In this regard, *General Telephone Company*, in which the Supreme Court reversed the Commission for

giving minimal consideration to replacement cost, is clearly distinguishable since in that case the Commission "failed to set forth its finding of the 'replacement cost,' depreciated." *State ex rel. North Carolina Utilities Commission v. General Telephone Co., supra* at 359, 189 S.E. 2d at 731. We find no error in the reasoning and means employed by the Commission to ascertain the fair value of the company.

[3] By its third assignment of error the petitioner contends that the Commission's determination of the fair rate of return was not supported by competent evidence. In the pertinent finding the Commission found that a return of 14.76% on original cost common equity would be fair and reasonable.

> The Commission is authorized by G.S. 62-133(b)(4) to [f]ix such rate of return on the fair value of the property as will enable the public utility by sound management to produce a fair profit for its stockholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers . . . and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

It is the Commission's duty to sift through the evidence and draw a conclusion therefrom as to a fair and reasonable rate of return. If there is competent evidence to support the findings and conclusions of the Commission, they will be upheld by the reviewing court. *State ex rel. North Carolina Utilities Commission v. General Telephone Co., supra.*

The only evidence offered, bearing on the rate of return, was the testimony of H. Randolph Currin, Jr., a Senior Operations Analyst for the Utilities Commission. Currin first testified that "a rate of return based on the operating expenses and the cost of capital will allow the company to meet its service and financial obligations and to establish a sufficiently sound reputation to attract future investors." Currin further testified that since there is no way to determine a market price for shares of a small company such as Mebane Home, the cost of equity capital must be ascertained by indirect means. While noting differences between Mebane Home and several larger companies, Currin used the cost of equity of the larger companies, 12.75%, as a "minimum starting

point" towards determining the cost of equity capital of Mebane Home. Currin concluded as follows:

> Since an investment in Mebane Home is presumably riskier, potential equity investors in Mebane Home will require some extra risk premium in addition to the base 12.75%.
>
> Though the Company is highly leveraged, Mebane Home's extra risk premium should be moderate, probably in the neighborhood of 2.0%-3.0%. Mebane Home's risk premium should be moderate for several reasons.
>
> Mebane Home has qualified for loans from the Rural Electrification Administration. Thus, the Company has not been forced to sell bonds in the capital markets, where 5 years ago they might have had to offer interest rates of 10% or more, and where, 18 months ago they probably would not have been able to sell bonds at any interest rate. Instead, the Company has been able to finance its construction with 35 year, REA notes, historically, at an interest rate of only 2%, and more recently, at a rate of 5.5%, resulting in an embedded cost of debt of only 3.56%.
>
> It is a fact that leverage, per se, increases the variability of returns to the equity holders, and that risk generally increases as the variability, or leverage, increases. Though Mebane Home is highly leveraged, as long as its return on investment is greater than 3.56%, the Company's stockholders benefit from favorable leverage. Assuming that Mebane Home's return on investment will, in the next few years, always be greater than its embedded cost of debt, and it always has been, then there is no increased risk to its stockholders associated with the high degree of leverage. On the contrary, in each year subsequent to 1961, Mebane Home's stockholders have earned more on their investment, than they would have with less leverage. Since 1970, the average return on equity has been 23.5%, with a high of 28.7%.
>
> In addition to the very low interest rates, and the associated benefits of high leverage, the Company recognizes other benefits from its affiliation with the REA.
>
> . . .

As to the conclusion I reached as to the cost of equity capital and the total cost of capital for Mebane Home, adding the 2.0%-3.0% risk premium to the 12.75% base cost of equity, results in a cost of equity for Mebane Home in the 14.75%-15.75% range.

The petitioner contends that there is no basis of comparison between Mebane Home and the larger companies to which Currin referred in his testimony. In his testimony Currin pointed out that the larger companies because of their greater resources present fewer risks to potential investors and thus can attract investors with a lower expected return. For this reason the cost of equity capital to the larger companies was used only as a minimum to which the risk premium of the smaller company could be added. Since no direct means of computing the cost of equity capital of Mebane Home was available, we think that it was proper to use the rates of larger companies as a starting point, taking into consideration the differences and adjusting accordingly. The findings and conclusions of the Commission as to the rate of return are supported by competent evidence.

The order of the Utilities Commission is affirmed.

Affirmed.

Judges BRITT and WEBB concur.

STATE OF NORTH CAROLINA v. JOHNNY C. HUGGINS

No. 7711SC722

(Filed 21 March 1978)

1. Searches and Seizures § 10— warrantless search of bedroom—probable cause—deputy's self-protection

A deputy sheriff's warrantless limited search of defendant's bedroom was not unconstitutional since the deputy had probable cause to believe that a search of the bedroom would lead to a knife which had been used as an instrumentality of the felony of crime against nature; he stood in the general vicinity of both the alleged perpetrator and the alleged victim, who was in an agitated state, and had reason to believe that the knife used in the commission of the alleged felony was in reach of both; and the deputy searched for the knife in order to protect himself.

2. Criminal Law §§ 50.2, 162— objection to evidence—no motion to strike

Testimony by a deputy sheriff that a spot on the sheets of defendant's bed looked like blood was properly admitted in a prosecution for crime against nature; furthermore, defendant cannot be heard to complain of any error in the admission of the testimony since, after his objection to the testimony was overruled, defendant made neither a motion to strike nor a request for an instruction to the jury to disregard the testimony.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 30 June 1977 in Superior Court, HARNETT County. Heard in the Court of Appeals 12 January 1978.

The defendant was indicted for the felony of crime against nature and entered a plea of not guilty. The jury returned a verdict of guilty of crime against nature as charged. From judgment sentencing him to ten years' imprisonment, defendant appealed.

The State offered evidence tending to show that on 12 March 1977 Scott Allen Murdock was in military service and stationed at Fort Bragg, North Carolina. Approximately 1:00 a.m. on that date, he was hitchhiking back to Fort Bragg from Hay Street in Fayetteville, North Carolina. Murdock was picked up by an unknown person who "started putting his hands on me" and engaged in a fight with that person resulting in Murdock's ear being bitten before he could get out of the car.

The State's evidence tended to show that the defendant, Johnny C. Huggins, then picked up Murdock, and Murdock agreed to go to the defendant's home to get medical attention for his injured ear. The defendant cleaned Murdock's ear and they shared a beer. Murdock then asked the defendant to take him back to Fort Bragg, and the defendant pulled a knife on him. The defendant offered Murdock twenty dollars to "go to bed with him." Murdock indicated that he would not, and the defendant backed him into a corner of the kitchen.

The State's evidence further tended to show that the defendant made Murdock go into a bedroom of the home. When Murdock resisted, the defendant stuck the knife in his back. While Murdock was lying on his stomach on the bed, the defendant held the knife to his back and performed a crime against nature upon him.

Having completed the unlawful sexual act, the defendant left Murdock in the room alone and told him to stay there. The de-

fendant told Murdock he would give him a ride back to the base in the morning. Murdock remained in the bedroom until he heard no noise from the defendant. He then left the home and called the Harnett County Sheriff's Department from a public telephone booth.

Shortly after Murdock called, he was met at the booth by Deputy Sheriff Ronald Green and reported what had taken place. Deputy Sheriff Green and Murdock then returned to the defendant's home. The deputy advised the defendant of Murdock's allegations and asked if the defendant would mind showing him the bedroom. The defendant answered, "not at all," and then showed the deputy into the bedroom.

When the deputy entered the bedroom, Murdock entered behind him. Murdock then stated: "There's my shorts in the corner." The deputy saw a spot which looked like blood on the sheet. At this point the deputy turned a pillow on the bed back and observed a knife. The three then left the room, and the deputy and Murdock departed the home.

The defendant testified in his own behalf and indicated that he had picked Murdock up and cleaned his ear. The defendant denied, however, any assault or that there had been a knife in the bedroom.

Attorney General Edmisten, by Associate Attorney George W. Lennon, for the State.

Bowen & Lytch, P.A., by R. Allen Lytch, for defendant appellant.

MITCHELL, Judge.

[1] The defendant first assigns as error the admission into evidence of the testimony of Deputy Sheriff Ronald Green concerning the knife which he stated he saw upon turning back the pillow in the bedroom of the defendant's home. The defendant contends that Deputy Green observed this knife, if at all, by virtue of an unconstitutional search and seizure. This assignment is without merit.

The trial court conducted a full *voir dire* hearing concerning the search of the bed in the defendant's home. At the conclusion

of the hearing, the trial court, based upon competent evidence, found that Deputy Green had probable cause to believe that a felony had been committed by the defendant shortly before Green's arrival at the residence. Additionally, the trial court found that Green was admitted by the defendant into the residence, and Green informed the defendant of the accusations against him and advised him of his constitutional rights. The court further found that Green then requested permission to look into the bedroom, and that the defendant granted him permission. The findings of the trial court being based upon competent evidence, are binding on this Court. *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971).

Based on the stated findings of fact, the trial court concluded that the defendant, with full knowledge of the allegations made against him by Murdock, understandingly and voluntarily consented to the officer's entry into the bedroom. The trial court further concluded that the moving of the pillow on the bed constituted a search by the deputy which had not been consented to by the defendant. Additionally, the trial court concluded that the deputy's knowledge that a knife might be in the room and that there might be a need to protect himself, together with the likelihood that evidence of the crime might be removed before a warrant could be obtained, was sufficient basis for his limited search for the knife without a warrant or permission. Having reached these conclusions, the trial court permitted Deputy Green to testify to having seen the knife under the pillow in the bedroom of the defendant's home at the time in question.

Only those searches and seizures which are unreasonable are constitutionally prohibited. *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968). One of the classes of cases representing a reasonable exception to the warrant requirement of the Fourth Amendment to the Constitution of the United States involves situations in which officers have "probable cause" for the search or seizure, and "exigent circumstances" exist making it impracticable to obtain a warrant. The conditions justifying searches or seizures under this exception to the requirement of a search warrant are totally independent from those justifying a search incident to an arrest. They are based not upon the right to arrest, but upon reasonable cause and exigent circumstances. 68 Am. Jur. 2d, Searches and Seizures, § 41, p. 695.

In the case *sub judice*, we must begin our analysis after the defendant had voluntarily consented to the deputy sheriff entering the bedroom. At that time, the deputy sheriff clearly had probable cause to believe that a search of the bedroom would lead to a knife which had been used as an instrumentality of the felony of crime against nature. Murdock had specifically informed the deputy that the crime had been perpetrated upon him by the defendant in that very bedroom and with a knife a short time previously.

In order that a search under the "probable cause" exception be proper, "exigent circumstances" must also exist which make it impracticable to obtain a warrant prior to searching. Here "exigent circumstances" existed which had not existed prior to the deputy entering the bedroom. The deputy stood in a bedroom in which he had reason to believe a violent felony had been recently committed with a deadly weapon. He stood in the general vicinity of both the alleged perpetrator and the alleged victim, who was in an agitated state, and had reason to believe that a knife used in the commission of the alleged felony was in reach of both. Clearly, it would have been impracticable to attempt at that time to obtain a warrant to look under the pillow. Deputy Green's search for weapons was justified without regard to the presence of probable cause to arrest as the search was strictly limited in nature to meet the need created by the exigencies which justified its initiation. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968).

In order to authorize a search for weapons without a warrant, it is necessary to balance the need to search or seize against the invasion which the search or seizure entails. The Supreme Court of the United States held in *Terry* that the police officer must be able to point to specific and articulable facts which, taken together with rational inferences therefrom, reasonably warrant the intrusion.

Here, the facts were not merely articulable. They were, in fact, articulated by the officer when he stated that:

> The only thing I did to protect myself was I was aware of the knife which I didn't observe anywhere in the area. I flipped the pillow back and the knife was there in my view. I was protecting myself. I just left it there. I didn't touch it.

> We went back into the living room and I explained to him what could happen if this gentleman took charges against him.

Deputy Green entered the room with the consent of the defendant and with direct information from an informant, who was present and in no way wished to remain confidential, that a felony had been committed there shortly before with a deadly weapon. The deputy was able to, and did, articulate these specific facts which warranted the minimal additional intrusion of lifting the pillow. The remainder of the officer's actions were also reasonable. Having determined the location of the knife, he proceeded to leave the room with the others, presumably to remove any danger that the weapon would be used against him or anyone present.

Although the deputy's actions did not technically constitute a so-called "stop and frisk" procedure, we hold this to be one of those "carefully defined classes of cases" referred to in *Terry*, which make up an exception to the warrant requirement and that the officer's actions were appropriate and reasonable. In this regard, we cannot improve on the language of the Supreme Court of the United States when it stated:

> We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.

Terry v. Ohio, 392 U.S. 1, 23, 20 L.Ed. 2d 889, 907, 88 S.Ct. 1868, 1881 (1968).

To hold the search by the deputy in this case unreasonable or not justified by exigent circumstances would be to require officers to take just such unnecessary risks in the performance of their duties. This we decline to do, and the assignment of error is overruled.

[2] The defendant by his next assignment contends it was error for the trial court to permit Deputy Green to testify that: "I just looked at the sheets and they looked soiled. It looked like there was a spot of blood on the sheets, of course, I'm no analyst, but it looked like." The defendant objected at this point, and the objection was overruled.

The record does not reveal that, after the objection was overruled, the defendant made either a motion to strike or a request for an instruction to the jury to disregard the testimony. In the absence of such motion or request, the overruling of the defendant's objection presented nothing for review on appeal, and he is not entitled to be heard to complain of error in the admission of the testimony. *Highway Commission v. Black*, 239 N.C. 198, 79 S.E. 2d 778 (1954); *Mays v. Butcher*, 33 N.C. App. 81, 234 S.E. 2d 204 (1977).

In any event, the testimony of Deputy Green concerning the spot on the sheets was admissible. Although the general rule purports to prohibit the stating of opinions by non-expert witnesses, the decided cases present a plethora of exceptions which have nearly consumed the rule. *See, generally*, Stansbury, N.C. Evidence 2d, §§ 122 through 131.

Perhaps it would have been possible for Deputy Green to describe the location, position and coloration of the spot he observed on the sheet without stating that it looked like blood. To have required him to attempt to do so, however, would not have been practicable and would have been a triumph of form over substance. Whether the testimony here is admissible as an "instantaneous conclusion of the mind," or as a "natural and instinctive inference," or as a "shorthand statement of the fact" or as one of the many other exceptions to the rule is primarily an academic question. The admission of Deputy Green's testimony under the circumstances indicated herein was proper. *State v. Markham*, 5 N.C. App. 391, 168 S.E. 2d 449 (1969), *cert. denied*, 275 N.C. 597 (1969); Stansbury, N.C. Evidence 2d, § 125. This assignment of error is, therefore overruled.

Appellant also assigns as error that part of the trial court's charge to the jury concerning Deputy Green's testimony that he found a soiled or blood spot on the sheet of the bed and that Murdock picked up a pair of shorts in that room which he said were

his. The defendant contends that portions of this testimony by Deputy Green did not corroborate the testimony of Murdock and to include them in the charge was error.

The trial court instructed the jury specifically that the testimony of Deputy Green as to what Murdock said could be considered only as corroboration. Deputy Green's testimony as to Murdock's finding the shorts and identifying them as his, tended to corroborate Murdock's testimony that he had been forced at knife point to remove his clothing in the bedroom in which the underwear was found.

Deputy Green's testimony as to seeing the spot which looked like blood on the sheet, tended to corroborate Murdock's prior testimony that he had been sexually attacked on the bed and that a knife was "stuck into his back." Additionally, Deputy Green's testimony as to the spot on the bed would have been admissible independent of its tendency to corroborate Murdock. The physical fact of such a spot on the bed is clearly a circumstance calculated to throw light upon the crime charged, and Deputy Green's testimony of his direct observation of the spot was independently admissible. *State v. Robbins*, 287 N.C. 483, 490, 214 S.E. 2d 756, 761 (1975), *modified as to death penalty*, 428 U.S. 903, 49 L.Ed. 2d 1208, 96 S.Ct. 3208 (1976); *State v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506 (1965), *cert. denied*, 384 U.S. 1020, 16 L.Ed. 2d 1044, 86 S.Ct. 1936 (1966).

Finally, the defendant attempts to raise a broadside assignment of error to the charge of the trial court. Although not required by such assignment to do so, we have reviewed the charge as a whole, as every charge must be reviewed. *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E. 2d 36 (1965); *State v. Munday*, 5 N.C. App. 649, 169 S.E. 2d 34 (1969), *cert. denied*, 275 N.C. 597 (1969). We are of the opinion and so hold that it leaves no reasonable cause to believe the jury was misled or misinformed. This assignment is overruled.

The defendant had a fair trial free of prejudicial error, and we find

No error.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. WILLIE JAMES WOODARD

No. 7720SC867

(Filed 21 March 1978)

Searches and Seizures § 39— warrant to search dwelling—search of room rented to defendant—no exclusive control by defendant—no knowledge by officers

The search of a bedroom and closet in the bedroom rented by defendant in his uncle's home pursuant to a warrant to search the uncle's home was lawful, and stolen clothing seized from the closet was properly admitted in evidence against defendant, where the evidence on voir dire showed: (1) defendant did not exercise sole or exclusive control over the bedroom and closet but shared them with the uncle's children, and (2) even if defendant had sole or exclusive control over the bedroom and closet, the officers did not know and had no reason to know that defendant exercised such control since the uncle was in the bedroom exercising apparent control during the search, and the officers had no reason to know that defendant paid rent on the room or had any interest in it to the exclusion of the owner.

APPEAL by defendant from *Barbee, Judge.* Judgment entered 25 May 1977 in Superior Court, STANLY County. Heard in the Court of Appeals 7 February 1978.

The defendant, Willie James Woodard, was indicted for felonious breaking and entering and felonious larceny. Upon his pleas of not guilty to each of the charges, the jury returned verdicts finding him not guilty of felonious breaking and entering and guilty of felonious larceny. The defendant having been found not guilty of breaking and entering and no evidence having been introduced as to the value of the goods stolen, the trial court on its own motion entered a verdict of guilty of misdemeanor larceny. From judgment sentencing him to imprisonment for a term of two years, defendant appealed.

The State's evidence tended to show that on 8 December 1975, Rebecca Hill was manager of the Oakboro Clothing Store in Oakboro, North Carolina. She left the store at 5:30 p.m. on that date. At the time of her departure, all of the doors to the store were locked and all windows closed. She returned at approximately 12:00 midnight, pursuant to a call from the Stanly County Sheriff's Department, to find the front door broken in and the back door open. An inventory revealed that numerous items of men's and women's clothing were missing from the store.

The State's evidence also tended to show that, on 10 January 1976, Jack C. Thomas, Chief of Police of Oakboro, North Carolina, searched the J. T. Jackson residence pursuant to a search warrant. Prior to searching, Chief Thomas read the search warrant in its entirety to Mr. Jackson and gave him a copy. He, with other officers, then proceeded to enter the home. The officers entered the first bedroom on the right after going through the kitchen. They found the defendant asleep on one of two beds in the room. A closet door in the bedroom was ajar, and the officers could observe both new and used clothes within. At the time the officers removed each item of clothing, later identified by Rebecca Hill as coming from the store, the defendant asked: "What are you doing with my clothing?"

Chief Thomas made an inventory of the items of clothing seized pursuant to the search warrant and gave a copy of the inventory to Mr. J. T. Jackson. Mr. Jackson made his mark on the inventory sheet to acknowledge its receipt, and his wife signed her name to the same sheet. The officers then called Rebecca Hill to the Oakboro Police Department where she identified each item from the closet as an item missing from her store.

The defendant objected to the identification of the items of clothing and to their admission into evidence and moved that they be suppressed as the fruits of an unlawful search and seizure. After conducting a hearing *voir dire* and making findings of fact and conclusions of law, the trial court denied the motion to suppress and permitted the evidence to be identified and introduced over the defendant's objection. At the close of the State's case, the defendant chose not to offer evidence and rested.

Other relevant facts are hereinafter set forth.

Attorney General Edmisten, by Associate Attorney Thomas F. Moffitt, for the State.

John M. Bahner, Jr., for the defendant appellant.

MITCHELL, Judge.

The defendant's sole assignment of error is directed to the trial court's overruling his motion to suppress the introduction into evidence of the items of clothing and his objection to testimony concerning those items. He contends the clothing seized pursuant

to a search warrant and introduced in evidence was the product of an unlawful search and seizure prohibited by the Fourth Amendment to the Constitution of the United States.

On *voir dire* the evidence for the defendant tended to show that he rented a room in the home of his uncle, J. T. Jackson, for $15 a week and shared the room and a closet in the room with Jackson's son Robert. Both the defendant and Robert Jackson kept their clothes in this closet, and J. T. Jackson's daughters on occasion used the closet. The defendant's evidence further tended to show that he was asleep on one of the two beds in the bedroom when police entered the room and conducted a search. The defendant was never shown a search warrant and never consented to the search.

The State's evidence on *voir dire* tended to show that Jack C. Thomas, Chief of Police of Oakboro, North Carolina, pursuant to a lawful warrant authorizing him to search the premises of J. T. Jackson, searched those premises on 10 January 1976. The warrant was read to J. T. Jackson prior to the search, and he was given a copy of both the search warrant and the supporting affidavit. During the search on 10 January 1976, no one informed the police that the defendant was renting a room or that any portion of the home was not under J. T. Jackson's control as owner of the premises.

The State's evidence on *voir dire* tended to show that the closet in the bedroom was actually used by the defendant, Robert Jackson and two of Robert Jackson's sisters. The defendant never told anyone to stay out of the room or closet, and no one ever asked the defendant's permission prior to going into the room or closet. The only items removed from the house by police were items of new clothing found in the closet in the defendant's bedroom which matched the description of the missing clothing.

The search was conducted in the presence of both the defendant and J. T. Jackson, and Jackson identified each item of clothing for the police. With the exception of the defendant's questions as to what was being done with his clothes, neither the defendant nor anyone else ever informed the police during the search that the defendant had any interest in or control over the bedroom or the closet. Upon completing the search, the police gave J. T. Jackson an inventory of items seized during the search.

The trial court made findings substantially incorporating this evidence for the defendant and the State and concluded that, during the search, J. T. Jackson was in apparent control of the premises. The court also concluded that, in fact: "The defendant did not have exclusive control of the bedroom in which he slept or the closet in the bedroom." For these reasons the trial court concluded that the search and seizure was lawful.

The defendant does not contend here, nor did he contend at trial, that the search warrant for the home of J. T. Jackson was invalid on its face or improperly issued. Rather, he contends that the evidence seized from the room which he rented within the Jackson home could not be used against him, as the warrant for the home was a general warrant. He takes the position that he had exclusive control of the bedroom, and a warrant directed to him and describing the room with particularity was required. We do not agree.

In support of his contentions, the defendant relies upon the case of *State v. Mills*, 246 N.C. 237, 98 S.E. 2d 329 (1957). That case involved a search, pursuant to a warrant, of the home of the defendant's lessor. *Mills* is distinguishable, however, as the uncontested facts there indicated that, prior to searching the defendant's room, the officers conducting the search were specifically informed by the lessor that the room was leased to defendant. The officers were also specifically informed by the lessor in *Mills* that she did not have authority to give the officers permission to search the room. Further, the uncontested evidence in *Mills* indicated the room in question was on the back porch of the lessor's dwelling house, that the lessor never entered the room and that both the lessor and the defendant recognized that the defendant had sole and exclusive control over the rented room. In *Mills* it was held that:

> When the officer was told by Laura Lewis that the defendant rented the back room in her dwelling house, he should have procured a proper search warrant against the defendant to search it before searching it. In our opinion, the search of this back room in Laura Lewis' home rented by the defendant without a valid search warrant to search it cannot be upheld under the circumstances here disclosed.

246 N.C. at 245, 98 S.E. 2d at 335.

In the present case the trial court made findings and conclusions, largely based upon uncontradicted evidence, that the defendant did not exercise sole or exclusive control over the bedroom or the closet in which the evidence was found. The evidence on *voir dire* clearly revealed that the defendant at all times shared both the bedroom and the closet with the children of J. T. Jackson. The premises belonged to Jackson, and the trial court specifically found that, during the search, he was at all times in apparent control of the entire premises. Additionally, Jackson was in the bedroom exercising apparent control while the police were conducting the search. Nothing in the record on appeal indicates that the officers knew or had any reason to know that the defendant paid rent on the room or had any interest in it to the exclusion of the owner.

The holding in *Mills* is generally recognized, and a search warrant directed against a multiple-unit structure must set forth with particularity the subunit to be searched. The better reasoned cases, however, hold this requirement inapplicable when the premises, or the portions thereof in question, are occupied in common by several individuals. Annot., 11 A.L.R. 3d 1330 (1967). This line of reasoning is consistent with the established principle that, where two individuals have equal rights to use or occupancy, either may consent to a search, and the evidence found therein may be used against the other. *State v. Penly*, 284 N.C. 247, 200 S.E. 2d 1 (1973); *State v. Melvin*, 32 N.C. App. 772, 233 S.E. 2d 636 (1977); *State v. Crawford*, 29 N.C. App. 117, 223 S.E. 2d 534 (1976). We hold that, as the bedroom and closet in question were occupied and used by the defendant and the Jackson family in common, the search warrant directed against Jackson and his premises was adequate to support the search of the closet and the seizure and introduction into evidence against the defendant of the items found therein.

Additionally, the evidence in this case was properly seized and admissible upon another separate and independent basis. Here, the evidence of both the defendant and the State and the conclusions of the trial court indicated the entire premises appeared to be within the control of the owner, J. T. Jackson. We conclude that, even had the bedroom and closet been under the sole and exclusive control of the defendant, the warrant and the search and seizure would not have been fatally defective. Where

officers do not know or have reason to know they are dealing with a multiple-unit dwelling, a search and seizure pursuant to a warrant authorizing the search of the entire dwelling is valid and evidence seized thereby is admissible. *United States v. Davis*, 557 F. 2d 1239 (8th Cir. 1977); *United States v. Jordan*, 349 F. 2d 107 (6th Cir. 1965); *United States v. Santore*, 290 F. 2d 51 (2d Cir. 1959), *aff'd in relevant part upon rehearing*, 290 F. 2d 74 (2d Cir. 1960) (en banc), *cert. denied*, 365 U.S. 834, 5 L.Ed. 2d 744, 81 S.Ct. 749 (1961); Annot., 11 A.L.R. 3d 1330 (1967) and cases cited therein.

We find both exceptions to the general requirement of *Mills*, that a search warrant directed against a multiple-occupancy structure must describe the area to be searched therein with particularity, to be present in this case. The officers did not know or have reason to know the defendant had sole or exclusive control over the bedroom or closet in the home described in the warrant. Additionally, the defendant did not, in fact, have sole and exclusive control over the bedroom or closet in that home. Either exception was sufficient to uphold the search, pursuant to the warrant for the Jackson home, of the room the defendant rented within the home.

The defendant had a fair trial free from prejudicial error, and we find

No error.

Judges MORRIS and CLARK concur.

JULIA LUCILLE BURNS MARTIN v. ELVIN RAY MARTIN

No. 7721DC221

(Filed 21 March 1978)

1. Divorce and Alimony § 24.1— child support—determination of amount

Findings and conclusions of the trial court were sufficient to support its order of child support and substantially complied with the statutory standard set forth in G.S. 50-13.4(c) where the court made findings as to expenses of the children in question, the net salaries of the parties, the weekly payments of the plaintiff, and the parties' ownership of a home by the entireties, and, based

upon these findings, the trial court concluded that the child support ordered was consistent with the needs of the minor children and the ability of defendant to provide for those needs.

2. Divorce and Alimony § 24.1— child support—possession of house as part of order

The trial court did not err in awarding possession of a home, owned by the parties as tenants by the entirety, to plaintiff as part of child support, since possession of real property may be awarded as part of child support in this State, and the trial court found the home to be a fit and proper place for the children to reside and found that the award of possession of the home and furnishings in addition to total cash payments for support of $331 per month did not exceed the children's necessary expenses of $390 per month.

3. Husband and Wife § 15.1— estate by entireties—possession by husband—common law abrogated by statute

To the extent that the General Assembly's will, as expressed in G.S. 50-13.4 which provides for the awarding of possession of a home as part of child support, conflicts with the common law principle that the husband is entitled to exclusive possession of entirety property, the common law has been abrogated and supplanted.

APPEAL by defendant from *Yeager, Judge.* Judgment entered 23 November 1976 in District Court, FORSYTH County. Heard in the Court of Appeals 18 January 1978.

Plaintiff wife initiated this action on 2 August 1976 seeking custody of the two minor children, counsel fees, child support, and possession "of appropriate properties of the parties" as part of the child support. A hearing was held on 15 November 1976, but none of the testimony or evidence from that hearing is included in the record on this appeal. Only the findings and order of the trial court dated 23 November 1976 are the subject of this appeal. The findings of the trial court are summarized as follows:

The plaintiff and defendant were lawfully married in Forsyth County on 1 April 1967, and both were citizens and residents there for more than six months prior to commencement of this action. The parties separated on 2 August 1976, and from that date the plaintiff had custody of the younger of the two minor children and properly attended to the child's needs. Both parties had custody of the other minor child from time to time, and both had properly attended to this child's needs. The parties each stipulated as to the good moral character and fitness of the other to exercise custody and/or visitation privileges relative to the children.

The defendant's net pay, after taxes, was $200 per week. The plaintiff's net pay after taxes was $172 per week less $55 per week for credit union payments on her car and money borrowed for the home. The expenses of the minor children were found to include:

baby-sitting	$ 17 per week
groceries	20 per week
lunches	5 per week
transportation	8 per week
school tuition	25 per week
shelter	100 per month
utilities	30 per month
clothing	35 per month

Additionally, the court found that the parties owned, as tenants by the entirety, a home which was a fit and proper place for the children to reside.

Upon the foregoing findings, the trial court concluded that the best interests of the children would be served by awarding custody of both children to the plaintiff, and that she should be awarded possession of the home and its furnishings as part of child support. The defendant should pay as additional child support the $191 per month house payment plus $35 per week. The court also concluded, "that the beforementioned child support is consistent with the needs of the minor children herein and the abilities of the defendant to provide for said needs."

Based upon its findings and conclusions, the trial court ordered custody of the children awarded to the plaintiff together with possession of the home and furnishings as part of the child support. The trial court also ordered that the defendant, as part of child support, pay $35 per week and make the $191 per month payments on the home. From this order the defendant appeals.

White and Crumpler, by Michael J. Lewis, and A. Lincoln Sherk, for defendant appellant.

John F. Morrow, for plaintiff appellee.

MITCHELL, Judge.

[1] The defendant appellant contends that the court erred, as its findings and conclusions were insufficient to support the order.

He first contends that the trial court "abused its discretion in ordering him to make support payments for the two minor children amounting to $342.67 per month," since the court found their expenses to be only $240 per month with $100 of that amount specifically designated for shelter.

Here the defendant appellant has confused the content of the order as stated in the record. The trial court found that "the expenses of the minor children include," a total of $390 per month. The defendant appellant was ordered to pay the $191 per month house payments, and an additional $35 per week child support, a total of $331 per month child support.

Paragraph (c) of G.S. 50-13.4 states that "[p]ayments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case." As the record on appeal is limited to the pleadings of the parties and the order of the court, we must presume the court's findings were supported by competent evidence, and they are conclusive on appeal if sufficient. *Cobb v. Cobb*, 10 N.C. App. 739, 179 S.E. 2d 870 (1971). The only issue presented for our determination, therefore, is whether the findings and conclusions were sufficient to support the order. We hold the findings and conclusions here were sufficient to support the order.

The trial court, in its findings, listed expenses which the necessities of the minor children would require. The trial court made additional findings of fact as to the net salaries of the plaintiff and defendant, the weekly payments of the plaintiff, and that they were owners of a home by the entirety. The trial court then concluded that child support consisting of the $191 monthly house payment together with possession of the homeplace and an additional payment of $35 per week was "consistent with the needs of the minor children herein and the abilities of the defendant to provide for said needs."

In *Andrews v. Andrews*, 12 N.C. App. 410, 183 S.E. 2d 843 (1971), which involved an appeal from a hearing and order on a motion in the cause to increase child support payments, we dealt with a contention that the order failed to comply with the

statutory standard of G.S. 50-13.4(c). In that case, as here, the trial court's findings related to the father's and mother's net take-home pay and the necessary expenses of the minor children. The findings of the trial court in *Andrews* concerning the necessary expenses of the children were even less detailed than those in the present case. Based upon its findings, the trial court in *Andrews* concluded, *inter alia*, that the amounts found were in fact needed for child support and that:

> The plaintiff is fully able to pay the sum . . . for the support of the child . . . plus all her reasonable medical, dental and drug bills. Considering the needs of this child and the respective income of the plaintiff and the defendant and their particular circumstances as to expenses, this sum . . . is fair and reasonable . . . .

12 N.C. App. at 415, 183 S.E. 2d at 846.

Here, as in *Andrews*, we find that the order reflected the fact that the trial court complied with the mandate of G.S. 50-13.4 and considered "the estate, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case." We reemphasize our suggestion in *Andrews* that:

> [I]t would be the better practice for the court's order to relate that the payment ordered is the amount necessary to meet the reasonable needs of the child for health, education, and maintenance. Nevertheless, the failure of the court to do so, certainly in this case, does not constitute reversible error.

12 N.C. App. at 417-418, 183 S.E. 2d at 848.

We find the reasoning of *Andrews* compelling in this case. The findings here revealed the take-home pay of both parties and a detailed list of expenses of the minor children. Based upon these findings, the trial court concluded that the child support ordered was "consistent with the needs of the minor children herein and the abilities of the defendant to provide for said needs." These findings and conclusions, while not ideal, substantially comply with the statutory standard set forth in G.S. 50-13.4(c).

[2] The defendant further contends that the trial court committed error in awarding possession of the home, owned by the par-

ties as tenants by the entirety, to the plaintiff as part of child support. We do not agree. We have previously rejected the contention that our courts may not award possession of real estate as a part of child support. *Arnold v. Arnold*, 30 N.C. App. 683, 228 S.E. 2d 48 (1976). We have specifically stated that:

> Certainly, shelter is a necessary component of a child's needs and in many instances it is more feasible for a parent to provide actual shelter as part of his child support obligations than it is for the parent to provide monetary payments to obtain shelter. A careful reading of G.S. 50-13.4(f)(2) indicates that the General Assembly contemplated instances in which the court would require "the transfer of real or personal property or an interest therein . . . as a part of an order for payment of support for a minor child . . ." and made provision to compel such transfer.

Boulware v. Boulware, 23 N.C. App. 102, 103, 208 S.E. 2d 239, 240-241 (1974).

The trial court in this case made findings that the expenses of the minor children include $100 per month for the purpose of shelter, and that the "said homeplace is a fit and proper place for the children to reside in." The trial court also found the expenses of the minor children to be $390 per month. Therefore, the award of possession of the homeplace and furnishings in addition to total cash payments for support of $331 per month does not exceed the necessary expenses for the children. This is particularly true as part of each such monthly cash child support payment will consist of the $191 per month mortgage payment which will build equity in the property owned by the parties as tenants by the entirety. For these reasons, we find the trial court's award of child support was within its discretion and not to be disturbed absent a gross abuse of discretion not present in this case. *Coggins v. Coggins*, 260 N.C. 765, 133 S.E. 2d 700 (1963); *Wyatt v. Wyatt*, 32 N.C. App. 162, 231 S.E. 2d 42 (1977); *Gibson v. Gibson*, 24 N.C. App. 520, 211 S.E. 2d 522 (1975).

The defendant contends that *Boulware* is distinguishable from the present case. In support of this argument, he points out that there were no findings by the trial court as to who was in possession of the home in the present case or that the home itself was specifically needed for support of the children. The trial court

did specifically find the home to be a "fit and proper place for the children to reside," and that the expense of sheltering the children alone was $100 per month. Based upon these findings, the trial court concluded the plaintiff should we awarded possession of the home as part of the child support, and that the child support awarded was consistent with the needs of the minor children. We hold these findings and conclusions to be sufficient to support the award.

[3] The defendant, relying upon *Hinton v. Hinton*, 17 N.C. App. 715, 195 S.E. 2d 319 (1973), contends that, under the common law, the husband is entitled to the exclusive possession of property owned by the parties as tenants by the entirety until their absolute divorce converts the estate into a tenancy in common. We find *Hinton* easily distinguishable, however, as that case in no way dealt with questions of child support. As pointed out, we have previously held that the General Assembly has made statutory provisions for awarding possession of a home as a part of child support. This is true without regard to whether the parties are divorced. To the extent the General Assembly's will, as expressed in G.S. 50-13.4, conflicts with the common law principle that the husband is entitled to exclusive possession of entirety property, the common law has been abrogated and supplanted. *See McMichael v. Proctor*, 243 N.C. 479, 91 S.E. 2d 231 (1956); *State v. Mitchell*, 202 N.C. 439, 163 S.E. 581 (1932).

The defendant made other arguments based on statutory provisions for awarding alimony or alimony *pendente lite* not applicable under these facts. We have carefully reviewed each of these contentions and find them without merit.

The judgment appealed from is

Affirmed.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. ROLAND DENNIS ROBINSON

No. 774SC846

(Filed 21 March 1978)

1. **Criminal Law §§ 73.1, 169.3— opening door to hearsay testimony**

In this prosecution for felonious assault, defendant opened the door to hearsay testimony by two witnesses that the victim stated in their presence that defendant caused her injuries by beating her when he extensively questioned other witnesses as to whether the victim had stated that her injuries had been caused by defendant.

2. **Criminal Law § 162— waiver of objection to evidence**

Where defendant objected to hearsay testimony that an assault victim had stated that defendant had beaten her but withdrew such objection prior to the court's ruling, and defendant waited until additional questions had been answered by the witness concerning the victim's accusation of defendant before objecting and moving to strike the witness's testimony, defendant's failure to object in apt time constituted a waiver of objection.

3. **Assault and Battery § 13; Criminal Law § 64— assault victim's propensity for drinking intoxicants—irrelevancy**

The trial court in a felonious assault prosecution properly excluded as irrelevant testimony concerning the victim's alleged propensity for drinking alcoholic beverages and her prior convictions for driving under the influence of intoxicants where there was specific evidence in the record that the victim had not been drinking at the time she was found in a battered condition and taken to the hospital.

APPEAL by defendant from *Peel, Judge*. Judgment entered 1 August 1977 in Superior Court, SAMPSON County. Heard in the Court of Appeals 2 February 1978.

The defendant was indicted for the felony of assault with a deadly weapon with intent to kill inflicting serious injury and entered a plea of not guilty. The jury returned a verdict of guilty of the lesser included felony of assault with a deadly weapon inflicting serious injury. From judgment sentencing him to not less than eight years nor more than ten years' imprisonment, defendant appealed.

The State's evidence tended to show that, at approximately 3:00 p.m. on 22 January 1977, several relatives went to visit Ann Bryant at her home near Clinton, North Carolina. Her car was parked near the home, and one of the visitors heard, coming from within the house, the sounds of a television. Movements were

heard within the house, but no one responeded to knocks on the door. At approximately 4:15 p.m. that day, Clara Holland called the Bryant home. The telephone was answered by the defendant, Roland Dennis Robinson, who told Mrs. Holland that Ann Bryant was asleep and that he would have her return the call. Mrs. Holland never received a return telephone call.

The State's evidence also tended to show that on the following day, at approximately 2:00 p.m., Mrs. Holland and Rena Britt went to the Bryant home. When Mrs. Holland opened the door, she observed Mrs. Bryant lying on the couch and the defendant lying on the floor. Mrs. Bryant had on only a housecoat which was not buttoned, and a thin blanket partially covered her. Mrs. Bryant had multiple bruises covering her entire body, and her eyes were swollen nearly closed. Mrs. Holland asked Mrs. Bryant how she had been hurt, but Mrs. Bryant did not answer.

The State's evidence tended to show that the defendant stated Mrs. Bryant had fallen in the bathroom and other places in the home the day before. Mrs. Holland and Rena Britt then left and returned with Mrs. Holland's husband and several of Mrs. Bryant's relatives. Carl Britt, one of the relatives, ordered the defendant out of the home while Mrs. Holland called the rescue squad.

The defendant continued to insist that Mrs. Bryant had received her injuries due to a fall or multiple falls. Donald Lewis, one of the rescue squad members who had brought Mrs. Bryant back to consciousness, asked her who had hurt her. She replied that the defendant had beaten her. She repeated this accusation when questioned by Lewis later at the hospital.

The State offered expert medical evidence, through the testimony of Dr. Frank Leak, tending to show that Mrs. Bryant had a basilar skull fracture which could not have been caused by a fall or falls, but was more likely caused by a blow from a blunt instrument. Mrs. Bryant developed bacterial meningitis while in the hospital and is now confined to a rest home. She cannot recognize anyone and is unable to respond to any questions. The prognosis for her recovery from this comatose state is poor.

The defendant offered no evidence.

Attorney General Edmisten, by Assistant Attorney General Joan H. Byers, for the State.

David J. Turlington, Jr., for defendant appellant.

MITCHELL, Judge.

[1] The defendant first assigns as error the admission into evidence of the testimony of two witnesses, Patricia Britt and Donald Lewis. They each testified that Ann Bryant stated in their presence that the defendant caused her injuries by beating her. We find no merit in this assignment.

In responding to the defendant's arguments in support of this assignment of error, the State contends *inter alia* that the statements of Ann Bryant to the witnesses should be treated as dying declarations and, therefore, as exceptionally admissible hearsay. We note that there is evidence in the record which would have supported a finding that the declarant, Ann Bryant, at the time the statements were made was in actual danger of death and had full apprehension of this danger. She suffered extensive and apparently irreversible brain damage which will, in all probability, leave her forever in a comatose state. However, cessation of all involuntary bodily functions, which is required in most jurisdictions for finding of "death," had not taken place.

The State contends that all of the considerations of public policy supporting the exception to the hearsay rule for dying declarations are present in this case, and that we should so rule. However, we are not required here to decide the issues presented by this intriguing proposition.

In this case prior to the admission of the testimony complained of, the defendant had extensively questioned other witnesses as to their communications with Ann Bryant. The defendant had inquired specifically into what, if anything, Ann Bryant had stated to these witnesses since her injuries. The defendant specifically inquired as to whether she stated the injuries had been caused by him. During the defendant's cross-examination of Mrs. Clara Holland, one of Mrs. Bryant's sisters, the following transpired:

> "Mr. Turlington: Now, she had never told you and never written anything to you that Roland Dennis Robinson ever touched her or laid a hand on her, has she?

Mr. Henry: Objection.

The Court: Overruled.

A. No, sir.

The Court: Ma'am?

A. No, sir.

The Court: Overruled."

It is apparent, therefore, that the defendant was responsible for introducing the complained of subject in the first instance by his vigorous cross-examination of the State's witnesses. Having opened the door on the subject, the defendant is entitled to no consideration on this assignment of error. *Adams v. Godwin*, 254 N.C. 632, 119 S.E. 2d 484 (1961); *See also*, *State v. Williams*, 255 N.C. 82, 120 S.E. 2d 442 (1961).

[2] Thereafter, during the testimony of the State's witness, Patricia Britt, the subject of what Ann Bryant had said to rescue squad member Donald Lewis concerning the defendant's having beaten her arose. At that point the defendant objected. Prior to a ruling by the trial court, however, the defendant specifically withdrew the objection. The witness was then questioned extensively concerning accusations against the defendant made to the rescue squad driver by Ann Bryant in the witness' presence. The witness, Patricia Britt, was then cross-examined by the defendant. After cross-examination of the witness, the defendant asked that the jury be excused in order that he might make a motion in their absence. Out of the presence of the jury, the defendant objected to the testimony concerning Ann Bryant's statements and made a motion to strike.

Even if the testimony complained of had been inadmissible, the trial court was not required to exclude it, as the defendant's failure to object promptly constituted a waiver. *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534 (1970), *cert. denied sub nom. Blackwell v. North Carolina*, 400 U.S. 946, 27 L.Ed. 2d 252, 91 S.Ct. 253 (1970). Further, where, as here, the defendant did not immediately object but waited until additional questions had been asked and answered before objecting and moving to strike, the failure to object in apt time is regarded as a waiver. The admission of evidence complained of is not then assignable as error ab-

sent unusual circumstances not here presented. *State v. Letterlough*, 6 N.C. App. 36, 169 S.E. 2d 269 (1969); Stansbury, N.C. Evidence 2d, § 27.

The reasoning of *Letterlough* applies with even greater vigor here than in that case. The record reveals that this defendant, by objecting and immediately withdrawing the objection when the testimony complained of was elicited, made a conscious decision to allow the testimony to come into evidence. Only after hearing all of the testimony on both direct and cross-examination did the defendant determine that he should change his trial strategy and seek exclusion. The admission of this testimony was not error.

We additionally note that the defendant made several objections to similar testimony which, when overruled by the trial court, were not followed by motions to strike or requests for instructions to the jury to disregard the testimony. This, too, constituted a waiver making the admission of the testimony proper. *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966); *Highway Commission v. Black*,, 239 N.C. 198, 79 S.E. 2d 778 (1954); *Mays v. Butcher*, 33 N.C. App. 81, 234 S.E. 2d 204 (1977).

Later, the defendant did, on one occasion, timely object and move to strike Donald Lewis' testimony concerning Mrs. Bryant's accusation of the defendant. However, since the defendant permitted the admission of similar evidence both before and after this, the benefit of the objection and motion to strike was lost. *Dunes Club v. Ins. Co.*, 259 N.C. 293, 130 S.E. 2d 625 (1963). The assignment of error is overruled.

[3] The defendant next assigns as error the refusal of the trial court to allow into evidence testimony concerning Ann Bryant's alleged propensities for drinking intoxicating beverages and her prior conviction for driving under the influence of intoxicants. The trial court properly excluded this evidence as irrelevant in this case as there was specific evidence in the record that Mrs. Bryant had not been drinking at the time she was found in a battered condition and taken to a hospital. The evidence which the defendant sought to introduce would not have contradicted that evidence and was, at best, remote and conjectural and would have had no value other than as an invitation to prejudice. It was, therefore, irrelevant and properly excluded. *Pearce v. Barham*,

267 N.C. 707, 149 S.E. 2d 22 (1966); *Redding v. Braddy*, 258 N.C. 154, 128 S.E. 2d 147 (1962).

Even had the evidence of Mrs. Bryant's prior consumption of alcohol been admissible, its exclusion would not require a new trial. Courts do not lightly set aside verdicts or grant new trials. *State v. Mundy*, 182 N.C. 907, 110 S.E. 93 (1921). As the excluded evidence clearly would not, if admitted, have changed the result of the trial, no new trial will be granted. Stansbury, N.C. Evidence 2d, § 9.

The defendant made other assignments of error which, upon our reading of the record in its entirety, we find to be without merit. The defendant had a fair trial free from prejudicial error and we find

No error.

Judges MORRIS and CLARK concur.

PHILBIN INVESTMENTS, INC. v. ORB ENTERPRISES, LIMITED AND DOVE, LIMITED

No. 7728SC312

(Filed 21 March 1978)

1. **Appeal and Error § 42— jurisdiction challenged on appeal—defendants bound by stipulations in record**

Defendants could not on appeal assert lack of jurisdiction over the person or insufficiency of service of process since the "Stipulations of Record on Appeal" specifically stated that the Buncombe County Superior Court had jurisdiction over all the parties and the subject matter and the action was properly before the court; moreover, service upon defendants was sufficient though the sheriff's return showed service upon "S. Thomas Walton," instead of "S. Thomas Walton, Registered Agent."

2. **Corporations § 26— articles of incorporation suspended—capacity to sue**

Defendants' contention that plaintiff lacked capacity to sue because plaintiff's articles of incorporation had been suspended pursuant to N.C.G.S. 105-230 at the time suit was brought is without merit.

3. **Reformation of Instruments § 1.1— unilateral mistake—no reformation**

Where there was no indication in the record that plaintiff expected less than a full warranty deed, and that was what one defendant delivered to it,

defendants' attempt to reform the deed by claiming mistake was ineffectual, since the mistake of only one party to an instrument, absent fraud, is not ground for relief by reformation.

4. Deeds § 8— no consideration—validity of deed

Defendants' contention that a warranty deed executed by one defendant to plaintiff was void because no consideration passed between the parties is without merit, since a deed in proper form is good and will convey the land described therein without any consideration, except as against creditors or innocent purchasers for value.

5. Deeds § 24.2— action for breach of covenant against encumbrances—defense of knowledge and record notice

Even a grantee's actual knowledge and record notice of the existence of an encumbrance do not constitute a defense to a grantee's action to recover damages for grantor's breach of a covenant against encumbrances.

APPEAL by defendants from *Martin, Judge*. Order entered 30 December 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 6 February 1978.

On 4 September 1974, plaintiff filed a complaint alleging that on 10 May 1972, defendant Orb conveyed to plaintiff by full warranty deed a tract of land and that the warranties had been breached because at the time the warranty deed was delivered there was an outstanding deed of trust on the tract of land, which was foreclosed and the land in question sold. Defendants filed a motion to dismiss for lack of jurisdiction over the person of defendants, for insufficiency of service of process and for lack of capacity of plaintiff to sue. The trial court entered an order denying defendants' motion, and the judge refused to sign a notice of appeal tendered by defendants. Defendants answered the complaint, denying liability on several grounds including failure to state a claim, lack of capacity to sue on the part of the plaintiff, lack of a corporate seal on the warranty deed, lack of intention that the deed be considered a warranty deed, mutual mistake as to the warranties in the deed and lack of consideration for the deed. Both parties moved for summary judgment. The deposition of J. C. Duyck, president of plaintiff corporation, reveals that: on or about 10 May 1972, the corporation owned a motel in Asheville; at about that time, plaintiff entered into an agreement with Billy Bryant to sell the motel to Bryant with part of the purchase price

to be paid by the conveyance of five lots in Buncombe County; in connection with that transaction, plaintiff retained Attorney S. Thomas Walton (who represents defendants in this action); it was agreed that Walton would be paid with one of the five lots and that, in order to accomplish this, all five lots would be conveyed to Orb which would then convey to plaintiff four of the lots with the other lot remaining in the name of either Walton or Orb; Duyck's understanding throughout this transaction was that he was to receive a full warranty deed; no monetary consideration changed hands between plaintiff and defendant in this transaction; at a time subsequent to the sale of the motel and the conveyance of the five lots, plaintiff learned of the existence of a deed of trust on the property in question; this deed of trust was later foreclosed and the property sold. The court entered an order denying defendant Orb's motion for summary judgment and allowing plaintiff's motion for summary judgment against defendant Orb and ordering that the action be promptly calendared for trial on the issue of damages. Defendants appealed.

Van Winkle, Buck, Wall, Starnes, Hyde & Davis, by Russell P. Brannon, for plaintiff appellee.

S. Thomas Walton, for defendant appellants.

ERWIN, Judge.

[1] Defendants first assign as error the trial court's denial of their motion to dismiss, asserting lack of jurisdiction over the person, insufficiency of service of process, and incapacity of plaintiff to sue. We note at the outset that the "Stipulations of Record on Appeal" contain the following:

> "1. That the Buncombe County Superior Court had jurisdiction over all parties to this action and the subject matter therein.
>
> 2. . . . that said action was properly before the Court."

Thus, defendants cannot now be heard to assert lack of jurisdiction over the person or insufficiency of service of process. In any event, the defect in service asserted by defendants is without merit. They contend that the sheriff's return, showing service on "S. Thomas Walton," instead of on "S. Thomas Walton, Registered Agent," renders service deficient. But the return fur-

ther shows that service was made at the very address to which the sheriff was directed to serve defendants through their registered agent. Defendants do not contend that Walton was not their registered agent. It is clear that the return here showed service on the defendants.

[2] In their contention that plaintiff lacked capacity to sue, defendants rely on the fact that plaintiff's articles of incorporation had been suspended pursuant to N.C. G.S. 105-230 at the time suit was brought. (The suspension occurred on 1 March 1973, and this suit was filed on 4 September 1974.) Defendants' contention has no merit; plaintiff had capacity to sue on 4 September 1974. Our reasoning, based on a reading of the cases and construction of the applicable statutes, is fully consistent with this Court's opinion in *Swimming Pool Co. v. Country Club*, 11 N.C. App. 715, 182 S.E. 2d 273 (1971), and need not be repeated here. *See also Parker v. Homes, Inc.*, 22 N.C. App. 297, 206 S.E. 2d 344 (1974); 3 N.C. Index 3d, Corporations § 26.

Defendants also assign error to the trial court's denial of defendant Orb Enterprises, Limited's motion for summary judgment. As we conclude that the trial court properly granted plaintiff's motion for summary judgment against defendant Orb, it follows that defendant Orb's motion was properly denied. Defendants admitted execution of a full warranty deed to plaintiff and that there was an outstanding deed of trust on the property. (While we note that the deed to plaintiff from defendant Orb does not show Orb's corporate seal, this defect is cured by N.C. G.S. 47-71.1, 1973 Session Laws, c. 479.)

[3] Defendants contend that an issue of fact exists as to whether or not it was the intent of the parties that Orb convey real property to plaintiff by warranty deed. Evidently, defendants' contention is based on mistake. However, there is no indication in the record that the plaintiff expected less than a full warranty deed, and that is what Orb delivered to it. In effect, defendants seek to reform the deed, but the mistake of only one party to an instrument, absent fraud, is not ground for relief by reformation. *Setzer v. Insurance Co.*, 257 N.C. 396, 126 S.E. 2d 135 (1962).

Further, this Court stated in *Parker v. Pittman*, 18 N.C. App. 500, 197 S.E. 2d 570 (1973) that:

"Even where appropriate grounds for reformation are asserted, '[w]hen a solemn document like a deed is revised by court of equity, the proof of mistake must be strong, cogent and convincing.' *Hege v. Sellers*, 241 N.C. 240, 84 S.E. 2d 892." 18 N.C. App. at 505, 197 S.E. 2d at 573.

[4] Defendants further assert that no consideration passed between plaintiff and defendant Orb, and therefore, the deed is "void." Assuming a lack of consideration, such is not the law; ". . . a deed in proper form is good and will convey the land described therein without any consideration, except as against creditors or innocent purchasers for value." *Smith v. Smith*, 249 N.C. 669 at 676, 107 S.E. 2d 530 at 535 (1959). This is a suit between the original grantor and original grantee, neither creditors nor innocent purchasers being involved.

[5] In their answer, the defendants admitted Orb's conveyance to plaintiff by full warranty deed the property in question and that, if the deed is a warranty deed, the covenants contained therein, or at least the covenant against encumbrances, was breached upon the delivery of the deed, in that there was an outstanding deed of trust on the property. The deed recites no exceptions as to any encumbrance not warranted against. As Professor Webster stated in Webster, Real Estate Law in North Carolina, § 190, p. 223: "The covenant against encumbrances is a covenant that there are no encumbrances outstanding against the premises at the time of the conveyance." Even the grantee's actual knowledge and record notice of the existence of an encumbrance do not constitute a defense to a grantee's action to recover damages for grantor's breach of the covenant against encumbrances. *Gerdes v. Shew*, 4 N.C. App. 144, 166 S.E. 2d 519 (1969). An issue in *Gerdes* related to whether or not the plaintiff was estopped to assert breach of the covenant against encumbrances where the provisions of the written sales contract provided that upon approval of title by purchaser's attorney, conveyance would be made by warranty deed and that if title were found defective, the owners would be notified and given opportunity to correct the defect, but plaintiff did not so notify the defendants. In ruling that the plaintiff was not so estopped, Judge Parker wrote for this Court:

"Acceptance of this argument would render completely meaningless all of the covenants in defendants' deed. If defendants did not mean to be bound by their covenants, they should not have included them in their deed. Execution and delivery of the deed containing full covenants established the extent of their obligations thereunder. It is presumed that the prior sales contract and all prior negotiations leading up to closing of the sale, insofar as they related to any matters covered by the covenants in defendants' deed, became merged in the deed itself." *Gerdes v. Shew, supra*, 4 N.C. App. at 150-151, 166 S.E. 2d at 524.

We conclude that there were no genuine issues as to any material fact regarding the liability of defendant Orb to plaintiff. We note that the trial court only granted summary judgment for plaintiff against Orb, and ordered that a trial be held as to the amount of damages, if any, to be recovered. This the trial court could do under Rule 56(c) and (d). This is a case where no defense was shown to exist, and summary judgment is therefore proper. *See Harrison Associates v. State Ports Authority*, 280 N.C. 251, 185 S.E. 2d 793 (1972), *petition for rehearing denied*, 281 N.C. 317 (1972); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

Justice Huskins, speaking for the Supreme Court in *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975), stated in reference to Rule 56: "The rule is designed to permit penetration of an unfounded claim or defense in advance of trial and to allow summary disposition for either party when a fatal weakness in the claim or defense is exposed." 288 N.C. at 378, 218 S.E. 2d at 381.

The judgment appealed from is

Affirmed.

Judges VAUGHN and HEDRICK concur.

HAROLD K. AUTRY, BY HIS GUARDIAN AD LITEM, HAROLD C. AUTRY v. AETNA LIFE AND CASUALTY INSURANCE COMPANY AND JOHNNY NETHERCUTT

No. 7713SC379

(Filed 21 March 1978)

1. Insurance § 69.2— definition of "uninsured motor vehicle"

An "uninsured motor vehicle" within the purview of G.S. 20-279.21(b)(3) is a vehicle which should be insured under the Motor Vehicle Safety and Financial Responsibility Act but is not or a vehicle which, though not subject to compulsory insurance under that Act, is at some time operated on the public highways.

2. Insurance § 69.2— uninsured motorists provision—unregistered motorcycle on private property

The uninsured motorists provision of an automobile liability policy does not cover accidents on private property involving motor vehicles not subject to the registration and compulsory insurance provisions of the motor vehicle financial responsibility statutes. Therefore, the uninsured motorists provision of plaintiff's automobile policy did not provide coverage for injuries to plaintiff's minor son when he was struck by a three-wheel custom-built motorcycle being driven by defendant in his own yard where the motorcycle was not equipped so that it could pass the inspection required for the issuance of N. C. license plates, and defendant had never operated the motorcycle on a public highway and did not intend to do so until he made the necessary repairs in order for the motorcycle to pass inspection.

APPEAL by plaintiffs from *Bailey, Judge*. Judgment entered 21 March 1977 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 10 February 1978.

The minor plaintiff Harold K. Autry, by and through his guardian ad litem Harold C. Autry, instituted an action against defendants to recover for injuries sustained as a result of the alleged negligence of defendant Nethercutt. Plaintiff Harold C. Autry, father of the minor plaintiff, also instituted an action in his individual capacity seeking to recover medical expenses incurred as a result of the aforesaid injuries sustained by the minor plaintiff. Both plaintiffs joined Aetna Life and Casualty Insurance Company as a defendant alleging that defendant Aetna is liable for the damages and expenses under the uninsured motorists clause in plaintiff father's automobile insurance policy.

Defendants answered and denied liability.

By agreement of parties, the cases were consolidated for trial and tried before Judge Bailey without a jury. The parties stipulated that the issues to be resolved were as follows: (1) Was the plaintiff injured and damaged by the negligence of defendant Nethercutt; (2) what amount, if any, is plaintiff entitled to recover for his injuries and damages; and (3) was the vehicle being operated by defendant Nethercutt at the time in question an uninsured motor vehicle according to the provisions of plaintiff's insurance policy with defendant Aetna and the applicable laws of North Carolina.

Upon conclusion of the trial, the trial court made findings of fact. We summarize so much of the court's findings of fact as is necessary for a decision, the numbering of the paragraphs being ours:

(1) On 24 November 1975, the minor plaintiff Harold K. Autry was injured when struck by a 1972 custom-built three-wheel motorcycle being operated in a negligent manner by defendant Nethercutt.

(2) The accident occurred while defendant Nethercutt was operating the vehicle in his own yard, and not on any public property or any public road or highway.

(3) The Nethercutt vehicle was originally designed to travel on public highways, however, at the time and place of the accident the vehicle had no brakes, no horn, the lights were not operating, the vehicle could not pass the inspection required for issuance of license plates and no North Carolina license plate had been issued to such vehicle. The vehicle was powered by a four-cylinder Volkswagen automobile engine which was located over the rear axle. There was only one seat and that seat was not secured to the vehicle at the time of the accident. The vehicle is so designed that it is difficult or impossible to control at high speeds.

(4) The vehicle had been registered with the North Carolina Department of Motor Vehicles by its former owner, but defendant Nethercutt never filed an application for a new certificate of title with the Department of Motor Vehicles. Defendant Nethercutt never operated the vehicle on any public highway and did not intend to operate it on any public highway until he made such

repairs as were necessary in order for the vehicle to pass inspection and be eligible for a North Carolina license plate as required by law for operation on public highways.

(5) In view of the nature in which defendant Nethercutt had used the vehicle, it was not required to be registered with the Department of Motor Vehicles and could not have been so registered in its then condition.

(6) With respect to the ownership, maintenance or use of such vehicle, there was neither cash or securities on file with the Commissioner of Motor Vehicles, nor a bodily injury and property damage liability bond or insurance policy applicable to the owner. In addition, the owner had not qualified as a self-insurer.

(7) The automobile liability policy issued by defendant Aetna to plaintiff father contained an uninsured motorist clause.

The trial court concluded that as a result of the negligence of defendant Nethercutt, plaintiffs were entitled to recover $6,705.05. In addition, the trial court concluded that plaintiffs were not entitled to recover from defendant Aetna for the reason that the vehicle being operated by defendant Nethercutt at the time of the minor plaintiff's injury was not an "uninsured motor vehicle" within the meaning of the applicable North Carolina Statutes or the provisions of the plaintiff's insurance policy.

From that portion of the judgment denying recovery from defendant Aetna, plaintiffs appeal to this Court.

Ray H. Walton, for the plaintiffs.

Poisson, Barnhill, Butler & Britt, by M. V. Barnhill, Jr., for the defendants.

MARTIN, Judge.

The sole question before this Court is whether defendant Nethercutt's three-wheeled vehicle, at the time and place of the incident in question, was an "uninsured motor vehicle" within the meaning of the applicable statutory provisions and provisions of plaintiff's insurance policy.

G.S. 20-279.21(b)(3) provides for the inclusion of "uninsured motorists coverage" as a compulsory part of any automobile

liability policy delivered with respect to a "motor vehicle registered or principally garaged in this State." For purposes of determining the extent of coverage under the uninsured motorists endorsement of an automobile liability policy, this subsection defines "uninsured motor vehicle" as follows:

> ". . . [A]n 'uninsured motor vehicle' shall be a motor vehicle as to which there is no bodily injury liability insurance and property damage liability insurance in at least the amounts specified in subsection (c) of G.S. 20-279.5 . . . or there is no bond or deposit of money or securities as provided in G.S. 20-279.24 or 20-279.25 in lieu of such bodily injury and property damage liability insurance, or the owner of such motor vehicle has not qualified as a self-insurer under the provisions of G.S. 20-279.33, or a vehicle that is not subject to the provisions of the Motor Vehicle Safety and Financial Responsibility Act; but the term 'uninsured motor vehicle' shall not include:
>
> a. A motor vehicle owned by the named insured;
>
> b. A motor vehicle which is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law;
>
> c. A motor vehicle which is owned by the United States of America, Canada, a state, or any agency of any of the foregoing (excluding, however, political subdivisions thereof);
>
> d. A land motor vehicle or trailer, if operated on rails or crawler-treads or while located for use as a residence or premises and not as a vehicle; or
>
> e. A farm-type tractor or equipment designed for use principally off public roads, except while actually upon public roads."

In almost identical language, the foregoing definition is incorporated into the automobile liability policy issued by defendant Aetna to plaintiff.

In view of the above quoted definition, the trial court's specific findings with respect to the three-wheeled vehicle—that

there was neither cash or securities on file, nor a liability bond or insurance policy applicable to the owner—were tantamount to a finding that the vehicle in question was *uninsured.* Based on this fact, plaintiffs argue that Nethercutt's three-wheeled vehicle, powered by a Volkswagen engine, was obviously a "motor vehicle" and consequently, an "uninsured motor vehicle" within the meaning of the statute. With this interpretation of the statutory term we cannot agree.

In ascertaining the intended meaning of "uninsured motor vehicle," and thus determining the scope of the statutory uninsured motorists provision as incorporated into plaintiff's policy, we note at the outset that the uninsured motorists section must be considered in light of the "Motor Vehicle Safety and Financial Responsibility Act" (the Act) which it amended. *See Buck v. Guaranty Co.*, 265 N.C. 285, 144 S.E. 2d 34 (1965). That Act, G.S. 20-279.1 *et seq.*, was intended to protect those who might be injured on the public highways of this State by providing assurance of the financial responsibility of all who operate motor vehicles on the public highways. *Harrelson v. Insurance Co.*, 272 N.C. 603, 158 S.E. 2d 812 (1967). This concern was effectuated by requiring registration of and proof of financial responsibility from any motor vehicle designed to be operated upon the public highways and intended by its owner to be so operated. G.S. 20-50; G.S. 20-309. However, it became immediately apparent that this statutory scheme accorded no protection to one injured by the negligent operation of a motor vehicle which was in fact *uninsured,* whether in willful disobedience of the registration and compulsory insurance statutes or as a result of an exemption from the requirements thereof. The uninsured motorists section of G.S. 20-279.21 was enacted in order to close these "gaps" in the motor vehicle financial responsibility legislation and thus, to provide financial recompense to innocent persons who receive injuries through the wrongful conduct of motorists who are uninsured and financially irresponsibile. *Moore v. Insurance Co.*, 270 N.C. 532, 155 S.E. 2d 128 (1967).

[1] Construing "uninsured motor vehicle" in light of the foregoing, we must conclude that the term is intended to include motor vehicles which should be insured under the Act but are not, and motor vehicles which, though not subject to compulsory insurance under the Act, are at some time operated on the public highways.

Only in these instances is the uninsured motorists provision serving its intended purpose of complementing the original Act and furthering the financial protection accorded thereby to persons injured by motor vehicles *on the public highways*. This purpose would not be served by interpreting the uninsured motorists provision so as to cover accidents involving motor vehicles not subject to compulsory insurance and which occur on private property. Such an interpretation would result in absolute financial protection against injury by motor vehicle, a concept neither contemplated nor intended by the original Act.

[2] In the instant case, the trial court found as fact that defendant Nethercutt never operated the three-wheeled vehicle on any public highway and did not *intend* to do so until he made such repairs as were necessary in order for the vehicle to pass inspection. In view of defendant's use of the vehicle and considering its condition, the court concluded that the three-wheeled vehicle was not required to be registered; thus, it was not subject to compulsory insurance. In addition, the court found that the accident occurred on private property, not on any public road or highway. In our opinion, the uninsured motorists provision was not intended to provide financial recompense to one injured on private property by a vehicle not subject to the registration and compulsory insurance provisions of our motor vehicle financial responsibility legislation.

Accordingly, we find that at the place of the accident and in its then condition, defendant's three-wheeled vehicle was not an "uninsured motor vehicle" within the intended scope of the uninsured motorists provisions so as to entitle plaintiffs to coverage thereunder. The trial court's judgment precluding recovery from defendant Aetna is affirmed.

Affirmed.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. JEFFREY ALLEN BROWN

No. 7721SC898

(Filed 21 March 1978)

Searches and Seizures § 41— execution of search warrant—failure to announce identity and purpose—suppression of seized evidence

Officers violated G.S. 15A-249 in the execution of a warrant to search defendant's residence for marijuana when an officer, dressed in jeans and sandals, forcibly entered defendant's residence without giving notice of his identity and purpose when defendant stepped onto his front porch to investigate a commotion other officers had intentionally created in front of defendant's residence, and other officers then entered the residence. Furthermore, the seized marijuana should have been suppressed pursuant to G.S. 15A-974(2) as evidence obtained as a result of a substantial violation of the Criminal Procedure Act since (1) the right of protection against unreasonable searches and seizures and the right of privacy were violated; (2) there was a total deviation from the procedures required by G.S. 15A-249; (3) the violation was willful; and (4) the exclusion of the seized evidence will tend to deter future violations of G.S. 15A-249.

APPEAL by defendant from *Lupton, Judge.* Judgment entered 19 July 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 1 March 1978.

Defendant was charged with felonious possession of marijuana. During the trial, he moved to suppress evidence obtained under the search warrant on the grounds that officers conducting the search unlawfully entered his house. Testimony introduced by defendant and the State on *voir dire* revealed the following: On 30 April 1977, Officers G. L. Rose and B. B. Woosley of the Winston-Salem Police Department were issued a search warrant for defendant's residence in Kernersville. The evidence sought to be seized under the warrant was marijuana. Officers Rose and Woosley, knowing that marijuana could easily be destroyed, met with Deputy Sheriff McGee and two other deputy sheriffs of Forsyth County and devised a plan for quick entry into defendant's house. Their motive was to prevent defendant from destroying any contraband he possessed. Their plan was to stage a chase in which a marked sheriff's car, with lights flashing and siren sounding, would pursue an unmarked police car and stop in front of defendant's house. The mock chase was designed to operate as a diversion for Deputy McGee, who was to be positioned beside the

door of defendant's house. If the defendant opened his door to investigate the commotion, Deputy McGee was supposed to enter the house and begin searching for contraband before any could be destroyed. The scheme was carried out as planned and defendant did in fact open the door to his house and step onto the front porch. At that instant, Deputy McGee went to the door, asked defendant if he could use his phone and when refused, pushed his way inside the house. Deputy McGee was dressed in jeans and sandals and was not in uniform. The search of the house resulted in the seizure of 18 bags of marijuana and other drug paraphernalia.

In his order denying defendant's motion to suppress evidence, Judge Lupton found that Deputy McGee did not knock or identify himself before entering defendant's residence, but that such conduct did not require the suppression of evidence seized under the search. The case was submitted to the jury and upon a verdict of guilty, defendant was sentenced to 24 months imprisonment. He appealed to this Court and the State concedes that the search was unlawful and the motion to suppress should have been granted.

Attorney General Edmisten, by Assistant Attorney General William Woodward Webb, for the State.

Johnson and Walker, by Gary J. Walker, for the defendant appellant.

WEBB, Judge.

Defendant's appeal presents the question whether the law enforcement officers in the execution of the search warrant, under the facts in this case, were justified in making a forcible, unannounced entry into defendant's residence when it reasonably appeared that notice of their entry would cause the destruction or secreting of contraband or evidence. We answer in the negative.

G.S. 15A-249 defines the procedures law enforcement officers must follow when executing a search warrant. It reads:

> The officer executing a search warrant *must, before entering the premises,* give appropriate notice of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched. If it is

> unclear whether anyone is present at the premises to be searched, he must give the notice in a manner likely to be heard by anyone who is present. (Emphasis added.)

No one disputes that the provisions of G.S. 15A-249 were not complied with during the search of defendant's house. Judge Lupton, however, found in his order that:

> ". . . the defendant was not prejudiced by this deviation from the requirements of North Carolina General Statute 15A-249 since the reason for complying with the above statute is to show that the officers were not trespassers and that the deviation from lawful conduct was minor, and that the lawfulness of the deviation was somewhat justified by the word received through the confidential informant that the contraband may be destroyed and that to exclude the seized evidence would not tend to deter future deviation of G.S. 15A-249, because again the officers had word that the destruction of the contraband was probable."

We do not read G.S. 15A-249 so narrowly as to have as its main purpose the protection of law enforcement officers from homeowner assaults, nor do we read the statute so broadly as to justify its violation when the destruction of contraband is probable. As we interpret the statute, it is also designed to protect the public from unreasonable searches and seizures and to guard the right to privacy in our homes. Unannounced, forcible entries by officers are authorized by statute in situations in which life or safety of any person is endangered. G.S. 15A-251(2).

Finding, as we have, that G.S. 15A-249 was violated during the search of defendant's residence, we must determine if this violation of statute requires the evidence seized to be excluded. We hold that the motion to suppress should have been granted. The statutory test for the exclusion or suppression of unlawfully obtained evidence is found in G.S. 15A-974. It provides:

> Upon timely motion, evidence must be suppressed if:
>
> (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or
>
> (2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining

whether a violation is substantial, the court must consider all the circumstances, including:

a. The importance of the particular interest violated;

b. The extent of the deviation from lawful conduct;

c. The extent to which the violation was willful;

d. The extent to which exclusion will tend to deter future violations of this Chapter.

We concede, without deciding, that the officer's conduct in gaining entry to search defendant's house would not require the exclusion of evidence under federal Constitutional standards and, *a fortiori*, State Constitutional standards. *See Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (1963). However, regardless of the constitutionality of the search, we hold that the evidence seized must be suppressed because the officers obtained their evidence "as a result of a substantial violation" of the Criminal Procedure Act. *See State v. Williams*, 31 N.C. App. 237, 229 S.E. 2d 63 (1976). Consideration of the circumstances cited under subsection (2) of G.S. 15A-974 leads us to conclude that the provisions of the Criminal Procedure Act were substantially violated. First, the protection of the public from unreasonable searches and seizures and the right to privacy in our homes are two interests that have been violated. We consider these interests to be of utmost importance. Second, Deputy McGee did not knock, identify himself (nor was he dressed in uniform so as to give rise to constructive notice of his authority), or state his purpose before entering defendant's house. This was a total deviation from the procedures outlined in G.S. 15A-249. Third, as to whether the violation of the statute was willful, it is evident from the record that the officers planned their diversionary chase to enable Deputy McGee to secretly enter defendant's residence. A prearranged scheme to circumvent the statute's requirements establishes that the violation was willful. Finally, we believe that the exclusion of evidence under the facts of this case will tend to deter future violations of G.S. 15A-249.

In so far as *State v. Watson*, 19 N.C. App. 160, 198 S.E. 2d 185 (1973) is inconsistent with this opinion, we believe that it has been overruled by G.S. 15A-251.

We reverse. The motion to suppress evidence should have been granted.

Judges BRITT and HEDRICK concur.

KENNETH MOORE MINTZ v. ROBERT LEE FOSTER

No. 7722SC250

(Filed 21 March 1978)

1. **Automobiles § 45.6— blackboard diagram—no introduction into evidence—no prejudice shown**

Defendant's contention that the trial court erred in permitting the plaintiff's witness to illustrate his testimony with a diagram drawn by him on a blackboard without testimony that it fairly represented the scene of the accident is without merit, since the diagram was not offered into evidence for any purpose; furthermore, defendant failed to show that use of the diagram was prejudicial and, without its erroneous use, a different result would have been likely.

2. **Automobiles § 80.1— turning into path of oncoming vehicle—no contributory negligence of driver of oncoming vehicle**

In an action to recover for personal injuries sustained by plaintiff in a collision between his motorcycle and defendant's truck, the trial court did not err in refusing to submit to the jury an issue of plaintiff's contributory negligence, since defendant presented no evidence; plaintiff's evidence tended to show no negligence on his part but tended to show that he was within the speed limit, in his own lane, and had to swerve to the right and brake in an effort to avoid defendant's truck, which had turned into plaintiff's lane; and the doctrine of *res ipsa loquitur* was inapplicable in this case.

3. **Automobiles § 90.14— violation of safety statute as negligence per se—jury instruction erroneous**

In an action to recover for injuries sustained by plaintiff in a collision between plaintiff's motorcycle and defendant's truck where the evidence tended to show that defendant had pleaded guilty to a traffic violation for "failure to see that intended movement could be made," the trial court erred in instructing the jury that "violation of a statute of a motor vehicle traffic law, enacted for public safety, is negligence within itself," since the statute which defendant had violated, G.S. 20-154, specifically provided that a violation of that statute would not constitute negligence *per se*.

APPEAL by defendant from *Graham, Judge*. Judgment entered 12 November 1976 in Superior Court, DAVIE County. Heard in the Court of Appeals 30 January 1978.

Plaintiff instituted this action to recover damages for personal injuries and property damage resulting from a collision between plaintiff's motorcycle and defendant's truck allegedly caused by the defendant's negligence. The defendant answered, denying negligence and alleging that the plaintiff was contributorily negligent.

At the trial, the plaintiff's evidence tended to show that: the accident occurred at approximately noon on 5 December 1972 in clear, dry weather; plaintiff was traveling west on U.S. Highway 158; defendant was traveling east and was attempting to make a left turn across the plaintiff's lane into a dirt road; the speed limit on the highway at that point was 55 miles per hour; plaintiff does not recall anything about the accident other than that he was going about 48 miles per hour and had speeded up slightly just before the accident; visibility was clear for about one-quarter of a mile; plaintiff's motorcycle left 40 feet of "indentions" in the pavement, and plaintiff ended up on the extreme right side of his lane near the entrance to the dirt road; defendant's truck left no skid marks and was observed after the accident by Officer Grooms as being partially on the dirt road and partially on U.S. Highway 158; defendant informed Officer Grooms that he had backed the truck up about three feet after the accident because plaintiff was under the front bumper; defendant also stated to Officer Grooms that he never saw the motorcycle prior to the collision; defendant pleaded guilty to a traffic violation for "failure to see that intended movement could be made"; plaintiff suffered extensive permanent injuries and incurred medical bills of approximately $14,000; and in the year prior to the accident plaintiff earned approximately $35,000 as a farmer but earned nothing for two years after the accident as a result of his injuries. Defendant presented no evidence but moved for a directed verdict. The motion was denied. The court refused to submit an issue of contributory negligence, although defendant requested one. The jury found that plaintiff was injured as a result of defendant's negligence and awarded damages of $10,000. The court set aside the verdict on the issue of damages and granted a new trial on that issue. Defendant appealed.

White & Crumpler, by Fred G. Crumpler, Jr., Harrell Powell, Jr., Michael J. Lewis, and David R. Tanis, for plaintiff appellee.

Brinkley, Walser, McGirt & Miller, by G. Thompson Miller; and William E. Hall, for defendant appellant.

ERWIN, Judge.

The defendant first assigns error to the trial court's failure to direct a verdict in his favor, contending there was no evidence of actionable negligence. This assignment is overruled. On a motion by a defendant for a directed verdict under Rule 50(a), plaintiff's evidence must be taken as true and must be considered in the light most favorable to him, giving plaintiff the benefit of every reasonable inference to be drawn from such evidence. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977). The record reflects ample evidence which would permit the jury to find defendant negligent.

[1] Defendant next assigns as error the trial court's permitting plaintiff's witness, Officer Grooms, to illustrate his testimony with a diagram drawn by him on a blackboard without testimony that it fairly represented the scene of the accident. First, we note that the diagram was not offered into evidence for any purpose, nor has any reproduction of the diagram been furnished this Court. Further, defendant must show not only a lack of authentication, but also that the use of the diagram was prejudicial and without its erroneous use, a different result would have been likely. *State v. Harris*, 23 N.C. App. 77, 208 S.E. 2d 266 (1974). This showing the defendant has failed to make.

[2] In his third assignment, defendant contends that the trial court erred in refusing to submit to the jury an issue of contributory negligence. The record shows that defendant offered no evidence. Plaintiff's evidence showed no negligence on his part, but tended to show plaintiff was within the speed limit, in his own lane, and had to swerve to the right and brake in an effort to avoid defendant's truck, which had turned into plaintiff's lane. Defendant's contention that the doctrine of *res ipsa loquitur* may apply here, permitting the inference that plaintiff was contributorily negligent in that his motorcycle left the highway ". . . without showing any reason for doing so . . .", is totally

groundless. This is not a situation where the nature of the occurrence itself would raise an inference of negligence. On the evidence here, it was not unusual for the motorcycle to have left the road.

The burden of proof on contributory negligence is clearly on defendant. *Clary v. Board of Education*, 286 N.C. 525, 212 S.E. 2d 160 (1975). The issue should not be submitted to the jury unless there is evidence from which contributory negligence could reasonably be inferred. *Atkins v. Moye*, 277 N.C. 179, 176 S.E. 2d 789 (1970). "Evidence which raises a mere conjecture is insufficient for the jury." *Bruce v. Flying Service*, 234 N.C. 79, 85, 66 S.E. 2d 312, 316 (1951). The evidence was insufficient here to dictate an instruction on contributory negligence.

[3] A fourth assignment of error relates to the following portion of the trial court's charge:

> "I instruct you that the violation of a statute of a motor vehicle traffic law, enacted for public safety, is *negligence within itself*, unless the statute provides for the contrary. Where a public safety statute has been enacted, the statute determines what must be done or what must not be done. The statute describes a standard. And that standard is absolute. The reasonable person test does not apply. Proof of a violation of a statute is proof of negligence . . ." (emphasis added).

Plaintiff offered into evidence the court records pertaining to defendant's guilty plea to the charge that he ". . . did unlawfully and willfully operate a motor vehicle on a public street or public highway, by failing to see before turning from a direct line that such movement could be made in safety." The implication of this instruction is that violation of a safety statute, which we here conclude must have been N.C. G.S. 20-154(a), constitutes negligence *per se*. However, 20-154(d) states: "A violation of this section shall not constitute negligence per se." As Judge Parker wrote for this Court in *Kinney v. Goley*, 4 N.C. App. 325, 332, 167 S.E. 2d 97, 102 (1969):

> "Since a violation of G.S. 20-154 is no longer to be considered negligence *per se*, the jury, if they find as a fact the statute was violated, must consider the violation along with all other facts and circumstances and decide whether, when so con-

sidered, the violator has breached his common law duty of exercising ordinary care."

We hold this instruction to be prejudicial error. In the *Kinney* case, *supra*, this Court further held that the trial court's having read G.S. 20-154 in its entirety to the jury did not cure the erroneous portion of the charge:

> "Conflicting instructions to the jury upon a material point, the one correct and the other incorrect, must be held for prejudicial error, requiring a new trial, since it cannot be known which instruction was followed by the jury in arriving at a verdict. *Barber v. Heeden*, 265 N.C. 682, 144 S.E. 2d 886." *Kinney v. Goley*, *supra*, at 332.

While the trial court did add the qualifying statement, "unless the statute provides for the contrary," it did not add that this statute does "provide for the contrary," leaving the jury with the impression that violation of this statute did constitute negligence *per se*.

This error requires a new trial on all issues. While we therefore need not reach the defendant's last assignment, that the trial court abused its discretion in only setting aside the verdict as to damages, we note that the verdict was for $10,000, the amount of defendant's insurance coverage, when the hospital and doctors' bills far exceeded that amount. This strongly suggests a compromise verdict. *See Robertson v. Stanley*, 285 N.C. 561, 206 S.E. 2d 190 (1974).

The judgment is reversed, and this cause is remanded for a new trial on all issues.

New trial.

Judges MORRIS and VAUGHN concur.

NINA RIDGE v. EDWARD D. WRIGHT

GRADY RIDGE v. EDWARD D. WRIGHT AND ROGER L. REVELS

No. 7722SC484

(Filed 21 March 1978)

1. **Process § 16— refused registered letter—letters which must be sent by ordinary mail**

The requirement of G.S. 1-105(3) that a refused registered letter be sent by ordinary mail applies only to those letters which are in fact refused, not to those which are unclaimed or those which are marked "moved, not forwardable."

2. **Process § 16— service of process on nonresident motorist—absence of affidavits—consideration of afffidavits on rehearing proper**

Where the court, on an earlier appeal, held that, without affidavits of compliance and other documents required by G.S. 1-105(3), the service of process upon nonresident defendants was defective, and the court remanded the causes to superior court for another hearing on defendants' motions to dismiss for insufficiency of service of process, it was proper for the trial court, on remand, to consider plaintiffs' affidavits of compliance with G.S. 1-105 which had been filed pending the first appeal of the case but which were not considered by the court on appeal.

APPEAL by defendants from *Long, Judge.* Orders entered 7 April 1977, in Superior Court, DAVIDSON County. Heard in the Court of Appeals 9 March 1978.

Plaintiff Nina Ridge filed a complaint on 3 August 1973, in which she sought damages for personal injuries sustained in a collision which occurred in Buncombe County between an automobile in which she was a passenger and another automobile owned by defendant Revels and driven by defendant Wright. According to plaintiff's allegations, both defendants are residents of the State of Florida.

Pursuant to G.S. 1-105, summonses and complaints as to both defendants were served upon the Commissioner of Motor Vehicles on 6 August 1973, and on 7 August the Commissioner mailed copies by registered mail, return receipt requested, to each defendant at an address in Florida. Defendant Wright's letter was returned marked "unclaimed." An alias and pluries summons was issued for defendant Wright on 26 October 1973, and was extended on 31 December 1973, and on 29 January 1974. This summons,

however, was never served. On 31 July 1974, plaintiff Nina Ridge took a voluntary dismissal without prejudice as to defendant Revels.

On 30 July 1974, plaintiff Grady Ridge instituted an action against defendants Revels and Wright for damages for personal injuries and property damage received in the same automobile collision. Summonses were served upon the Commissioner of Motor Vehicles on 5 August 1974, and these summonses were sent by registered mail, return receipt requested, to defendants on the same day. The post office returned the letter addressed to defendant Revels with the notation "Moved, Not Forwardable." The letter addressed to defendant Wright was delivered to him.

Defendants filed similar motions in each case moving to dismiss under G.S. 1A-1, Rule 12(b) for insufficiency of service of process. On 30 September 1975, Judge Crissman entered orders denying defendants' motion to dismiss, and defendants appealed. They argued before this Court that their motion to dismiss for lack of service should be allowed since plaintiffs' attorney did not file affidavits of compliance as required by G.S. 1-105(3). These affidavits were filed pending the first appeal of this case but were ordered stricken from the record. In *Ridge v. Wright*, 29 N.C. App. 609, 225 S.E. 2d 131 (1976), this Court held that, without the affidavits of compliance and other documents required by G.S. 1-105(3), the service of process was defective. The court vacated the portions of the trial court's orders denying defendants' motions to dismiss or, in the alternative, to quash the service of process, and remanded the causes to superior court for another hearing on defendant's motions.

At the 14 February 1977 session of Superior Court of Davidson County, Judge James M. Long heard the motions of defendants. At this hearing plaintiffs introduced two documents, purported affidavits of compliance as required by G.S. 1-105(3). These documents had not been before Judge Crissman at the earlier hearing on defendants' motions. Judge Long entered orders again denying defendants' motions, and defendants appealed.

Wilson, Biesecker, Tripp & Wall, by Roger S. Tripp, and Young, Moore, Henderson & Alvis, by John E. Aldridge, Jr., for plaintiff appellees.

Uzzell and Dumont, by Larry Leake, for defendant appellants.

ARNOLD, Judge.

[1] By this appeal defendants again assign as error the failure of the trial court to grant their motions to dismiss or, in the alternative, to quash the return of summons. First, defendants contend that G.S. 1-105, which deals in part with service upon nonresident drivers of motor vehicles, required plaintiff, upon the return of "unclaimed" papers to defendant Wright, to send the letter to Wright by ordinary mail. G.S. 1-105(3) reads:

> "The defendant's return receipt, or the original envelope bearing a notation by the postal authorities that receipt was refused, and an affidavit by the plaintiff that notice of mailing the registered letter and refusal to accept was forthwith sent to the defendant by ordinary mail, together with the plaintiff's affidavit of compliance with the provisions of this section, must be appended to the summons or other process and filed with said summons, complaint and other papers in the cause."

According to their interpretation of this section defendants equate a receipt that was *refused* with one that was *unclaimed.* This interpretation, however, flies in the face of the ordinary words of the statute and is rejected. A reading of G.S. 1-105(2) shows that the legislature addressed both a refusal to accept a registered letter and non-delivery of an unclaimed registered letter. We read the requirement in G.S. 1-105(3) that a refused registered letter be sent by ordinary mail to apply only to those letters which were in fact "refused."

Defendants' second argument is that a returned letter marked "moved, not forwardable" should also be treated as a letter which has been refused. For the reasons already stated, we do not accept this interpretation of G.S. 1-105.

[2] The final argument by defendants is that this Court in *Ridge v. Wright, supra,* did not comtemplate that, on remand, the trial

court would consider plaintiffs' affidavits of compliance with G.S. 1-105. G.S. 1-105(3), of course, requires that plaintiffs append affidavits of compliance with G.S. 1-105 to the summons and file such affidavits with other papers in the cause. In reviewing this Court's action in *Ridge v. Wright, supra*, we conclude that the cause was remanded for the very purpose of allowing the trial court to review the motions in light of plaintiffs' affidavits. We, therefore, find no error in the trial court's denial of defendants' motions.

Affirmed.

Judges MORRIS and MARTIN concur.

IN THE MATTER OF THE WILL OF NAZER VERNON RAY, DECEASED

No. 7715SC121

(Filed 21 March 1978)

1. **Evidence § 53; Wills § 10— holographic will—opinion of handwriting expert**

   An expert in handwriting analysis was properly allowed to state his positive opinion that an alleged holographic will could not have been written by decedent.

2. **Appeal and Error § 24— admission of testimony—absence of objections or motions to strike**

   The propriety of the admission of testimony is not presented on appeal where there were no objections or motions to strike the testimony at trial.

3. **Wills §§ 10, 23— instruction on purpose of law permitting holographic wills—harmless error**

   In this caveat proceeding in which the caveators contended that decedent's attested will had been revoked and superseded by a holographic will, the caveators were not prejudiced by the trial court's instruction that the purpose of the law permitting the probation of holographic wills is to permit a person who is incapable of procuring assistance or not inclined to make known his intentions prior to death to execute a valid will in his own handwriting without witnesses, although the instruction added nothing to the jury's understanding of its task and should have been omitted.

APPEAL by caveators from *Lee, Judge*. Judgment entered 24 September 1976 in Superior Court, ORANGE County. Heard in the Court of Appeals 1 December 1977.

In re Ray

On 29 March 1972, deceased, Vernon Ray, duly executed a will that had been prepared at his request by his attorney, the Honorable A. H. Graham. Mr. Graham and his secretary witnessed the execution of the will. Ray died on 25 November 1972, and the will was admitted to probate in common form a few days later. Several months later, on 22 March 1973, appellants filed a caveat. The only basis for the caveat was that the will had been revoked and superseded by a holographic will that caveators contended was the last will and testament of Ray. The handwritten document was dated 20 October 1972.

An issue was submitted to the jury as to whether the handwritten document dated 20 October 1972 was the last will and testament of Ray. The jury answered that issue in the negative. The second issue was whether the typewritten document dated 29 March 1972 was the last will and testament of Ray. The jury answered that issue "yes," and judgment was entered causing that will to be probated in solemn form.

Graham, Manning, Cheshire & Jackson, by Lucius M. Cheshire, for propounder appellees.

Young, Moore, Henderson & Alvis, by B. T. Henderson II, and Charles H. Young, Jr.; Bryant, Bryant, Drew & Crill, by Victor S. Bryant, Jr., attorneys for caveator appellants.

VAUGHN, Judge.

[1] Caveators group four exceptions under one assignment of error wherein they contend the court erred in allowing propounders' expert witness, James Durham, to state in terms of absolute certainty matters upon which he should have been permitted only to express an opinion. The witness was found to be an expert in the field of handwriting analysis. He testified at length with respect to his observations concerning the handwriting in the alleged holographic will and other writings of the deceased. When asked for his opinion concerning whether the alleged holographic will was in the handwriting of Ray, he replied:

> "A. My opinion is that Nazer Vernon Ray emphatically did not in my opinion and could not have made the writing of Exhibit C-1."

On another occasion he testified:

". . . in my opinion, it was simulated, it's not a genuine signature, the word 'October' and [the skill in writing that I would like to demonstrate on some slides make it completely impossible, absolutely, utterly impossible in my mind, in my opinion, of all of the handwriting that I ever examined; that Nazer Vernon Ray could possibly have written this Will. It's completely impossible, in my opinion.]"

Caveators' exceptions to the testimony were properly overruled. The witness was qualified as an expert. His testimony was based on his personal observations. The jury could have only understood the testimony as being the opinion of the expert and not a positive statement of the fact to be proven. It is true, of course, that the expert clearly indicated that he was positive in his opinion. We see no sound reason why an expert must express doubts about the validity of his opinion when he has none. The weight to be given his opinion is for the jury, and he can be contradicted and impeached as other witnesses.

[2] Caveators bring forward another assignment of error arising out of the admission of testimony as to statements deceased had made with respect to the disposition of his property. Caveators' brief only states arguments in support of their exceptions to the testimony of the witness Graham found at page 97 of the record, testimony of the witness Shambly at page 100, and that of witness Murray at page 102.

The witness Graham testified that he prepared the 29 March will according to the wishes of the testator as they were expressed to him. He was asked if the deceased made a statement relative to his three sisters. Caveators then made a general objection which was overruled. The witness responded that testator did not make such a statement at that time. Caveators did not thereafter object to or move to strike any of the rest of the testimony of the witness. Objections to testimony must be taken at trial so as to give the trial judge the opportunity to pass on them.

The witness Murray was asked if the testator ever discussed his plans for the disposition of his property with him. Caveators voiced a general objection which was overruled. The witness responded that testator never told him anything about his will but did tell him when he made one. At no time thereafter did

caveators ever object to any questions directed to the witness or move to strike any testimony given by the witness. Defendant's exception to the testimony of the witness Shambly must fail for the same reason. There was no objection or motion to strike voiced at trial. Moreover, at no time did caveators interpose objections "to the admission of evidence involving a specified line of questioning" as permitted by Rule 46(a)(1) of the Rules of Civil Procedure. Since there were no objections or motions to strike the testimony at trial, the propriety of the admission of the testimony is not presented on appeal.

[3] In the course of explaining the requirements for a valid holographic will, the judge added the following statement to which caveators except:

> "The purpose of the law is to enable persons who cannot procure the assistance of others in the preparation of a Will, or those who are not inclined to make known prior to their death what disposition has been made of their property, to execute a valid Will by a paperwriting in their own handwriting and without the formal attestation of witnesses."

Caveators argue that the statement was prejudicial because it might have caused the jury to believe that an otherwise valid holographic will would be invalid in the absence of evidence showing that testator was either incapable of procuring assistance or not inclined to make known his intentions prior to death. We note that the statement was quoted verbatim from N.C.P.I. Civil 860.10, which was apparently copied from a statement by Justice Allen in *Alexander v. Johnston*, 171 N.C. 468, 471, 88 S.E. 785, 786 (1916). Justice Allen may have been correct in the two purposes he assigns as "The" purpose for which the Legislature in 1784 enacted the amendment to the statute so as to permit the probation of holographic wills. Potter's Laws of North Carolina (1821) c. 225, § 5. The statute also undoubtedly serves other purposes. Although we do not agree that the inclusion of the statement in the charge requires a new trial in the case on appeal, we are satisfied that it added nothing to the jury's understanding of its task and that it should have been omitted.

We find no prejudicial error.

No error.

Judges BRITT and PARKER concur.

CHARLES M. WYATT v. JUDY P. WYATT

No. 7725DC404

(Filed 21 March 1978)

Divorce and Alimony § 27— child support—attorney's fees—ability to pay—income of plaintiff's present wife

The trial court did not err in considering the income of plaintiff's present wife when weighing his expenses and debts against his financial resources to determine his financial ability to pay defendant's counsel fees in a child support action where plaintiff's present wife is a member of his current household and is the mother of all three children residing therein.

APPEAL by plaintiff from *Tate, Judge.* Order entered 19 March 1977 in District Court, BURKE County. Heard in the Court of Appeals 1 March 1978.

This is the third appeal in this child support case. The facts are stated in the opinions on the two prior appeals reported in 27 N.C. App. 134, 218 S.E. 2d 194 (1975) and 32 N.C. App. 162, 231 S.E. 2d 42 (1977). On the last appeal we affirmed the trial court's order setting the amount of the child support payments to be made by plaintiff-father but vacated the order awarding attorney's fees because of insufficient findings of fact as to the reasonable worth of the legal services rendered. On remand, further hearings were held from which, by consent of the parties, it was agreed that the court should make findings of fact (1) as to the nature and scope of the legal services rendered, the skill and time required, and the reasonable worth of attorney's fees incurred, and (2) as to plaintiff's financial circumstances and ability to pay counsel fees. At conclusion of the hearings, the court entered an order making detailed findings of fact on these matters, from which the court concluded that legal fees in the amount of $1,975.00 incurred by defendant-mother in the prosecution of this action to obtain adequate child support payments from the father were reasonable in view of the nature and extent of the services rendered and that these fees were necessarily incurred because of the refusal of the plaintiff to make adequate support payments for his child. The court found that in 1975 plaintiff had paid $200.00 on account of these fees, leaving an outstanding balance of $1,775.00, and that plaintiff's financial circumstances are such that he is able to pay said fees. The court ordered plaintiff to pay $1,775.00 as the balance of the reasonable attorney's

fees incurred by defendant, but granted plaintiff the option to pay this sum in annual installments of not less than $250.00 beginning on 30 June 1977, with interest on the unpaid balance at 6% per annum. From this order plaintiff appeals.

John H. McMurray for plaintiff appellant.

Byrd, Byrd, Ervin and Blanton by Joe K. Byrd for defendant appellee.

PARKER, Judge.

The court's finding that legal fees in the total amount of $1,975.00 were reasonable was fully supported by its detailed findings of fact as to the nature and extent of the services rendered, and on this appeal plaintiff does not challenge those findings. Rather, he challenges the court's finding that his financial circumstances are such that he is able to pay said fees. In this connection he first contends that the court erred by making findings of fact as to the earnings of his present wife and by obviously taking those earnings into account in making its determination as to plaintiff's ability to pay. We find no error.

In evaluating plaintiff's financial circumstances, the court first made findings regarding plaintiff's ordinary monthly household expenses and his outstanding debts. Plaintiff's current household, consisting of five persons, includes himself, his present wife, their twin children, and his present wife's child by a former marriage. Itemizing the various expenses, plaintiff testified that the total monthly expenses for that household (including child support payments he is making to his child by his first marriage) amounted to $887.00. In accord with plaintiff's testimony, the court found as a fact that plaintiff's total monthly expenses for the household and for child support amounted to $887.00. The court also found that plaintiff had debts amounting to a total of $1,183.00. The court then made findings regarding plaintiff's income and other financial resources, taking into consideration not only plaintiff's income but also the income of his present wife.

Plaintiff contends that the court should not have considered his present wife's income when weighing his expenses and debts against his financial resources to determine his financial ability to pay defendant's counsel fees. We disagree. Plaintiff's present wife

is a member of his current household, and she is the mother of all three children residing in that household. Under these circumstances, it was proper for the court to consider the substantial income received by a member of that household who shared in the responsibility for its support. Moreover, plaintiff himself presented for the court's consideration evidence regarding his present wife's income, and he should not now be heard to complain that the court took this evidence into consideration.

We also find no merit in plaintiff's second contention, which is that the court abused its discretion in ordering him to pay the balance of $1,775.00 in attorney's fees without making sufficiently specific findings as to his present ability to pay. The findings made by the court were both specific and detailed, and we find no abuse of the court's discretion.

Affirmed.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. LOUIS WAYNE JORDAN

No. 776SC903

(Filed 21 March 1978)

Automobiles § 126.3— breathalyzer test—administering officer not arresting officer

An officer who arrested defendant at 3:00 a.m. for driving under the influence was not disqualified by G.S. 20-139.1(b) from giving defendant a breathalyzer test at 5:00 a.m. after he was arrested by another officer for a second offense of driving under the influence.

APPEAL by defendant from *Smith (Donald L.), Judge.* Judgment entered 13 July 1977 in Superior Court, HERTFORD County. Heard in the Court of Appeals 2 March 1978.

Defendant was tried for operating a motor vehicle on a highway while under the influence of intoxicating liquor. The State offered evidence that Officer Martin stopped defendant at approximately 4:00 a.m. on 11 July 1976 after noticing that he drove his vehicle on and off the shoulder of the road. The officer smelled alcohol on defendant's breath and placed him under ar-

rest. Upon arriving at the Ahoskie Police Department, defendant was asked to submit to a breathalyzer test. The test was administered at 5:08 a.m. by Trooper H. S. Banks. Banks is a qualified breathalyzer operator and found that defendant's reading was .16 percent alcohol by weight. Both officers testified that in their opinion defendant was under the influence of alcohol.

Defendant was found guilty as charged, and judgment imposing a fine and prison sentence was entered.

Attorney General Edmisten, by Assistant Attorney General William B. Ray and Deputy Attorney General William W. Melvin, for the State.

Ralph G. Willey III and Carter W. Jones, for defendant appellant.

VAUGHN, Judge.

Defendant contends that the court committed reversible error when it allowed Trooper Banks to testify concerning the results of the breathalyzer test he administered to defendant. This contention is based on G.S. 20-139.1(b) which provides that "in no case shall the arresting officer or officers administer" the chemical test for alcohol. "The purpose of this limitation in the statute is to assure that the test will be fairly and impartially made." *State v. Stauffer*, 266 N.C. 358, 359, 145 S.E. 2d 917, 918 (1966). Defendant, in essence, argues that Trooper Banks should be considered as the arresting officer and his testimony excluded in order to serve the purposes of the statute. His argument is based on Banks' opportunity to have a preconceived notion that defendant's test should disclose a high alcoholic content.

Trooper Banks had arrested defendant for driving under the influence at about 3:00 a.m. on the same morning, following an accident in which defendant was involved. After taking a breathalyzer test, defendant was released on bond and left the police station with his attorney. Approximately 20 minutes after his release, defendant was arrested by Officer Martin on the charge that gives rise to the present appeal. Trooper Banks was still at the police station and administered the breathalyzer analysis. In *State v. Stauffer, supra*, the Court held that the officer who stopped defendant's car for the purpose of investigating his erratic driving was an arresting officer, even though his cap-

tain, who had been summoned to assist, actually made the investigation and the arrest. In *State v. Dail*, 25 N.C. App. 552, 214 S.E. 2d 219 (1975), *cert. den.*, 288 N.C. 245, 217 S.E. 2d 669, this Court held that an officer on his way to the station to administer the breathalyzer test who stopped at the arrest scene to help move a car out of the highway was not an arresting officer under the terms of the statute. In *State v. Green*, 27 N.C. App. 491, 219 S.E. 2d 529 (1975), this Court held that an officer is not an arresting officer where he had seen the defendant earlier and remarked that he was drunk but was not present at the time that defendant was seen operating his vehicle or at the time he was arrested.

The principle that underlies the statute seems to be that, in the interest of fairness as well as the appearance of fairness, an officer, whose judgment in selecting a defendant for arrest or in making the arrest may be at issue at trial, should not administer the chemical test that will either confirm or refute the soundness of his earlier judgment in causing the arrest. In *State v. Stauffer*, *supra*, the officer who administered the test was the one who caused the arrest and was on the scene when it was made by another officer. He, therefore, had the same interest in the outcome of the test that he would have had if he had made the actual arrest. It was, therefore, improper to allow him to administer the test or to testify as to the result. In *Green* and *Dail*, however, the officers who administered the tests neither selected the defendants for arrest nor made the arrests. It was, therefore, proper for them to administer the tests even though their prior observations of the accused may have allowed them to have preconceived notions about what the tests would probably disclose. In the case at bar, Trooper Banks had nothing to do with defendant's arrest. His arrest of defendant on a similar charge earlier in the morning does not bring him within the disqualification set out in the statute. There was no error, therefore, in allowing him to testify as to the results of the test.

No error.

Chief Judge BROCK and Judge ERWIN concur.

In re Lee

IN THE MATTER OF CARL MOSES LEE RESPONDENT

No. 7710DC452

(Filed 21 March 1978)

1. **Insane Persons § 1.2— involuntary commitment—findings required**

To support an involuntary commitment order the court must find by clear, cogent and convincing evidence that a respondent is both mentally ill and imminently dangerous to himself or others.

2. **Insane Persons § 1.2— imminent danger to self—inability to care for self**

The trial court's determination that respondent is imminently dangerous to himself because he is unable to provide for his basic needs was supported by evidence that respondent's welfare depends upon his taking certain medication; respondent cannot be depended upon to obtain and take his needed medication outside of a hospital; and respondent is unable to earn money and receives a monthly check of only $121.90.

APPEAL by respondent from *Bason, Judge.* Order entered 30 December 1976 in District Court, WAKE County. Heard in the Court of Appeals 7 March 1978.

This is an appeal from an involuntary commitment order. Following a hearing the court made numerous findings of fact, summarized in pertinent part as follows:

Respondent is a 32-year-old male who has been hospitalized by involuntary commitment six times since 1960, diagnosed each time as borderline mental retardation with schizophrenia. In previous years when respondent was not in the hospital he lived with his mother who is now 72 years old, has had a stroke and has been removed from her home to reside with one of her daughters where she requires constant attention.

Respondent does not own a home and has never held a job although he has helped his brother from time to time in farming and operating a store. Respondent attended school to the fifth grade and has an IQ of 81.

Following his release from his fourth involuntary commitment in January 1974, two medications were prescribed but respondent acknowledged to his doctor that he stopped taking the medicine two or three months before his fifth involuntary commitment in 1975. Following his release from his fifth commitment in November 1975, medicine was again prescribed but thereafter,

when respondent was the only person occupying his mother's home, a bag containing approximately 2,000 pills similar to those prescribed for him were found in his suitcase under his bed. The present proceeding was begun on 9 March 1976 after respondent threatened his brother with a pistol if his brother refused to bring him some beer and wine.

When respondent was admitted to the hospital in 1976 he was excited, exercising poor judgment and was uncooperative with respect to medication. Shortly thereafter his medication was changed to Prolixin, an anti-psychotic drug, given every two weeks by injection, and Artane, given orally each day. Since April 1976 respondent has shown no signs of hallucinations, has not been psychotic or aggressive, but without his medications his conduct would be more erratic. His illness of schizophrenic reaction is in a state of remission as a result of his taking Prolixin, but in spite of the remission, he does not correctly comprehend his present situation in that his goals and plans for return to his mother's home are unrealistic inasmuch as he would have to occupy the home alone, unattended, and without means of support other than a monthly check of $121.90.

Respondent has no skills to maintain himself outside of a hospital and is in no way able to provide for his basic needs. He is in need of the structured environment and external support provided by a hospital and cannot function independently outside of the hospital on his present dosage of medication. His prognosis is poor for both his chronic schizophrenia and his mental retardation.

Although respondent's brother lives only 50 yards from his mother's home, he has never assumed any responsibility regarding respondent's taking his medication outside of the hospital. While respondent is potentially dangerous, he is harmless as long as he is given Prolixin by injection and Artane regularly to offset the side effects of Prolixin.

The court concluded that respondent suffers from mental illness; that he is not now imminently dangerous to others by reason of his illness but is imminently dangerous to himself. The court ordered that respondent be recommitted to the mental hospital for a period not to exceed one year. Respondent appealed.

Attorney General Edmisten, by Associate Attorney Isaac T. Avery III, for the State.

Judith L. Kornegay for respondent appellant.

BRITT, Judge.

Respondent's sole assignment of error is based on his exception to the trial court's conclusion of law that he "is now imminently dangerous to himself by reason of his mental illness". We find no merit in the assignment.

[1] To support an involuntary commitment order, the court must find by clear, cogent and convincing evidence that a respondent is both mentally ill and imminently dangerous to himself or others. *In Re Carter*, 25 N.C. App. 442, 213 S.E. 2d 409 (1975). In the case at hand respondent does not challenge the court's determination that he is mentally ill; he does challenge the determination that he is imminently dangerous to himself.

[2] G.S. 122-58.2(1) provides that as used in Article 5A (Involuntary Commitment) "[t]he phrase 'dangerous to himself' includes, but is not limited to, those mentally ill or inebriate persons who are unable to provide for their basic needs for food, clothing, or shelter; . . . ." Thus the question presented is whether the court's findings that respondent, because of his mental illness, was unable to provide for his basic needs were sufficient. We think they were.

The findings are clear that respondent's welfare depends on his being injected every two weeks with Prolixin and that he take Artane orally every day; and that he cannot be depended on to obtain and take his needed medication outside of the hospital. He is unable to earn money and has a monthly income of only $121.90. Considering present day costs, that amount of money could not cover the cost of maintaining shelter for respondent and providing him with food, clothing, fuel and other basic needs.

For the reasons stated, the order appealed from is

Affirmed.

Judges CLARK and ERWIN concur.

RANDALL KEITH BELL, BY HIS GUARDIAN *AD LITEM* GEORGE MARTIN; AND FRANK BELL v. HAROLD WALTER BRUEGGEMYER

No. 7722SC354

(Filed 21 March 1978)

1. **Negligence § 18; Automobiles § 85— child between 7 and 14—no contributory negligence as matter of law**

A child between the ages of 7 and 14 cannot be held contributorily negligent as a matter of law.

2. **Automobiles § 69— striking bicyclist—sufficiency of evidence**

In an action to recover damages sustained by the minor plaintiff when he was struck by defendant's automobile, evidence was sufficient for the jury where it tended to show that defendant failed to sound his horn before passing the minor plaintiff's bicycle; defendant attempted to pass at an intersection in violation of G.S. 20-150(c); he failed to drive on the right side of the road; he failed to keep a vigilant lookout; and he failed to keep his vehicle under control and bring it to a halt so as to avoid the collision.

3. **Automobiles § 85— child on bicycle—no contributory negligence of father**

Plaintiff father was not barred from recovery by his own negligence in allowing his son to ride his bicycle on the highway without proper safety instructions where the evidence tended to show that the minor plaintiff's mother and father were separated; the minor was living with his mother; there was no evidence that the father gave his son permission or knew that he would ride on the highway on the day of the accident; and the father had previously given his son safety instructions.

APPEAL by plaintiffs from *Graham, Judge*. Judgment entered 1 March 1977 in Superior Court, DAVIE County. Heard in the Court of Appeals 9 February 1978.

This is an action by the plaintiffs to recover damages which they allege were proximately caused by the negligence of the defendant. The plaintiffs' evidence showed that on 12 November 1974, at approximately 5:30 p.m., Randall Keith Bell, a 13-year-old boy was riding his bicycle in a southerly direction on Highway 601 in Davie County. His cousin "Chip" Cranfill was riding ahead of him on a bicycle. The defendant was driving his automobile behind the two boys and in a southerly direction on Highway 601. There was another automobile proceeding southward on the highway between the defendant and the two boys. It was between sunset and dark. Randall Keith Bell's bicycle had a reflector about three inches in diameter under the seat and reflectors

on the pedals. At the point the parties were proceeding southward, there was an incline in the highway with a solid yellow line in the southbound lane of the highway. A short distance ahead of the parties was the intersection of Highway 601 and Angel Road.

The plaintiffs' evidence further showed that the automobile ahead of defendant passed the two boys on the bicycles a short distance before reaching the intersection. The defendant saw the two boys when the automobile ahead of him passed them. The defendant after "touching his brakes" and without sounding his horn, followed the car ahead around the bicycles. The plaintiff Randall Keith Bell was struck by defendant's automobile.

Defendant's motion for a directed verdict at the close of the plaintiffs' evidence was allowed and the plaintiffs have appealed to this Court.

Hall, Booker, Scales and Cleland, by Roy G. Hall, Jr., for plaintiff appellants.

Hudson, Petree, Stockton, Stockton and Robinson, by J. Robert Elster and Robert J. Lawing, for defendant appellee.

WEBB, Judge.

We hold there is sufficient evidence in this case for it to be submitted to the jury.

[1] We note at the outset that the minor plaintiff being between the age of 7 and 14 at the time of the accident could not be contributorily negligent as a matter of law. *Weeks v. Barnard*, 265 N.C. 339, 143 S.E. 2d 809 (1965). For this reason, a directed verdict for defendant should not have been granted on this ground. The defendant cites cases which, in a well-reasoned argument, he contends say that a 13-year-old child can be held contributorily negligent as a matter of law. We believe the case law in this State is such that we cannot accept the defendant's argument.

[2] This brings us to the question of whether there is enough evidence of defendant's negligence that the issue should be submitted to the jury. In *Webb v. Felton*, 266 N.C. 707, 147 S.E. 2d 219 (1966), a 15-year-old boy was struck while turning his bicycle in front of a bus approaching from his rear. The bus had ac-

celerated without its horn being sounded and had moved toward the center line to pass. The Court held:

> "The failure of the bus driver to blow his horn in apt time before attempting to pass the boy on his bicycle . . . was a violation of G.S. 20-149(b), and evidence of negligence." 266 N.C., at 710.

We are unable to distinguish this case from *Webb*.

Other evidence which we believe was sufficient to overcome the motion for a directed verdict is (1) the defendant attempted to pass at an intersection in violation of G.S. 20-150(c), *Teachey v. Woolard*, 16 N.C. App. 249, 191 S.E. 2d 903 (1972); (2) the defendant failed to drive on the right side of the road, *Snellings v. Roberts*, 12 N.C. App. 476, 183 S.E. 2d 872 (1971); (3) the defendant failed to keep a vigilant lookout, *Wainwright v. Miller*, 259 N.C. 379, 130 S.E. 2d 652 (1963), and (4) failed to keep his vehicle under control and bring it to a halt so as to avoid the collision, *Wainwright v. Miller, supra.*

[3] The defendant further contends that plaintiff, Frank Bell, is barred from recovery by his own negligence in allowing his son to ride his bicycle on the highway without proper safety instructions. In this case, the evidence showed that the minor plaintiff's father and mother were separated and the minor was living with his mother. There is no evidence which shows the father gave his son permission or knew that he would ride his bicycle on Highway 601 on that day. The father testified that he had told his son that when he was riding a bicycle he should "watch for cars and be careful," "to watch for cars" and to "keep his eyes behind him and in front of him too in case a car slipped up on him." On this evidence we hold that plaintiff, Frank Bell, is not barred by his own contributory negligence.

It is held that this case be

Reversed and remanded.

Judges BRITT and HEDRICK concur.

EDMUND STRUDWICK NASH, TRADING AND DOING BUSINESS AS NASH PROPERTIES, INC. v. ROBERT L. YOUNT AND WILLIAM E. BUTNER, TRADING AND DOING BUSINESS AS WILKES INDUSTRIAL PARK

No. 7723SC405

(Filed 21 March 1978)

1. **Brokers and Factors § 1.1— exclusive listing contract—interpretation of exclusion of land**

A contract giving plaintiff real estate broker the exclusive right to sell property owned by defendants in an industrial park, but excluding "land lying east of Cub Creek, adjoining Elmer Lowe's property and north of State Road servicing Tom Thumb Plant," was not ambiguous and could only be interpreted to exclude property which was both east of Cub Creek and north of the State Road servicing the Tom Thumb Plant. Therefore, defendants could not offer evidence to explain the terms of the contract.

2. **Brokers and Factors § 6— exclusive listing contract—assumption of debt by purchasers—gross consideration—right to commissions**

Where an exclusive listing contract gave plaintiff real estate broker the right to a commission of 10% of the "gross consideration" upon a sale or exchange of the listed property by plaintiff or anyone else, and defendant owners conveyed the property in return for an assumption by the purchasers of an indebtedness of $214,000.00 secured by deeds of trust on the property, the gross consideration to defendant owners within the meaning of the contract was $214,000.00, and plaintiff is entitled to a commission of $21,400.00.

APPEAL by defendants from *Crissman, Judge.* Judgment entered 3 May 1977 in Superior Court, WILKES County. Heard in the Court of Appeals 1 March 1978.

The plaintiff, who is in the real estate business in Wilkes County, entered into a contract on 13 January 1975 with the defendants. Under the terms of this contract, the plaintiff agreed to make a diligent effort to secure a purchaser, by advertising or otherwise, for certain property owned by the defendants. In exchange for this promise, the defendants agreed to pay a commission to the plaintiff of ten percent "of the gross consideration upon the sale or exchange of said property, whether made by [plaintiff] or any other person during the period" of three months from 13 January 1975. The property which was the subject of the listing was described as:

"Approximately 125 acres known as Wilkes Industrial Park, lying west of Oakwoods Road, South of By-Pass 421,

> Wilkes County, N.C. EXCLUDED from this contract is that land lying east of Cubb Creek adjoining Elmer Lowe's property and north of State Road servicing Tom Thumb Plant."

By deeds recorded 10 April 1975, the defendants conveyed certain property which the plaintiff contends was the property for which he had an exclusive listing.

The plaintiff made a motion for summary judgment. At the hearing on this motion the plaintiff relied on the pleadings, answers to interrogatories and an affidavit by plaintiff. The defendants' answers to the interrogatories revealed that the land sold was in Wilkes Industrial Park and west of Cub Creek. The answers to interrogatories also revealed that the consideration for the sale of the lots was the assumption by the purchasers of indebtedness totaling $214,000.00 secured by deeds of trust on the property.

Judge Crissman allowed the plaintiff's motion and entered judgment for $21,400.00 for the plaintiff. This appeal followed.

McElwee, Hall and McElwee, by William H. McElwee III, for plaintiff appellee.

William E. Butner and J. Richardson Rudisill, Jr., for defendant appellants.

WEBB, Judge.

[1] We hold that Judge Crissman was correct and the judgment must be affirmed. It seems clear that there is no genuine issue as to the following facts: The plaintiff and defendants entered into a contract under the terms of which the plaintiff was to receive a ten percent commission on property sold. Excluded from the property on which the plaintiff was to receive the commission was "land lying east of Cubb Creek, adjoining Elmer Lowe's property and north of State Road servicing Tom Thumb Plant." The sale was made within the listing period.

If the phrase in quotation marks above is ambiguous, the motion for summary judgment should not have been allowed. We hold that it is not ambiguous. By the use of the conjunction "and," we hold that the contract can only be interpreted to mean that in order for property to be excluded from the listing, it must be

both east of Cub Creek and north of the State Road serving the Tom Thumb Plant.

The defendants contend that the language is ambiguous because they interpret it as excluding all the land east of Cub Creek and also all the land north of the road serving the Tom Thumb Plant. They also contend that the description does not mention a valuable building which was on a part of the property and the parties would have mentioned this building if they had intended to include it. The defendants also contend they could have offered evidence as to the proper interpretation of the contract.

Since we have held the terms of the contract are not ambiguous, the express language of the contract controls and not what either party thought the agreement to be. *Crockett v. Savings and Loan Association*, 289 N.C. 620, 224 S.E. 2d 580 (1976). When the terms of a contract are not ambiguous, the court and not a jury will interpret it. *Brokers, Inc. v. Board of Education*, 33 N.C. App. 24, 234 S.E. 2d 56 (1977).

[2] The defendants also contend that damages in the amount of $21,400.00 should not have been awarded. They contend that no tangible res was received from which to pay a commission, that the consideration was the assumption by the buyer of an indebtedness and the defendants will not receive anything of actual value except as the indebtedness is paid. We do not take such a view of the term "gross consideration." We believe it means the total consideration before deductions for expenditures or other things. See the definition of "gross earnings" in Black's Law Dictionary, Rev. 4th Ed., at page 599. We hold that when the purchasers of the property assumed an indebtedness of $214,000.00, the gross consideration to the defendants was $214,000.00. The plaintiff was entitled to a commission of $21,400.00.

The judgment of the Superior Court is

Affirmed.

Judges BRITT and HEDRICK concur.

EVELYN HILDRETH HALL v. ALEXANDER H. HALL

No. 7720DC400

(Filed 21 March 1978)

1. **Appeal and Error § 2— contention not raised in court below**

A contention not raised in the court below may not be raised for the first time on appeal.

2. **Husband and Wife § 11.2— meaning of "single" in separation agreement**

The term "single" as used in a separation agreement was not ambiguous and could not be interpreted as meaning "alone" but clearly meant "unmarried."

APPEAL by defendant from *Huffman, Judge.* Judgment entered 5 January 1977, in District Court, ANSON County. Heard in the Court of Appeals 1 March 1978.

In August 1976, plaintiff filed a complaint alleging that on 9 October 1973 she and defendant entered into a separation agreement under which defendant agreed to pay plaintiff the sum of $300 per month and that, from March through August 1976, defendant refused to pay more than $200 per month. Plaintiff prayed for judgment that the contract between the two was valid and enforceable, for judgment against defendant for the sum of $100 per month from March 1976, and for reasonable attorney's fees.

Defendant, in his answer, admitted the 9 October 1973 agreement and his payments of only $200 per month for the months March through August 1976. He alleged as defenses that the separation agreement was so vague as to be unenforceable, that plaintiff had violated the terms of the separation agreement by living with another man, and that the parties were divorced in November 1974, thereby terminating plaintiff's right to alimony under North Carolina law.

Plaintiff then filed a motion to strike defendant's defenses and for an order under the Uniform Declaratory Judgment Act (G.S. 1-253 *et seq.*) setting forth the rights of the parties. In a 5 January 1977 judgment, the court found that the only issue involved was the interpretation of the contract and the rights of the parties thereunder. The court also found that the controversy

was justiciable and determinable under the Uniform Declaratory Judgment Act, and from judgment in favor of plaintiff, defendant appeals.

A. Paul Kitchin for plaintiff appellee.

Henry T. Drake for defendant appellant.

ARNOLD, Judge.

The October 1973 separation agreement provided, *inter alia*, that, on March 1, 1974, defendant was to begin to pay to plaintiff during each calendar month:

> "the sum of Three Hundred Dollars ($300) for the support of her and her said minor child, such payments to continue so long as Cathy Annette Hall remains single; that said payments of $300.00 per month shall continue until Cathy Annette Hall reaches the age of twenty-one years; should the said Cathy Annette Hall marry during this time, said payments shall be reduced to One Hundred and Fifty Dollars ($150.00) per month and the sum of $150.00 per month is to be paid thereafter, or in any event after Cathy Annette Hall reaches the age of twenty-one years, said sum of $150.00 per month shall be paid to Evelyn Hildreth Hall so long as she continues to remain single."

In its declaratory judgment the court found that the word "single" was a matter to be determined by law and that "single" meant unmarried.

[1] Defendant, who had requested a jury trial, argues first that the court erred in its findings as to the issues involved and in its finding that no issue existed to be tried by the jury. We agree with defendant that absent a waiver of jury trial, the trial court under the Declaratory Judgment Act, G.S. 1-253 *et seq.*, may only determine questions of law. *See, e.g. Insurance Co. v. Simmons, Inc.*, 258 N.C. 69, 128 S.E. 2d 19 (1962). However, we disagree with defendant's argument that there were questions of fact which should have been submitted to the jury. Only in his brief on appeal does defendant argue that the written agreement did not constitute the entire agreement between the parties. He did not argue that in the case below and his pleadings may not be read to imply this argument. Hence, we may not consider that argument

on this appeal. *See, e.g. Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E. 2d 204 (1972).

[2] Defendant argues that the term "single," as used in the separation agreement, was ambiguous and that extrinsic evidence relating to the agreement may be competent to clarify the terms. *See, e.g. Goodyear v. Goodyear*, 257 N.C. 374, 126 S.E. 2d 113 (1962). While his argument that "single" means "alone" may be ingenious, we do not accept it. The term "single" as used in this separation agreement is not ambiguous; it clearly means unmarried. Ordinary words will be given their ordinary significance unless a special use is apparent. *See, e.g. Insurance Co. v. Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410 (1966). Where the language of a contract is plain the construction of the agreement is a matter of law for the court. *See, e.g. Kent Corporation v. Winston-Salem*, 272 N.C. 395, 158 S.E. 2d 563 (1968).

Next, defendant argues that the court erred in striking his three defenses. Again, however, his argument depends upon whether "single" means "unmarried" or "alone," and that question has already been determined in plaintiff's favor.

Affirmed.

Judges PARKER and MARTIN concur.

IN THE MATTER OF THE WILL OF MYRTIE D. JOYNER, DECEASED

No. 778SC493

(Filed 21 March 1978)

Wills § 16— children of testatrix—standing to file caveat

G.S. 31-32 gave caveators, who were children of the testatrix, standing to maintain a caveat to the will, since they were persons who were "entitled under such will, or interested in the estate," and the trial court erred in dismissing the caveat.

APPEAL by propounders from *Graham, Judge*, and *Smith, Judge*. Judgment and order entered 3 February 1977 and 6 March 1977, respectively, in Superior Court, WAYNE County. Heard in the Court of Appeals 9 March 1978.

Caveators have appealed from a judgment dismissing the caveat and from a later order denying a motion to set aside the dismissal. A paper writing purporting to be the will of Myrtie D. Joyner was probated in common form by the Clerk of Superior Court of Wayne County. Willie Mintz Joyner and Mary Bell J. Hill, children of the alleged testatrix who were purportedly named by the will as representatives of the estate, propounded the paper writing and were appointed executors. Mary Louise J. Brown, Carlotta J. Jones, and Danselene J. Uzzell, who were also children of Myrtie D. Joyner, filed a caveat to the will. When the matter came on for trial, the propounders made an oral motion that the caveat be dismissed on the ground that those named as beneficiaries under the will were the same persons who were the heirs at law of Myrtie D. Joyner and each would take in the same proportion the estate of Myrtie D. Joyner whether or not the will was probated. The court granted the propounders' motion to dismiss and the caveators appealed. At a later term of Superior Court, the caveators made a motion to set aside the judgment dismissing the caveat. This motion was denied on the ground that the Superior Court could not rule on it while the case was on appeal. The caveators have also appealed from this order.

Joseph H. Davis, for caveators appellants.

Herbert B. Hulse and Philip A. Baddour, Jr., for propounders appellees.

WEBB, Judge.

The determination of this case depends on the construction of G.S. 31-32 which says:

> "At the time of . . . the probate thereof in common form, or at any time within three years thereafter, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will."

If the caveators have any standing to maintain this proceeding, it is as "any person entitled under such will, or interested in the estate." The propounders rely on some of the language of *In re Thompson*, 178 N.C. 540, 101 S.E. 107 (1919) that a person must have a pecuniary interest in the outcome of a

caveat proceeding to have standing to maintain it. They also rely on *In re Will of Edgerton*, 29 N.C. App. 60, 223 S.E. 2d 524 (1976). *Thompson* holds that the purchasers of land from the heirs at law of the deceased are persons who are interested in the estate and may maintain a caveat. *Edgerton* holds the son of a testator who before his father's death released all interest in the estate has no standing to caveat the will. We do not believe either case is controlling here.

We hold that under the plain words of the statute the caveators in this case are persons who are "entitled under such will, or interested in the estate." This gives them standing to maintain a caveat to the will. The Superior Court was in error for dismissing the caveat.

In light of this decision, we do not pass on the appeal from the order entered 28 February 1977.

Reversed.

Judges PARKER and VAUGHN concur.

FRED HAZARD v. MARGARET C. HAZARD

No. 7715DC480

(Filed 21 March 1978)

Judgments § 21.2— divorce action—attack on consent judgment improper—independent action required

In an action for divorce on the ground of one year's separation, defendant was not entitled to attack a consent judgment rendered in an earlier action between the two parties, since a consent judgment cannot be modified or set aside without the consent of the parties thereto except for fraud or mutual mistake, and the proper procedure to vacate the consent judgment is by an independent action.

APPEAL by defendant from *Paschal, Judge*. Judgment entered 17 March 1977, in District Court, ORANGE County. Heard in the Court of Appeals 9 March 1978.

Plaintiff initiated this action seeking an absolute divorce from defendant on the ground of one year's separation. Defendant

answered and alleged, among other things, that plaintiff's prayer for absolute divorce be denied because the consent judgment in defendant's prior action for alimony without divorce was procured by fraud upon the defendant. Defendant also sought reformation of the prior consent judgment.

Evidence put on by plaintiff tended to show that he and defendant were married in 1943, that they separated on 15 August 1975, and that he had been a resident of North Carolina for more than six months prior to the institution of this action. The defendant attempted to introduce evidence that the earlier consent judgment was procured by fraud, but the plaintiff objected, and the objection was sustained.

The trial judge found that the parties had been lawfully married and had subsequently lived separate and apart for more than one year, and that plaintiff was a citizen and resident of North Carolina for more than six months before the institution of this action. He granted the absolute divorce. Defendant appeals.

Battle and Bayliss, by F. Gordon Battle, William H. Bayliss, and Dalton Loftin, for plaintiff appellee.

Manning, Jackson, Osborn & Frankstone, by David R. Frankstone, for defendant appellant.

ARNOLD, Judge.

Defendant argues that she should have been allowed to attack the consent judgment rendered in an earlier action between the two parties. Her argument fails. The case of *Becker v. Becker*, 262 N.C. 685, 138 S.E. 2d 507 (1964), presented a similar argument, and that case controls our decision here. In *Becker*, the Supreme Court followed the well settled principle of law in North Carolina that a consent judgment cannot be modified or set aside without the consent of the parties thereto except for fraud or mutual mistake, and the proper procedure to vacate the consent judgment is by an independent action. *Id.* at 690, 138 S.E. 2d at 511, citing *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118 (1956); *King v. King*, 225 N.C. 639, 35 S.E. 2d 893 (1945). The Court held, therefore, that, in an action for divorce on the ground of two years' separation, the defendant was not entitled to attack a prior separation agreement embodied in a consent judgment. In *Becker*,

as in the case *sub judice*, the plaintiff's action for divorce was not based upon the consent judgment which defendant sought to attack.

We have reviewed the record and conclude that the trial court did not err in excluding evidence concerning the prior consent judgment and in granting plaintiff an absolute divorce from defendant.

Affirmed.

Judges MORRIS and MARTIN concur.

GUY SUTTON, JR. AND WIFE, ANNE ELIZABETH SUTTON v. MRS. ELISE SUTTON, WIDOW, CAROLYN BRAMM SUTTON, UNMARRIED, MICHAEL GLENN SUTTON, UNMARRIED, ROBERT STEEL SUTTON AND WIFE, HILDA BROWN SUTTON, ELSIE SUTTON ADKINS AND HUSBAND, ELLET ADKINS, JR., AND LEHMAN SUTTON

No. 773SC128

(Filed 4 April 1978)

1. **Wills § 54— whether beneficiary takes devise or bequest**

Testator's devise to his wife of "a sufficient amount of my real and personal property when added to the value of my home, and other property that she will receive outside of this Will, that will equal one-third of my net estate" gave to the wife an undivided interest in testator's realty rather than a dollar amount to be derived from a sale of estate property.

2. **Evidence § 31.1— photostatic copy of affidavit—best evidence rule**

A photostatic copy of an affidavit containing appraisals of testator's lands was not admissible under the best evidence rule where there was no accounting for nonproduction of the original and no showing that the copy qualified as a business or public record under G.S. 8-45.1.

3. **Wills § 19— intent of testator—four corners of will—irrelevant testimony**

Testimony as to the relationship between testator and another was not relevant to show testator's intent and was properly excluded where the intent of the testator was clearly manifested within the four corners of his will.

4. **Appeal and Error § 24— necessity for objection or motion to strike**

Any objection or exception to the admission of testimony was waived where the testimony was presented without objection or motion to strike.

5. Wills § 57; Trial § 58— value of land—findings by court—range of values presented by witnesses

Findings of the trial court as to the values of parcels of real estate owned by testator at his death were supported by the evidence where the values found by the court did not correspond precisely to the values set forth by any single witness but fell within the range of the values presented by the witnesses for the opposing parties.

6. Banks and Banking § 4; Estates § 9— joint bank account—withdrawal after testator's death—amount passing outside will

Where testator's wife withdrew $1800 from a joint and survivorship account with testator after testator's death, the trial court properly found that half of that amount passed to the wife outside testator's will by virtue of his death, since the wife was deemed to have owned the other half of the account at the time of testator's death.

7. Appeal and Error § 45.1— abandonment of contention—failure to discuss in brief

Appellants are deemed to have abandoned a portion of an assignment of error for which they presented no explanation or authority in their brief. Appellate Rule 28(a).

APPEAL by respondent Elise Sutton, et al, from *Browning, Judge.* Judgment entered 11 October 1976 in Superior Court, PITT County. Heard in the Court of Appeals 1 December 1977.

Guy Sutton, Jr., and his wife, Anne Elizabeth Sutton, filed a petition on 6 January 1975 seeking the sale of certain real property in Pitt County. The petition alleged that petitioners, respondents Elise Sutton, et al, and respondent Lehman Sutton own the property as tenants in common. On 1 April 1975 all respondents except Lehman Sutton filed an answer denying that Lehman Sutton had any "fee interest" in the land, requested a judicial determination of the will of Guy Sutton, Sr., and a judicial determination of the interests of the parties involved before any sale of the property. On 12 June 1975, respondent Lehman Sutton answered, claiming an interest in the property as a tenant in common and requesting a sale of the property. On 7 October 1975, the Clerk of Superior Court entered an order adjudging, among other things, that Lehman Sutton was entitled to a distribution in the amount of 80% of the sum of $2,674.64 in full satisfaction of his interest in the Guy Sutton lands. From this order, Lehman Sutton appealed to Superior Court. From a judgment entered 11 October 1976, adjudging that Lehman Sutton owns an undivided interest in the real property of Guy Sutton, Sr., passing to him (Lehman) from the will of his mother Ruth Smith Sutton, respondents Elise Sutton, et al, have appealed.

This dispute arises from the uncertainty of the distribution of property owned by Guy Sutton, Sr., during his lifetime. On 17 April 1972, Guy Sutton, Sr. died leaving a will containing the following language which is the focal point of this dispute.

> "I give and devise to my said wife, RUTH SMITH SUTTON, a sufficient amount of my real and personal property when added to the value of my home, and other property that she will receive outside of this Will, that will equal one-third of my net estate."

The remainder of the Guy Sutton, Sr. estate was to be divided one-fourth (1/4th) to Guy Sutton, Jr., one-fourth (1/4th) to Elsie Sutton, one-fourth (1/4th) to Robert Steel Sutton, and the remaining one-fourth (1/4th) was to be divided equally among Elise Sutton, and her four children.

On 29 March 1973, Ruth Smith Sutton died leaving a will under which four-fifths (4/5ths) of her estate would pass to Lehman Sutton and one-fifth (1/5th) to Guy Sutton, Jr. The petition seeking a sale of the land and this appeal by Elise Sutton, et al, arises from the inability of the heirs of Guy Sutton, Sr. and Ruth Smith Sutton to agree on an accurate distribution of the property passing under the wills of their deceased parents.

Underwood and Manning, by Sam B. Underwood, Jr. and Samuel J. Manning, for respondent appellants.

Everett and Cheatham, by C. W. Everett, Sr., and Edward J. Harper II, for Lehman Sutton, respondent appellee.

MORRIS, Judge.

[1] Respondent appellants (Elise Sutton, et al.) preserve 19 assignments of error in 14 arguments. By their first argument and fourth assignment of error the appellants contend that the trial court erred by failing to find certain facts requested by the appellants. Essentially their argument is that Ruth Smith Sutton did not take an interest in land under the will of her husband Guy Sutton, Sr., and therefore Lehman Sutton (appellee) could not take an interest in the land under the will of Ruth Smith Sutton, thereby precluding him from receiving proceeds from the sale of the land as a tenant in common. By this single assignment of error the appellants seek to challenge several findings of fact and as such the assignment of error is broadside and ineffective to raise a question on appeal. Nevertheless, we choose to speak to

the merits of the questions which appellants attempt to raise. We disagree with the contentions of the appellants. At issue is the construction of Guy Sutton, Sr.'s will, and the meaning of the phrase "I give and devise to my said wife, RUTH SMITH SUTTON, *a sufficient amount of my real and personal property* when added to the value of my home, and other property that she will receive outside of this Will, that will equal one-third of my net estate." We conclude that the testator, by this clause, conveyed an undivided interest in realty to Ruth Smith Sutton. It follows, therefore, that Lehman Sutton received a four-fifths undivided interest in the lands of Guy Sutton, Sr. which passed to Ruth S. Sutton via the will of Guy Sutton, Sr.

The appellants contend that the will of Guy Sutton, Sr. required the trial court to: (1) ascertain the value of the net estate; (2) calculate the value of the residence owned by the entirety and other property passing to Ruth S. Sutton "outside the will" and (3) give to Ruth S. Sutton an "amount" of realty and personalty so that the total value of her inheritance would be one-third of the net estate. Appellants contend that the term "amount" was used by Guy Sutton, Sr. to mean that a specific dollar value was to be ascertained and paid to Ruth S. Sutton to equal one-third of the net estate but that this dollar amount was to be derived from the sale of personal or real property without Ruth S. Sutton's receiveing a fractional or undivided interest in the real property to the extent the property passing to her outside the will was less than one-third of the net estate. We do not so construe the term "amount".

> "The controlling objective of testamentary construction is the intent of the testator. *Trust Co. v. Schneider*, 235 N.C. 446, 451, 70 S.E. 2d 578. This intent is ordinarily to be ascertained from an examination of the will from its four corners. *Bullock v. Bullock*, 251 N.C. 559, 563-4, 111 S.E. 2d 837." *Bank v. Hannah*, 252 N.C. 556, 559, 114 S.E. 2d 273, 276 (1960); *McCain v. Womble*, 265 N.C. 640, 144 S.E. 2d 857 (1965).

It is clear from the four corners of his will that Guy Sutton, Sr. meant for his wife to inherit an undivided interest in his realty, for his will provided for the management of the property and the distribution of the income of the property for the benefit of his wife. Guy Sutton, Sr. provided in his will that the real property

may be rented or farmed on a share-crop basis as the managers of the real property in question "deem best for my said wife", and the will further provided that the managers of the property "shall pay the net profits from said estate to my said wife if in their opinion she is capable of handling same and if she is not capable of handling the income from said property, then and in that event they shall spend the profits for her use and benefit." It is obvious that the testator intended that Ruth S. Sutton receive an undivided interest in the land and thereby a continuing interest in the rents and profits rather than whatever amount or pecuniary interest the executors found necessary to meet the one-third interest of the net estate to be taken by Ruth S. Sutton. We believe and so hold that the word "amount" in the will of Guy Sutton, Sr. was employed by the testator in the sense of a quantum of interest rather than in specific pecuniary terms. We also hold that under the will of Ruth S. Sutton, Lehman Sutton took four-fifths of the undivided interest in the realty of Guy Sutton, Sr. owned by Ruth S. Sutton at the time of her death. Upon the death of Ruth S. Sutton, therefore, Lehman Sutton became a tenant in common owning an undivided interest in the realty and farmland owned by Guy Sutton, Sr., and is, therefore, entitled to an interest in the proceeds from the sale of land of which Guy Sutton, Sr. died seized.

[2] Appellants next argue their assignment of error No. 1, that the court erred in refusing to allow into evidence the photostatic copy of the original affidavit of Alton Barrett as to the values of land in question. We disagree. As a general rule, whenever the contents of a writing are to be proved, the best evidence rule requires a party to produce the original writing, unless nonproduction is excused. 2 Stansbury's N.C. Evidence (Brandis Rev. 1973), § 190. The affidavit contained appraisals of the real estate owned by Guy Sutton, Sr. in Pitt County at his death. As such, it was clearly intended to serve as proof of its contents. Thus a photostatic copy of the affidavit was not admissible under the rule without first accounting for nonproduction, 2 Stansbury, supra, §§ 192-193, or showing that it qualified as a business or public record, G.S. 8-45.1. Appellants did not attempt to make any such showing. The burden was on them to show affirmatively the facts necessary to establish the competency of the evidence. *Mahoney v. Osborne*, 189 N.C. 445, 127 S.E. 533 (1925). This assignment of error is overruled.

By assignment of error No. 2, appellants contend that the court erred in refusing to allow Robert S. Sutton to testify as to the value of real estate as shown on schedule "A" of the federal estate tax return filed by the executors of Guy Sutton, Sr.'s estate. The error, if any, in the court's ruling is clearly harmless since schedule "A" had previously been admitted into evidence. The matters contained therein were thus before the court, and the excluded testimony of Robert S. Sutton would merely have been cumulative. Appellants' second assignment of error is overruled.

[3] For their assignment of error No. 3, appellants contend that the trial court erred in excluding testimony of Elsie Sutton Adkins as to the relationship between Guy S. Sutton, Sr. and appellee Lehman Sutton. Appellants argue that in light of the alleged ambiguous wording of Item II of Guy S. Sutton, Sr.'s will, the excluded testimony was relevant in seeking to discover the intent of the testator.

The intent of Guy S. Sutton, Sr. was clearly manifested within the "four corners" of the will. It was not necessary to go outside of the will to seek clarification, and the testimony of Elsie Sutton Adkins was irrelevant and properly excluded by the trial court. As stated by Justice Merrimon (later Chief Justice) in *McDaniel v. King*, 90 N.C. 597, 602 (1884):

> "If a will is sufficiently distinct and plain in its meaning as to enable the court to say that a particular person is to take, and that a particular thing passes, that is sufficient; and it must be construed upon its face without resorting to extraneous methods of explanation to give it point. Any other rule would place it practically within the power of interested persons to *make* a testator's will, so as to meet the convenience and wishes of those who might claim to take under it."

This third assignment of error is, therefore, overruled.

By assignment of error No. 5, appellants contend that the trial court's finding of fact No. 13 was not supported by sufficient competent evidence. The challenged findings set forth the value of the various interests in real estate owned by Guy Sutton, Sr. at his death. Within the framework of this assignment of error,

appellants present two issues, to wit: (1) the admissibility of the testimony of appellee's witnesses McArthur, Strickland, and Moore, as to the value of the property in question, and (2) the sufficiency of the evidence to support the trial court's findings as to the values of the respective tracts of real property. The presentation of more than one issue of law under a single assignment of error violates Appellate Rule 10(c). However, we have chosen to address the two questions presented by appellants and have found both to lack substantial merit.

[4] Appellants first contend that the evidence of value tendered by appellee through witnesses McArthur, Strickland and Moore was inadmissible because appraisals were made by the witnesses some four years after the death of Guy Sutton, Sr.; and furthermore, as to the witness Moore, testimony as to valuation based on sales of comparable farm properties did not indicate that the comparable sales were of land similar to the land in question. We do not discuss these questions since the testimony of these three witnesses was presented without objection, and no motion to strike was made after its admission. Any objection or exception by appellants is, therefore, waived. *Dunn v. Brookshire*, 8 N.C. App. 284, 174 S.E. 2d 294 (1970).

[5] As to the alleged insufficiency of the evidence to support the trial court's findings of fact as to the value of the real estate owned by Guy Sutton, Sr. at his death, it is well settled that findings of the trial judge sitting as the trier of facts will not be disturbed on appeal on the theory that the evidence did not support the findings if there is any competent evidence to support them. *Church v. Church*, 27 N.C. App. 127, 218 S.E. 2d 223, *cert. den.* 288 N.C. 730 (1975). In the case *sub judice*, the trial court assigned values to the parcels of real estate owned by Guy Sutton, Sr. which fall within the range of values presented by the witnesses for the opposing parties. In most instances, the court did not find values which corresponded precisely to the values as set forth by any single witness. However, had this issue been answered by a jury, appellant would not be heard to complain that the values found by the jury did not correspond precisely to the testimony of any one witness. "In cases in which value is established by the opinion of witnesses, the jurors are not required to take the estimate of any of the witnesses, but may use their own judgment." 25 C.J.S., Damages, § 88, p. 971. "Although

jurors, commissioners, *or other triers of fact* cannot disregard the evidence which the parties produce in respect of the compensation to be awarded, including the value of property taken and injuries to property not taken, they are not bound by the opinions or estimates of the witnesses who testify before them, but may give such weight to the testimony as they think proper." (Emphasis supplied.) 29A C.J.S., Eminent Domain, § 275, pp. 1227-1228; *Williams v. Highway Commission*, 252 N.C. 514, 114 S.E. 2d 340 (1960).

Where facts are found by the court, sitting without a jury, they have the force and effect of a verdict of a jury if supported by competent evidence. *Blackwell v. Butts*, 278 N.C. 615, 180 S.E. 2d 835 (1971). In the instant case, the trial judge was confronted not only with varying appraisals of the value of Guy Sutton, Sr.'s property, but also with the testimony as to the underlying factors that the various witnesses considered in reaching their opinions, such as tobacco allotments, acreage, road frontage, etc. Having reviewed all the evidence that was before the trial court, we conclude that the findings of fact as to the value of Guy Sutton, Sr.'s real estate are supported by the evidence presented and are conclusive, as would have been a jury verdict. Therefore, this assignment of error is overruled.

The question raised by appellants in their assignment of error No. 6 has been fully dealt with under assignment of error No. 4, supra, and requires no further discussion.

[6] By their assignments of error Nos. 7 and 11, appellants challenge the trial court's findings as to the amount of property that passed to Ruth S. Sutton outside of her husband's will. More specifically, appellants contend (a) that $1896.73 contained in a joint bank account on the date of Guy Sutton, Sr.'s death was property passing to Ruth S. Sutton outside of the will and that the court erred in including only $900 of that amount; (b) that a stipulated sum of $3,224.63 passed under the will and not outside of the will; (c) that the total sum of property passing outside of the will, as found by the trial court, was erroneous in that the finding of the value of the residence owned by Guy Sutton, Sr. and Ruth S. Sutton was not based on competent evidence, and the total sum failed to include the value of household furniture and an automobile. We will deal with these three arguments separately.

The record reveals that on 17 April 1972, the date of Guy Sutton, Sr.'s death, there existed a joint bank account in the name of Guy and Ruth Sutton in the Farmville branch of the Bank of North Carolina; that on this date, Ruth S. Sutton withdrew $1800 from the joint account (the record does not reveal whether the withdrawal occurred prior to or subsequent to Guy Sutton, Sr.'s death); that the balance remaining after the withdrawal was $193.47. The record does not affirmatively reveal that the account was established pursuant to G.S. 41-2.1(a), thus giving Ruth S. Sutton survivorship rights in the unwithdrawn deposit, subject to the rights of creditors as per G.S. 41-2.1(b). However, neither party raised any question as to the nature of the joint account. Both sides have argued for an application of G.S. 41-2.1 which is favorable to them. Thus we assume that the account was a joint account with right of survivorship, and the only question before this Court in relation thereto is what portion of the account, if any, passed to Ruth S. Sutton outside of her husband's will by virtue of his death.

The record further reveals that of the $193.47 balance remaining in the account following the $1800 withdrawal, one-half ($96.73) was included by Guy Sutton, Sr.'s executors in their 90-day inventory as personal property of the estate, and one-half was left in the account for Ruth S. Sutton. It was stipulated that all of the personal property in the estate of Guy Sutton, Sr. was applied to debts, costs of administration, taxes, etc., leaving no surplus.

Assuming that the $1800 withdrawal was made subsequent to Guy Sutton, Sr.'s death, the trial court correctly determined that $900 passed to Ruth S. Sutton outside of her husband's will. G.S. 41-2.1(b) (as written in 1972) establishes that the incidents of a joint and survivor deposit account, include

> "(2) During the lifetime of both or all the parties, the deposit account shall be subject to their respective debts to the extent that each has contributed to the unwithdrawn account. *In the event their respective contributions are not determined, the unwithdrawn fund shall be deemed owned by both or all equally.*
>
> (3) Upon the death of either or any party to the agreement, the survivor, or survivors, becomes the sole owner, or

> owners, of the entire unwithdrawn deposit subject to the claims of the creditors of the deceased and to governmental rights in that portion of the unwithdrawn deposit which would belong to the deceased had said unwithdrawn deposit been divided equally between both or among all the joint tenants at the time of the death of said deceased." (Emphasis supplied.)

There is no evidence in the record which would indicate the respective contributions of Guy and Ruth S. Sutton in the joint account. Thus, pursuant to the above-quoted subsection (2), it is deemed to have been owned by each equally. At her husband's death Ruth S. Sutton became the sole owner of the unwithdrawn deposit as the survivor, pursuant to subsection (3), supra, half of which passed to her outside of her husband's will subject to claims of creditors, etc. The other half she was deemed to own at her husband's death. Ruth S. Sutton withdrew $1800 from the account, $900 of which passed to her outside of the will. Of the remaining $193.47, half or $96.73 was included in Guy Sutton, Sr.'s estate and was used to satisfy claims against the estate. The other half, which was left in the account, was deemed to have been owned by Ruth S. Sutton prior to her husband's death and thus did not pass to her outside of the will.

Were we to assume that the $1800 withdrawal occurred prior to Guy Sutton, Sr.'s death, then none of that amount could be said to have passed to Ruth S. Sutton as survivor by virtue of her husband's death. G.S. 41-2.1(b)(1) accords each party to a joint account the right to withdraw any part or all of the deposit. In such an event, there remained an unwithdrawn deposit of $193.47, none of which, as discussed supra, passed to Ruth S. Sutton outside of the will by virtue of Guy Sutton, Sr.'s death.

The trial court obviously assumed that the withdrawal occurred subsequent to Guy Sutton, Sr.'s death. This assumption is not supported by the evidence. However, this assumption was favorable to appellants. The alternative assumption would have reduced the amount of property passing to Ruth S. Sutton outside of her husband's will, thus increasing the amount of property needed to equal one-third of Guy Sutton's net estate. Since the error, if any, was favorable to appellants, they cannot be heard to complain. *Prevette v. Bullis*, 12 N.C. App. 552, 183 S.E. 2d 810 (1971).

[7] Appellants contend that the trial court erred in finding that a stipulated sum in the amount of $3,224.63 constituted property passing to Ruth S. Sutton outside of the will of Guy Sutton, Sr., on the grounds that the stipulated sum was paid to and for Ruth S. Sutton by the executors under the will. No explanation of or authority for this proposition is presented by appellants. Appellate Rule 28(a) provides in part as follows:

> "The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned."

As to this particular contention, appellants have patently ignored the requirements of Appellate Rule 28(a), and are deemed to have abandoned this portion of their assignment of error No. 7.

Finally, appellants contend that the trial court's finding as to the value of the residence owned by Ruth and Guy Sutton, Sr. as tenants by the entirety was based upon incompetent evidence, and that the trial court erred in failing to include the value of an automobile and household furniture as property passing to Ruth Sutton outside of her husband's will. We disagree as to all counts.

The court found that the residence in question had a fair market value on 17 April 1972 of $29,000. This finding is supported by the testimony of appellee's witness Moore. Appellants neither objected to nor did they move to strike this testimony; thus they waived any objection as to its competency. *Dunn v. Brookshire*, supra. The trial court's finding supported by competent evidence is binding on appeal. *Church v. Church, supra.*

The title to the automobile, a 1968 Pontiac Lemans, was in the name of Ruth S. Sutton, as shown by a certificate of title introduced into evidence at trial, which had an issue date of 5 March 1968. This certificate of title was clearly evidence from which the trial court could have inferred that the automobile was owned by Ruth S. Sutton at the time of her husband's death. *See*

G.S. 20-78(b). Evidence presented by appellants to the effect that Guy Sutton, Sr.'s executors believed that the car belonged to Guy Sutton, Sr. at his death and considered it as property passing to Ruth S. Sutton outside of the will, did not compel a finding to that effect.

Appellants' contention that the value of household furniture should have been included as property passing outside of the will is likewise without merit. There is nothing in the record indicating that title to this property passed by operation of law to Ruth S. Sutton outside of the will, notwithstanding the testimony of the co-executors that they so considered the furniture and therefore did not include it in the inventory of the assets of the estate. There is nothing in the record which would prevent the household furniture from passing to the devisees under Guy Sutton, Sr.'s will.

We hold that the trial court, in finding of fact No. 16, properly concluded that the amount of property passing to Ruth S. Sutton by reason of the death of Guy Sutton and outside of his will equalled $33,124. Assignments of error Nos. 7 and 11 are overruled.

We have carefully reviewed appellants' remaining assignments of error, and have found that, to the extent they are not repetitious of appellants' previous arguments or based upon appellants' contention as to the meaning of the term "amount" (which contention we have rejected), they otherwise lack substantial merit. We have reviewed the trial court's findings of fact, and find them to be supported by the evidence. These findings, in turn, support the court's conclusions of law as to the interests of the parties in the lands and funds at issue in this case. Therefore, the judgment of the trial court is

Affirmed.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. MILTON EDGAR WRAY

No. 7727SC769

(Filed 4 April 1978)

Criminal Law § 160— contradiction in record on appeal—addition to record properly allowed

Where the statement in the record on appeal that there was no answer to the questions asked the jury by the trial judge in taking the verdicts was inconsistent with and contradictory to the recitals in the judgment entered by the trial court, the Court of Appeals could add new matter to the original record on appeal for the purpose of correcting the contradiction in the original record on appeal, particularly since the Court of Appeals had remanded the case to the trial court for the purpose of determining whether there was an answer to the trial court's questions by the jury foreman which the trial court heard or observed, all parties involved had notice of the issues and an opportunity for appearance and hearing on the issues, and the parties filed with the Court of Appeals supplemental briefs on those issues.

APPEAL by defendant from *Thornburg, Judge.* Judgments entered 26 April 1977, in Superior Court, CLEVELAND County. Heard in the Court of Appeals 19 January 1978.

Defendant was charged and found guilty of (1) speeding 66 miles per hour in a 55 mile per hour zone, and (2) resisting arrest. He appeals from judgments imposing consecutive jail terms.

The evidence for the State tends to show that on 26 June 1976, about 1:15 a.m., State Trooper Bennett clocked with radar an approaching car on State Highway No. 226 at 66 miles per hour, then pursued and stopped it. Defendant was driving. He had an odor of alcohol. Trooper Bennett placed defendant under arrest, but, as he was attempting to place defendant in the patrol car defendant ran into the woods. The trooper had another person in custody and could not pursue defendant. Based upon information on the driver's license that Trooper Bennett obtained from defendant, a warrant was issued for his arrest.

Defendant and his father testified that defendant was at home, that defendant's brother, Edgar, Jr., had borrowed the car at 7:30 p.m. Edgar, Jr. called about 1:00 a.m. and told them he had abandoned the car on Highway No. 226; that Edgar, Jr. looks like defendant.

Defendant also was charged with driving a motor vehicle on a public highway while under the influence of intoxicating liquor, but the jury found him not guilty of that charge.

Attorney General Edmisten by Special Deputy Attorney General Ann Reed for the State.

Assistant Public Defender F. Douglas Canty for defendant appellant.

CLARK, Judge.

We first consider the defendant's contention that the verdicts were insufficient to support the judgments. In considering this assignment of error we noted that the record on appeal relating to the verdicts and judgments reveals that the trial judge rejected the verdicts first returned by the jury and then proceeded to take the verdicts by asking questions correctly worded to insure proper verdicts. The record further reveals that there was no answer to these questions, but that, thereupon, the trial judge imposed judgments as though the questions had been answered in the affirmative. The judgment rendered in Case No. 76CR6582 recites the following: "Having been found guilty of the offense of speeding 66 m.p.h. in a 55 m.p.h. zone . . . ." The judgment rendered in Case No. 76CR6585 recites the following: "Having been found guilty of the offense of resisting arrest . . . ." In view of the apparent contradictions in the record, this Court on 13 February 1978, entered the following order:

> "The record on appeal, pages 30 and 31, discloses the following:
>
> 'THE VERDICT
>
> (The jury returns into the courtroom at 5:31 p.m.)
>
> [THE CLERK: Would the jurors stand, please. (The jurors stand.) Would the foreman speak for the jury. Ladies and gentlemen of the jury, have you agreed upon an unanimous verdict?
>
> THE FOREMAN: We appointed a foreman. We didn't have one Court-appointed, and we got together and appointed me spokesman, and we come to the conclusion that he was guilty of speeding and resisting.

THE COURT: All right, let the Clerk take your verdict. As to the—I'll go ahead and take it. Members of the jury, as to 76-CRS-6582 wherein the defendant, Milton Edgar Wray, is charged with speeding sixty-six miles per hour in a fifty-five miles-per-hour zone, do you find the defendant guilty as charged or not guilty?

THE FOREMAN: We find him guilty of speeding.

THE COURT: Guilty as charged of speeding sixty-six miles per hour in a fifty-five miles-per-hour zone?

THE FOREMAN: (No answer.)

THE COURT: All right, now, in 76-CRS-6585, *State v. Milton Edgar Wray*, wherein the defendant stands charged with resisting an officer, do you find the defendant guilty as charged or not guilty?

THE FOREMAN: We find him guilty of resisting.

THE COURT: Guilty as charged of resisting an officer?

THE FOREMAN: (No answer.)

THE COURT: These two verdicts are your verdicts, Members of the Jury, so say you all?

THE JURORS: Yes.'

It appears from the record that the foreman of the jury made no answer to the two questions of the trial court which would have been determinative of whether proper verdicts were returned by the jury, but that the trial court thereafter proceeded to judgment on both charges as though the jury had answered 'Yes' to the aforesaid questions.

Though the parties agreed to the record on appeal, the contradiction in, or possible omissions from, the record on appeal are such that we remand to the trial court for its determination of whether there was an answer to the said questions by the foreman of the jury which the trial court heard, or whether the questions were answered by sign, gesture or other conduct.

IT IS, THEREFORE, ORDERED that if the trial court cannot make such determination, this Court shall be so notified; that if the trial court does make such determination, the added record on appeal shall be settled by the trial court and the same shall be certified by the clerk, filed in this court and added to the record on appeal without printing.

The parties may elect to file supplemental briefs relating only to issues raised by the added record, the appellant within 10 days after the added record is docketed in this court and the appellee within 10 days after the appellant's brief has been served on appellee. If filed, the briefs shall not be printed. The case will be disposed of without oral argument.

In addition to transmitting a copy of this Order to the Clerk of Superior Court of Cleveland County, to F. Douglas Canty, Assistant Public Defender, 15 S. Washington Street, Shelby, North Carolina 28150, Telephone: 704/482-8928, and to W. Hampton Childs, District Attorney, Lincoln County Courthouse, Lincolnton, North Carolina 28092, Telephone: 704/735-2232, it is directed that a copy of this Order be mailed directly to the trial judge, The Honorable Lacy H. Thornburg at his home address."

On 20 February 1978, a certified Order and Affidavits were filed in this Court as follows:

"ORDER

THIS CAUSE coming on to be heard before the undersigned Trial Judge Presiding pursuant to Order of the North Carolina Court of Appeals entered in cases above entitled, 76-CR-6582 and 76-CR-6585; and the Court having personal recollection of the event inquired about in the Order of the North Carolina Court of Appeals, it is the Order of the Court that case on appeal shall be settled as follows:

QUESTION:

THE COURT: Guilty as charged of speeding 66 miles per hour in a 55 miles per hour zone.

ANSWER:

THE FOREMAN: Yes (Remaining jurors answering Yes or nodding in the affirmative.)

QUESTION:

THE COURT: Guilty as charged of resisting an officer.

ANSWER:

THE FOREMAN: Yes (Remaining jurors answering Yes or nodding in the affirmative.)

The Court finding as fact that the questions were answered as above set forth with the Foreman of the Jury answering Yes and all remaining jurors either answering Yes or nodding affirmatively to indicate their assent to the verdict rendered by the Foreman.

Added to this Order by way of affidavit is an affidavit of the Assistant District Attorney indicating his recollection of the event and an affidavit of defense counsel if he has an independent recollection of what occurred.

This Order, together with accompanying affidavit or affidavits shall constitute an addendum to the record as certified by the Assistant Clerk of Superior Court.

Done in Chambers in Charlotte, North Carolina, in the presence of W. H. Childs, District Attorney of the 27-B Prosecutorial District, Douglas Canty, defense attorney, and William L. Morris, Assistant District Attorney.

This the 16th day of February, 1978.

s/ Lacy H. Thornburg
Presiding Superior Court Judge"

"AFFIDAVIT

I, William L. Morris, Assistant District Attorney, 27-B, State of North Carolina depose and say:

1. That I was the Prosecuting Attorney in the above entitled cases, 76 CRS 6582 and 76 CRS 6585 and having a personal recollection of the event inquired about in the Order of

the North Carolina Court of Appeals having been personally present at the time I remember the following:

QUESTION:

THE COURT: Guilty as charged of speeding 66 miles per hour in a 55 miles per hour zone.

ANSWER:

THE FOREMAN: Yes (Remaining jurors answering Yes or nodding in the affirmative.)

QUESTION:

THE COURT: Guilty as charged of resisting an officer.

ANSWER:

THE FOREMAN: Yes (Remaining jurors answering Yes or nodding in the affirmative.)

This the 17th day of February, 1978.

(Verified)"

"AFFIDAVIT

I, Charles D. Randall, Attorney at Law, depose and say:

1. That I was an Assistant Public Defender for the 27th Judicial District and represented the above named defendant in Cleveland County Superior Court in the above entitled cases, 76 CRS 6582 and 76 CRS 6585 and having a personal recollection of the event inquired about in the Order of the North Carolina Court of Appeals having been personally present at the time, I remember the following:

QUESTION:

THE COURT: Guilty as charged of speeding 66 miles per hour in a 55 miles per hour zone.

ANSWER:

I have no personal recollection as to the answer, if any.

QUESTION:

THE COURT: Guilty as charged of resisting an officer.

ANSWER:

THE FOREMAN: Yes (Remaining jurors answering Yes or nodding in the affirmative.)

This the 17th day of February, 1978.

(Verified)"

Also filed with the foregoing papers were certified copies of Minutes of the 25 and 26 April 1977 Session of the Superior Court of Cleveland County, showing that the jury returned verdicts of "Guilty As Charged" on both the speeding charge (76CRS6582) and the resisting arrest charge (76CRS6585).

Supplemental Briefs were filed by the defendant and the State. Thus, we have before us the issue of whether this Court may add the foregoing new matter to the record on appeal for the purpose of correcting contradiction in the original record on appeal.

Defendant takes the position that this Court is bound by the original record as certified citing *Smith v. Bottling Co.*, 221 N.C. 202, 19 S.E. 2d 626 (1942); *State v. Williams*, 280 N.C. 132, 184 S.E. 2d 875 (1971); *State v. Fields*, 279 N.C. 460, 183 S.E. 2d 666 (1971); *State v. Hickman*, 2 N.C. App. 627, 163 S.E. 2d 632 (1968). These cases and many others in this State have firmly established that principle of law.

There is at least one exception to this established rule of law. In *State v. Old*, 271 N.C. 341, 344, 156 S.E. 2d 756, 758 (1967), it is stated:

". . . However, if a case on appeal contains in material parts of the record proper such inconsistent and contradictory statements so that obviously if one material recital is correct, others therein equally material cannot be, then it becomes the duty of this Court, under its supervisory power, to remand the action to the Superior Court with directions that notice be given to counsel and parties, and after hear-

ing, to certify any corrections necessary to make the record conform to the facts. . . ."

This exception is recognized in other states which hold that, in a proper case, a remand of the appeal record for augmentation or correction lies within the discretion of the appellate court. 4A C.J.S. Appeal and Error, § 1124. An appellate court may make appropriate orders for the correction of the appeal record so as to make it conform to the record of the trial court. 24A C.J.S., Criminal Law, § 1780.

We find that the statement in the record on appeal that there was no answer to the questions asked by the trial judge in taking the verdicts of the jury is inconsistent with and contradictory to the recitals in the judgments entered by the trial court. This Court's order of remand to the trial court notified all parties of the issues involved, the parties had the opportunity for appearance and hearing on the issues, and the parties filed with this Court supplemental briefs on these new issues. We, therefore, add to the original record on appeal in this case before us the new matter certified to this Court as a part of the record on appeal.

We are aware of the reason and purpose behind the general rule that the appellate court is bound by the record agreed upon by the parties. Any amendment or addition to the record must be approached with care and caution. We do not advocate a policy of liberality in making or allowing amendments or additions to an agreed record on appeal. We have done so in the case *sub judice* only because of the obvious contradictions in the record which, in the interest of justice, needed to be corrected.

It is noted that neither the District Attorney nor the Assistant Public Defender who agreed to the record on appeal participated in the trial of the case. However, the inconsistency in the record on appeal relative to the jury return of the verdicts should have been obvious to both of them.

We think it appropriate to repeat the admonition to defense counsel which Justice (now Chief Justice) Sharp gave in *State v. Fields*, 279 N.C. 460, 183 S.E. 2d 666 (1971): "We also remind defense counsel that, as officers of the court, they have an equal duty to see that reporting errors are corrected. Their duty to a

client does not embrace the right to perpetuate and take advantage of such mistakes. . . ." 279 N.C. at 463, 183 S.E. 2d at 669.

Too, the admonition to solicitors (now District Attorneys) in *State v. Fox*, 277 N.C. 1, 28-29, 175 S.E. 2d 561, 578 (1970), is appropriate:

> "Although the primary duty of preparing and docketing a true and adequate transcript of the record and case on appeal in a criminal case rests upon defense counsel, G.S. § 1-282, G.S. § 15-180, it is the duty of the solicitor to scrutinize the copy which appellant serves upon him. If it contains omissions, errors, or misleading juxtapositions it is the solicitor's responsibility to file exceptions or a countercase within his allotted time. . . . This, of course, necessitates the expenditure of the time and effort required to make a careful and painstaking examination of it and to file exceptions or countercase if either is necessary to provide a correct record and a case on appeal which truly and intelligibly sets out the proceedings as they occurred. Only upon such a record can the Attorney General and the Appellate Division do justice to the State and to the defendant."

It should be noted that a jury may indicate its verdict by an affirmative nod rather than an oral answer to questioning by the court official who takes the verdict. *State v. Hampton*, 294 N.C. 242, 239 S.E. 2d 835 (1978). The court reporter during return of the verdict should be so situated as to both hear and see the jury. The court reporter in the trial court is an officer of the court and is under its control. It is the duty of the reporter to report the trials. G.S. 7A-95. The report (transcript) of the trial as prepared by the court reporter is not sacrosanct. The record on appeal is settled by the trial judge if the parties do not agree. The parties do not have to agree that the transcript of trial prepared by the court reporter is absolutely correct. If the parties do not agree, the record on appeal is settled by the trial judge. 1 Strong's N.C. Index, Appeal and Error, § 38.

Since the corrected record on appeal reveals that the jury returned verdicts of "guilty as charged" on both the speeding and resisting arrest charges, the verdicts clearly were sufficient to support the judgments. *State v. Lassiter*, 208 N.C. 251, 179 S.E. 891 (1935). The defendant's assignment of error is overruled.

We have carefully examined the defendant's other assignments of error and find them to be without merit.

No error.

Judges MORRIS and MITCHELL concur.

STATE OF NORTH CAROLINA v. CARL HUBERT ALSTON, JR.

No. 7718SC884

(Filed 4 April 1978)

1. **Criminal Law § 75.9— volunteered incriminating statements—no voir dire required**

The trial court was not required to conduct a *voir dire* hearing to determine the admissibility of defendant's volunteered statements, nor was the judge, when he held a hearing in his discretion, required to support his determination with specific findings of fact, since the evidence tended to show that defendant's incriminating statements were made in a hospital within the hearing of a police officer; defendant was not in custody at the time he made the statements; and the statements were not the result of any threats or compulsion.

2. **Criminal Law § 43— illustrative evidence—no findings of fact required**

A trial judge is not required to make findings of fact upon the admission of illustrative evidence.

3. **Homicide § 21.7— murder by stabbing—sufficiency of evidence**

Evidence in a murder prosecution was sufficient to be submitted to the jury, though there was no direct evidence identifying defendant as the person who killed the deceased, since there was evidence of an altercation between the defendant and the deceased after which defendant pursued deceased from the scene of the altercation; a trail of blood led from that scene to the site of the killing; a man was seen stabbing another man near the scene of the altercation between defendant and deceased; and defendant admitted stabbing a man who had cut his wife.

4. **Criminal Law § 116— defendant's failure to testify—instruction not prejudicial**

Where the trial judge, at the close of the State's evidence, directed the jury to go to lunch explaining that "the defendant has elected not to put on any evidence which is the privilege of the defendant, of course," any error was cured by the court's subsequent full instruction with respect to defendant's failure to testify or offer evidence.

5. Criminal Law § 112.4— circumstantial evidence—jury instructions proper

The trial court's instruction on circumstantial evidence which stated that "you must be satisfied beyond a reasonable doubt that not only is the circumstantial evidence relied upon by the State consistent with the defendant being guilty but that it is inconsistent with his being innocent" was sufficient to explain to the jury the intensity of proof required for conviction on the basis of circumstantial evidence.

6. Homicide § 28.5— defense of family—instruction not required

In a prosecution for murder, defendant's statement that he had stabbed a man who cut his wife was not sufficient to raise an issue of defense of family, since the evidence did not show that defendant, in stabbing deceased, was acting to save his wife from death or great bodily harm but instead tended to show that defendant pursued deceased some 100 yards from the scene of an altercation between them to the place where the stabbing occurred.

7. Homicide § 23.1— second degree murder and voluntary manslaughter—intentional crimes—instructions proper

The trial court properly instructed the jury that second degree murder and voluntary manslaughter were intentional killings.

Judge WEBB dissenting.

APPEAL by defendant from *Collier, Judge.* Judgment entered 2 June 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 28 February 1978.

The defendant was charged in a proper bill of indictment with the murder of Alexander Barnhardt. Upon his plea of not guilty, the State presented evidence tending to show the following:

On 16 January 1977 the defendant and the deceased, Alexander Barnhardt, were at the Carlotta Club in Greensboro, North Carolina. After Barnhardt and the defendant's wife finished dancing, a fight erupted between Barnhardt and the defendant. The fight continued outside in the parking lot where the defendant struck Barnhardt several times. The defendant's wife "grabbed herself," and Barnhardt fled with the defendant following in pursuit. Two women driving by on Market Street in the vicinity of the Carlotta Club saw one man crouched over another man, stabbing him repeatedly.

A short time after midnight on the same night the defendant arrived at the emergency room of Moses Cone Hospital in Greensboro accompanying his wife who was bleeding from a cut

on her face. He was quite upset and told a police officer that a man had cut his wife and that he had stabbed the man. He then stated in a loud voice to the desk clerk that the man "deserved killing" and he was going to find him. The police officer notified headquarters that a stabbing had taken place and then followed the defendant to his automobile. When the defendant attempted to start his car the officer grabbed his keys and asked him to get out of the car. The officer found several knives in the car, one of which appeared to have blood on it.

Barnhardt was found dead lying beside Market Street with knife wounds in his chest, face, arms and neck. A trail of blood led from his body to the parking lot of the Carlotta Club.

The defendant offered no evidence. The jury found the defendant guilty of second degree murder. From a judgment imposing a 35 to 40 year prison sentence, the defendant appealed.

Attorney General Edmisten, by Associate Attorney Thomas H. Davis, Jr., for the State.

Assistant Public Defender D. Lamar Dowda for the defendant appellant.

HEDRICK, Judge.

[1] In his first assignment of error the defendant contends that the trial court erred in "failing to find facts upon which to base its conclusions after conducting three *voir dire* examinations." The first *voir dire* hearing to which the defendant refers was conducted upon the defendant's objection to the admission of testimony recounting the incriminating statements made by defendant as he entered the hospital with his wife.

It is a firmly established rule that when the defendant objects to the introduction of an in-custody confession, "the trial judge must conduct a *voir dire* hearing to determine whether the confession was voluntarily made and whether the requirements of the *Miranda* decision have been met." *State v. Biggs*, 289 N.C. 522, 529-30, 223 S.E. 2d 371, 376 (1976). At the conclusion of the hearing the trial judge must make specific findings of fact if there are any material conflicts in the evidence. *State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977).

The first statement by the defendant to which Officer Joyner testified was made when the defendant brought his wife to the emergency room. Officer Joyner who happened to be at the hospital for another matter observed the defendant walk in and heard him state "that a man had cut his wife and that he had stabbed him and stabbed him and left him out there." A few minutes later as Officer Joyner was talking on the telephone he overheard the defendant state to the desk clerk "that a man that would do something like that deserved killing, and he was going back out there." The record clearly and affirmatively demonstrates that the defendant was not in the custody of the police officer when he made the incriminating statements. Thus, the cases cited by the defendant and relied upon in his brief are not controlling in the present case.

In *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970), the defendant argued that the trial court erred in failing to conduct a *voir dire* hearing upon his objections to the admission of statements made to a fellow inmate. Justice Higgins, speaking for the Supreme Court, rejected the defendant's argument as follows:

> The defendant misinterprets the necessity for the voir dire examination to determine the voluntariness of his admissions to his jailmate Pierce. As a general rule, voluntary admissions of guilt are admissible in evidence in a trial. To render them inadmissible, incriminating statements must be made under some sort of pressure.

State v. Perry, supra at 345, 172 S.E. 2d at 546. In the present case, as in *Perry*, the defendant volunteered the incriminating statements free from any threat or compulsion. Thus, the trial judge was not required to conduct a *voir dire* hearing. And when, in his discretion, he sent the jury from the room and held a hearing to determine the admissibility of the statements, he was not then required to support his determination with specific findings of fact.

[2] The second and third *voir dire* hearings were held to determine the admissibility of State Exhibits consisting of photographs of the deceased and the interior of the automobile which the defendant drove to the hospital and a knife found in the automobile. Following the hearings the photographs were admitted by the trial court for illustrative purposes, but the knife was

excluded. The defendant apparently argues that because of some "confusion" surrounding the admission of the photographs the trial court was required to make specific findings of fact at the conclusion of the hearings. We are unaware of any rule requiring the trial judge to make findings of fact upon the admission of illustrative evidence and we see no reason to impose such a burden. This assignment of error is overruled.

[3] By his second assignment of error the defendant contends that the trial court erred in failing to grant defendant's motions for judgment as of nonsuit at the close of the State's evidence. While there is no direct evidence identifying the defendant as the person who killed the deceased, there is evidence that there was an altercation between the defendant and the deceased after which the defendant pursued the deceased from the Carlotta Club parking lot; that a trail of blood led from the parking lot to the site of the killing; that a man was stabbing another man on Market Street near the Carlotta Club; and that the defendant admitted to stabbing a man who had cut his wife. Viewed in the light most favorable to the State, *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971), this evidence is sufficient to require submission of the case to the jury and to support the verdict.

[4] In his third assignment of error the defendant contends that the trial court erred in its instructions to the jury regarding the defendant's right "not to offer evidence." At the close of the State's evidence the trial judge directed the jury to go to lunch explaining that "[t]he defendant has elected not to put on any evidence which is the privilege of the defendant, of course." Thereafter in his charge, the trial judge fully instructed the jury with respect to the defendant's failure to testify or offer evidence. The defendant, without citing any authority, argues that the prior statement by the trial judge with respect to the defendant's right not to testify was inadequate to explain the law and was not cured by the subsequent full instruction. The trial judge's instruction satisfies the standards of G.S. 8-54, conforms to instructions approved by our Supreme Court, *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976), and was almost identical to that suggested by the defendant. Any prejudice resulting from the trial judge's prior statement was cured by his instruction. This assignment of error is overruled.

[5] By his fourth assignment of error the defendant contends that the trial court erred in its instruction to the jury relative to its consideration of circumstantial evidence. The trial judge charged in pertinent part as follows:

> Circumstantial evidence is recognized and accepted proof in a court of law. However, before you may rely upon the evidence to find the defendant guilty, you must be satisfied beyond a reasonable doubt that not only is the circumstantial evidence relied upon by the State consistent with the defendant being guilty but that it is inconsistent with his being innocent.

In the absence of special request by the defendant the trial judge is not required to instruct on circumstantial evidence. *State v. Davis*, 25 N.C. App. 181, 212 S.E. 2d 516 (1975). The record in this case does not show that any such request was tendered by the defendant.

In any event, it has been held that no set form of words is necessary to explain to the jury the intensity of proof required for conviction on the basis of circumstantial evidence. *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971). We think the instruction in the present case, measured by standards formulated by the Supreme Court, is adequate to convey the substance of the law that in order to justify conviction all circumstances proved must be "consistent with the hypothesis of guilt and inconsistent with every other reasonable hypothesis." *State v. Westbrook, supra* at 42, 181 S.E. 2d at 586. We are aware that the instruction found deficient in *State v. Lowther*, 265 N.C. 315, 144 S.E. 2d 64 (1965), is similar to that challenged in the present case. While we do not project the instruction in the present case as a model, we do think that it is sufficiently explicit to escape the infirmities of the *Lowther* instruction. Accordingly, we find no error in the challenged instruction.

The defendant next contends that the trial court erred in its instruction to the jury regarding illustrative evidence. When the photographs of the deceased were admitted into evidence the trial judge instructed the jury that "you may consider these photographs only for the purpose of illustrating the testimony of this witness, if you do so find that they illustrate her testimony, and for no other purpose." When the photograph of the interior of

the defendant's automobile was admitted the trial judge instructed to the same effect. These instructions which were apparently overlooked by the defendant in his argument were clearly adequate to explain the law, and the trial judge was not required to instruct further. *State v. Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974); 1 Stansbury § 34 (Brandis Rev. 1973).

[6] Next, the defendant argues that the trial court erred in failing to instruct on the law of defense of family. A person has the right to kill in defense of self or family. *State v. Carter*, 254 N.C. 475, 119 S.E. 2d 461 (1961). And if there is evidence tending to raise such a defense then it becomes a substantial feature of the case and the defendant is entitled to an instruction thereon. *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974). In the present case the record is devoid of any evidence that the defendant in stabbing the deceased was acting to save his wife from death or great bodily harm. To the contrary, the evidence tends to show that the defendant chased the deceased from the Carlotta Club parking lot to a spot one hundred yards away where the stabbing occurred. The defendant's statement that he had stabbed the man who cut his wife was not sufficient, standing alone, to raise an issue of defense of family. *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296 (1976).

[7] In his seventh assignment of error the defendant contends that the trial court erred in failing to "explain to the jury that second degree murder and voluntary manslaughter are intentional killings." The exception on which this assignment is based refers to the following definitions included in the judge's charge:

> Second degree murder is the unlawful killing of a human being with malice.
>
> Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

Later in his charge the judge instructed that in order to find the defendant guilty of second degree murder the jury must find "that the defendant intentionally and with malice stabbed" the deceased; and that in order to find the defendant guilty of voluntary manslaughter the jury must find that the defendant "intentionally and without justification or excuse, stabbed" the deceased. The defendant argues that the subsequent instructions failed to cure the deficiencies of the earlier definitions.

As a general rule, the judge's charge must be considered as a whole " 'and isolated portions of it will not be held prejudicial when the charge as a whole is correct.' " *State v. Bailey*, 280 N.C. 264, 267, 185 S.E. 2d 683, 686 (1972). The omission of an element of the offense in one portion of the judge's charge will not be deemed prejudicial when he fully sets forth all elements in another portion. *State v. Richards*, 15 N.C. App. 163, 189 S.E. 2d 577 (1972).

With respect to the judge's charge on voluntary manslaughter, we find that the first definition provided by the judge was adequate in itself. *State v. Thompson*, 226 N.C. 651, 39 S.E. 2d 823 (1946). Assuming, however, that the first definition of second degree murder was inadequate standing alone, the charge as a whole reflects that all elements of the offense were fully explained to the jury. This assignment of error has no merit.

The defendant also assigns as error the trial court's instruction regarding the presumptions raised by the use of a deadly weapon in a homicide. The court's instruction was substantially similar to one recently approved by the Supreme Court in *State v. Biggs*, 292 N.C. 328, 233 S.E. 2d 512 (1977). And it is now settled that the presumptions of unlawfulness and malice which arise on evidence of an intentional killing with a deadly weapon are constitutional. *State v. Lester*, 289 N.C. 239, 221 S.E. 2d 268 (1976). This assignment of error is clearly without merit.

The defendant, in his final assignments of error, attacks the trial court's instructions with respect to provocation and burden of proof. The defendant points out several references by the judge in his charge to "adequate provocation" and argues in effect that the phrase was left "undefined." The defendant ignores that portion of the charge fully explaining the legal concept of provocation. The charge also reveals that the trial judge fully instructed on the State's burden of proof as to each element. These assignments border on the frivolous.

The defendant received a fair trial free from prejudicial error.

No error.

Judge BRITT concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent on the ground that the instructions on circumstantial evidence violate the rule of *State v. Lowther*, 265 N.C. 315, 144 S.E. 2d 64 (1965). The judge in his charge followed almost verbatim the Pattern Jury Instructions, NCPI—Crim. 104.06. I am aware that the instructions on circumstantial evidence were recently changed to the form in which Judge Collier gave them. I do not understand why they were changed. As I read *Lowther*, no set form of words is required, but the jury must be told in substance that the circumstantial evidence must point unerringly to guilt and exclude to a moral certainty every other reasonable hypothesis except that of guilt. I do not believe the instructions in this case did so.

The majority relies on *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971). In that case, the judge instructed the jury that one of the theories upon which the State was proceeding was that the defendant was acting in concert with another person and that community of purpose could be shown by circumstances as well as by direct evidence. The court instructed the jury that they must be satisfied beyond a reasonable doubt that the defendant was acting as a part of a common plan. The Supreme Court held this to be sufficient. In this case, the judge charged the jury as to circumstantial evidence that they must be satisfied "beyond a reasonable doubt that not only is the circumstantial evidence . . . consistent with the defendant being guilty but that it is inconsistent with his being innocent." I believe this was error, and I vote to reverse.

STATE OF NORTH CAROLINA v. JAMES EARLEY GRAHAM, JR.

No. 7712SC569

(Filed 4 April 1978)

1. **Criminal Law § 77.2— exculpatory statements by defendant—inadmissibility as substantive evidence—admissibility for corroboration—exclusion as harmless error**

The trial court properly sustained the State's general objection to testimony by defendant that he told an officer at the Law Enforcement Center that the shooting of decedent was accidental, since exculpatory statements by defendant which were not part of the *res gestae* were not admissible as substantive evidence. Furthermore, if it was error to sustain the State's general objection because the testimony was admissible for the limited purpose of corroborating defendant's trial testimony, defendant was not prejudiced thereby where the officer thereafter testified fully concerning the statements made to him by defendant at the Law Enforcement Center.

2. **Criminal Law § 51.1— gun residue tests—qualification of expert—training received after tests**

Evidence of training received by an SBI agent prior to conducting residue tests with the homicide weapon was adequate to establish his qualifications to conduct the tests and to testify as an expert concerning the tests, and evidence of additional training which he received after the tests were conducted was properly admitted to bolster his qualifications to interpret the test results at the trial.

3. **Criminal Law § 57— gun residue tests—firings into paper—time of tests—ammunition used**

Gun residue tests were not inadmissible because the test firings were made into paper rather than into cloth similar to that in decedent's dress. Nor were the tests inadmissible on the ground that they were made three months after decedent was killed, during which time some of the powder residue on the dress might have been removed by handling, or on the ground that the ammunition used in the test firings was not the same type used to fire the fatal shot, where there was no evidence to indicate that decedent's dress was subjected to such vigorous handling as to affect materially the results of the tests, and the record did not establish that a different type of bullet was used in the tests than the one which killed the decedent.

4. **Criminal Law § 97.1— permitting State to reopen case**

The trial court did not abuse its discretion in permitting the State to reopen its case and present further evidence after both parties had rested.

5. **Homicide § 32.1— error in instructions cured by verdict of guilty of lesser offense**

The jury's verdict finding defendant guilty of the lesser offense of voluntary manslaughter rendered harmless any errors in the court's instructions on

the greater offense of second degree murder absent a showing that the verdict was affected thereby.

6. **Homicide § 21.9— heat of passion—argument and fight over gun**

In this homicide prosecution, evidence that defendant and deceased were arguing and fighting over a gun when deceased was shot was sufficient to permit the jury to find that defendant acted under the influence of passion when the killing occurred and to support the court's submission of an issue as to voluntary manslaughter.

7. **Homicide § 27.1— heat of passion—erroneous instruction cured by verdict**

Even if the court's definition of "heat of passion" was too strict, defendant was not prejudiced thereby since the jury did find that defendant acted in the heat of passion, thereby reducing his offense from second degree murder to manslaughter.

APPEAL by defendant from *Godwin, Judge*. Judgment entered 6 January 1977 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 15 November 1977.

Defendant was indicted for the first degree murder of Wilma Grooms. He was arraigned on a charge of second degree murder, to which he pled not guilty.

The State presented evidence to show: On 8 November 1975 defendant was living with Wilma Grooms. On that date Wilma returned to her apartment accompanied by her friend, Ida McKinnon, with whom she had spent the preceding night. Defendant asked Wilma where she had been and why she hadn't come home the night before. A quarrel ensued between defendant and Wilma, in the course of which defendant asked Wilma to return some money he had given her. Defendant told Ida McKinnon several times to leave, but each time Wilma told her to stay. Defendant went out to his car, opened the trunk, and returned to the apartment carrying a .22 caliber rifle. As Ida McKinnon started to leave, she heard Wilma say, "no, Junior, don't do that." Wilma and the defendant were standing close together in the middle of the living room, each attempting to hold the gun. Ida heard a shot. When this occurred, defendant was holding the gun toward the ceiling. Ida ran downstairs. When she left, defendant and Wilma were struggling for the gun. About thirty seconds after the first shot, Ida heard a second shot and heard defendant yell, "Where is she, I'm going to kill her too."

The police arrived a short time later to find Wilma's body on the floor in the kitchen with the rifle beside her. Her death was caused by a single gunshot wound in the chest, the path of the bullet beginning below the sixth rib, going from front to back, right to left, and at a 15 degree angle upward.

Defendant testified that he had wanted Ida to leave the apartment and that his only purpose in getting the rifle was to scare Ida. Wilma grabbed the gun when he brought it into the apartment, and in the ensuing struggle the gun accidentally discharged.

The jury found defendant guilty of voluntary manslaughter. From judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Jesse C. Brake for the State.

James D. Little for defendant appellant.

PARKER, Judge.

[1] On direct examination, defendant testified that when the officers came they took him to the Law Enforcement Center where he talked to Officer Cook. Defendant's counsel then asked him what he had told Cook. Objection by the State was sustained, to which ruling defendant now assigns error. We find no prejudicial error. The excluded testimony would not have been admissible as substantive proof in the defendant's favor. "What a party says exculpatory of himself after the offense was committed, and not part of the *res gestae*, is not evidence for him. Otherwise, he might make evidence for himself." *State v. Stubbs*, 108 N.C. 774, 775, 13 S.E. 90, 90 (1891); *accord, State v. Norris*, 284 N.C. 103, 199 S.E. 2d 445 (1973); *State v. Mitchell*, 15 N.C. App. 431, 190 S.E. 2d 430 (1972). Although not admissible as substantive evidence, testimony that defendant had made prior consistent statements to the police would have been admissible for the limited purpose of corroborating his trial testimony, and defendant himself was competent to testify that he made such statements. 1 Stansbury's N.C. Evidence, Brandis Rev. § 52. Defendant, however, did not offer the excluded testimony for the limited purpose for which it was admissible. He offered it generally, and the court sustained the State's general objection. There is authority to support the

view that the trial judge cannot be charged with error in excluding the evidence under these circumstances. *Freeman v. Ponder*, 234 N.C. 294, 67 S.E. 2d 292 (1951); 1 Stansbury's N.C. Evidence, Brandis Rev. § 27. We need not, however, rest our decision on that basis. If it be conceded that it was error to sustain the State's general objection in this case, defendant could have suffered no prejudice. Officer Cook, called as a defense witness, later testified fully and without objection concerning the statements which defendant made to him at the Law Enforcement Center. These statements corroborated defendant's testimony that the shooting was accidental. To the extent that such corroborating testimony served to strengthen defendant's credibility with the jury, it could only have carried greater weight by coming from Officer Cook than from the defendant himself. Thus, defendant could not have been prejudiced by the exclusion of his own testimony that he had made the prior consistent statements.

[2] The State presented the testimony of Frederick Hurst, a special agent employed since 1 July 1969 in the crime laboratory of the State Bureau of Investigation. This witness was permitted to testify as an expert that in his opinion, based on test firings he made with the homicide weapon, the muzzle of the weapon "would have probably been at an approximate distance of greater than four feet but less than six and a half feet" from the dress worn by the decedent when she received the fatal shot. Before this testimony was admitted, the witness testified in detail concerning his courses of study and his on-the-job training experience with the State Bureau of Investigation. He was also permitted to testify, over defendant's objection, concerning a one week course of study "in reference to gunpowder and primer residue" which he took at the F.B.I. Academy at Quantico in August, 1976. Defendant contends that this testimony should not have been admitted, since it related to a course of study taken after the witness conducted the test firings involved in the present case, and that without evidence of this training, Hurst did not possess the necessary qualifications as an expert. We disagree. "The court's finding that a witness is qualified as an expert will not be disturbed on appeal if there is evidence to show that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject as to which he testifies." *State v. Vestal*, 278 N.C. 561, 594,

180 S.E. 2d 755, 776 (1971). The evidence of training Hurst received prior to conducting the tests was clearly adequate to establish his qualifications to conduct the tests. The evidence of additional training he received at the FBI Academy after the tests were conducted served to bolster his qualifications to interpret the test results at the trial. We find no error in admitting the testimony as to the post-test training or in permitting Hurst to testify as an expert.

[3] Defendant nevertheless contends that the test firings were conducted in a manner which rendered their results so unreliable that evidence concerning them should have been excluded. In this connection he points out that the test firings were made into paper rather than into cloth similar to that in decedent's dress; that they were made three months after decedent was killed, during which time some of the powder residue on the dress might have been removed by handling; and that the ammunition used in the test firings was not the same type used to fire the fatal shot. These factors were properly brought to the jury's attention by cross-examination of the State's witness, Hurst. They go to the weight and credibility of his testimony, not to its admissibility. *See State v. Tola*, 222 N.C. 406, 23 S.E. 2d 321 (1942). In our opinion, none of the factors involved, nor all of them in combination, were such as to render the test results so unreliable that it was error to admit testimony concerning them. In *State v. Atwood*, 250 N.C. 141, 108 S.E. 2d 219 (1959), our Supreme Court found no error in admitting expert opinion testimony based in part on test firings made into white blotting paper rather than into clothing of a type worn by the deceased. There was no evidence in this case to indicate that decedent's dress was subjected to such vigorous handling as to affect the results of the tests materially. Finally, the record does not establish that Hurst used a different type of bullet than the one which killed the deceased. (In this connection, the record describes the ammunition used by Hurst as "Remington Caliber .22 long rifle hollow point ammunition, the gold coated lead bullet," while the bullet which inflicted the fatal wound was described simply as a "twenty-two long.") We find no error in the admission of evidence concerning the tests or in permitting the expert to testify as to his opinion based thereon.

[4] After the State and the defendant presented evidence and rested, the trial judge permitted the State to reopen its case and

present further evidence. In this there was no error. "It is well settled that it is within the discretion of the trial judge to reopen a case and to admit additional evidence after both parties have rested and even after the jury has retired for its deliberations." *State v. Shutt*, 279 N.C. 689, 695, 185 S.E. 2d 206, 210 (1971); *accord, State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335 (1975). In the present case defendant makes no contention that he was denied opportunity for rebuttal, and no abuse of the court's discretion has been shown.

[5] By his assignment of error No. 8, defendant contends the court erred in its instructions to the jury on the offense of second degree murder. The verdict finding defendant guilty of the lesser offense of voluntary manslaughter rendered harmless any errors in the court's instructions on the greater offense, absent a showing that the verdict was affected thereby. *State v. Mangum*, 245 N.C. 323, 96 S.E. 2d 39 (1957); *see also State v. De Mai*, 227 N.C. 657, 44 S.E. 2d 218 (1947). Nothing in this record indicates that the challenged instructions on second degree murder in any way affected the verdict rendered finding defendant guilty of voluntary manslaughter.

[6] Defendant assigns error to the court's instructing the jury on voluntary manslaughter. While conceding that the State's evidence tended to show him guilty of second degree murder, he contends that the only other verdicts which could be supported by the evidence were verdicts finding him either guilty of involuntary manslaughter or not guilty and that under no view of the evidence could the jury properly find him guilty of voluntary manslaughter. We do not agree. "One who kills a human being while under the influence of passion or in the heat of blood produced by adequate provocation is guilty of manslaughter." *State v. Wynn*, 278 N.C. 513, 518, 180 S.E. 2d 135, 139 (1971). In the present case the evidence of the arguments and the fighting over the gun was sufficient to permit a jury to find that defendant acted under the influence of passion when the killing occurred. If there was scant evidence that defendant's passion was produced by adequate provocation, defendant is in no position to complain for it is well settled that "if the court charges on a lesser included offense when all the evidence tends to support a greater offense, the error is favorable to the defendant and he is without standing to challenge the verdict." *State v. Vestal*, 283 N.C. 249, 252, 195 S.E.

2d 297, 299 (1973). Indeed, as the opinion in the last cited case points out, 283 N.C. at 253, 195 S.E. 2d at 299-300, "[i]n borderline cases, prudence dictates submission of the lesser offenses. To give the defendant absolution if the judge makes a mistake in his favor, would tend to put the judge on trial. Such is not the purpose of the law."

[7] Defendant next contends that even if it was proper to submit voluntary manslaughter as a possible verdict, the court erred by incorrectly defining "heat of passion" in such manner that the jury would have had to find that the defendant was in a "near rage" at the time of the shooting in order to benefit from the instruction. The short answer to this complaint is that even if the court's definition was too strict, the jury by its verdict did find that defendant acted in the heat of passion, thereby reducing his offense from second degree murder to manslaughter. We suspect that the error complained of was one in transcription rather than in what the court actually said to the jury, but whether that be true or not, it is clear that defendant was in no way prejudiced. His assignment of error directed to the court's instructions on voluntary manslaughter is overruled.

Defendant's motions to set aside the verdict and to grant a new trial were addressed to the sound discretion of the trial court. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971); *State v. Leigh*, 278 N.C. 243, 179 S.E. 2d 708 (1971). There was sufficient evidence to support the verdict, and no abuse of discretion has been shown.

Defendant's final assignment of error, No. 11, purports to bring in question the court's instructions on involuntary manslaughter. This assignment of error is based solely on Exception No. 17, which appears simply at the end of the charge without identifying in any manner the portion of the instructions in question as required by App. R. 10(b)(2). This exception will not be considered. App. R. 10(a).

In defendant's trial and in the judgment entered we find

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOSEPH THOMAS BOYD

No. 775SC893

(Filed 4 April 1978)

1. **Criminal Law § 90.2— State's impeachment of own witness**

The trial court in an armed robbery case did not err in permitting the State to impeach its own witness who testified that he believed defendant was not the man who committed the robbery where the witness had told the assistant district attorney who was handling the case that he would inform him if he decided defendant was not the man, but the witness did not so inform the assistant district attorney before taking the stand.

2. **Criminal Law § 90.2— motion to impeach own witness—when made**

The State's motion to examine its own witness as an adverse witness on redirect examination of the witness did not come too late since the State's passing of the witness to defendant did not negate the existence of surprise.

3. **Criminal Law § 90.2— motion to impeach own witness—voir dire—failure to find facts**

Defendant was not prejudicied by the failure of the trial court to make findings of fact after the *voir dire* hearing on the State's motion to examine its own witness as an adverse witness where the evidence on *voir dire* clearly established that the State was surprised by the witness's testimony.

4. **Criminal Law § 99.9— examination of witness by court—reasons for witness's change of mind**

The trial judge in an armed robbery case did not express an opinion in violation of G.S. 1-180 when he questioned a witness as to whether he had been certain before trial that defendant was the robber and as to the features of defendant which caused the witness to decide during the trial that defendant was not the robber.

5. **Criminal Law § 114.2— instructions—corroboration of defense witness**

Defendant was not prejudiced by the trial court's instruction that the testimony of defendant's alibi witness was "in some degree" corroborated by two of defendant's other witnesses.

6. **Criminal Law § 113.1— witnesses' uncertainty that defendant was robber—instructions supported by evidence**

The evidence supported instructions by the trial court that a witness testified that although the defendant bore "considerable resemblance" to the robber, she was not certain that he was the robber, and that another witness was "uncertain" as to whether defendant was the one who committed the robbery.

APPEAL by defendant from *James, Judge*. Judgment entered 4 May 1976, in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 1 March 1978.

Defendant, indicted on four counts of armed robbery and two counts of attempted armed robbery, waived arraignment, entered a plea of not guilty to all six counts, and the cases were joined for trial. The State's evidence tended to show that at approximately 7:40 p.m. on 29 January 1976, defendant entered New Hanover Farmer's Market, pulled out a sawed-off shotgun and demanded money from those present. Anna Pickett, an employee of the market, positively identified the defendant as being the man who came into the store and to whom she gave money from the cash register. Joseph N. Kentrolis, owner of the market, and John Henry Allen also positively identified defendant. Alan Dale Strickland, the fourth witness for the State, and one of the alleged victims of the attempted robbery, testified that he "firmly believe[d]" that defendant was not the man who attempted to rob him and who robbed the other victims.

Defendant put on evidence tending to show that he was at New Hanover Memorial Hospital with Ethel Council from approximately 7:40 p.m. to 8:00 p.m. on the day in question. With the exception of ten minutes when defendant was in the Ebony Club, he and Ethel Council remained together the remainder of the night. Liston Thompkins, Jr., another of the alleged victims of armed robbery, testified that defendant was "not the man that was present in the store that night with the shotgun." Vera Garner, who was also present during the robberies and attempted robberies, stated that, although defendant resembled the man in the store, she would not say for sure that defendant was the man.

The jury returned a verdict of guilty as charged to all counts. Defendant appeals.

Attorney General Edmisten, by Associate Attorney Kaye R. Webb, for the State.

James K. Larrick for defendant appellant.

ARNOLD, Judge.

[1] After the State's witness Alan Strickland testified that he firmly believed defendant Boyd was not the man who robbed him at New Hanover Market, Strickland was cross-examined by defendant's counsel. On redirect examination, the State attempted to impeach the credibility of its own witness, and defendant ob-

jected. A *voir dire* hearing was held, and Strickland stated that he had told the Assistant District Attorney that morning that he would tell him if defendant was not the man who committed the robberies, and that he had not told him prior to his taking the stand. Strickland further stated that he was not sure that defendant was not the man until he took the witness stand. At the close of the *voir dire* the court ruled that the State could examine Strickland as an adverse witness. Defendant contends that the court erred in this ruling. We disagree.

Our Supreme Court, in *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975), examined the generally recognized exception to the rule that the solicitor (or district attorney) may not impeach a State's witness by evidence that the witness has made prior statements inconsistent with his testimony. The exception allows impeachment "where the party calling the witness has been misled and surprised or entrapped to his prejudice." *State v. Pope*, *supra* at 512, 215 S.E. 2d at 144, *quoting Green v. State*, 243 Md. 154, 157, 220 A. 2d 544, 546 (1966). Our Supreme Court, in discussing the exception to the anti-impeachment rule, stated:

> "Surprise or entrapment, however, will not automatically invoke the anti-impeachment corollary. The State's motion to be allowed to impeach its own witness by proof of his prior inconsistent statements is addressed to the sound discretion of the trial court. The motion should be made as soon as the prosecuting attorney is surprised. He may not wait until subsequent 'surprises' follow. . . .
>
> "Before granting the motion the court must be satisfied that the State's attorney has been misled and surprised by the witness, whose testimony as to a material fact is contrary to what the State had a *right* to expect. These preliminary questions are determined by the court upon a *voir dire* hearing in the absence of the jury in the manner in which the admissibility of a confession is ascertained after objection. If the trial judge finds that the State should be allowed to offer prior inconsistent statements, his findings should also specify the extent to which such statements may be offered."

287 N.C. at 512-13, 215 S.E. 2d at 145.

[2] Defendant argues that our Supreme Court thereby established a procedural framework for invoking the exception to the anti-impeachment rule and that the State failed to follow it in the instant case. First, defendant argues, instead of passing the witness to defendant for cross-examination the State should have moved to examine Strickland as an adverse witness on direct, and that the motion came too late on redirect examination. During *voir dire*, however, Strickland stated that he had told the assistant district attorney who was handling the case that he would inform him if he decided defendant was not the man. We do not believe that the State's passing the witness to defendant negated the existence of surprise, and we find no error in the discretionary ruling by the trial court to allow the State's motion.

[3] Defendant next argues that the court erred in not making findings of fact after the *voir dire* hearing. The evidence on the *voir dire*, however, clearly established the surprise of the State so that we see no prejudicial error in the court's failure to state a finding of surprise. While the trial court might have stated the extent to which the inconsistent statements were offered, we can find no prejudicial error in the court's failure to do so.

[4] The second assignment of error brought forth by defendant is that the court erred in its own questioning of Alan Dale Strickland. We have reviewed pertinent parts of the record and find nothing improper in the court's questions. The trial court may ask questions of witnesses which may aid in clarifying the witness's testimony and which are not prejudicial to either party. *See, e.g. State v. Bunton*, 27 N.C. App. 704, 220 S.E. 2d 354 (1975). The following excerpt from the record contains the portions to which defendant took exception. Mr. Strickland stated, on redirect examination:

> "As to what feature about the defendant or about the individual who had the shotgun on the 29th of January, what features did I notice that I felt would assist me in being able to recognize him if I saw him again, I say he had a wool like toboggan sitting on the top part of his head pulled down. He had three to four teeth out. Small moustache maybe to the side of his upper lip. He was short and he had on a long green like a Marine field jacket on. This morning after I first

saw the defendant I did not have a conversation with Det. Wolak. I spoke to him over here on the bench. He did not ask me a question about this defendant. He did not speak directly to me but he was speaking to all of us, Mr. Kentrolis and Anna Pickett, and he looked right at me and I nodded my head too. I shook my head like that.

"Q. Indicating that you did recognize him?

"MR. LARRICK: Object.

"A. At that moment, yes sir.

"MR. LARRICK: I object.

"COURT: What did you mean to indicate by nodding your head?

"A. At that time 'Yes'.

"COURT: Yes what?

"EXCEPTION NO. 4.

"A. That he was the person.

"COURT: Go ahead.

"I did say that I was a friend of Charles Kentrolis. I had not been working on this particular day, the 29th of January. I had been at Castle Hayne before I went out to the fruit stand. I was at the Shamrock Grill at Castle Hayne. The Shamrock Grill. I did not have anything to drink while I was there. I met him there.

"RECROSS EXAMINATION by Mr. Larrick:

"My personal opinion as to how tall the man was that committed the robbery was that he was a couple of inches taller than I am. I am five foot five inches. That would make the man approximately five foot seven. His hair was about the same length as this gentleman here.

"COURT: For clarification, Mr. Strickland, this Court and this jury may not be clear as to what you are or are not saying so let me ask you this. This morning before the trial began were you then certain that this defendant was the

man who committed the robbery or not? Were you then certain or not?

"EXCEPTION NO. 5.

"A. At the time, yes. The more I looked at the man the more I thought about it. I am not sure. I can't say positively.

"COURT: So you are not saying you have now changed your mind.

"EXCEPTION NO. 6.

"A. No, sir. I am saying that I don't think this is the man that robbed the store.

"COURT: And what are the features that you say that you based your opinion upon that this is not the man?

"EXCEPTION NO. 7.

"A. Yes, sir.

"COURT: I say what is it you base your opinion upon?

"EXCEPTION NO. 8.

"A. He does not have a real flat nose.

"COURT: Anything else?

"EXCEPTION NO. 9.

"A. His height.

"COURT: What about that?

"EXCEPTION NO. 10.

"A. He is too tall.

"MR. LARRICK: Could I clarify that for the record. Who is too tall? What do you mean by that?

"A. The gentleman that robbed the fruit stand is shorter than this gentleman here.

"COURT: Have you seen this man with his shoes standing up this morning?

"EXCEPTION NO. 11.

"A. Yes, sir. When I first saw him this morning he was sitting in the far bench over there.

"COURT: Come around again and let him look at you again. Stand right there. And you see what kind of shoes he has got on, how high or how low they are. You can estimate what his height would be without his shoes on. What do you say about it?

"EXCEPTION NO. 12.

"A. I still say he is too tall.

"COURT: All right. That is all. You may come down.

"WITNESS EXCUSED."

We find nothing here which amounts to the trial court's expression of an opinion in violation of G.S. 1-180.

[5] The defendant's final assignment of error, that the court erred in its charge by misstating material facts not in evidence and by expressing an opinion in violation of G.S. 1-180, is also without merit. The first charge to which defendant excepts is the trial court's summary that the testimony of defendant's witness, Ethel Council (establishing an alibi), was "in some degree" corroborated by two of defendant's other witnesses. Defendant cites *State v. Byrd*, 10 N.C. App. 56, 177 S.E. 2d 738 (1970), for the proposition that the question of whether the testimony of one witness corroborates that of another is a question of fact for the jury. In that case, however, a new trial was ordered because the trial court instructed that the testimony of the State's prosecuting witness was corroborated by another witness. In the instant case the trial court stated that the testimony of defendant's witness who established an alibi for defendant was corroborated by another of defendant's witnesses—a statement which inured to the benefit of defendant.

[6] The second portion of the court's charge to which defendant took exception was a summary of Vera Garner's testimony that "although the defendant bore considerable resemblance that she could not say and was not certain" that he was the man committing the robberies. We find no assumption by the trial court of evidence totally unsupported by the record, and we do not find that use of the word "considerable" prejudiced the defendant.

The final portion of the court's charge to which defendant objected is its summary of the testimony of Alan Dale Strickland:

> "Now, to the testimony of the witnesses presented by the State but who testified that the defendant was not the man, that is the testimony of Alan Dale Strickland, who testified in substance that the person committing the acts was nervous and he got a good look at him, he had a moustache, a bushy haircut, a goatee, but that the defendant here charged is not the man who committed the acts, [that witness spoke a little less uncertain, that he simply did not know for certain one way or the other].
>
> "To the foregoing portion of the Charge in brackets, the defendant excepts.
>
> EXCEPTION NO. 17"

We think the record supports the part of the charge that Strickland was uncertain as to whether defendant was the one who committed the robbery. He stated that he did not think defendant was the robber but that at another time he had identified defendant as the robber. Taken in its full context, we find no prejudicial error to defendant.

No error.

Judges PARKER and MARTIN concur.

GEORGE EDWARD KELLY AND RUFUS HAMILTON KELLY v. MARY LEE BRILES AND RUTH ADDISON BRILES, INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF BERTIE WALLACE BRILES

No. 7718SC237

(Filed 4 April 1978)

1. Mines and Minerals § 2— failure to fence mine openings—intentional entry—no recovery for injury

Plaintiffs' complaint failed to state a cause of action based on G.S. 74-4 and G.S. 74-13 making it a criminal offense to fail to fence the opening of mines to prevent inadvertent entrance into them, since plaintiffs' complaint demonstrated that the minor plaintiff's entry into defendants' mine was intentional rather than inadvertent; there was no statutory duty placed upon de-

fendants to fence the mines so securely that even an intentional entry would be impossible; and, even if violation of the safety statute was negligence, plaintiffs could not recover because they could not show that failure to fence so as to prevent inadvertent entry was the proximate cause of an injury resulting from an intentional entry.

2. Mines and Minerals § 2; Negligence § 59.2— licensee in mine—duty to refrain from wilful and wanton negligence—complaint insufficient to state claim

Where plaintiffs' complaint alleged that people frequently visited mines on defendants' property and that defendants were aware of such use, but there was no evidence that defendants derived any benefits from such visits, the minor plaintiff who entered one of defendants' mines was a licensee to whom defendants owed only the duty to refrain from wilful and wanton negligence and from the commission of any act which would increase the hazard. Plaintiffs' complaint was insufficient to state a claim for negligence where there was no allegation of wilful and wanton negligence.

APPEAL by plaintiffs from *Walker, Judge*. Order granting motion to dismiss issued 18 January 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 19 January 1978.

Plaintiffs filed the complaint in this action 11 October 1976. Service upon the defendants was effected 13 October 1976. Plaintiffs' complaint included the allegations set out below which must be taken as true in ruling on a Rule 12(b)(6) motion.

On 12 October 1973, defendants owned certain property in Randolph County known as the Hoover Hill Gold Mining Land. Located on this property are abandoned gold mines. There are no barricades or fences blocking the entrance to the mines. The mines and mine shafts were in such condition that they could collapse at any time. Defendants had actual or constructive notice that the mines were "ultra hazardous" and in that dangerous condition. For many years, the mines had been a place of interest frequented by persons of all ages. Visitors explored the property and mines as if the land were a public park or tourist attraction. These persons frequenting the mines were unaware of the dangerous condition. Defendants were aware that the mines were being so used. Defendants were also aware that these persons were unaware of the dangerous condition of the mines. As plaintiff George Edward Kelly was entering one of the mines to explore it, a portion of the wall collapsed, and he was permanently injured.

Plaintiff, George Edward Kelly, joined by his father, Rufus Hamilton Kelly, filed suit against the defendants (landowners) seeking to recover both compensatory and punitive damages. Pursuant to Rule 12(b)(6) of the Rules of Civil Procedure, defendants moved for a dismissal for failure to state a claim upon which relief can be granted. Defendants argued that plaintiffs' complaint in no manner alleged any possible legal duty and that the complaint revealed, as to plaintiff George Edward Kelly, contributory negligence as a matter of law. Considering the complaint only, the trial court granted defendants' motion and entered an order dismissing the action. Plaintiffs appealed from that order of dismissal.

Schoch, Schoch and Schoch, by Arch Schoch, Jr., for plaintiff appellants.

Douglas, Ravenel, Hardy, Crihfield & Bullock, by Frank W. Bullock, Jr., for defendant appellees.

MORRIS, Judge.

Plaintiffs' complaint should be dismissed under Rule 12(b)(6) only if "it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." (Emphasis deleted.) *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E. 2d 161, 166 (1970), *quoting* 2A Moore's Federal Practice (2d ed. 1968), § 12.08. We now review the complaint in this action in light of the requirements of *Sutton v. Duke* to determine whether it states a cause of action under G.S. 74-13 (now repealed) and, if not, whether it states a cause of action on the basis of negligence.

[1] Plaintiff has relied in part upon former G.S. 74-4 and G.S. 74-13 to state a claim. G.S. 74-4 was a statute enacted to protect the public health and safety. It provided that "[a]ll underground entrances to any place not in actual course of working or extension shall be properly fenced across the whole width of such entrance so as to prevent persons from inadvertently entering the same." G.S. 74-4. A subsequent section of the act imposes criminal penalties for a violation of the statute. G.S. 74-13, furthermore, created a cause of action for a person injured by a mineowner's willful failure to comply with G.S. 74-4. These statutes, although

now repealed, were in effect at the time of the occurrence alleged in the complaint.

G.S. 74-4 requires that the openings of mines "be properly fenced . . . *to prevent persons from inadvertently entering the same.*" (Emphasis added.) Plaintiffs' complaint alleges that plaintiff "*decided to explore* one of the mines" (emphasis added), and "*was climbing in* one of the mines" (emphasis added) when he was injured. Sound statutory construction requires that the plain meaning of the word "inadvertently" be used. Webster's Third New International Dictionary (1968) in its definition of "inadvertent" suggests four synonyms: heedless, negligent, inattentive, and unintentional. When the plain meaning of "inadvertently" is used, it becomes obvious that the purpose of the requirement of G.S. 74-4 was to prevent persons from accidentally falling into abandoned mines. In this case, the plaintiff intentionally climbed into the mine.

There was no statutory duty to fence or barricade the mines so securely that even an intentional entry would be impossible. The statute only imposed the duty to fence or barricade "so as to prevent persons from inadvertently entering the same." Because the cause of action purportedly stated in plaintiffs' complaint necessitates a duty to fence so as to prevent intentional entry, plaintiff cannot rely upon G.S. 74-4 and 13.

In addition, the North Carolina Courts have repeatedly said that even though violation of a health or safety statute is negligence, there will be liability only if the violation is the proximate cause or one of the proximate causes of the injury. *See, e.g., Bell v. Page*, 271 N.C. 396, 156 S.E. 2d 711 (1967); *Smith v. Metal Co.*, 257 N.C. 143, 125 S.E. 2d 377 (1962). It seems apparent that under no state of facts could the failure to fence so as to prevent inadvertent entry be the proximate cause of an injury resulting from an intentional entry. We are of the opinion that plaintiffs' cause of action, if any, does not come within the purview of the statutes upon which they rely.

[2] We now determine whether plaintiffs' complaint states a claim under a negligence theory. The complaint alleges that persons frequently visited the mines and that defendants were well aware of that use, but the complaint alleges no benefit to the defendants from the visits. Under these facts, the plaintiff clearly

was not an invitee when he entered the mine but would occupy the status of a licensee when he entered the mine since the open use by the public implies an invitation. *See generally Hood v. Coach Co.*, 249 N.C. 534, 107 S.E. 2d 154 (1959).

The duties of a landowner to a licensee are substantially the same as to a trespasser. *Wagoner v. R.R.*, 238 N.C. 162, 77 S.E. 2d 701 (1953). However, even though one is only a licensee, the landowner cannot, while the licensee is on the premises, increase the hazard through active and affirmative negligence in the operation or management of his property. *Wagoner v. R.R., supra; Jones v. R.R.*, 199 N.C. 1, 153 S.E. 637 (1930); *Batts v. Telephone Co.*, 186 N.C. 120, 48 S.E. 893 (1923). Furthermore, a landowner will be liable to a licensee for injury caused by willful or wanton conduct. *Haddock v. Lassiter*, 8 N.C. App. 243, 174 S.E. 2d 50 (1970).

> "The duty an owner owes a licensee is described in detail in *Dunn v. Bomberger*, 213 N.C. 172, 195 S.E. 364:
>
> > 'As plaintiff's intestate was a licensee, defendant did not owe him the duty to keep his premises in a reasonably safe condition. The only duty resting upon the defendant was to refrain from willful or wanton negligence and from the commission of any act which would increase the hazard. The owner of land is not required to keep his premises in a suitable or safe condition for those who come there solely as licensees and who are not either expressly invited to enter or induced to come upon them for the purpose for which the premises are appropriated and occupied. In authoritative decisions of this and other jurisdictions the degree of care to be exercised by the owner of premises toward a person coming upon the premises as a bare or permissive licensee for his own convenience is to refrain from willful or wanton negligence and from doing any act which increases the hazard to the licensee while he is upon the premises. The owner is not liable for injuries resulting to a licensee from defects, obstacles or pitfalls upon the premises unless the owner is affirmatively and actively negligent in respect to such defect, obstacle or pitfall while the licensee is upon his premises, resulting in increased hazard and danger to the licensee. *Brigman v.*

Construction Co., 192 N.C., 791, and cases there cited. The *Brigman* case is reported and annotated in 49 A.L.R., 773.'" *Clarke v. Kerchner*, 11 N.C. App. 454, 460, 181 S.E. 2d 787, 791 (1971), *cert. den.* 279 N.C. 393 (1971).

Most jurisdictions now impose a duty upon the landowner to warn licensees of hidden dangers known to the landowner. *See, e.g., Holcombe v. Buckland*, 130 F. 2d 544 (4th Cir. 1942); The Friendship II, 113 F. 2d 105 (5th Cir. 1940), *rev'd on other grounds* 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903 (1941); *Haag v. Stone*, 127 Ga. App. 235, 193 S.E. 2d 62 (1972); *Recreation Centre Corporation v. Zimmerman*, 172 Md. 309, 191 Atl. 233 (1937); *Malmquist v. Leeds*, 245 Minn. 130, 71 N.W. 2d 863 (1955); *Reagan v. Perez*, 215 Va. 325, 209 S.E. 2d 901 (1974). *But see, e.g., Louisville & Nashville Railroad Company v. Hobbs*, 155 Ky. 130, 159 S.W. 682 (1913); *Reardon v. Thompson*, 149 Mass. 267, 21 N.E. 369 (1889). *See also* Restatement (Second) of Torts, §§ 335 and 342 (1964); Annot., 55 A.L.R. 2d 525 (1957). The requirements of the Restatement (Second) of Torts impose an even more stringent duty upon the landowner to inspect the premises for potential danger to licensees. North Carolina, however, retains the rule that "the licensee who enters on premises by permission only goes there at his own risk and enjoys the license subject to its concomitant perils," *Pafford v. Construction Co.*, 217 N.C. 730, 737, 9 S.E. 2d 408 (1940), with the landowner being assessed for liability only for willful or wanton negligence, and the commission of any act which would increase the hazard to the licensee while he is upon the premises. *Clarke v. Kerchner*, supra. It is not within our province to apply a different rule.

The complaint in this action does not allege willful and wanton negligence, nor do the plaintiffs seriously contend that it does.

For the reasons stated herein, the judgment of the trial tribunal must be

Affirmed.

Judges CLARK and MITCHELL concur.

W. W. CARSON, T/A CARSON GAS COMPANY v. PHILLIP D. SUTTON AND CONNIE J. SUTTON

No. 773SC218

(Filed 4 April 1978)

1. **Rules of Civil Procedure § 56— motion for summary judgment—affidavits not inherently suspect**

Affidavits filed by plaintiff in support of his motion for summary judgment were not "inherently suspect," even though the affiants may have been interested in the outcome of the case, where all relevant facts to which the affiants testified in their affidavits were not peculiarly within their own knowledge but were equally available to defendants.

2. **Rules of Civil Procedure § 56; Bills and Notes § 20— action on note—summary judgment**

In this action to recover on a promissory note, affidavits filed by plaintiff were not merely reiterative of the allegations of the complaint but were sufficient to support plaintiff's motion for summary judgment, and summary judgment was properly entered for plaintiff where defendants did not respond to plaintiff's motion by affidavit but chose to rely on the generalized denials in their answer.

3. **Rules of Civil Procedure § 56— summary judgment—right to trial by jury**

The summary judgment procedure does not deprive a litigant of the constitutional right to a trial by jury.

APPEAL by defendants from *Ervin, Judge*. Judgment entered 14 January 1977 in Superior Court, PITT County. Heard in Court of Appeals 18 January 1978.

Plaintiff commenced this civil action on 18 October 1976 by filing a complaint alleging that defendants executed and delivered to plaintiff on or about 16 January 1976, a promissory note in the amount of $14,291.89 bearing interest at the rate of 8% per annum beginning 18 December 1976, and that the note was due and payable on or before 15 October 1976. The copy of the note attached to the complaint reveals that presentment, protest and demand, and notice thereof were waived in the note. The complaint further alleged that the total amount of the note and interest thereon were due. Plaintiff prayed judgment in the amount of $14,291.89 plus interest and costs. Defendants answered denying all material allegations of the complaint.

On 29 December 1976, plaintiff filed a motion for summary judgment. The motion was supported by two affidavits. The affidavit of plaintiff contained statements that the defendants had executed the note, that the note was an unconditional promise to pay, that the sum of $14,291.89 was justly due on or before 15 October 1976, that nothing had been paid on the note, that Exhibit "A" attached to the affidavit (which was exactly the same as Exhibit "A" attached to the complaint) was a copy of the note, and that defendants were not entitled to any credits or setoffs. The affidavit of Frances R. Carson stated that she became acquainted with the defendants and their signatures while working for Carson Gas Company, that she had examined the note in question, that the signatures of Phillip D. Sutton and Connie J. Sutton on the note were true and genuine, that she arranged for the execution of the note by defendants, that defendant Connie J. Sutton delivered the note to her for the benefit of Carson Gas Company, and that the note was given for the payment of accounts due and owing Carson Gas Company.

Defendants did not respond to plaintiff's motion by affidavit. Defendants' attorney merely filed a statement that defendants were entitled to a trial under "our Constitutions" since they had denied the material allegations of plaintiff's complaint and that the affidavits filed by plaintiff were merely reiterative of the allegations in plaintiff's complaint. The trial court found that there was no genuine issue as to any material fact, concluded that plaintiff was entitled to judgment as a matter of law, and granted summary judgment. Defendants appealed.

Everett and Cheatham, by C. W. Everett, Sr., and Edward J. Harper, for plaintiff appellee.

Willis A. Talton for defendant appellants.

MORRIS, Judge.

Defendants contend that the trial court erred in granting plaintiff's motion for summary judgment. In support of their contention, defendants advance the arguments (1) that the supporting affidavits are "merely reiterative" of the allegations in plaintiff's complaint and (2) that the supporting affidavits are "inherently suspect".

Summary judgment may be granted where "the pleadings . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). The party moving for summary judgment has the burden of showing there is no genuine issue of material fact. *Loan Corp. v. Miller*, 15 N.C. App. 745, 190 S.E. 2d 672 (1972). However,

> "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." G.S. 1A-1, Rule 56(e).

Kidd v. Early, 289 N.C. 343, 222 S.E. 2d 392 (1976), dealt with circumstances similar to those presently before this Court and held that

> ". . . summary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate." 289 N.C. at 370, 222 S.E. 2d at 410.

This Court is confronted with two appropriate lines of inquiry: (1) Are there only "latent doubts" as to the affiants' credibility? (2) Is summary judgment otherwise appropriate?

Defendants contend that the testimony of the affiants is "inherently suspect" and, therefore, that plaintiff cannot meet the test of *Kidd v. Early* which allows only "latent doubts" as to the affiants' credibility.

[1] In *Kidd v. Early, supra*, the Court stated that

> ". . . the motion should ordinarily be denied even though the opposing party makes no response, if (1) the movant's supporting evidence is self contradictory or circumstantially

> suspicious or the credibility of a witness is inherently suspect either because he is interested in the outcome of the case and the facts are peculiarly within his knowledge or because he has testified as to matters of opinion involving a substantial margin for honest error. . . ." 289 N.C. at 366, 222 S.E. 2d at 408.

In the present case, for the affiants' testimony to be found "inherently suspect" the court would have to ascertain not only that the affiants were "interested in the outcome" but also that the affiants were testifying as to facts peculiarly within their own knowledge. Clearly, that situation does not exist in this case because all relevant facts to which the witnesses testified in their affidavits would be equally available to the defendants. The mere fact that the witness is an interested party does *not* render his testimony "inherently suspect". *Taylor v. City of Raleigh*, 290 N.C. 608, 625, 227 S.E. 2d 576, 586 (1976); *Kidd v. Early*, supra. Thus, there are only "latent doubts" as to the affiants' credibility.

Defendants do not seriously contend that they set forth specific facts showing there was a genuine issue of fact. Defendants admittedly have chosen to rely on the generalized denials in their answer.

[2] Defendants, in essence have argued that plaintiff's motion for summary judgment was not "appropriate" because the affidavits do not adequately "support" the motion. Defendants contend that the affidavits of W. W. Carson and Frances R. Carson are "merely reiterative" of the allegations in the complaint and that these affidavits only amount to plaintiff's "yelling a little louder". Thus, defendants conclude that plaintiff did not truly support his motion for summary judgment.

Defendants' argument rests heavily on *Loan Corp. v. Miller, supra. Loan Corp. v. Miller*, however, is clearly distinguishable. In that case, the flaw was not the moving party's failure to "support" her motion. The flaw was that the pleadings and affidavit affirmatively showed that a genuine issue of fact did exist: Was the defendant's signature forged? In the present case, however, just the opposite is true. No real issue of fact has been raised. There is only defendants' generalized denial.

Even assuming that an affidavit which was "merely reiterative" of the pleadings would not support a motion for sum-

mary judgment, summary judgment would still be appropriate in this case. The affidavits did reiterate the execution and delivery of the note and its terms and conditions. The affidavits also set out the reason for the execution of the note, certain circumstances surrounding the execution, the genuineness of the signatures, and the absence of any setoffs. Thus, in this case, the affidavits were not merely reiterative; they filled in numerous gaps left by the complaint.

Thus, plaintiff met the requirements of *Kidd v. Early* for obtaining a summary judgment. Indeed, a more appropriate case for applying *Kidd v. Early* is difficult to imagine. Where, as in this case, a party has shown that he is entitled to relief and the opposing party offers not even the slightest suggestion of a genuine issue of fact, the motion for summary judgment should be granted.

[3] Finally, defendants have leveled a broadside attack on *Kidd v. Early* and the whole summary judgment procedure and have asserted that the procedure so applied amounts to a denial of the right to trial by jury. The same issue was addressed by the Court in *Kidd v. Early*. The Court held specifically that the procedure did not violate either the Constitution of North Carolina or the Constitution of the United States. *Kidd v. Early*, 289 N.C. at 368-70, 222 S.E. 2d at 409 and 410.

Affirmed.

Judges CLARK and MITCHELL concur.

STATE OF NORTH CAROLINA v. WILLIE SNEAD, JR.

No. 7711SC847

(Filed 4 April 1978)

1. **Automobiles § 126.5— driving under the influence— statements by defendant— evidence withdrawn— no prejudice**

Defendant was not prejudiced where the trial court erroneously admitted defendant's answers to an officer's questions in the course of the officer's completing an accident identification report at the police station, since that testimony was admitted during the morning and the court, following a lunch

recess, withdrew the testimony from the jury's consideration; the evidence which was properly before the jury was sufficient to sustain the verdict; and the mind of the average juror would not find the State's case significantly less persuasive had the later withdrawn testimony never been admitted.

2. **Automobiles § 129— driving under the influence—no instruction on reckless driving—no error**

In a prosecution for driving under the influence of intoxicating liquor, the trial court did not err in failing to instruct on the lesser included offense of reckless driving, since there was no evidence to support such a charge. G.S. 20-140(c).

3. **Automobiles § 127.1— driving under the influence—sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for driving under the influence of intoxicating liquor where it tended to show that defendant was involved in a one-car accident; defendant told the investigating officer that he was driving the car; the officer detected the odor of alcohol about defendant; and a breathalyzer test administered to defendant resulted in a reading of .21.

Judge VAUGHN dissenting.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 16 May 1977 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 6 February 1978.

Defendant was convicted of driving under the influence of intoxicating liquor and given a suspended sentence. At the trial, the State's evidence tended to show that: the investigating officer arrived at the scene of a one-car accident at about 6:25 p.m. on 24 October 1976; he asked who had been driving the car, and defendant replied that he had been; the officer detected a slight odor of alcohol and asked defendant to get into his patrol car; and after completing his field investigation, the officer returned to his car, noticed a strong odor of alcohol, and arrested defendant for driving under the influence, warning him of his *Miranda* rights.

The evidence further showed that the officer took defendant to the police station and administered certain balance tests, and defendant had difficulty performing them and that defendant was not again advised of his *Miranda* rights at the station. A voir dire was held, and the trial court ruled that defendant's answers to questions put to him at the station were admissible. The answers tended to show that he was somewhat confused, that he had consumed two beers before the accident, and that by his own admission, he "could be" under the influence. Following a lunch recess,

the trial court changed its ruling and instructed the jury as follows:

> "Members of the jury, before lunch, the witness, Sykes, was allowed to testify that the Defendant made certain answers to questions put to him at the Breathalyzer Room in the Smithfield Police Department building. I have now ruled that that was error and that the evidence respecting the Defendant's answers to the questions put to him at that time by Officer Sykes was not properly admissible. I now direct you to disregard all of the testimony of Officer Sykes relating to answers given him at the Smithfield Police Department by the Defendant, to put entirely out of your mind any responses made by the Defendant to any questions there put to him by Officer Sykes, and to allow none of his answers to be considered by you, or to have any effect upon your deliberations and verdict. . . ."

The State also presented the testimony of the officer who had administered the breathalyzer test to defendant, the results being a reading of .21.

Attorney General Edmisten, by Associate Attorney David Roy Blackwell and Assistant Attorney General Isaac T. Avery III, for the State.

James E. Floors and James W. Narron, for defendant appellant.

ERWIN, Judge.

[1] Defendant first contends that the admission of his answers to the officer's questions in the course of completing an accident identification report at the police station were erroneously admitted. The trial court first allowed such testimony, but following the lunch recess, it reversed its ruling and instructed the jury as set forth above. Thus, we need only address the second aspect of defendant's argument, namely that the instruction was insufficient to cure the error. Unless the evidence is obviously prejudicial, particularly if repeated or allowed to remain before the jury for an unduly long period, erroneously admitted evidence which is later excluded and the jury instructed to disregard it will ordinarily be found to be harmless error. 1 Stansbury's North

Carolina Evidence, § 28 (Brandis Revision 1973). The law will presume that the jury followed the judge's instructions. *State v. Long*, 280 N.C. 633, 187 S.E. 2d 47 (1972). Our impression of the record is that the interval during which the erroneously admitted evidence was before the jury was not unduly long and that there were no subsequent events at the trial which tended to re-emphasize the testimony. *See State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974), *modified on other grounds*, 428 U.S. 903, 49 L.Ed. 2d 1207, 96 S.Ct. 3205 (1976). Further, the cases indicate that when this issue is before us, we should examine the nature of the evidence and its probable influence upon jurors' minds in reaching their verdict. *State v. Crowder, supra.* Here we find that the evidence properly before the jury was sufficient to sustain the verdict. The mind of the average juror would not find the State's case significantly less persuasive had the later withdrawn testimony never been admitted. *See Schneble v. Florida*, 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056 (1972).

[2] Defendant next assigns error to the trial court's failure to instruct the jury on N.C. G.S. 20-140(c), which states:

> "Any person who operates a motor vehicle upon a highway or public vehicular area after consuming such quantity of intoxicating liquor as directly and visibly affects his operation of said vehicle shall be guilty of reckless driving and such offense shall be a lesser included offense of driving under the influence of intoxicating liquor as defined in G.S. 20-138 as amended."

Our inquiry into this assignment must be: Was there any evidence here which tended to show that defendant's consumption of intoxicating liquor "directly and visibly" affected his operation of his motor vehicle? Put differently, was there sufficient evidence to sustain a verdict of defendant's guilt of having violated G.S. 20-140(c)? *See* 4 N.C. Index 3d, Criminal Law § 115; *State v. Pate*, 29 N.C. App. 35, 222 S.E. 2d 741 (1976). We hold that there was not such evidence, and the trial court properly refused to instruct the jury on reckless driving. Defendant cites *State v. Burrus*, 30 N.C. App. 250, 226 S.E. 2d 677 (1976), in support of this assignment. In that case, however, the physical facts at the accident scene provided strong evidence of a violation of G.S. 20-140(c), defendant having been found by the officer slumped over the

steering wheel with a highway warning barrel under the front of the car, three barrels having been knocked over. Here such strong physical evidence is not present; in fact, defendant told the officer that he had had to swerve to avoid another car.

[3] Defendant's final assignment of error is that the trial court erred in denying his motions for judgment as of nonsuit and to set aside the jury's verdict as being against the weight of the evidence. It is well settled that on motion for nonsuit, all evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference deducible thereform. When there is sufficient evidence, direct or circumstantial, by which the jury could find the defendant had committed the offense charged, then the motion should be denied. *See State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093, 51 L.Ed. 2d 539, 97 S.Ct. 1106 (1977); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); 4 N.C. Index 3d, Criminal Law § 106.2.

The record does not reveal how long prior to the officer's arrival the accident had occurred, how long defendant had been at the scene, or when defendant had consumed intoxicating liquor. However, defendant told the officer he had been driving, the officer went to the scene in response to a radio call, and when he arrived, there were several people there. Further, the officer detected the odor of alcohol about defendant, and the breathalyzer test results were .21. There was sufficient evidence from which the jury could logically conclude that defendant was under the influence at the time of the accident. *See State v. Cummings*, 267 N.C. 300, 148 S.E. 2d 97 (1966); *State v. Lindsey*, 264 N.C. 588, 142 S.E. 2d 355 (1965).

In defendant's trial and judgment appealed from, we find

No error.

Judge HEDRICK concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

Sykes, the arresting officer, testified, in part, as follows:

"In my opinion, the Defendant was under the influence at the scene and at the police department, but I don't know what his condition was, if any, at the time the accident occurred."

The officer's candid statement sums up my view of the evidence in this case. There is absolutely no evidence as to when defendant operated the vehicle. The jury could not infer, therefore, that because he was under the influence when seen by the officer that he was under the influence at some indefinite time in the past when he operated the vehicle. Defendant admitted that he had been driving the vehicle but did not say when. Trooper Sykes testified that he went to the scene in response to a radio call and saw a number of people in addition to the defendant. If the officer's investigation and especially his interrogation of these potential witnesses had disclosed any evidence tending to show when defendant was last known to have operated the vehicle, surely the State would have offered that evidence at trial. In *State v. Cummings*, cited by the majority, the engine of defendant's vehicle was still hot when the officers arrived. The radiator was leaking, and the officers followed a trail of water from the point of impact to defendant's vehicle. The Court noted that it was reasonable to believe that "on the busy streets of High Point the trail of water would have been eradicated by other cars in a few minutes." In *State v. Lindsey*, also cited by the majority, defendant was seen operating the vehicle less than one-half hour before officers arrived at the scene of the wreck. In the case at bar, the State has left a gap in the evidence that this Court should not attempt to close. The motion for nonsuit should have been allowed.

STATE OF NORTH CAROLINA v. JAMES ELWOOD JOHNSON

No. 7714SC929

(Filed 4 April 1978)

1. Criminal Law § 29.1— plea of insanity—time for raising—method of raising affirmative defense

The trial court did not err in denying defendant's motion, made when the case was called for trial, to plead temporary insanity, since defendant failed to comply with G.S. 15A-959 which requires that, if a defendant intends to raise the defense of insanity but does not plan to put on expert evidence, he must

file notice of such intention within the time provided for the filing of pretrial motions under G.S. 15A-952; moreover, the court's denial of defendant's motion did not deprive him of his right to present his affirmative defense to the jury, since, under the general plea of not guilty, such as defendant made in this case, a defendant may prove affirmative defenses such as insanity.

2. Criminal Law § 75.11— incriminating statement—waiver of right to remain silent inferred

The trial court did not err in admitting into evidence an incriminating statement made by defendant to a public safety officer who arrested him without first making specific findings as to its voluntariness, since there was no conflicting evidence with respect to the statement and since the court, under the circumstances surrounding the interrogation of defendant, could infer a knowing and intelligent waiver by defendant of his right to remain silent.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 12 July 1977, in Superior Court, DURHAM County. Heard in the Court of Appeals 7 March 1978.

Defendant was charged upon proper bills of indictment with secret assault on, and assault with intent to kill, his wife Glenna Moore Johnson and with secret assault on, and assault with intent to kill his sister-in-law Eunice Bertha Moore. He waived formal arraignment and pleaded not guilty. At trial, the State's evidence tended to show that defendant and his wife had separated in February 1977, and that defendant had harassed his wife on various occasions during the separation. On the night of 20 April 1977, as defendant's wife and sister-in-law were leaving a church revival, they were stopped by defendant. According to Mrs. Johnson, defendant asked her to get into his car and, upon her refusal, stated that if she didn't get in his car, he would shoot both of the women. Defendant did shoot both women, attempted but failed to shoot himself, and then fainted. A Public Safety Officer for the City of Durham was also at the revival and, upon learning of the incident, ran to defendant and apprehended him. Various other witnesses for the State, including Mrs. Moore, substantially verified Mrs. Johnson's testimony concerning the shooting.

Defendant elected to put on no evidence. He moved for judgment as of nonsuit as to both counts in the two indictments and was granted the motion for nonsuit as to secret assault. The jury found him guilty on the two counts of assault with a deadly weapon with intent to kill and he was sentenced to prison for not less than fifteen nor more than twenty years.

Defendant appeals.

Attorney General Edmisten, by Associate Attorney Donald W. Grimes, for the State.

Blackwell M. Brogden and Blackwell M. Brogden, Jr., for defendant appellant.

ARNOLD, Judge.

[1] On 11 July 1977, when this case was called for trial, defendant through counsel filed a Notice of Defense of Temporary Insanity. The trial court denied defendant's motion, and defendant thereupon entered a plea of not guilty. Now it is argued that the trial court erred in denying the defendant his right to plead not guilty by reason of temporary insanity. We cannot agree.

G.S. 15A-959 states that, if, as here, a defendant intends to raise the defense of insanity but does not plan to put on expert evidence, he must file notice of such intention within the time provided for the filing of pretrial motions under G.S. 15A-952. Although no reference is made to a specific section of G.S. 15A-952, it seems clear that G.S. 15A-952(c) covers the time within which pretrial motions must be made. That section states that, unless otherwise provided, pretrial motions must be made at or before the time of arraignment if arraignment is held prior to the session of court for which the trial is calendared. If arraignment is to be held at the session for which the trial is calendared, pretrial motions must be filed no later than five o'clock p.m. on the Wednesday prior to the session when trial begins.

In the instant case, having waived formal arraignment, the defendant was bound to give notice no later than five o'clock p.m. on the Wednesday prior to the session. This he did not do. In order to obtain court permission for notice filed later than the G.S. 15A-952(c) deadline, the defendant must show cause. G.S. 15A-959(a). Defendant, in this case, also failed to show cause for the late notice of defense of temporary insanity.

Defendant argues that the court's denial of his motion deprived him of his right to present his affirmative defense to the jury. This argument is without merit. Our case law has clearly established that under the general plea of not guilty, such as defendant made in this case, a defendant may prove affirmative

defenses such as insanity. *See, e.g. State v. Williams*, 214 N.C. 682, 200 S.E. 399 (1939). This general rule was applied to a situation similar to the one before us in *State v. Mathis*, 293 N.C. 660, 239 S.E. 2d 245 (1977). In that case, the Supreme Court held that, where defendant's notice of the proposed insanity plea was rejected, the defendant nonetheless could, under the general "not guilty" plea, put on evidence of his insanity. We are aware of the inconsistencies of requiring notice on the one hand and allowing evidence even in the absence of notice on the other hand. Under current law, however, this is the result we are compelled to reach.

[2] A second argument made by defendant is that the trial court erred in admitting into evidence an incriminating statement made by defendant to Public Safety Officer J. L. Hughes. The record shows that Hughes took defendant into custody, handcuffed him, and read him the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). When asked whether he understood his rights, defendant answered "uh huh." Thereafter, according to the testimony of Officer Hughes:

> "Mr. Johnson stated that the handcuffs were hurting his wrists and asked me would I take them off. I told him I would check them when we got downtown to headquarters and loosen them if they were hurting, and I said 'I imagine those two ladies are hurting right now. Do you realize, sir, that you could have killed those two ladies?'
>
> * * * *
>
> "At this point Mr. Johnson said, 'God damn it, that is what I meant to do.' "

It is defendant's contention that the admission of this testimony was error since there was no competent evidence to support a ruling that the statement of the defendant had been made voluntarily and without coercion, or that the statement had been made after a voluntary and informed waiver of defendant's right to remain silent. Defendant cites *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971), which held that an intelligent waiver of the right to counsel could not be inferred when defendant was given the *Miranda* warnings, stated that he knew and understood his rights, and failed to request counsel. The requirements of the *Blackmon* case, however, have been relaxed by *State v. Swift*, 290

N.C. 383, 226 S.E. 2d 652 (1976). See *State v. Rives*, 31 N.C. App. 682, 230 S.E. 2d 583 (1976). The *Swift* decision allows the court to infer a knowing and voluntary waiver of the right to remain silent, as well as other rights secured by the Fifth Amendment, from the circumstances surrounding the explanation of rights and interrogation of the defendant.

The record discloses that immediately following a question concerning Officer Hughes's conversation with defendant, the court held a *voir dire* hearing in which not only defense counsel but also the court questioned Hughes concerning defendant's statement. We find no error in the trial court's failure to make findings, since, under *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976), our Supreme Court held that in the absence of conflicting evidence such findings are not strictly required.

Furthermore, we find that the trial court did not err in admitting defendant's statement since, under the circumstances surrounding the interrogation of defendant, the court clearly could infer a knowing and intelligent waiver. The court questioned Officer Hughes at length about defendant's mental capacity at the time. Witness Hughes stated that defendant talked "like he knew what he was doing." Moreover, there was no evidence whatsoever of any action by the public safety officer which coerced defendant into making the incriminating statement.

Another argument which deserves consideration is defendant's assertion that the court erred in admitting into evidence a box of bullets discovered in defendant's automobile by one of the investigating officers. According to the testimony of Officer Early, he saw the box of cartridges on the floor of defendant's vehicle after he stuck his head through an open window. Assuming, contrary to our view, that the search, as defendant argues, was in violation of the rights of defendant under the Fourth Amendment of the United States Constitution, we find that the trial court's error in allowing this illegally seized material into evidence was harmless beyond a reasonable doubt. *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970).

We have reviewed defendant's other assignments of error and find

No error.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. ROBERT BOYCE SETZER

No. 7725SC832

(Filed 4 April 1978)

1. **Criminal Law § 142.3— probation—condition forbidding loitering around public buildings—reasonableness**

A condition of defendant's probation that he not loiter in or around the courthouse or any other public building unless on business did not amount to banishment, since defendant was not required to stay completely away from the public buildings, but was required only to limit his frequenting of these places to those occasions on which he had business; moreover, this condition of defendant's probation was reasonably related to the offense for which defendant was convicted, unlawful entry, and thus tended to further his reform, since the conduct which precipitated defendant's troubles in the first instance was his breaking into a courtroom, and the overriding concern in defendant's situation was that he used public buildings as temporary abodes.

2. **Criminal Law § 143.6— probation revocation hearing—violation of condition of probation—sufficiency of finding**

Where a condition of defendant's probation was that he not loiter in or around the courthouse or any other public building unless on business, the trial court's finding in a probation revocation hearing that defendant was in the jail building on the night in question and was not on any lawful business at that time was sufficiently specific for the court to determine that this conduct violated the condition imposed.

APPEAL by defendant from *Grist, Judge.* Judgment and commitment entered 20 July 1977 in Superior Court, CATAWBA County. Heard in the Court of Appeals 3 February 1978.

After trial *de novo* before a jury in Superior Court on 20 June 1977, defendant was found guilty of the misdemeanor offense of unlawful entry. He was sentenced to two (2) years imprisonment, execution thereof suspended for five (5) years upon the following conditions, to which defendant assented: (1) that he pay the costs of the action; (2) that he obtain a permanent place to live; and (3) that he not loiter on the courthouse grounds or in the courthouse or any other public building unless he is there on business.

On 7 July 1977, defendant was served with a notice of intent to pray revocation of the suspended sentence on the ground that he willfully violated the terms of the judgment by loitering on the second floor of the Catawba County Jail building on 3 July 1977.

At the revocation hearing on 20 July 1977, State's evidence tended to show that at 10:00 p.m. on 3 July 1977 defendant was seen looking out of a window in the men's restroom on the second floor of the jail building. The building was closed except for the Sheriff's Department on the third floor. The deputy sheriff who noticed defendant proceeded to the second floor and found the door to the men's restroom locked. After several demands, defendant unlocked the door. He was observed to be in a drunken condition with a half pint of wine in his possession.

Defendant's evidence tended to show that he has a kidney problem which necessitated his using the bathroom on the evening in question. Someone was in the first floor restroom, so defendant went to the second floor. The bottle of wine did not belong to defendant, but was in the restroom trash can.

From the evidence presented, the court found that defendant had willfully and without lawful excuse violated the terms of his suspended sentence in that he was in the Catawba County Jail building on 3 July 1977 and was not there for business reasons. The court ordered defendant imprisoned for two (2) years. Defendant appealed.

Attorney General Edmisten, by Associate Attorney R. W. Newsom III, for the State.

Isenhower and Long, by David L. Isenhower, for the defendant.

MARTIN, Judge.

[1] Defendant contends that the condition he is accused of violating is invalid because it is unreasonable and is imposed for an unreasonable length of time.

In support of this contention defendant first argues that the condition that defendant not loiter in or around the courthouse or any other public building unless on business is void in that it amounts to banishment. We disagree.

It is well settled law that "[i]n North Carolina a court has no power to pass a sentence of banishment; and if it does so, the sentence is void." *State v. Doughtie*, 237 N.C. 368, 74 S.E. 2d 922 (1953); *State v. Culp*, 30 N.C. App. 398, 226 S.E. 2d 841 (1976). In

Culp this Court stated, quoting from 8 C.J.S. Banishment, p. 593 (1962), that "[t]he concept of banishment has been broadly defined to include orders compelling individuals '. . . to quit a city, place, or country, for a specific period of time, or for life.' " In the instant case, defendant was clearly not compelled to "quit" the courthouse and other public buildings; rather, the condition imposed merely limited his frequenting of these places to those occasions on which he had business.

Defendant further argues that the subject condition is unreasonable for the reason that it bears no reasonable relationship to the offense for which defendant was convicted and thus, does not tend to further his reform.

As a general proposition, it is true that the primary purpose of a suspended sentence is to further the reform of the defendant. *State v. Smith*, 233 N.C. 68, 62 S.E. 2d 495 (1950). We are of the opinion that the condition complained of in the instant case does not contravene this principle. The conduct which precipitated defendant's troubles in the first instance was his breaking into a courtroom. He was thereafter convicted of unlawful entry. The overriding concern in defendant's situation was that he used public buildings as temporary abodes. We can perceive of no condition more clearly related to preventing this unlawful use of public property than to limit defendant's access to these buildings to business purposes only.

Defendant also argues that the subject condition is imposed for an unreasonable length of time. We disagree. The five (5) year suspension period is within the statutory limit fixed by G.S. 15-200, and on the facts of this case, we cannot find that it was unduly burdensome. Defendant's first assignment of error is overruled.

[2] In the only other assignment of error which merits our attention, defendant argues that the trial court's finding of fact fails to support its conclusion that defendant violated the subject condition. Specifically, defendant contends that the court failed to find that defendant was "loitering."

Regarding the necessity of specific findings of fact upon revocation of a suspended sentence, our Supreme Court, in *State v. Davis*, 243 N.C. 754, 92 S.E. 2d 177 (1956), stated:

". . . [W]here the finding of the court does not state wherein a defendant has violated the conditions and there is a question as to the validity of one or more of the conditions imposed, the defendant is entitled to have the cause remanded for a specific finding as to wherein he has violated the conditions upon which the sentence was suspended. It is only by such a finding that a defendant may be able to test the validity of a condition he believes to be illegal and void in the event the purported violation is based on such condition."

In accord is *State v. Langley*, 3 N.C. App. 189, 164 S.E. 2d 529 (1968).

The specificity contemplated by these decisions requires the trial judge to go beyond the summary finding that a defendant has "willfully violated" the terms of his suspended sentence. The findings should refer to the *manner* in which defendant has violated conditions imposed. *See State v. Langley, supra.* In the instant case, the findings of the court upon which the revocation of defendant's suspended sentence is based do not contain the word "loiter." However, the court's finding that defendant was in the jail building on the night in question and was not on any lawful business at that time was sufficient, in point of specificity, for the court to determine that this conduct violated the condition imposed. We are bound by this finding. Accordingly, we overrule this assignment of error.

We have carefully reviewed the remaining assignments of error and find them to be without merit.

The judgment of the trial court revoking defendant's suspended sentence is affirmed.

Affirmed.

Judges PARKER and ARNOLD concur.

C. THOMAS WOOD, J. P. RIDDLE, AS OWNERS AND LESSEES UNDER LONG-TERM LEASE, AND DONALD CRAIG HARRIS, TENANT, ON BEHALF OF THEMSELVES AND ALL OTHER PROPERTY OWNERS AND TENANTS OF THE CAMBRIDGE ARMS APARTMENTS, COUNTY OF CUMBERLAND, STATE OF NORTH CAROLINA, SIMILARLY SITUATED, PLAINTIFFS v. CITY OF FAYETTEVILLE, NORTH CAROLINA, AND THE CITY COUNCIL OF SAID CITY, SAID COUNCIL CONSISTING OF BETH D. FINCH, MAYOR, AND J. L. DAWKINS, VINCENT H. SHIELDS, STEVEN R. SATISKY, L. EUGENE PLUMMER, MARION C. GEORGE, JR. AND MARIE W. BEARD, COUNCIL, DEFENDANTS JOHN M. MONAGHAN, JR. AND THOMAS M. MCCOY INDIVIDUALLY, AND JOHN M. MONAGHAN, JR. AND THOMAS M. MCCOY ON BEHALF OF THEMSELVES AND ALL OTHER CITIZENS, RESIDENTS, AND TAXPAYERS OF THE CITY OF FAYETTEVILLE, CUMBERLAND COUNTY AND STATE OF NORTH CAROLINA, SIMILARLY SITUATED, INTERVENORS DEFENDANTS

No. 7712SC166

(Filed 4 April 1978)

Appeal and Error § 6.4— order permitting intervention of parties—no immediate appeal

No appeal lies from an order permitting the intervention of parties where the order did not adversely affect a substantial right which the appellant may lose if not granted an appeal before final judgment.

APPEAL by plaintiffs from *Herring, Judge.* Judgment entered 19 October 1976, in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 18 January 1978.

The plaintiff appellants have appealed from the 19 October 1976 order of the trial court permitting intervention in this action by the intervenor defendant appellees as representatives of a class pursuant to G.S. 1A-1, Rule 23 and Rule 24. The plaintiffs contend that the interlocutory order allowing intervention adversely affects their substantial rights and may be appealed prior to a final disposition of the action on its merits.

On 26 May 1976, the defendants, the City Council of the City of Fayetteville, passed Annexation Ordinance Number 173 which purported to annex an area known as the Cambridge Arms Apartments. On 4 June 1976, the plaintiffs brought an action alleging that Section 2 of Chapter 1058 of the 1969 Session Laws of North Carolina [hereinafter "Section 2"] provides that the annexation of any given area in Cumberland County by the City of Fayetteville may be halted by the filing of a petition in opposition to annexation signed by a majority of the registered voters residing within the area. It is further alleged in the complaint that, prior to the

passage of the annexation ordinance, the plaintiffs presented a petition in opposition to annexation and, thereby, complied with the requirements of Section 2. The plaintiffs contend the annexation ordinance was in direct violation of Section 2 and, therefore, unlawful and void. The plaintiffs sought both declaratory and injunctive relief.

On 12 July 1976, the defendants filed an answer in which they raised, among other defenses, the alleged unconstitutionality of Section 2 under several sections of both the Constitution of the United States and the Constitution of North Carolina. On 13 July 1976, the intervenor defendants filed a motion to intervene. On 2 August 1976, the plaintiffs filed a motion to strike that portion of the original defendants' answer alleging the unconstitutionality of Section 2. On 3 August 1976, the plaintiffs filed their response in opposition to the motion for intervention.

On 19 October 1976, the trial court entered an order granting the motion of the intervenor defendants to intervene both as a matter of right and as a matter in the discretion of the trial court. The order also provided that the intervenor defendants were permitted to intervene on behalf of themselves and a class constituted of all others similarly situated. It additionally provided that the proposed answer of the intervenor defendants, which was attached to the motion of 13 July 1976 and raised the defense of unconstitutionality, be deemed as filed on 19 October 1976. The plaintiffs gave notice of appeal and seek to have us review the validity of the entire order of 19 October 1976.

On 21 October 1976, the trial court entered an order granting the plaintiffs' motion to strike the constitutionally based defense from the answer of the original defendants. The original defendants gave notice of appeal but failed to perfect the appeal, and it is not before us for consideration.

Rose, Thorp, Rand & Ray, by Herbert H. Thorp and Ronald E. Winfrey, for plaintiff appellants.

Clark, Clark, Shaw & Clark, by John G. Shaw, for intervenor defendant appellees.

MITCHELL, Judge.

At the outset, we must determine whether an appeal will lie from the interlocutory order of 19 October 1976 granting the mo-

tion to intervene. It has long been the general rule in this jurisdiction that an order granting the right of intervention is not appealable, as any of the original parties may appeal from an adverse decision granting the intervenor relief on the merits. *Bennett v. Shelton*, 117 N.C. 103, 23 S.E. 95 (1895). Obviously the rule was based upon the fact that, in such situations, procedural economy commands that an appeal be permitted only from a final adverse decision. It is equally obvious that an order granting intervention may be reviewed upon appeal from the final judgment in the cause. *Gammon v. Johnson*, 126 N.C. 64, 35 S.E. 185 (1900); *Bennett v. Shelton*, 117 N.C. 103, 23 S.E. 95 (1895).

Although the rule is not absolute, ordinarily no appeal will lie from an order permitting intervention of parties unless the order adversely affects a substantial right which the appellant may lose if not granted an appeal before final judgment. *Simon v. Board of Education*, 258 N.C. 381, 128 S.E. 2d 785 (1963); *Burgess v. Trevathan*, 236 N.C. 157, 72 S.E. 2d 231 (1952); *McPherson v. Morisette*, 243 N.C. 626, 91 S.E. 2d 574 (1956) (per curiam); Annot., 15 A.L.R. 2d 336 (1951). The rule applies with equal vigor without regard to whether the trial court grants a motion to intervene as a matter of right pursuant to G.S. 1A-1, Rule 24(a) or as permissive intervention pursuant to G.S. 1A-1, Rule 24(b). Both the general rule and the exception have been approved in substance and adopted by the General Assembly in G.S. 7A-27(d)(1) and G.S. 1-277.

The plaintiffs contend that the order permitting intervention denied them a substantial right in that they will now be required to defend the constitutionality of Section 2. They contend they would not have been required to defend the constitutionality of Section 2 had the trial court denied the motion to intervene. We note, however, that when the order permitting intervention was granted, the constitutional issues had been raised as a defense by the original defendants in the case. Clearly, at that point, permitting the intervention of other parties defendant who raised the constitutional defense did not change the nature of the action or affect a substantial right of the plaintiffs. It was only later that the trial court ordered that defense stricken from the answer of the original defendants.

Assuming *arguendo* that the trial court's order permitting intervention was the sole method by which the constitutional

defense was raised, however, we do not find it adversely affected a substantial right which the plaintiffs may lose if the order is not reviewed before final judgment. The assignments and contentions the plaintiffs seek to present on interlocutory appeal will not be lost and may be thoroughly reviewed upon appeal from the final judgment if necessary. *Gammon v. Johnson*, 126 N.C. 64, 35 S.E. 185 (1900). Under the circumstances of this case, the plaintiffs have shown no prejudice which would warrant an appeal, and we order the

Appeal dismissed.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. ARCHIE S. McKINNON, SR.

No. 7718SC910

(Filed 4 April 1978)

Criminal Law § 144— amendment of judgment—citation to proper statute

The trial court had authority to amend a judgment out of term to correct a clerical error by substituting a citation to the appropriate statute under which defendant was convicted, G.S. 14-106, in place of a citation to an inapposite statute, G.S. 14-107; furthermore, the erroneous reference in the judgment to G.S. 14-107 was harmless surplusage which did not vitiate the judgment or render excessive the sentence imposed which was within the limits prescribed for a violation of G.S. 14-106.

APPEAL by defendant from *Kivett, Judge*. Judgment entered 9 June 1977 and amended 9 November 1977, in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 March 1978.

The defendant was charged by a warrant with the general misdemeanor of obtaining property in return for a worthless check in violation of G.S. 14-106. Upon his plea of not guilty, the district court rendered a verdict of guilty and entered judgment. The defendant appealed the judgment of the district court and, upon trial de novo in superior court, entered a plea of not guilty. The jury returned a verdict of guilty. From judgment sentencing him to imprisonment, the defendant appealed.

The facts pertinent to this appeal are uncontested. On 15 February 1977, a warrant was issued against the defendant, Archie S. McKinnon, Sr., charging him with obtaining property in return for a worthless check in violation of G.S. 14-106. The defendant was tried and convicted upon this warrant in district court and appealed to the superior court. Upon his trial de novo in superior court, the defendant was found guilty by a jury and sentenced to twenty-four months' imprisonment. Pursuant to the provisions of G.S. 15-197.1, the court ordered that the defendant serve an active sentence of six months' imprisonment and the remainder of the sentence be suspended for five years with the defendant placed on probation.

The superior court judgment of 9 June 1977 imposing the sentence indicated on its face that the defendant had been tried for and convicted of issuing worthless checks in violation of G.S. 14-107. On 9 November 1977, an amended judgment was filed out of term with the clerk which was identical to the judgment of 9 June 1977 with the sole exception of inserting a reference to G.S. 14-106 in place of the reference to G.S. 14-107. From the judgment as amended, the defendant appeals.

Attorney General Edmisten by Assistant Attorney General James Wallace, Jr. for the State.

Harold F. Greeson for the defendant appellant.

MITCHELL, Judge.

The defendant, Archie S. McKinnon, Sr., has presented us with a single assignment of error directed only to the judgment and sentence of the superior court. He contends that the act of the superior court in entering the amended judgment out of term is void, as it altered the conclusion of law in the case after the term during which the original judgment was entered. He further contends the initial judgment referring to G.S. 14-107 remains in effect, and that the sentence imposed thereby was in excess of the maximum sentence of not more than thirty days' imprisonment provided for in that statute. The defendant contends this case must be remanded to the superior court for entry of a proper judgment and sentence not in excess of the maximum provided by G.S. 14-107.

A review of the judgment of 9 June 1977, prior to amendment, should not be made without reference to the warrant initiating the charge giving rise to the judgment and sentence. *See Coach Co. v. Coach Co.*, 237 N.C. 697, 76 S.E. 2d 47 (1953); *State v. Edgerton*, 25 N.C. App. 45, 212 S.E. 2d 398 (1975). The warrant upon which the defendant was tried and convicted in district court, and again convicted on trial de novo in superior court, specifically stated that the defendant was charged with a violation of G.S. 14-106. Allegations supporting each and every element of an offense under G.S. 14-106 were specifically set forth in that warrant. As neither the testimony presented in superior court nor the superior court's instructions to the jury are included in the record on appeal, we must presume that the charge was correct and the evidence supported the allegations contained in the warrant. Thus, a conviction and judgment sentencing the defendant for a violation of G.S. 14-106 were proper.

When the judgment in this case is reviewed in light of the warrant initiating the charge against the defendant, as it must be, it is clear that the reference to G.S. 14-107 was merely a clerical error. A court of record has inherent power to amend its records to make them speak the truth, whether in or out of term. 8 Strong, N.C. Index 3d, Judgments, § 6.1, pp. 21-23. The amended judgment filed in this case on 9 November 1977 involved merely the substitution of a citation to the appropriate statute in place of a citation to an inapposite statute. As such it constituted merely the correction of a clerical error by an amendment to the record to make it speak the truth. This was not error.

Even if the amended judgment is viewed as void ab initio, however, the defendant is not entitled to the relief he seeks. It is recognized that a reference in an indictment to the specific section of the General Statutes relied upon is not necessary to its validity, and reference to an inapposite statute will not vitiate such an indictment. *State v. Anderson*, 259 N.C. 499, 130 S.E. 2d 857 (1963); *State v. Smith*, 240 N.C. 99, 81 S.E. 2d 263 (1954). Where, as here, a reference to an inapposite statute is made in a judgment, it is less likely to be harmful to a defendant than when made in an indictment. Unlike a warrant or indictment, the judgment comes only after trial and cannot be said to mislead the defendant in his attempts to ascertain the charge against him in order to prepare his defense. We hold, therefore, that the

reference to an inapposite statute in the judgment prior to amendment in this case did not vitiate that judgment or render the sentence imposed a sentence in excess of that provided by law for the violation of G.S. 14-106, which the defendant was found to have committed. The reference to G.S. 14-107 in the judgment was, therefore, harmless surplusage. *State v. Edgerton*, 25 N.C. App. 45, 212 S.E. 2d 398 (1975).

The defendant does not contend there was error in the trial of this case, and limits his assignment of error to the contentions previously set forth and relating solely to the judgment. For the reasons discussed, we find the judgment of the superior court was proper and must be

Affirmed.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. DONALD McKINLEY BRACKETT

No. 777SC881

(Filed 4 April 1978)

1. **Criminal Law § 66.16— in-court identification of defendant—independent origin—no taint from photographic identification**

Evidence was sufficient to support the trial court's finding that an identification of defendant by the victim of an attempted armed robbery was based solely on the victim's observations of defendant on the day of the crime and was not tainted by a subsequent photographic identification where the evidence tended to show that the victim observed defendant in her store on two occasions, the second one lasting for five to ten minutes; she observed defendant at close range and under good lighting; the photographic identification took place seven months after the alleged crime; and when she was handed the photographs, the victim promptly picked out those of defendant and his friend.

2. **Criminal Law § 122.2— jury instructed to deliberate further—no coercion of verdict**

The trial court did not coerce the jury into reaching a verdict where the judge recalled the jury for the purpose of checking their progress and sent them back to deliberate further without instructing that no one should surrender his or her conscientious convictions in order to agree upon a verdict.

State v. Brackett

APPEAL by defendant from *Martin (Perry), Judge*. Judgment entered 23 June 1977 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 28 February 1978.

Defendant was tried and convicted for the attempted armed robbery of Mrs. Grady E. Smith at her place of business, a store and grill. He was sentenced to prison for a term of not less than 40 years nor more than 50 years. He has appealed to this Court asking review of certain parts of the trial for alleged errors, to wit: the identification of defendant as the perpetrator of the crime and the conduct of the trial judge after the case was submitted to the jury.

Attorney General Edmisten, by Associate Attorney Norma S. Harrell, for the State.

Fountain and Goodwyn, by George A. Goodwyn, for the defendant appellant.

WEBB, Judge.

[1] Defendant's first contention is that Judge Martin erred in finding that the in-court identification of defendant by Mrs. Grady E. Smith, the victim of the attempted armed robbery, was based solely on her observations of defendant on the day of the crime and was not tainted or influenced by a series of photographs shown to her by investigating officer, Deputy Tom Moore. This contention, by implication, also challenges the finding by Judge Martin that there was nothing in the earlier photographic showing "so impermissibly suggestive as to taint Mrs. Smith's in-court identification." Since a *voir dire* hearing was held to determine the propriety of admitting identification testimony, the findings of Judge Martin are conclusive on appeal if they are supported by competent evidence in the record. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974).

Evidence introduced by the State on *voir dire* tended to show that Mrs. Smith saw the defendant twice on 6 September 1976, the day of the incident. The first opportunity she had to observe defendant was when he and a friend entered her store that morning. Defendant and his friend walked about the store and then defendant went over to the cash register and purchased a package of chewing gum. When he paid for the gum, he was

standing about a foot and a half from Mrs. Smith. She next saw defendant when he shortly returned to the store and stood at the bread counter. When Mrs. Smith went over to assist defendant, he drew a gun and stuck it in her face. Defendant forced her over to the cash register and commanded her to open it. When she refused, he began to beat her on the head with his gun. He continued to strike her until a truck and tractor pulled up outside the store. Defendant then ran outside and rode away in a car driven by his friend. Mrs. Smith testified that the defendant was in the store the second time for between five and ten minutes. She further testified that there are fluorescent lights located throughout the store and they stay on all the time.

The State's evidence further showed on *voir dire* that Officer Tom Moore, a Deputy Sheriff of Edgecombe County, took a number of photographs to Mrs. Smith and asked her if she could pick out the two men who entered her store on 6 September 1976. The photographs were all of black males. Mrs. Smith recognized two men in the photographs, the defendant and his friend.

The defendant did not offer any evidence on *voir dire*, but cross-examination of Mrs. Smith revealed the fact that the photographs were not shown to Mrs. Smith until April of 1977, seven months after the attempted robbery. Cross-examination also brought out the fact that when Mrs. Smith was handed the photographs in April, she promptly selected the defendant's picture from the group.

We hold that there is ample, competent evidence to support Judge Martin's findings. Mrs. Smith had an opportunity to observe defendant twice; she observed him from close range; she observed him under good lighting, and she observed him for between five and ten minutes on one occasion alone. We hold that this evidence is sufficient to support the finding that the in-court identification was based solely on Mrs. Smith's recall of events of 6 September 1976. The record is void of any evidence of impropriety in the photographic showing. Therefore, we hold that the evidence supports the finding that there was nothing impermissively suggestive about the photographic identification procedure used.

We cannot agree with defendant's contention that the seven-month lapse of time between the attempted armed robbery and

the out-of-court photographic identification created a substantial likelihood that Mrs. Smith would misidentify the perpetrator of the crime. The test of admissibility of an in-court identification following an out-of-court photographic showing is a factual one in which the court must weigh the totality of the circumstances. *Simmons v. U.S.*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968); *see also State v. Long*, 293 N.C. 286, 237 S.E. 2d 728 (1977); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974). If the court finds that "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," then the identification is not admissible unless it is shown to be derived from independent recollection of events prior to the photographic showing. *See Simmons v. U.S., supra; State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972); *State v. Hill*, 34 N.C. App. 347, 238 S.E. 2d 201 (1977). We do not believe that a seven-month lapse between the crime and the out-of-court identification is a sufficient circumstance, standing alone, to require the exclusion from evidence of the in-court or photographic identification of defendant. As stated above, there are competent facts to support finding that the in-court identification was based on the event and not the photographs.

[2] Defendant next argues that the trial judge pressured the jury into reaching a verdict. The record shows that the case was submitted to the jury around 5:00 p.m. on the day of the trial. Judge Martin called the jury into the courtroom at approximately 5:35 p.m. to inquire about the progress of the jury's deliberations and also to ask if the jury wanted the court to send out for supper. The foreman informed the judge that one vote had been taken and they were about to take a second vote when called into the courtroom. The first vote had resulted in a 4 to 8 split. The jury agreed to take a second vote before arrangements were made for supper. They retired to deliberate again at 6:40 p.m. and returned at 6:44 p.m. The foreman announced that a second vote had been taken and the split was 2 to 10. Judge Martin then asked the foreman if he wanted the court to send out for dinner or did he wish to continue deliberations. When the foreman did not answer, Judge Martin suggested that in view of the fact that the jury was making some progress, they retire and continue deliberations and if no verdict was reached within a reasonable

time, he would recall them to the courtroom. At 7:10 p.m. the jury returned a verdict of guilty of attempted robbery with a firearm.

Defendant contends that the verdict was coerced because the trial judge sent the jury back to continue deliberations without instructing the jury that no one should surrender his or her conscientious convictions in order to agree upon a verdict. We disagree. Whether the verdict was improperly coerced is determined by reviewing the facts and circumstances of the particular case before the court. *State v. McKissick*, 268 N.C. 411, 150 S.E. 2d 767 (1968). It is not error, per se, if on every occasion that the jury is called in or returns to report its progress, there is a failure by the trial judge to instruct the jury that each member should follow his or her conscience and not feel compelled to reach a verdict. *State v. McLamb*, 13 N.C. App. 705, 187 S.E. 2d 458 (1972); *State v. Carr*, 23 N.C. App. 546, 209 S.E. 2d 320 (1974); *State v. Sutton*, 31 N.C. App. 697, 230 S.E. 2d 572 (1976). We find nothing in Judge Martin's action that would improperly coerce a verdict.

Defendant's other contention relates to his motions to dismiss and motion to set aside the verdict. Since defendant bases his arguments on the failure of the State to properly identify the perpetrator of the crime, it is without merit.

No error.

Judges BRITT and HEDRICK concur.

ARZELL COCKERHAM MOORE v. WILLIAM LAMON MOORE, SR.

No. 7721DC486

(Filed 4 April 1978)

1. Divorce and Alimony § 24.4— child support order—enforcement by contempt—findings required

The trial court did not err in finding defendant in contempt of court for failing to transfer title to a 1973 Oldsmobile to plaintiff pursuant to an earlier order of the court for child support, and the court was not first required to make a specific finding that defendant had the present ability to comply with the court order.

2. Divorce and Alimony § 24.3— child support order—lump sum payment—award of automobile—order not void

A child support order was not void on its face because it denied plaintiff alimony, awarded lump sum child support payments, and then ordered defendant to convey title to an automobile to plaintiff without designating the transfer of title as a child support award; moreover, G.S. 50-13.4(e) requiring that allowances for child support and alimony be separately stated and identified was inapplicable, since the court's order expressly stated that plaintiff was not entitled to alimony.

3. Divorce and Alimony § 24.1— child support—lump sum payment—award of automobile—methods of payment not mutually exclusive

Defendant's contention that methods of payment under G.S. 50-13.4(e) are mutually exclusive and that the trial court was therefore without authority in ordering both a lump sum payment and transfer of car title as child support is without merit since the court is not limited to ordering one method of payment to the exclusion of others provided in the statute.

APPEAL by defendant from *Alexander, Judge.* Order entered 27 April 1977 in District Court, FORSYTH County. Heard in the Court of Appeals 9 March 1978.

Plaintiff instituted contempt proceedings against defendant to enforce a child support order entered 15 December 1975. The alleged grounds for contempt were defendant's failure to pay the sum of $375.00 per month child support and defendant's failure to transfer title to plaintiff of a jointly-owned 1973 Oldsmobile automobile as ordered by the court. Defendant filed a reply to plaintiff's motion in which he alleged that since the 15 December 1975 motion denied alimony to the plaintiff, the order to transfer title to the Oldsmobile was beyond the power of the court because such an award would constitute alimony. Judge Alexander found that defendant had brought his arrearages in child support payments up-to-date, but further decreed that defendant was in willful contempt of court for not transferring title to the 1973 Oldsmobile to plaintiff. There was no specific finding that defendant had the present ability to transfer the car title. Defendant has appealed to this Court.

Harold R. Wilson, for plaintiff appellee.

Westmoreland and Sawyer, by Barbara C. Westmoreland, for defendant appellant.

WEBB, Judge.

[1] Defendant first contends that it was error for Judge Alexander to hold him in contempt of court without specifically finding as a fact that defendant had the present ability to comply with the 15 December 1975 order. In support of his contention, defendant relies on *Cox v. Cox*, 10 N.C. App. 476, 179 S.E. 2d 194 (1971) and *Bennett v. Bennett*, 21 N.C. App. 390, 204 S.E. 2d 554 (1974) which state the general rule that before the court can punish a defendant as for contempt it must find that the defendant presently possesses the means to comply and willfully refuses to comply with the court's order. We believe the facts of this case are distinguishable from *Cox*, *Bennett* and other cases reciting the general rule. *Cox*, *Bennett* and a plethora of other cases with similar holdings emerged from the factual setting of a supporting spouse failing to make alimony or child support payments in the amounts established by court order. *See Gorrell v. Gorrell*, 264 N.C. 403, 141 S.E. 2d 794 (1965); *Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966); *Ingle v. Ingle*, 18 N.C. App. 455, 197 S.E. 2d 61 (1973); *Fitch v. Fitch*, 26 N.C. App. 570, 216 S.E. 2d 734 (1975); *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E. 2d 178 (1977); *Conrad v. Conrad*, 35 N.C. App. 114, 239 S.E. 2d 862 (1978). *Gorrell*, *Mauney* and *Fitch* also follow the established rule that the court must make an investigation into the current financial status of the defendant to determine if he has the present ability to pay the amounts set by order of the court. This appeal, in contrast, does not concern the ability to pay awarded sums. Defendant in his reply did not defend his actions on the basis of his inability to transfer title to the automobile. Instead, he tries to justify his refusal to obey the court's order on the grounds that the court was awarding alimony and not child support when it ordered the title transferred. We hold that under the facts of this case, Judge Alexander was not required to make a specific finding that defendant had the present ability to comply with the court order, but we further find that there was sufficient evidence before the judge from which he could reasonably conclude that defendant had the present ability to transfer title to the 1973 Oldsmobile automobile to plaintiff.

[2] Defendant next contends that he cannot be punished as for contempt for disobeying a court order that was void *ab initio*. He argues that the order is void on its face because after denying

that plaintiff was entitled to alimony in paragraph 1 and awarding lump sum child support payments in paragraph 3, the court then ordered the defendant in paragraph 5 to convey title to the 1973 Oldsmobile without designating the transfer of title as a child support award. Defendant relies on *Manning v. Manning*, 20 N.C. App. 149, 201 S.E. 2d 46 (1973) which held that the court errs when it fails to separately state and identify the allowances for alimony or alimony *pendente lite* and child support as required by subsection (e) of G.S. 50-13.4. We do not believe *Manning* is controlling. In *Manning*, both alimony and child support were awarded. Here, paragraph 1 of the order expressly stated that the plaintiff was not entitled to alimony. G.S. 50-13.4(e) provides in part:

> ". . . In every case in which payment for the support of a minor child is ordered and alimony or alimony pendente lite is *also ordered*, the order shall separately state and identify each allowance." (Emphasis added.)

In the setting of this case, the court was not required to separately state the identity of the allowances since plaintiff had been denied alimony; *i.e.*, this case was not one in which alimony was "also ordered."

[3] Defendant further contends that methods of payment under G.S. 50-13.4(e) are mutually exclusive and, therefore, the court was without authority in ordering both a lump sum payment and transfer of car title as child support. We disagree with defendant's construction of the statute. G.S. 50-13.4(e) also provides in part:

> "Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein, or a security interest in real property, as the court may order."

We hold that the court is not limited to ordering one method of payment to the exclusion of the others provided in the statute. The Legislature's use of the disjunctive and the phrase "as the court may order" clearly shows that the court is to have broad discretion in providing for payment of child support orders.

For the above stated reasons, the contempt order is

Affirmed.

Judges PARKER and VAUGHN concur.

GREAT DANE TRAILERS, INC., D/B/A TRAILER RENTAL COMPANY v. NORTH BROOK POULTRY, INC.

No. 7726SC501

(Filed 4 April 1978)

Rules of Civil Procedure § 4; Process § 12— service on corporation—leaving copies at home of registered agent

The corporate defendant was properly served with process by leaving copies thereof at the registered agent's home with the agent's wife, who is a person of suitable age and discretion. G.S. 1A-1, Rule 4(j)(1), (6).

APPEAL by defendant from *Griffin, Judge*. Order entered 21 April 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 March 1978.

Plaintiff instituted this civil action by filing a complaint on 11 May 1973 in which it alleged that the defendant had breached an agreement for the lease of two Great Dane trailers to the defendant and sought to recover overdue trailer rentals, casualty damages for one of the trailers, and possession of the other trailer. Ancillary to its complaint the plaintiff filed an affidavit seeking claim and delivery of the latter trailer, and on the same day the Clerk of Superior Court of Mecklenburg County issued an Order of Seizure. On 19 June 1973 default was entered against the defendant by the Clerk of Superior Court for failure to plead or otherwise defend in the action instituted against it. Pursuant to the Order of Seizure a refrigerated trailer, unit number 31-627, was taken from the defendant on 12 July 1973. On 13 September 1973 default judgment was entered by Judge William T. Grist in Superior Court, Mecklenburg County, for the failure of the defendant to plead or defend.

On 9 December 1976 the defendant filed a motion pursuant to Rule 60(b) for relief from the entry of default and default judg-

ment alleging, among other things, lack of jurisdiction because of defective service of process. After a hearing on the motion, the trial judge entered an order on 21 April 1977 finding the following pertinent facts:

> A verified COMPLAINT was filed and a summons issued, in the above-entitled action, in the Superior Court Division of the General Court of Justice in Mecklenburg County, North Carolina, on May 11, 1973, summoning the defendant, in care of Harvey V. Houser, Registered Agent, at Route 2, Vale, North Carolina, in Lincoln County.
>
> The Lincoln County Sheriff's return on the summons recites that the summons and the COMPLAINT were received on May 13, 1973, by the Sheriff, and served on Harvey V. Houser on May 18, 1973, at his residence, by leaving copies thereof with his wife.
>
> . . .
>
> Harvey V. Houser now is president of the defendant and has been president thereof continuously since at least May 11, 1973, and the defendant company is still in business at the present time.
>
> Harvey V. Houser now is the registered agent of the defendant, and he has been such continuously since at least May 11, 1973.
>
> The residence address, as well as the registered address, of the registered agent on May 11, 1973, and at all times pertinent herein, was the same, namely Route 2, Vale, North Carolina.
>
> The corporate office of the defendant company on May 11, 1973, and all times pertinent herein was not the same as the registered address of the registered agent.

The trial judge then concluded that the defendant was properly served with process "pursuant to North Carolina General Statutes Sec. 1A-1, Rule 4(j)(6)b, of the Rules of Civil Procedure," and denied the defendant's motion. The defendant appealed.

Hamel, Hamel, Welling & Pearce, by Reginald S. Hamel and Hugo A. Pearce III, for plaintiff appellee.

Don M. Pendleton and Thomas M. Shuford, Jr., for defendant appellant.

HEDRICK, Judge.

The defendant contends that the trial court erred in denying its motion pursuant to Rule 60(b) for relief from the default judgment. The defendant argues that the trial court never obtained jurisdiction in this action because service of process was never had on the corporate defendant in the manner provided by the North Carolina Rules of Civil Procedure.

General Statute 1A-1, Rule 4(j)(6) provides the following means for serving process on a corporation:

> Domestic or Foreign Corporation.—Upon a domestic or foreign corporation:
>
> a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office; or
>
> b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service or [of] process or *by serving process upon such agent or the party in a manner specified by any statute.* [emphasis added.]

In the present case, process was served on the corporate defendant by leaving copies thereof with the wife of the registered agent at his residence. Defendant cites cases construing the federal counterpart of our Rule 4(j)(6) as authority for its position that this manner of service was inadequate. *See Bard v. Bemidji Bottle Gas Co.*, 23 F.R.D. 299 (1958); *In Re Eizen Furs, Inc.*, 10 F.R.D. 137 (1950); *Tyson v. Publishers Co., Inc.*, 223 F. Supp. 114 (1963). Although our own statute is similar to the pertinent federal statute, Federal Rules of Civil Procedure 4(d) (3) and (7), there is a difference in wording which dictates a different construction on the facts of this case. While our statute permits service on a corporation "by serving process upon . . . [an *agent* authorized by appointment or by law] in a manner specified by any statute," the federal rule requires service on the *corporation*

itself "in the manner prescribed by any statute." Thus, under North Carolina law we may consider any statute setting forth alternative means of serving such an agent, while under federal law our consideration is limited to statutes providing means of serving corporations.

The trial court found and the record establishes that at the time this lawsuit was instituted Harvey V. Houser was the registered agent of the defendant corporation appointed pursuant to G.S. 55-13(b). Thus as long as process was served on Houser "in a manner specified by *any statute*" it was effective to confer jurisdiction on the Superior Court. The return of service discloses that process was served on Houser by leaving copies thereof at his house with his wife, "who is a person of suitable age and discretion" in compliance with Rule 4(j)(1) which provides the manner of serving process upon a natural person. In our opinion by the interplay of the cited statutes the corporate defendant was properly served with process.

The order appealed from is affirmed.

Affirmed.

Chief Judge BROCK and Judge MITCHELL concur.

LELIA G. COLTRAINE, ADMINISTRATRIX OF THE ESTATE OF HUBERT GRAY COLTRAINE, DECEASED v. PITT COUNTY MEMORIAL HOSPITAL

No. 773SC381

(Filed 4 April 1978)

Hospitals § 3.2— failure to restrain patient—failure to provide nurses—no actionable negligence

In an action to recover for the death of plaintiff's intestate which resulted from defendant's allegedly negligent failure to provide adequate medical facilities, the trial court properly granted defendant's motion for directed verdict where the evidence was insufficient to show negligence on the part of defendant in failing to apply restraints to plaintiff's intestate so that he could not extricate himself and in failing to provide plaintiff's intestate with round the clock nurses; moreover, plaintiff failed to show that defendant's negligence, if any, was a proximate cause of deceased's death, since there was no evidence that defendant could have foreseen that failure to restrain deceased properly

and to provide him with round the clock nurses would result in deceased's fall from the second story of the hospital.

APPEAL by plaintiff from *Ervin, Judge.* Judgment entered 12 January 1977, in Superior Court, PITT County. Heard in the Court of Appeals 10 February 1978.

Plaintiff filed a complaint against defendant alleging that defendant hospital, acting by and through its employees, was negligent in failing to provide adequate medical facilities and that defendant's negligence was the proximate cause of the death of plaintiff's intestate. In its answer, defendant alleged that the complaint failed to state a claim for relief and further denied any negligence. In a later motion to amend its answer, defendant asserted the defense of contributory negligence on the part of plaintiff's intestate. The motion was allowed.

At the trial of this case, plaintiff's evidence tended to show that in December 1969, plaintiff's intestate, Hubert Gray Coltraine, had been admitted to Pitt County Memorial Hospital (hereinafter Hospital) for treatment for acute bronchitis as well as acute alcoholism. According to his doctor, Dr. W. S. Dawson, Mr. Coltraine became confused during his hospital stay and, as a result of that confusion, Dr. Dawson ordered a neurological consultation on 2 January 1970. The results of the neurological consultation were "basically negative." Thereafter, Dr. Dawson ordered that Mr. Coltraine be put on restraints, *i.e.*, a posey belt and wrist cuff restraints. On 13 January, Dr. Dawson ordered private duty nurses around the clock, and he stipulated that the nurses be registered nurses. There being no available registered nurses, however, no one was assigned to the patient around the clock.

On 14 January at approximately 1:30 or 1:45 p.m., Nancy Carter, a nursing student, securely placed the restraints on Mr. Coltraine. According to the record, the next time Mr. Coltraine was seen, at approximately 2:00 p.m., he was standing on the ledge of the second floor and holding the bottom of the third floor. He subsequently fell. Six hours after the fall, he died of hemorrhagic shock.

At the close of the plaintiff's evidence, defendant's motion for a directed verdict was granted on the sole ground that the

plaintiff failed to establish actionable negligence. Plaintiff appeals.

Rodman, Rodman, Holscher & Francisco, by Edward N. Rodman and David C. Francisco, for plaintiff appellant.

Smith, Anderson, Blount & Mitchell, by John H. Anderson and Joseph E. Kilpatrick, for defendant appellee.

ARNOLD, Judge.

We believe that plaintiff's evidence, viewed, as it must be, in the light most favorable to her, was not sufficient to overcome defendant's motion for directed verdict (G.S. 1A-1, Rule 50). In order to make out a case of negligence, plaintiff must introduce evidence tending to support the conclusion (1) that defendant was negligent and (2) that such negligence was a proximate cause of the death of plaintiff's intestate. *See, e.g. McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972). As to (1), the first prerequisite for establishing negligence is the existence of a legal duty, owed by defendant to plaintiff's intestate, to use due care. The second prerequisite is a breach of that duty. Plaintiff argues, first, that the evidence was sufficient to show that the hospital personnel were negligent in applying the restraints ordered by Dr. Dawson in a manner that allowed the deceased to extricate himself. The duty, according to plaintiff, was to apply properly the restraints ordered by Dr. Dawson, and that duty, she asserts, was breached. There was, however, no evidence that the hospital breached that duty, *i.e.*, that the hospital personnel improperly or negligently applied the posey belt and wrist cuffs. Nancy Carter's deposition stated that she was aware that Mr. Coltraine had extricated himself on previous occasions and that when she left him he was securely fastened. There was evidence that patients could extricate themselves even from properly fastened restraints. The record reveals no evidence of actionable negligence by defendant hospital.

Plaintiff also argues that there was evidence of actionable negligence in that defendant failed to provide plaintiff's intestate with round-the-clock nurses. The record shows that the doctor of Mr. Coltraine, Dr. Dawson, requested that registered nurses be assigned to the patient around the clock, that no registered nurses were available, and that, knowing this, Dr. Dawson made

no alternative requests. There is no evidence that any hospital personnel knew that Mr. Coltraine nevertheless needed constant care. Having informed the responsible doctor that no registered nurses were available, the defendant hospital, we believe, fulfilled its duty to the patient.

We also conclude that plaintiff's case failed to establish (2), that negligence, if any, was the proximate cause of the death of plaintiff's intestate. An essential element of proximate cause is reasonable foreseeability. *See, e.g. Pittman v. Frost*, 261 N.C. 349, 134 S.E. 2d 687 (1964). Assuming there were evidence that Ms. Carter improperly applied the restraints, or that defendant had a duty to provide round-the-clock attendants, there is no evidence that defendant hospital could have foreseen the fall from the ledge of the second floor. Dr. Dawson stated that the purpose of the restraints was to keep Mr. Coltraine from falling out of bed or out of a chair. He further stated that he did not view his patient as being suicidal. Hence, plaintiff also failed to show a proximate cause between the breach of duty, if any, and the fall by Mr. Coltraine.

The directed verdict in favor of defendant is, therefore,

Affirmed.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. FRED M. JENKINS

No. 7715SC912

(Filed 4 April 1978)

1. **Criminal Law § 34.4— evidence of prior offense—admissibility for corroboration**

In a prosecution for taking indecent liberties with a female under the age of 16, the trial court did not err in allowing testimony by the prosecuting witness concerning a similar incident which occurred two weeks before the alleged crime for which defendant was on trial, since evidence of the independent offense was admissible to corroborate the offense charged.

2. **Criminal Law § 119— child's testimony—requested instruction not given—no error**

In a prosecution for taking indecent liberties with a female under the age of 16, the trial court was not required to give the jury a precautionary instruc-

tion requested by defendant concerning the testimony of the child prosecuting witness.

3. Criminal Law § 113.4— failure to define words in jury instructions—no error

In a prosecution for taking indecent liberties with a female under the age of 16, a violation of G.S. 14-202.1(a), the trial court did not err in failing to define "wilfully," "for the purpose of arousing or gratifying sexual desires," and "lewd and lascivious acts" as those words are used in the statute, since those terms were common enough to be understood by jurors.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 22 June 1977, in Superior Court, ALAMANCE County. Heard in the Court of Appeals 3 March 1978.

Defendant was charged upon a proper bill of indictment with wilfully and feloniously taking immoral, improper, and indecent liberties for the purpose of arousing and gratifying his sexual desires with a female under the age of sixteen years of age. G.S. 14-202.1. A jury found him guilty, and he was sentenced to five years imprisonment.

Defendant appeals.

Attorney General Edmisten, by Assistant Attorneys General Sandra M. King and Elisha H. Bunting, for the State.

John D. Xanthos for the defendant appellant.

ARNOLD, Judge.

[1] Defendant assigns as error the trial court's admission of testimony, by the prosecuting witness, of an unrelated prior alleged act of misconduct by the defendant. The evidence tended to show that on 19 July 1976, defendant, a forty-nine-year-old man, took the prosecuting witness, an eleven-year-old girl, and his daughter, to a K-Mart to get a cold drink. While his daughter was in the K-Mart, defendant, according to the prosecuting witness, fondled her and exposed himself to her. The evidence about which defendant complains is the testimony of the prosecuting witness of a similar incident which occurred two weeks before the 19 July incident.

Defendant argues the general rule, as stated in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), that in a prosecution for a particular crime, the State may not offer evidence tending to

show that the accused has committed another distinct, independent, or separate offense, even though the offense is of the same nature as the crime charged. Defendant, however, fails to point out those cases in which evidence of such independent offenses has been held competent on the ground that it corroborates the offense charged. In *State v. Browder*, 252 N.C. 35, 112 S.E. 2d 728 (1960), for example, our Supreme Court held that, in a prosecution for carnal knowledge of a female child under twelve years old, evidence of prior acts of intercourse between the defendant and the prosecuting witness was properly admitted in corroboration of the offense charged. *See also Gasque v. State*, 271 N.C. 323, 156 S.E. 2d 740 (1967). While the present case does not involve the crime of rape, the offense charged is sufficiently analogous to warrant the exception to the rule that evidence of independent offenses is not admissible. Defendant's argument, therefore, does not prevail.

[2] A second question presented by this appeal is whether the trial judge must give a requested precautionary instruction concerning the testimony of the child prosecuting witness. The defendant requested the following instruction:

> "Respecting the testimony of . . . [prosecutrix], you are instructed that her testimony must be carefully scrutinized and cautiously examined. You should take into consideration her power of observation, susceptibility and suggestibility. You are cautioned that children of her age are most susceptible to influence and suggestion and are more prone to imagination than are adults."

It is settled in this jurisdiction that if a specifically requested jury instruction is proper and is supported by the evidence, the trial court must give the instruction, at least in substance. *State v. Bolton*, 28 N.C. App. 497, 221 S.E. 2d 747 (1976). The question then arises as to whether the requested instruction was proper under the evidence of this case. Under *State v. Bolton, supra*, that question is for the trial judge since he "can more accurately determine those instances when the instruction would be appropriate." *Id.* at 499, 221 S.E. 2d at 748. We find no abuse of the trial court's discretion in refusing defendant's requested instructions.

[3] Finally, we consider defendant's argument that the trial court erred in insufficiently defining for the jury the essential elements of G.S. 14-202.1(a) which reads as follows:

> "(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> "(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> "(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years."

Defendant argues that the judge should have defined "wilfully," "for the purpose of arousing or gratifying sexual desires," and "lewd and lascivious acts." We do not agree. These terms are common enough to be understood by jurors who are presumed to understand the meaning of English words as they ordinarily are used. *State v. Withers*, 2 N.C. App. 201, 162 S.E. 2d 638 (1968). *See also State v. Davenport*, 225 N.C. 13, 33 S.E. 2d 136 (1945), where our Supreme Court, in holding the judge did not err in not defining "lewdly and lasciviously" in an adultery prosecution, stated:

> "In many instances, of course, the law cannot be regarded as self-explanatory in all particulars, and judicial interpretation becomes a requirement of the law. G.S. 1-180. What situations demand an explanation of the law through proper instruction to the jury without special prayer, and what explanations may be regarded as matters of subordinate elaboration, must be referred to the history of the subject as developed in our Reports, rather than to any fixed rule. New situations must be dealt with as they arise. We can only say here that the statute itself employs simple and understandable terms which directly define the offense, and we think the instruction was comprehensible."

Id. at 17, 33 S.E. 2d at 139.

Defendant's other assignments of error have been considered. We find in the trial

No error.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. CHARLIE HOWARD

No. 7715SC928

(Filed 4 April 1978)

1. **Criminal Law § 169.6— failure of record to show excluded testimony**

The sustaining of an objection will not be held prejudicial when the record does not show what the answer of the witness would have been had the objection not been sustained.

2. **Narcotics § 4— possession of heroin—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for possession of heroin where it tended to show that an officer observed defendant tear something in two and then saw two pieces of paper fall from defendant's hands; the officer went to the spot where they fell and found two envelopes, one of which was torn in two; and the untorn envelope contained nine packets of heroin.

3. **Criminal Law §§ 112.1, 113.3— failure to request instructions**

In the absence of a request for specific instructions, the trial court was not required to define reasonable doubt or to instruct on the credibility of witnesses, the weight to be given particular evidence or the impeachment of a witness by a prior inconsistent statement.

4. **Criminal Law § 111.1— judge's duty of impartiality—failure to instruct**

A trial judge is not required to instruct on his duty of impartiality.

APPEAL by defendant from *Fountain, Judge*. Judgment entered 24 February 1977 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 7 March 1978.

Defendant was indicted for felonious possession of heroin with intent to sell. He entered a plea of not guilty.

The State presented evidence which tended to show that on 19 March 1976 the Burlington Police Department, acting pursuant to a tip, placed defendant under surveillance. Defendant was first

observed in a parked automobile with another person on Rawhut Street. He emerged from the parked car and proceeded in the direction of Dudley Street where three or four men were standing in front of a cafe. As defendant approached these men, he turned and spotted the police officers who were tracking him. He immediately quickened his pace and headed into an alley. Detective Alvis Wilson followed defendant on foot and observed him tearing something in two. Wilson then saw two pieces of paper fall from defendant's hands. The pieces of paper turned out to be two envelopes, one torn in two. Upon analysis, the two envelopes were found to contain a small amount of marijuana and nine packets of heroin, respectively.

The defendant presented no evidence.

The case was submitted to the jury only on the lesser included offense of unlawful possession of heroin. The jury returned a verdict of guilty and defendant was sentenced to two (2) to three (3) years imprisonment. Defendant appealed to this Court.

Attorney General Edmisten, by Associate Attorney Thomas H. Davis, Jr., for the State.

Leroy W. Upperman, Jr., for the defendant.

MARTIN, Judge.

Defendant first contends that the trial court erroneously and prejudicially restricted his right of cross-examination. Specifically, he argues that the trial court improperly limited his opportunity to cross-examine and impeach State's witness Wilson by sustaining the State's objections to certain questions relative to Wilson's testimony at a previous hearing.

[1] Our courts have oft stated the rule that "the legitimate bounds of cross-examination are largely within the discretion of the trial judge, so that his ruling will not be held as prejudicial error absent a showing that the verdict was improperly influenced thereby." *State v. Chance*, 279 N.C. 643, 185 S.E. 2d 227 (1971). In the instant case, defense counsel's inquiries to Wilson relative to his previous testimony were unrestricted except for two instances in which the court sustained the State's objections apparently because of the form of the questions propounded. Without passing on the correctness of these rulings, we are of the

opinion that no prejudicial error has been made to appear from the record. Not only does the record disclose that defense counsel was otherwise unrestricted in his cross-examination of Wilson, but it also *fails* to show what the answers would have been to the excluded questions. It is well established in this State that the sustaining of an objection will not be held prejudicial when the record does not show what the answer would have been had the objection not been sustained. *State v. Felton*, 283 N.C. 368, 196 S.E. 2d 239 (1973). This assignment is accordingly overruled.

[2] Defendant next assigns error to the trial court's denial of his timely motions to dismiss the charge. He contends that the State failed to produce substantial evidence on the issue of defendant's possession of heroin. This contention is without merit.

Defendant dwells at length on Detective Wilson's testimony that he observed *two* pieces of paper fall from defendant's hands. It is defendant's argument that these two pieces of paper were the torn envelope containing marijuana and that there was no evidence linking defendant to a third piece of paper—an untorn envelope containing heroin. Defendant's argument is untenable. After observing defendant tear and drop the pieces of paper, Wilson immediately went to the spot where they fell and found the two envelopes, one of which was torn in two. It is simply unrealistic to maintain that an envelope containing heroin just happened to be lying in the same spot. The reasonable inference to be drawn from this evidence, considering it in the light most favorable to the State, is that defendant disposed of both the envelopes containing the drugs when he saw the officers. We overrule this assignment of error.

[3, 4] In the remaining assignments of error, defendant brings forward a number of exceptions to the court's charge to the jury. These we find to be without merit. The trial court did not err in failing to define "reasonable doubt" in the absence of a request for the same from defendant. *State v. Ingland*, 278 N.C. 42, 178 S.E. 2d 577 (1971). Likewise, the trial court's failure to instruct on the credibility of witnesses, the weight to be given particular evidence and the impeachment of a witness by prior inconsistent statements was not prejudicial error in light of defendant's failure to request specific instructions on such matters. *See State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513 (1973); *State v. Nettles*, 20

N.C. App. 74, 200 S.E. 2d 664 (1973). Finally, defendant has cited, and we can find, no authority for the proposition that a trial judge is required to instruct on his duty of impartiality. When the charge is considered contextually, and as a whole, we find it to be free from prejudicial error.

In defendant's trial, we find no prejudicial error.

No error.

Judges MORRIS and ARNOLD concur.

ELSIE SEYMORE GOBBLE v. JAMES ODELL GOBBLE

No. 7722DC506

(Filed 4 April 1978)

Divorce and Alimony §§ 18.11, 18.16— alimony pendente lite—counsel fees—award improperly made

In a hearing on plaintiff's motion for alimony pendente lite and counsel fees where the trial court found that defendant was unemployed at the time of the hearing and that he was at that time unable to pay any alimony pendente lite or counsel fees, an award of alimony pendente lite and counsel fees was erroneous because the court failed to find as a fact that defendant was failing to fulfill his earning capacity because of his disregard of his marital obligation to provide reasonable support for plaintiff; moreover, the award was also erroneous because the judge failed to find as a fact that plaintiff was without sufficient means whereon to subsist during the pendency of the action.

APPEAL by defendant from *Olive, Judge*. Judgment entered 21 February 1977 in District Court, DAVIDSON County. Heard in the Court of Appeals 10 March 1978.

This is a civil action wherein the plaintiff seeks a divorce from bed and board, alimony pendente lite and counsel fees. The defendant filed a counterclaim for divorce from bed and board. After a hearing on plaintiff's motion for alimony pendente lite and counsel fees, the trial judge made findings and conclusions which except where quoted are summarized as follows:

Plaintiff and defendant were married on 9 November 1968, and no children were born of the marriage union. In April, 1974,

plaintiff suffered a "stroke," and as a result the plaintiff has difficulty in speaking and is extremely nervous and emotional. On 26 September 1976, the defendant assaulted the plaintiff, and as a result the plaintiff was forced to leave the home.

> 5. That beginning in the early summer of 1976 and up until the plaintiff left home, defendant had on several occasions committed acts of physical and verbal abuse knowing that because of plaintiff's health problems, such conduct would upset her; . . . .

Plaintiff returned to the home in November, 1976, where she presently resides with her mother and defendant, and in which she and defendant occupy separate rooms. Because of plaintiff's illness, she has been unable to work and receives Social Security benefits in the amount of $227.00 a month.

> 8. That defendant was employed at Glosson Motor Lines prior to the hearing in this matter earning approximately $170.00 to $175.00 per week net pay; that Glosson Motor Lines has filed for reorganization under Chapter 10 of bankruptcy law, and defendant was notified on the day of this hearing of the termination of his employment; and that defendant has other income from the sale of used automobiles;
>
> 9. That plaintiff is in need of support from the defendant and is in need of a place to live; and that plaintiff is unable to pay counsel fees for the prosecution of this action.
>
> Based on the foregoing findings of fact, it is concluded as a matter of law that defendant has offered such indignities to the person of the plaintiff as to render her life burdensome and her condition intolerable; that plaintiff is a dependent spouse and defendant is the supporting spouse; that plaintiff is in need of the sum of $45.00 per week alimony *pendente lite* and possession of the homeplace; that counsel for plaintiff has rendered valuable legal services for and on behalf of plaintiff and is entitled to counsel fees in the amount of $300.00; and that because of the termination of his employment, defendant is unable at this present time to pay any amounts of alimony *pendente lite* or counsel fees.

Defendant appealed.

No counsel for plaintiff appellee.

Wilson & Biesecker, by Joe E. Biesecker, for defendant appellant.

HEDRICK, Judge.

Defendant contends the findings of fact do not support the order that defendant pay alimony pendente lite in the amount of $45.00 per week, and $300.00 attorney's fees.

An award of alimony pendente lite may not be based on the earning capacity of the supporting spouse in the absence of a finding that the defendant is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reaonable support. *Robinson v. Robinson*, 10 N.C. App. 463, 179 S.E. 2d 144 (1971); *Robinson v. Robinson*, 26 N.C. App. 178, 215 S.E. 2d 179 (1975). Since the judge found as a fact that the defendant was unemployed at the time of the hearing, and that he was at that time unable to pay any alimony pendente lite or counsel fees, it is obvious that the award of alimony pendente lite in the amount of $45.00 weekly was not based on the defendant's present earnings, but was based on the defendant's apparent earning capacity. The award of alimony pendente lite in the amount of $45.00 weekly, therefore, is erroneous because the court failed to find as a fact that the defendant was failing to fulfill his earning capacity because of his disregard of his marital obligation to provide reasonable support for the plaintiff.

The award of alimony pendente lite and counsel fees is likewise erroneous because the judge failed to find as a fact that the plaintiff was without sufficient means whereupon to subsist during the pendency of the action. G.S. 50-16.3. *Newsome v. Newsome*, 22 N.C. App. 651, 207 S.E. 2d 355 (1974).

For the reasons stated, the order is vacated and the cause is remanded to the District Court for a new hearing and new findings.

Vacated and Remanded.

Chief Judge BROCK and Judge MITCHELL concur.

DOUGLAS MATTHEWS v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND G. PERRY GREENE

No. 7710SC271

(Filed 4 April 1978)

Appeal and Error § 9— review of preliminary injunction—mootness

Writ of certiorari to review a preliminary injunction staying plaintiff's dismissal as a highway patrolman without a hearing is dismissed as presenting moot issues where plaintiff has been afforded the administrative remedies sought by his request for injunctive relief by an order of the State Personnel Commission remanding the cause for further grievance procedures and the preliminary injunction has expired by its own terms, and where the statutes in question have been substantially amended and the issues involved are no longer a matter of public interest.

ON writ of certiorari to review the orders of *Bailey, Judge*, entered 23 December 1976 and 30 December 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 31 January 1978.

The plaintiff, Douglas Matthews, filed a complaint on 23 December 1976, in which he alleged he had been wrongfully discharged without notice or hearing from the North Carolina Highway Patrol on 22 December 1976 by the defendant, G. Perry Greene, Secretary of the North Carolina Department of Transportation. The plaintiff further alleged the defendant Greene held a press conference on 22 December 1976, during which he publicly announced that the defendant was being dismissed for violations of the "Highway Patrol Code of Conduct," including misuse of firearms and use of excessive force in the apprehension of a suspect. The allegations against the plaintiff arose from his participation in a law enforcement roadblock which resulted in the death of a hostage.

In his complaint, the plaintiff alleged that his discharge without a hearing denied him rights specifically granted by the State Personnel Act, G.S., Chapter 126. He additionally alleged that his discharge and the public statements made in the press conference of the defendant Greene foreclosed other employment opportunities to him and damaged his standing and reputation. The plaintiff alleged that these actions were malicious and deprived him of liberty without due process of law in violation of the Civil Rights Act, 42 U.S.C. § 1983 (1871).

The plaintiff alleged his discharge would cause him immediate irreparable injury as he would be unable to meet his fixed financial obligations and would be stigmatized. The plaintiff prayed injunctive relief, damages, attorney's fees and costs.

On 23 December 1976 the trial court issued a temporary restraining order staying the decision terminating plaintiff's employment, ordering his reinstatement and directing that defendants appear at a later date and show cause why the temporary restraining order should not be continued. A hearing was conducted on 30 December 1976. Based upon the plaintiff's verified complaint and affidavits, the trial court on that date made findings of fact and conclusions of law and entered an order granting a preliminary injunction continuing the temporary restraining order.

The defendants objected and excepted to the orders entered by the trial court. Upon application of the defendants, we issued a writ of certiorari on 9 February 1977 to review the said orders.

Sanford, Cannon, Adams & McCullough, by H. Hugh Stevens, Jr. and Hugh Cannon, for plaintiff appellee.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin and Associate Attorney David Roy Blackwell, for defendant appellants.

MITCHELL, Judge.

The defendants first contend that, whether the trial court's orders were based upon alleged violations of the plaintiff's rights under the General Statutes of North Carolina or the United States Code, the trial court had no authority to enter orders staying the dismissal of the plaintiff before the exhaustion of his administrative remedies under the State Personnel Act, G.S., Chapter 126 and the Administrative Procedure Act, G.S., Chapter 150A. By these contentions the defendants have raised substantial issues which, for reasons hereinafter set forth, we need not reach.

Prior to oral arguments before us in this case, the plaintiff filed a "motion to dismiss appeal" in which he stated that the State Personnel Commission, by decision and order dated 4 May

1977, had remanded his case to the "third step of the grievance procedure of the Department of Crime Control and Public Safety for further proceedings." The plaintiff contends in his motion that the issues before us are now moot, as the order of the State Personnel Commission "has the effect, *inter alia*, of temporarily staying the plaintiff's dismissal and affording him the administrative remedies sought by his request for injunctive relief." During oral arguments, counsel for both parties informed us that, as a result of pursuing these grievance procedures, the plaintiff has been reinstated by administrative action, and that the administrative action has not been appealed by the Department of Crime Control and Public Safety. Counsel for both parties also agreed that the time for taking such appeal has run, and that the Secretary of Crime Control and Public Safety does not intend to attempt to appeal. As the preliminary injunction entered on 30 December 1976 continued the temporary restraining order of 23 December 1976 only "pending petitioner's exhaustion of all administrative remedies to which he is entitled," that injunction has now expired and is void by its own terms.

The general rule is that an appeal presenting a question which has become moot will be dismissed. *Parent-Teacher Assoc. v. Bd. of Education*, 275 N.C. 675, 170 S.E. 2d 473 (1969). That rule is subject to an exception, however, when the question involved is a matter of public interest. In such cases the courts have a duty to make a determination. *Leak v. High Point City Council*, 25 N.C. App. 394, 213 S.E. 2d 386 (1975).

We find that the facts in the present case do not present us with a situation giving rise to the exception to the general rule. During the pendency of this action, the General Assembly has substantially amended the State Personnel Act, G.S., Chapter 126 by enacting Chapter 866 of the 1977 North Carolina Session Laws. We find that the substantial amendments to Chapter 126 contained therein, together with the fact that there no longer exists a controversy among the parties in this case, would render our determination of the issues sought to be presented by the defendants little more than an advisory opinion as to the effect of prior law on hypothetical parties. *Parent-Teacher Assoc. v. Bd. of Education*, 275 N.C. 675, 170 S.E. 2d 473 (1969) and cases cited therein; 1 Strong, N.C. Index, Appeal and Error, § 9, pp. 215-18. We decline to render such an opinion and hold the issues before

us by virtue of our having granted the writ of certiorari are no longer matters of such public interest as to require us to resolve them by making a determination.

For the reasons previously stated herein, the motion to dismiss is well taken, and we order the

Writ of certiorari dismissed.

Judges MORRIS and CLARK concur.

L. M. BRINKLEY & ASSOCIATES AND COMMERCIAL BUILDERS, INC., T/A NEW MARKET SHOPPING CENTER v. INTEGON LIFE INSURANCE CORPORATION

No. 776SC456

(Filed 4 April 1978)

Contracts §§ 12.1, 30— loan commitment—failure to close—forfeiture of standby fee

Provision of a loan commitment agreement stating that, should the commitment not be closed, the lender "will retain the standby fee to cover a portion of the cost of origination and processing the application and for reservation of the allotted funds" was not ambiguous and did not present a question of fact for the jury, since the provision clearly gave the lender the right, upon failure to close the commitment, to retain the entire standby fee paid by the borrower.

APPEAL by plaintiffs from *James, Judge*. Judgment entered 18 April 1977, in Superior Court, HERTFORD County. Heard in the Court of Appeals 7 March 1978.

Plaintiffs and defendant entered into a loan commitment agreement whereby defendant was to provide permanent financing for a shopping center plaintiffs were building. Under the terms of the agreement, defendant was committed to a loan of $1,275,000, contingent upon plaintiffs' meeting certain requirements, and plaintiffs were to submit a $38,250 cash "standby fee" which was to be refunded upon the closing of the loan.

According to plaintiffs' complaint, defendant, contrary to the loan commitment agreement, required plaintiffs to complete an additional 2,000 square feet of local space prior to loan disburse-

ment. Plaintiffs advised defendant that in order to complete the 2,000 square feet it was necessary to increase the amount of permanent financing. Plaintiffs further alleged that defendant refused to discuss the matter, and plaintiffs thereafter obtained permanent financing from other sources.

Defendant refused to return the standby fee deposited by plaintiffs, and plaintiffs brought this action alleging an unlawful and wilful scheme to deprive plaintiffs of their contractual rights and breach of contract. Plaintiffs sought punitive as well as actual damages, including the return of the standby fee.

In the answer filed by defendant it is alleged that plaintiffs themselves elected not to close the loan and that, according to the clear language of the contract, plaintiffs thereby forfeited the standby fee. After pretrial discovery procedures, defendant moved for summary judgment pursuant to G.S. 1A-1, Rule 56. That motion was granted and plaintiffs appeal.

Pritchett, Cooke & Burch, by William W. Pritchett, Jr. and Roswald B. Daly, Jr., for plaintiff appellants.

Cherry, Cherry and Flythe, by Joseph J. Flythe, for defendant appellee.

ARNOLD, Judge.

The sole issue for our consideration is whether there was a genuine issue of material fact which would render summary judgment inappropriate. G.S. 1A-1, Rule 56. Plaintiffs' only contention is that the contract provision relating to the standby fee was ambiguous and therefore a question of fact for the jury. We do not agree.

The contract provision in question reads:

> "The accepted commitment copy must be returned within one week along with $38,250 (collected) cash STANDBY FEE which will be refunded if the loan is closed in accordance with this commitment. Should our accepted commitment not be closed, we will retain the standby fee to cover a portion of the cost of origination and processing the application and for reservation of the allotted funds."

Plaintiffs argue that the phrase "to cover a portion of the cost of origination and processing the application and for reservation of

the allotted funds" renders the provision ambiguous. The quoted phrase, however, does not render ambiguous the clear words that defendant, upon failure to close the commitment, is entitled to retain the standby fee. We note that nothing in the language indicates that defendant is to retain only a portion of the standby fee, as plaintiffs argue.

Having found that the provision in question is not ambiguous, we apply the rule that its interpretation was a matter of law for the court. *See, e.g. Root v. Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968). There being no genuine issue of material fact, the trial court properly granted defendant's motion for summary judgment.

Affirmed.

Judges MORRIS and MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 MARCH 1978

DARDEN v. DARDEN No. 776DC276	Northampton (72CVD367)	Vacated and Remanded
FOX v. FOX No. 7726DC407	Mecklenburg (76CVD1849)	Affirmed
HALE v. ROBERTS No. 7710SC434	Wake (71CVD2968)	Dismissed
IN RE BENTON No. 7712DC395	Cumberland (76SP1164)	Reversed
IN RE HERBIN No. 7717DC458	Granville and Rockingham (77SP46)	Reversed
MANLY v. PENNY No. 7710SC448	Wake (77CVS1315)	Affirmed
STATE v. CALLICUTT No. 7720SC788	Moore (77CR1211)	No Error
STATE v. DIXON No. 7726SC915	Mecklenburg (75CR47316)	No Error
STATE v. SIMS No. 7728SC924	Buncombe (77CRS12234) (77CRS12235)	Judgment Arrested and Remanded
STATE v. TURNAGE No. 773SC900	Craven (76CRS11211)	Affirmed
STATE v. TWINE No. 771SC897	Chowan (77CR903-A) (77CR903-B) (77CR921)	No Error
TRAYWICK v. TRAYWICK No. 7720DC408	Union (74CVD0221)	Affirmed
WHITENER v. WILSON No. 7727SC431	Lincoln (76CVS223)	Affirmed
WILLIAMS v. WILLIAMS No. 7719DC152	Cabarrus (76CVD0852)	Affirmed

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EATON v. EATON No. 7718DC479	Guilford (76CVD2827)	New Trial
JONES v. JONES No. 7726SC389	Mecklenburg (76SP581)	Affirmed

MILLS v. CATALANI No. 7719SC370	Randolph (76CVS2)	No Error
PHILLIPS v. CURRIE MILLS, INC. No. 7720SC482	Moore (74CVS41)	Affirmed
ROUSE v. ROUSE No. 7712DC464	Cumberland (76CVD2185)	Appeal Dismissed
STATE v. HUNT No. 7716SC914	Robeson (77CR817)	No Error
STATE v. McLAURIN No. 7712SC888	Cumberland (76CRS33181) (76CRS33182)	No Error

APPENDIX

AMENDMENT TO
RULES OF APPELLATE PROCEDURE

AMENDMENT TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

The second paragraph of Rule 27(c) of the Rules of Appellate Procedure, 287 N.C. 671, 740, shall be amended to read as follows. (New material appears in italics. The sentence now appearing in the rule which reads, "After the appeal is docketed in the appellate division such motions are made to the appellate court where docketed", has been deleted):

> A motion to extend the time for filing the record on appeal to a time greater than 150 days from the taking of appeal may only be made to the appellate court to which appeal has been taken. All other motions for extensions of time are made to the trial tribunal from whose judgment, order, or other determination the appeal has been taken during the time prior to docketing of the appeal in the appellate division. *No extension of time shall be granted by the trial tribunal which, if fully used, would preclude filing the appeal within 150 days from the taking of the appeal. If the appellate division extends the 150-day filing period, any subsequent motion for any extension of time shall be made to the appellate court where the case is to be docketed.* Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or, if to a commissioner, then by that commissioner.

This amendment to Rule 27(c) was adopted by the Court in Conference on 7 March 1978 to become effective immediately upon its adoption. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals and by distribution of the amendment by mail to the Clerk of Court in each county of the state.

EXUM, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

TOPICS COVERED IN THIS INDEX

Titles and section numbers in this Index, e.g. Appeal and Error § 1, correspond with titles and section numbers in the N. C. Index 3d (Abandonment of Property—Trial) and N. C. Index 2d (Trover and Conversion—Witnesses).

ABATEMENT AND REVIVAL

§ 3. Abatement on Ground of Pendency of Prior Action

Trial court did not abuse its discretion in allowing plaintiff's motion to stay the proceedings, though the trial court did not find that it would work a substantial injustice for the action to be tried by the court and that some other jurisdiction provided a convenient, reasonable and fair place of trial. *Allen v. Trust Co.*, 267.

ABDUCTION

§ 1. Abduction of Children

In a prosecution of defendant for abduction of his grandson, trial court erred in failing to grant his motion for nonsuit since the evidence tended to show that the child's father consented to the abduction. *S. v. Walker*, 182.

Trial court erred in failing to instruct on the defense of mistake of fact where the evidence tended to show that defendant and his son were operating under the mistaken belief that the female child whom they allegedly abducted was defendant's granddaughter. *Ibid.*

ACCOUNTS

§ 2. Accounts Stated

An account stated was established in plaintiff broker's action to recover an amount allegedly owed to it by defendant as a result of losses to defendant's commodities trading account, and plaintiff was entitled to have the jury answer an issue as to the amount of defendant's indebtedness to plaintiff. *Harris, Upham & Co. v. Paliouras*, 458.

APPEAL AND ERROR

§ 6.4. Appeal Relating to Party Matters

No appeal lies from an order permitting the intervention of parties. *Wood v. City of Fayetteville*, 738.

§ 6.7. Appeal Based on Amendment to Pleadings

The denial of a motion to amend the answer to allege a compulsory counterclaim is immediately appealable. *Hudspeth v. Bunzey*, 231.

§ 9. Moot Questions

Plaintiff's appeal from the trial court's order dissolving an order of attachment entered by the clerk is moot. *Supply Service v. Thompson*, 406.

Questions relating to the trial court's issuance of a preliminary injunction prohibiting violation of a covenant not to compete were moot where the duration of the covenant had terminated. *Herff Jones Co. v. Allegood*, 475.

Writ of certiorari to review a preliminary injunction staying plaintiff's dismissal as a highway patrolman is dismissed as moot. *Matthews v. Dept. of Transportation*, 768.

§ 16.1. Limitations of Powers of Trial Court After Appeal

Clerk of superior court had no authority to revoke the letters testamentary issued to the person named executor in testatrix' purported will while propounders' appeal from judgment in the caveat proceeding was pending. *In re Worrell*, 278.

APPEAL AND ERROR—Continued

§ 38. Settlement of Case on Appeal

Defendants' contention that the trial court erred in instructing on the quantum of proof was not before the court on appeal since that issue was determined adversely to defendants by the trial court at the conference to settle the record on appeal. *Matthews v. Lineberry*, 527.

§ 42. Conclusiveness and Effect of Record

Defendants could not on appeal assert lack of jurisdiction where the stipulations in the record stated that the superior court had jurisdiction over the parties and subject matter. *Investments, Inc. v. Enterprises, Ltd.*, 622.

§ 62.2. Granting of Partial New Trial

Trial court should have granted defendant's motion to set aside the entire verdict rather than just that portion related to damages. *Digsby v. Gregory*, 59.

ARREST AND BAIL

§ 3. Right of Officers to Arrest Without Warrant

An officer's warrantless detention of defendant was proper where the officer had reasonable suspicion that defendant had committed the crime of larceny. *S. v. Bridges*, 81.

§ 6. Resisting Arrest

Two year sentence of imprisonment for obstructing an officer in violation of G.S. 14-223 is greater than that permitted by statute. *S. v. Stephens*, 335.

ASSAULT AND BATTERY

§ 13. Competency of Evidence

Trial court in a felonious assault prosecution properly excluded as irrelevant testimony concerning the victim's alleged propensity for drinking intoxicants and her prior convictions for driving under the influence. *S. v. Robinson*, 617.

§ 14.4. Assault With Deadly Weapon, A Firearm, With Intent to Kill

Jury could find that defendant intended to kill from evidence that defendant deliberately shot the victim at close range with a 12-gauge shotgun. *S. v. Holley*, 64.

§ 16.1. Submission of Question of Defendant's Guilt of Lesser Degree of Offense Not Required

In a case in which defendant was convicted of assault inflicting serious bodily injury, trial court did not err in failing to instruct on simple assault where all of the evidence tended to show the victim received serious injury. *S. v. Harrill*, 222.

ATTORNEYS AT LAW

§ 5. Duty to Represent Client

An attorney was properly held in contempt of court where he permitted the trial court to order that he be provided a transcript of a criminal trial at State's expense when he had no intention of perfecting an appeal or using the transcript for an appeal, failed and refused to obtain an extension of time in which to serve and file the record on appeal, and misrepresented to the court that he had filed a petition for a writ of certiorari in the Court of Appeals. *S. v. Joyner and In re Paul*, 89.

ATTORNEYS AT LAW—Continued

§ 7.4. Fees Based on Provisions of Notes

In an action to recover on a promissory note, trial court properly entered summary judgment for plaintiff as to attorney fees where the note provided for attorney fees. *Management Corp. v. Stanhagen*, 571.

§ 7.5. Allowance of Fees as Part of Costs

Trial court did not err in refusing to award attorney's fees to the successful plaintiff in an action to recover for damages to plaintiff's automobile where the jury awarded plaintiff $250 and defendant's insurance carrier had offered to settle plaintiff's claim for $200. *Harrison v. Herbin*, 259.

AUTOMOBILES

§ 45.6. Competency of Diagrams

Defendant failed to show that use of a blackboard diagram was prejudicial. *Mintz v. Foster*, 638.

§ 46. Opinion Testimony as to Speed

Trial court properly allowed defendant to state his opinion as to the speed of plaintiff's vehicle where defendant observed the vehicle for eighty feet. *Beaman v. Sheppard*, 73.

§ 69. Negligence in Striking Bicyclist

Evidence was sufficient for the jury in an action to recover for damages sustained by minor plaintiff when he was struck while riding his bicycle by defendant's automobile. *Bell v. Brueggemyer*, 658.

§ 72. Sudden Emergency

Trial court did not err in instructing on the doctrine of sudden emergency where defendant pulled his truck off the road because plaintiff's vehicle was heading directly toward him and defendant pulled back on the road to avoid hitting a road sign. *Beaman v. Sheppard*, 73.

§ 76.1. Contributory Negligence in Following too Closely

Plaintiff's evidence showed that his driver was contributorily negligent as a matter of law when he drove his tractor trailer into a ditch to avoid hitting a pickup he was following when another truck blocked the road ahead of him. *Daughtry v. Turnage*, 17.

§ 80.1. Turning; Collisions Involving Oncoming Vehicles

In an action to recover for personal injuries sustained by plaintiff in a collision which occurred when defendant's truck turned into the path of plaintiff's motorcycle, trial court did not err in refusing to submit an issue of plaintiff's contributory negligence. *Mintz v. Foster*, 638.

§ 89.1. Sufficient Evidence of Last Clear Chance

Trial court properly submitted an issue of last clear chance to the jury where the evidence tended to show that defendant was traveling 30 to 35 mph when plaintiffs' parked car first came into view about a block away. *Digsby v. Gregory*, 59.

§ 90.14. Erroneous Instruction on Negligence

Trial court erred in instructing that a violation of the statute relating to failure to see that an intended movement could be made in safety was negligence per se. *Mintz v. Foster*, 638.

AUTOMOBILES—Continued

§ 126.3. Breathalyzer Tests; Manner of Administering

An officer who had earlier arrested defendant for a similar offense was not disqualified by G.S. 20-139.1(b) from giving defendant a breathalyzer test after he was arrested by another officer for driving under the influence. *S. v. Jordan*, 652.

§ 126.5. Statement of Defendant; Admissibility in Driving Under the Influence Case

Defendant was not prejudiced where the trial court erroneously admitted a statement by defendant and subsequently withdrew the evidence from the jury's consideration. *S. v. Snead*, 724.

§ 127.1. Sufficient Evidence of Driving Under the Influence

Evidence was sufficient for the jury in a prosecution for driving under the influence of intoxicating liquor. *S. v. Snead*, 724.

§ 129. Instructions in Driving Under the Influence Case

In a prosecution for driving under the influence of intoxicating liquor, trial court did not err in failing to instruct on the lesser included offense of reckless driving. *S. v. Snead*, 724.

§ 140. Altering Vehicle Serial Number

A conviction of altering a motor vehicle serial number must be set aside where the court failed to require the jury to find that the number allegedly altered was assigned to the vehicle by the Division of Motor Vehicles. *S. v. Wyrick*, 352.

BANKS AND BANKING

§ 4. Joint Accounts

Summary judgment was properly entered for a defendant who contended that a bank account was a joint account with right of survivorship in deceased's brother. *Moore v. Galloway*, 394.

Half of an amount withdrawn by testator's wife from a joint and survivorship account after testator's death passed to the wife outside testator's will by virtue of his death. *Sutton v. Sutton*, 670.

BILLS AND NOTES

§ 19. Defenses and Competency of Parol Evidence

Testimony by plaintiffs that they signed a letter of credit and guaranty on the condition that two other persons would remain liable on the debt was properly excluded as being in violation of the parol evidence rule. *O'Grady v. Bank*, 315.

Trial court improperly granted summary judgment in an action to recover on a promissory note where defendant raised a genuine issue of material fact as to whether there was a failure of consideration for the note sued upon. *Stachon & Assoc. v. Broadcasting Co.*, 540.

§ 20. Sufficiency of Evidence in Action on Note

Trial court properly entered summary judgment for defendant bank in an action to rescind a letter of credit and a guaranty given as security for a note to a bank. *O'Grady v. Bank*, 315.

BROKERS AND FACTORS

§ 1.1. Real Estate Brokers

A contract giving plaintiff real estate broker the exclusive right to sell property owned by defendants in an industrial park was not ambiguous. *Nash v. Yount*, 661.

§ 6. Right to Commissions Generally

Where property was conveyed in return for an assumption by the purchasers of an indebtedness of $214,000, the "gross consideration" upon which a real estate broker's fee was to be based was $214,000. *Nash v. Yount*, 661.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.4. Presumptions from Possession of Recently Stolen Property

Evidence was sufficient for the jury in a prosecution for felonious breaking and entering and felonious larceny where the evidence tended to show that defendant was in possession of recently stolen property. *S. v. Warren*, 468.

§ 5.7. Breaking and Entering and Larceny Generally

State's evidence was sufficient for the jury on the issue of guilt of two defendants of breaking and entering a tobacco packhouse and larceny of tobacco therefrom. *S. v. Reagan*, 140.

§ 6.4. Breaking and Entering

Where an indictment charges defendant with breaking *and* entering, proof by the State of either a breaking *or* entering is sufficient. *S. v. Reagan*, 140.

CLERKS OF COURT

§ 4. Issuance and Revocation of Letters of Administration

Clerk of superior court had no authority to revoke the letters testamentary issued to the person named executor in testatrix' purported will while propounders' appeal from judgment in the caveat proceeding was pending. *In re Worrell*, 278.

COMPROMISE AND SETTLEMENT

§ 1.1. Validity and Conclusive Effect

Original defendant's ratification of her insurance carrier's settlement with the third-party defendant barred the original defendant's claim against the third-party defendant for both contribution and damages. *Lyon v. Younger*, 408.

CONSPIRACY

§ 6. Sufficiency of Evidence and Nonsuit

Testimony of a coconspirator was sufficient for the jury in a prosecution for conspiracy to break and enter a tobacco packhouse with intent to steal tobacco therefrom. *S. v. Reagan*, 140.

§ 26. Actions by Corporation

Defendant's contention that plaintiff lacked capacity to sue because plaintiff's articles of incorporation had been suspended at the time suit was brought is without merit. *Investments, Inc. v. Enterprises, Ltd.*, 622.

CONSTITUTIONAL LAW

§ 67. Identity of Informants

Trial court did not err in refusing to require disclosure of the identity of a confidential informant. *S. v. Warren*, 468.

§ 72. Use of Inculpatory Statement of Codefendant

A codefendant was properly allowed to testify as to statements made to him by defendant which tended to implicate defendant. *S. v. McAdoo*, 364.

CONTEMPT OF COURT

§ 2.2. Acts Committed Outside Courtroom

An attorney was properly held in contempt of court where he permitted the trial court to order that he be provided a transcript of a criminal trial at State's expense when he had no intention of perfecting an appeal or using the transcript for an appeal, failed and refused to obtain an extension of time in which to serve and file the record on appeal, and misrepresented to the court that he had filed a petition for a writ of certiorari in the Court of Appeals. *S. v. Joyner and In re Paul*, 89.

CONTRACTS

§ 6. Contracts Against Public Policy

The courts will not enforce an obligation to repay advancements made by a corporation to a political candidate in violation of a state statute. *Louchheim, Eng & People v. Carson*, 299.

§ 16. Conditions of Contract

Plaintiff was not entitled to recover on a promissory note where defendant had agreed to pay only conditionally and plaintiff failed to show the conditions were met. *Tire Co. v. Morefield*, 385.

§ 18. Modification

A contract for the performance of engineering services was initially made with defendant individually and there was no mutual agreement to remove liability from defendant and place it on defendant's corporation. *Bridger v. Mangum*, 569.

§ 30. Forfeitures and Penalties Under Terms of Instrument

Provision of a loan commitment agreement gave the lender the right, upon failure to close the commitment, to retain the entire standby fee paid by the borrower. *Brinkley & Associates v. Insurance Co.*, 771.

CRIMINAL LAW

§ 11. Accessories After the Fact

Court did not err in striking any reference to "Arthur Parrish" from indictments charging defendant with being an accessory after the fact to murder and armed robbery by Arthur Parrish and another unknown black male since the change did not constitute an amendment prohibited by statute. *S. v. Carrington*, 53.

Trial court in a prosecution for being an accessory after the fact did not err in failing to instruct on "specific intent" to aid the principal. *Ibid.*

CRIMINAL LAW—Continued

§ 21. Preliminary Proceedings

A seven hour delay between defendant's arrest and the time he was taken before the magistrate was not unreasonable in violation of G.S. 15A-501. *S. v. Sings*, 1.

§ 23. Plea of Guilty

The State Board of Alcoholic Control was not estopped to suspend petitioner's ABC permits for knowingly selling beer to a minor by a plea bargain agreement in a criminal action against petitioner's employee based on the sale of beer to a minor. *Motor Co. v. Board of Alcoholic Control*, 536.

§ 29.1. Procedure for Raising and Determining Issue of Mental Capacity

Trial court did not err in denying defendant's motion, made when the case was called for trial, to plead temporary insanity. *S. v. Johnson*, 729.

§ 34.4. Admissibility of Evidence of Other Offenses

Trial court in an armed robbery case did not err in admitting evidence of a shoot out between defendant and a deputy sheriff which occurred when defendant attempted to flee. *S. v. Collins*, 250.

Trial court did not err in allowing testimony by the prosecuting witness concerning a similar incident which occurred two weeks before the alleged crime for which defendant was on trial since evidence of the independent offense was admissible to corroborate the offense charged. *S. v. Jenkins*, 758.

§ 34.7. Admissibility of Evidence of Other Offenses to Show Intent

Trial court properly excluded evidence of punishment imposed upon defendant for a prior conviction since such evidence was not relevant to show intent or state of mind. *S. v. Mitchell*, 95.

§ 35. Evidence Offense Was Committed by Another

Trial court in a homicide prosecution properly excluded defendant's evidence that the crime may have been committed by another. *S. v. Couch*, 202.

§ 51.1. Sufficiency of Showing of Qualification of Expert

Evidence of training received by an SBI agent prior to conducting gun residue tests was sufficient to allow him to testify as an expert, and evidence of additional training he received after the tests were conducted was properly admitted to bolster his qualifications to testify at the trial. *S. v. Graham*, 700.

§ 57. Evidence in Regard to Firearms

Gun residue tests were not inadmisible because the test firings were made into paper rather than into cloth similar to that in decedent's dress. *S. v. Graham*, 700.

§ 62. Lie Detector Tests

In N.C. evidence relating to the results of polygraph tests is admissible only when there is a stipulation providing for its admission. *S. v. Williams*, 216.

Defendant's contention that the admission of polygraph evidence as a part of the State's evidence before defendant was given an opportunity to present evidence was in violation of his Fifth Amendment right against self-incrimination is without merit. *Ibid.*

§ 66.11. Confrontation at Scene of Crime

In-court identification of defendant by an armed robbery victim was not tainted by a pretrial identification procedure at the crime scene. *S. v. Daniels*, 85.

CRIMINAL LAW—Continued

§ 66.16. Independent Origin of In-Court Identification in Cases Involving Photographic Identification

Trial court properly found that a victim's in-court identification of defendant was based on observations at the crime scene and was not tainted by subsequent photographic identification. *S. v. Brackett*, 744.

§ 66.17. Independent Origin of In-Court Identification in Case Involving Other Pretrial Identification Procedures

Trial court did not err in allowing a robbery victim to make an in-court identification of defendant after the court had excluded evidence of the viewing of defendant by the victim at the police station. *S. v. Stephens*, 335.

§ 66.18. Voir Dire to Determine Admissibility of Identification

Failure of the trial court to conduct a hearing to determine the admissibility of the victim's in-court identification testimony was harmless. *S. v. Thomas*, 198.

§ 73.1. Admission of Hearsay Statement as Prejudicial or Harmless Error

Defendant in an assault prosecution opened the door to hearsay testimony by two witnesses that the victim stated in their presence that defendant had beaten her. *S. v. Robinson*, 617.

§ 75.3. Effect on Confession of Confronting Defendant With Evidence

The fact that defendant was confronted with illegally seized evidence just prior to making in-custody statements did not render the statements involuntary. *S. v. Sings*, 1.

§ 75.9. Volunteered Statements

Trial court was not required to conduct a voir dire hearing to determine the admissibility of defendant's volunteered statements. *S. v. Alston*, 691.

§ 75.10. Waiver of Constitutional Rights

Trial court erred in admission of defendant's in-custody statements without a specific finding as to whether defendant voluntarily waived his right to counsel at the in-custody interrogation where the voir dire evidence concerning defendant's waiver of counsel was conflicting. *S. v. Wilson*, 551.

§ 75.11. Waiver of Constitutional Rights; Sufficiency of Waiver

Trial court did not err in admitting into evidence an incriminating statement made by defendant without first making findings as to its voluntariness since there was no conflicting evidence with respect to the statement and the court could infer waiver by defendant of his right to remain silent. *S. v. Johnson*, 729.

§ 75.12. Use of Unconstitutionally Obtained Confession

Trial court erred in admitting inculpatory statements on rebuttal for the purpose of impeaching defendant without first finding that the statements were made voluntarily and understandingly where the court had excluded the statements as substantive evidence on the ground the illiterate defendant did not have the mental capacity to understand his right to counsel. *S. v. Byrd*, 42.

§ 76.4. Conduct of Voir Dire Hearing

Trial court did not abuse its discretion in refusing to allow defendant's father to testify at a voir dire hearing since the father had violated the court's sequestration order. *S. v. Sings*, 1.

CRIMINAL LAW—Continued

§ 77.2. Self-Serving Declarations

Trial court properly excluded exculpatory statements made by defendant at the police station. *S. v. Graham*, 700.

§ 81. Best Evidence Rule

The best evidence rule was not violated by an officer's testimony describing the label on a bottle containing methadone which bore defendant's name. *S. v. Bethea*, 512.

§ 84. Evidence Obtained by Unlawful Means

Although officers may have violated federal regulations when they used an outpatient at a drug rehabilitation center to purchase methadone from another outpatient, suppression of the evidence thereby obtained was not required. *S. v. Bethea*, 512.

§ 86.2. Prior Convictions Generally

Trial court properly denied defendant's motion for mistrial based on a question pertaining to his past record asked defendant by the district attorney on cross-examination. *S. v. Berry*, 128.

Trial court erred in allowing the prosecution to ask defendant whether he had been convicted of an offense in 1960, since defendant offered evidence that he was without counsel during the 1960 trial due to his indigency and the State offered no evidence to the contrary. *S. v. Vincent*, 369.

§ 86.5. Particular Questions as to Specific Acts

Trial court did not err in allowing the district attorney to cross-examine defendant about drugs found in his home pursuant to an illegal search. *S. v. Ross*, 98.

§ 87. Direct Examination of Witnesses

Where a party seeking to challenge the competency of a witness makes objection but fails to state any basis therefor, trial court does not err in refusing to hold a voir dire to determine the competency of the witness. *S. v. Harrill*, 222.

§ 88.4. Cross-Examination of Defendant

Questions asked defendant by the district attorney by which he tried to show an attempt by defendant to induce a witness to testify falsely in his favor were properly allowed by the trial court. *S. v. Thomas*, 198.

§ 89.3. Prior Statements of Witness; Consistent Statements

In a prosecution for embezzlement from a drug store, trial court did not err in allowing into evidence a memorandum of a meeting between the employer and defendant for purpose of corroboration. *S. v. Livingston*, 163.

Testimony by a police officer was not admissible to corroborate defendant's testimony where it was not a prior consistent statement of defendant but was a hearsay statement by another person. *S. v. McAdoo*, 364.

§ 89.4. Prior Statements of Witness; Inconsistent Statements

A detective's prior statements in a newspaper article which speculated that a murder may have resulted from motorcycle gang warfare were not admissible as prior inconsistent statements. *S. v. Couch*, 202.

CRIMINAL LAW—Continued

§ 90.2. When Cross-Examination of Own Witness May Be Permitted

Trial court in an armed robbery case did not err in permitting the State to impeach its own witness who testified that he believed defendant was not the man who committed the robbery. *S. v. Boyd*, 707.

Defendant was not prejudiced by the failure of the trial court to make findings of fact after the *voir dire* hearing on the State's motion to examine its own witness as an adverse witness where the evidence on *voir dire* clearly established that the State was surprised by the witness's testimony. *Ibid.*

§ 98.2. Sequestration of Witnesses

Trial court did not abuse its discretion in refusing to allow defendant's father to testify at a voir dire hearing since the father had violated the court's sequestration order. *S. v. Sings*, 1.

§ 99.5. Admonition of Counsel

The trial judge did not express an opinion when on two occasions he interrupted defense counsel and admonished him not to interrupt the State's witnesses. *S. v. Harrill*, 222.

§ 99.9. Particular Questions in Examination of Witness by Court Held Proper

Trial judge in an armed robbery case did not express an opinion when he questioned a witness as to the features of defendant which caused the witness to decide during trial that defendant was not the robber. *S. v. Boyd*, 707.

§ 101. Conduct or Misconduct Affecting Jurors

Trial court did not err in denying defendant's motion for mistrial based on (1) the sheriff's remark to defense counsel when a juror was nearby that "I understand your boys are about to enter guilty pleas in this case," and (2) a conversation during trial between a juror and a deputy sheriff concerning a gospel group in which the deputy sang. *S. v. Clemmons*, 192.

§ 101.1. Statement of Prospective Juror

A prospective juror's statement during voir dire examination that he knew defendant because he "had tried to lift a power saw from me" was not so prejudicial as to require a mistrial. *S. v. McAdoo*, 364.

§ 111.1. Particular Miscellaneous Instructions

A trial judge is not required to instruct on his duty of impartiality. *S. v. Howard*, 762.

§ 112.4. Charge on Degree of Proof Required of Circumstantial Evidence

Trial court's instruction on circumstantial evidence which stated that "you must be satisfied beyond a reasonable doubt that not only is the circumstantial evidence relied upon by the State consistent with the defendant being guilty but that it is inconsistent with his being innocent" was sufficient to explain to the jury the intensity of proof required for conviction on the basis of circumstantial evidence. *State v. Alston*, 691.

§ 113. Statement of Evidence and Application of Law Thereto

Trial court did not err in instructing the jury on principles of law from other cases without including the facts of those other cases. *S. v. Williams*, 216.

CRIMINAL LAW—Continued

§ 113.1. Summary of Evidence

Trial judge did not express an opinion when he introduced his summary of the State's evidence by stating that "the State has offered evidence which in substance tends to show" while failing to use similar phraseology in introducing his summary of defendant's evidence. *S. v. Harris*, 401.

§ 114.2. No Expression of Opinion in Statement of Evidence

Trial judge did not express an opinion on the evidence when he instructed that "of course they [the defendants] contend." *S. v. McAdoo*, 364.

Defendant was not prejudiced by the trial court's instruction that testimony by defendant's alibi witness was "in some degree" corroborated by two of defendant's other witnesses. *S. v. Boyd*, 707.

§ 116. Charge on Failure of Defendant to Testify

Defendant was not prejudiced by the trial court's reference to his failure to testify. *S. v. Alston*, 691.

§ 117. Charge on Character Evidence and Credibility of Witnesses

Trial court erred in instructing the jury that character evidence offered in defendant's behalf could be considered as substantive evidence without instructing that it could be considered as bearing upon his credibility. *S. v. Jones*, 388.

§ 117.4. Instructions on Credibility of Accomplices

Trial court did not err in refusing to give defendant's tendered instructions that the jury could convict on "unsupported" testimony of an accomplice, but it is dangerous to do so. *S. v. Wyrick*, 352.

§ 118.2. Particular Charge on Contentions as Not Erroneous or Prejudicial

Trial court's statement of the State's contentions could properly be inferred from the evidence. *S. v. McAdoo*, 364.

§ 119. Requests for Instructions

In a prosecution for taking indecent liberties with a female under the age of 16, trial court was not required to give the jury an instruction requested by defendant concerning the testimony of the child prosecuting witness. *S. v. Jenkins*, 758.

§ 122.1. Jury's Request for Additional Instructions

Where the jury, after it had begun its deliberations, asked the court a question about corroborative evidence, it was not error for the court to fail to instruct on corroborative evidence but to instruct the jury to rely on its own recollection as to whether the testimony of the witnesses was corroborative. *S. v. Burks*, 273.

§ 122.2. Additional Instructions Upon Failure to Reach Verdict

Trial court did not coerce the jury into reaching a verdict where the judge recalled the jury for the purpose of checking their progress and sent them back to deliberate further without instructing that no one should surrender his conscientious convictions in order to reach a verdict. *S. v. Brackett*, 744.

§ 142.3. Particular Conditions of Probation Held Proper

Trial court in an embezzlement case did not err in ordering defendant to pay over $4000 in restitution as a condition of probation. *S. v. Livingston*, 163.

CRIMINAL LAW—Continued

A condition of defendant's probation that he not loiter in or around the courthouse or any other public building unless on business did not amount to banishment and was reasonably related to the offense for which defendant was convicted. *S. v. Setzer*, 734.

§ 143. Revocation of Probation

Superior court in a probation revocation hearing was not divested of jurisdiction so far as restitution was concerned because defendant had filed a petition for bankruptcy since the petition was filed after defendant's probation had been revoked. *S. v. Hutson*, 378.

§ 143.10. Violation of Condition as to Payments

Where there was evidence that defendant failed to pay his fine and court costs which was a condition of his probation, and there was no evidence of his inability to pay, trial court properly found that defendant wilfully and without just excuse violated the conditions of the probation judgment. *S. v. Williams*, 262.

Where probation judgments provided that defendant would make payments of $75 per month with full restitution to be made in one year, the judgments did not mean that defendant was not in violation unless he failed to make full payment within the year. *S. v. Hutson*, 378.

§ 143.12. Sentence Upon Revocation of Probation

Where the record was not clear that the defendant was originally sentenced to more than three months in prison in a prosecution for issuing a worthless check, the trial court erred in revoking probation and activating a six month prison sentence. *S. v. Hutson*, 378.

§ 143.13. Appeal From Order of Revocation

A defendant on appeal from an order revoking probation may not challenge his adjudication of guilt. *S. v. Williams*, 262.

§ 144. Modification and Correction of Judgment in Trial Court

Trial court had authority to amend a judgment out of term to correct the citation to the statute under which defendant was convicted. *S. v. McKinnon*, 741.

§ 160. Correction of Record

The Court of Appeals could properly add new matter to the original record on appeal for the purpose of correcting a contradiction in the original record. *S. v. Wray*, 682.

§ 177.1. Remand for Correction of Uncertainty or Error in Judgment or Sentence

Where there was no error in the trial on one charge, but the sentence thereon was made to begin at the expiration of the sentence on another charge upon which a new trial had been granted, the judgment on the charge upheld must be set aside and the cause remanded for judgment. *S. v. Wyrick*, 352.

§ 177.2. Remand to Correct Other Errors

Criminal case was remanded to trial court for a determination as to whether in-custody statements made by defendant were made voluntarily and understandingly. *S. v. Byrd*, 42.

Case is remanded to the trial court for a determination as to whether defendant waived his right to counsel during interrogation. *S. v. Wilson*, 551.

DAMAGES

§ 17. Instructions

In an action to recover for injuries sustained in an automobile accident, defendants were not prejudiced by the trial court's instruction to the jury that they could find the amount of damages to be anywhere from one cent to $20,000. *Matthews v. Lineberry*, 527.

Trial court did not err in instructing the jury that it could consider plaintiff's loss of time from school and repeating a school course in determining damages. *Ibid.*

DEDICATION

§ 2. Dedication by Plat

No question of material fact existed as to the proper dedication of a sewer easement shown on a subdivision plat, and there was no merit in the contention that the easement was dedicated for storm sewer purposes only and that the city could not use it for a sanitary sewer. *Sampson v. City of Greensboro*, 148.

DEEDS

§ 20.6. Who May Enforce Restrictions

An association of property owners did not have the right to enforce restrictive covenants in deeds to owners of lots in a resort development. *Property Owners' Assoc. v. Current*, 135.

§ 24.2. Effect of Actual Knowledge of Covenants Against Encumbrances

Even a grantee's actual knowledge and record notice of the existence of an encumbrance do not constitute a defense to a grantee's action to recover damages for grantor's breach of a covenant against encumbrances. *Investments, Inc. v. Enterprises, Ltd.*, 622.

DESCENT AND DISTRIBUTION

§ 7. Per Stirpes and Per Capita Divisions

Property which reverted to testator's estate upon the death of one of his sons without a descendant was properly divided half to the children of another son who had been a life tenant and the other half per stirpes to testator's remaining grandchildren. *House v. White*, 124.

DIVORCE AND ALIMONY

§ 18.11. Alimony Pendente Lite: Findings as to Dependency

Fact that the wife had a savings account of $21,000 did not preclude the court from finding she did not have sufficient means to subsist during the pendency of an action for alimony and from awarding her alimony pendente lite and counsel fees. *Davis v. Davis*, 111.

Trial court erred in awarding plaintiff alimony pendente lite where the court found that defendant was unemployed at the time of the hearing and that he was at that time unable to pay alimony pendente lite. *Gobble v. Gobble*, 765.

DIVORCE AND ALIMONY—Continued

§ 21.1. Enforcement of Alimony Award: Notice and Hearing

In a hearing for defendant to show cause why he should not be held in contempt for wilful failure to comply with a court order to pay alimony and support, trial court's suspension of the support payments without proper motion and without notice deprived plaintiff of her property rights without due process. *Conrad v. Conrad*, 114.

§ 21.3. Evidence and Findings

Trial court's sole finding of fact that defendant had $100 in his checking account was insufficient to support the court's conclusion that defendant's noncompliance with an alimony order was not wilful. *Conrad v. Conrad*, 114.

§ 24.1. Determining Amount of Child Support

Findings and conclusions of the trial court were sufficient to support its order of child support and substantially complied with the statutory standards of G.S. 50-13.4(c). *Martin v. Martin*, 610.

Trial court did not err in awarding possession of a home owned by the parties as tenants by the entirety to plaintiff as part of child support. *Ibid.*

Defendant's contention that methods of payment under G.S. 50-13.4(e) are mutually exclusive and that the trial court was therefore without authority in ordering both a lump sum payment and transfer of the car title as child support is without merit. *Moore v. Moore*, 748.

§ 24.4. Enforcement of Support Orders; Contempt

Trial court could find defendant in contempt for failing to transfer title to a car to plaintiff pursuant to an earlier child support order, and the court was not first required to find that defendant had the present ability to comply with the order. *Moore v. Moore*, 748.

§ 27. Attorney's Fees and Costs

Trial court properly considered the income of plaintiff's present wife in determining his financial ability to pay defendant's counsel fees in a child support action. *Wyatt v. Wyatt*, 650.

EASEMENTS

§ 8.3. Utility Easements; Sewers

There was no merit in the contention that a sewer easement shown on a subdivision plat was dedicated for storm sewer purposes only and that defendant city could not use the area for a sanitary sewer. *Sampson v. City of Greensboro*, 148.

EJECTMENT

§ 13.1. Evidence Fitting Description to Land Claimed

Court erred in granting summary judgment for plaintiff in an action in which plaintiff claimed superior title from a common source where plaintiff's evidence failed to fit the description in her chain of title to the land claimed. *Faucette v. Griffin*, 7.

ELECTIONS

§ 15. Campaign Contributions

The payment of money by a corporation engaged in the business of public relations for media advertising for the campaign of a political candidate with the expectation of reimbursement by the candidate constituted an illegal campaign contribution or expenditure. *Louchheim, Eng & People v. Carson*, 299.

EMBEZZLEMENT

§ 6. Directed Verdict

Trial court properly denied defendant's motion for directed verdict in a prosecution of defendant for embezzlement from a drug store. *S. v. Livingston*, 163.

EMINENT DOMAIN

§ 16. Persons Entitled to Compensation Paid

Trial court properly ruled that it could not disburse funds paid into court in an action to condemn church property for a highway because there was a dispute as to title to the realty between the owners of a determinable fee (the church trustees) and the owners of a reversionary interest in the realty. *Board of Transportation v. Greene*, 187.

EQUITY

§ 2.2. Applicability of Doctrine of Laches to Particular Proceedings

Plaintiffs were barred by laches from attacking a rezoning ordinance where they did nothing to invalidate the ordinance until five years and nine months after the ordinance was adopted. *Capps v. City of Raleigh*, 290.

ESTATES

§ 9. Joint Estates and Survivorship in Personalty

Half of an amount withdrawn by testator's wife from a joint and survivorship account after testator's death passed to the wife outside testator's will by virtue of his death. *Sutton v. Sutton*, 670.

ESTOPPEL

§ 1.1. Estoppel Where Deed is Void

A married woman who executed a deed without the written assent of her husband was estopped from defeating the title of her grantee once the marriage relation was severed by the death of her husband or by divorce. *Faucette v. Griffin*, 7.

§ 5.2. Conveyance of Property by Married Woman

Where a wife's purported conveyance of entirety property to a third party was inoperative because the husband did not join therein, the wife's interest in the property as a tenant in common after she obtained a divorce from the husband was unaffected by the third party's unasserted right of estoppel against her, and she was entitled to maintain an action for partition of the property. *Meachem v. Boyce*, 506.

A trustee in a deed of trust and a grantee in a deed to whom a wife conveyed entirety property were necessary parties in an action for partition brought by the wife as a tenant in common after she obtained a divorce from the husband. *Ibid.*

EVIDENCE

§ 31.1. Examples of Best and Secondary Evidence

Statements in an affidavit by the former Secretary of the Board of Transportation explaining the reason the Board decided to locate a proposed highway on church property were not inadmissible as hearsay and did not violate the best evidence rule. *Board of Transportation v. Greene*, 187.

A photostatic copy of an affidavit containing appraisals of testator's lands was not admissible under the best evidence rule. *Sutton v. Sutton*, 670.

§ 32.5. Matters Relating to Conditions Precedent

Testimony by plaintiffs that they signed a letter of credit and guaranty on the condition that two other persons would remain liable on the debt was properly excluded as being in violation of the parol evidence rule. *O'Grady v. Bank*, 315.

§ 53. Testimony as to Handwriting

An expert in handwriting analysis was properly allowed to state his positive opinion that an alleged holographic will could not have been written by decedent. *In re Ray*, 646.

FALSE PRETENSE

§ 2. Indictment

Trial court did not err in ordering that an indictment for obtaining property by false pretense be amended to allege the offense occurred on 18 November 1976 instead of 18 November 1977. *S. v. Tesenair*, 531.

§ 3.1. Sufficiency of Evidence

Defendant's falsification of invoices for the purpose of obtaining payment from a store for more cases of beer than he actually delivered amounted to a false pretense within the meaning of G.S. 14-100(a). *S. v. Grier*, 119.

The crime of obtaining property by false pretense may be committed when one obtains goods on credit by a wilful misrepresentation of his identity, regardless of any intention of defendant ultimately to pay or not to pay. *S. v. Tesenair*, 531.

§ 3.2. Instructions

Trial court's instructions properly placed the burden of proving the elements of the crime charged upon the State. *S. v. Mitchell*, 95.

In a prosecution for obtaining property by false pretense, trial court did not err in instructing the jury on attempting to obtain property by false pretense. *S. v. Grier*, 119.

FRAUDULENT CONVEYANCES

§ 3.4. Sufficiency of Evidence

Evidence was insufficient to show that deeds representing the transfer of land were fraudulent conveyances. *Bank v. Evans*, 322.

GAS

§ 1. Regulation

Evidence supported an order of the Utilities Commission basing the volume variation adjustment factor for the rates of a natural gas company on both historical and future entitlement periods and requiring a true-up adjustment for past periods. *Utilities Comm. v. Public Service Co.*, 156.

HIGHWAYS AND CARTWAYS

§ 2.1. Restrictions Against Advertisements Along Highways

Petitioner who erected outdoor advertising signs in October 1972 had notice that outdoor advertising on specified highways was under the regulation and control of respondents, and he was properly required by respondents to remove the signs. *Advertising Co. v. Dept. of Transportation*, 226.

HOMICIDE

§ 8. Intoxication, Defense of

Voluntary drunkenness is not a defense to second degree murder. *S. v. Couch*, 202.

§ 12. Indictment

An indictment for murder could not support a conviction of assault upon a female. *S. v. Craig*, 547.

§ 14.1. Presumptions from Intentional Use of Deadly Weapon

The malice required for second degree murder may be implied from evidence that the victim's death resulted from an attack by hands alone when the attack was made by a mature man upon an infant. *S. v. Jones*, 48.

§ 15. Relevancy and Competency of Evidence in General

In a prosecution for involuntary manslaughter of a customer in defendant's tavern, trial court erred in excluding testimony by defendant's witness that, approximately two months before the shooting, he chambered a round in the gun used by defendant, which was kept under the tavern bar, and left the gun half-cocked. *S. v. Collins*, 242.

§ 19.1. Evidence of Character or Reputation

Defendant in a homicide prosecution was not prejudiced where the trial court sustained the district attorney's objection to defense counsel's questions to defendant as to why he shot the victim since defendant answered that he was afraid of the victim because of his reputation as a dangerous man, and the court did not strike that testimony. *S. v. Hodges*, 328.

§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder

Evidence was sufficient to support a verdict finding defendant guilty of second degree murder of a 20-month-old child. *S. v. Jones*, 48.

Evidence was sufficient to be submitted to the jury though there was no direct evidence identifying defendant as the person who killed deceased. *S. v. Alston*, 691.

§ 21.9. Sufficiency of Evidence of Guilt of Manslaughter

Evidence that defendant and deceased were arguing and fighting over a gun when deceased was shot was sufficient to support submission of an issue as to voluntary manslaughter. *S. v. Graham*, 700.

§ 28.1. Duty of Trial Court to Instruct on Self-Defense

There was no evidence requiring the trial court to instruct on self-defense. *S. v. Berry*, 128.

§ 28.5. Defense of Others

Defendant's statement that he had stabbed a man who had cut his wife was not sufficient to raise an issue of defense of family. *S. v. Alston*, 691.

HOMICIDE—Continued

§ 28.8. Defense of Accidental Death

Trial court in a homicide prosecution erred in failing to instruct the jury on the defense of accident. *S. v. Martin*, 108.

§ 30.2. Necessity for Instruction on Manslaughter

Trial court in a murder case was not required to charge on manslaughter because of defendant's evidence that he was upset when deceased unexpectedly returned to his home and interrupted defendant's tryst with deceased's wife. *S. v. Couch*, 202.

§ 30.3. Instructions on Involuntary Manslaughter

Evidence was sufficient to support defendant's conviction for involuntary manslaughter of a patron of a tavern owned by defendant. *S. v. Collins*, 242.

§ 32.1. Harmless or Prejudicial Error and Cure by Verdict

Defendant failed to show that he was prejudiced by the trial court's denial of his motion for nonsuit on the charge of second degree murder since defendant was, in effect, acquitted of second degree murder when he was convicted of manslaughter. *S. v. Hodges*, 328.

The jury's verdict finding defendant guilty of voluntary manslaughter rendered harmless any errors in the court's instructions on second degree murder. *S. v. Graham*, 700.

HOSPITALS

§ 3.2. Liability for Negligence of Employees

Evidence was insufficient to show negligence on the part of defendant hospital in failing to apply restraints to plaintiff's intestate and in failing to provide intestate with round the clock nurses; moreover, there was no evidence that defendant could have foreseen that the failure to restrain deceased properly and to provide him with nurses would result in his fall from the second story of the hospital. *Coltraine v. Hospital*, 755.

HUSBAND AND WIFE

§ 5.1. Husband's Assent to Wife's Conveyance

A 1935 deed purporting to convey real property of a married woman without the written assent of her husband was void, but once the marriage relation was severed by death of the husband or by divorce, the woman was estopped to defeat the title of her grantee. *Faucette v. Griffin*, 7.

Where a wife's purported conveyance of entirety property to a third party was inoperative because the husband did not join therein, the wife's interest in the property as a tenant in common after she obtained a divorce from the husband was unaffected by the third party's unasserted right of estoppel against her, and she was entitled to maintain an action for partition of the property. *Meachem v. Boyce*, 506.

§ 9. Liability of Third Person for Injury to Spouse

A married man cannot maintain an action for loss of consortium when his wife is negligently injured by another. *Cozart v. Chapin*, 254.

HUSBAND AND WIFE—Continued

§ 11.2. Construction of Separation Agreement

The term "single" as used in a separation agreement could not be interpreted as meaning "alone" but clearly meant "unmarried." *Hall v. Hall*, 664.

INDICTMENT AND WARRANT

§ 12.2. Amendment

Court did not err in striking any reference to "Arthur Parrish" from indictments charging defendant with being an accessory after the fact to murder and armed robbery by Arthur Parrish and another unknown black male since the change did not constitute an amendment prohibited by statute. *S. v. Carrington*, 53.

Trial court did not err in ordering that an indictment for obtaining property by false pretense be amended to allege the offense occurred on 18 November 1976 instead of 18 November 1977. *S. v. Tesenair*, 531.

§ 17.2. Variance Between Averment and Proof as to Time

Where the State presented evidence tending to show that the alleged rape occurred on the date fixed by the bill of indictment, the defendant presented alibi evidence, and the State then presented rebuttal evidence that the crime occurred on a different date, there was a fatal variance between the indictment and the proof. *S. v. Vincent*, 369.

INJUNCTIONS

§ 13.2. Evidence of Irreparable Injury

Plaintiff failed to show irreparable injury to support the issuance of a preliminary injunction prohibiting the violation of a covenant not to compete. *Herff Jones Co. v. Allegood*, 475.

INSANE PERSONS

§ 1.2. Sufficiency of Evidence to Support Findings Required by Involuntary Commitment Statutes

Trial court's determination that respondent is imminently dangerous to himself because he is unable to provide for his basic needs was supported by the evidence. *In re Lee*, 655.

INSURANCE

§ 3. Nature and Elements of Contract and Policy

The fact that an endorsement in a fire insurance policy which limited coverage was not signed did not invalidate the endorsement. *Greenway v. Insurance Co.*, 308.

§ 43.1. Hospital Expense Policy

Plaintiff was not entitled to coverage under a policy which excluded coverage for "treatment of bodily injuries arising from or in the course of any employment" where the self-employed plaintiff suffered an injury arising from his work. *Brown v. Insurance Co.*, 256.

INSURANCE—Continued

§ 60. Accident Policies: Disease

In an action to recover under an accident insurance policy which excluded any loss caused by pre-existing disease, a question of fact as to whether the arteriosclerotic condition of the insured was so severe that it constituted a disease within the meaning of the policy was raised. *Emanuel v. Insurance Co.*, 435.

§ 67. Actions on Accident Policies

Plaintiff's evidence was sufficient for the jury in an action on a policy insuring against death by accident where it showed insured met his death by an unexplained shooting. *Moore v. Insurance Co.*, 69.

§ 69.2. Meaning of "Uninsured Vehicle" in Automobile Insurance Policy

The uninsured motorist provision of plaintiff's automobile policy did not provide coverage for injuries to plaintiff's minor son when he was struck by a three-wheel custom-built motorcycle being driven by defendant in his own yard where the motorcycle was not equipped so that it could pass the inspection required for license plates and had never been operated on a public highway. *Autry v. Insurance Co.*, 628.

§ 72. Vehicles Covered by Collision Policy

Plaintiff's complaint was insufficient to show that a leased International tractor was a "replacement" vehicle within the purview of a collision insurance policy covering a Ford tractor owned by plaintiff. *Grant v. Insurance Co.*, 246.

§ 79.1. Automobile Liability Insurance Rates

Superior Court of Wake County had subject matter jurisdiction of a petition for review of an order of the Commissioner of Insurance prohibiting the Automobile Rate Office from implementing reduced automobile medical payments rates in accordance with its standard rule of application, and the Commissioner acted arbitrarily in entering such order. *Automobile Rate Office v. Ingram*, 578.

§ 122. Conditions of Fire Policies

An endorsement limiting an insurer's liability to 75% of the value of a home if there were no telephone installed was reasonable because tied to an increased risk. *Greenway v. Insurance Co.*, 308.

§ 147. Aircraft Insurance

Plaintiff failed to comply with the notice requirements of an aircraft policy and defendant did not waive noncompliance with the notice requirements by investigating the accident or by denying liability on other grounds. *Taylor v. Insurance Co.*, 150.

INTOXICATING LIQUOR

§ 2.3. Suspension of License Generally

The State Board of Alcoholic Control was not estopped to suspend petitioner's ABC permits for knowingly selling beer to a minor by a plea bargain agreement in a criminal action against petitioner's employee based on the sale of beer to a minor. *Motor Co. v. Board of Alcoholic Control*, 536.

JUDGMENTS

§ 21.2. Fraud or Mutual Mistake in Consent Judgment

In an action for divorce on the ground of one year's separation, defendant was not entitled to attack a consent judgment rendered in an earlier action between the parties. *Hazard v. Hazard*, 668.

JURY

§ 1.1. Right to Jury Trial on Issues of Fact

Trial court erred in denying defendant a jury trial in an action in which plaintiff sought partition of property formerly held by the parties as tenants by the entirety on the ground that she had obtained a divorce from defendant in Florida and was entitled to partition as a tenant in common where defendant alleged the Florida divorce was invalid because plaintiff was not legally domiciled in Florida at the time of the divorce. *Burke v. Harrington*, 558.

§ 3.1. Qualification of Jurors

It is actual service as a juror rather than a mere summons for jury duty which disqualifies a person for service for the next two years. *S. v. Berry*, 128.

§ 6.3. Propriety and Scope of Voir Dire Examination

Though it was error for the trial court to refuse to permit propounders, during the voir dire examination of prospective jurors, to inquire if they believed in the right of a person to make a will, such error did not warrant a new trial. *In re Worrell*, 278.

§ 7.1. Grounds for Challenge Generally

Trial court did not err in denying defendant's motion to challenge the array. *S. v. Berry*, 128.

LABORERS' AND MATERIALMEN'S LIENS

§ 2. Contract With Husband or Wife

There was a genuine issue of a material fact as to whether feme defendant was a party to a contract between the plaintiffs and defendant husband for the construction of a house on a lot owned by defendants as tenants by the entirety, and trial court erred in entering summary judgment for the feme defendant in an action on the contract and in ordering that plaintiffs' notice of a claim of lien for labor and materials be stricken from the record. *Ervin v. Turner*, 265.

LANDLORD AND TENANT

§ 11. Assignment and Subletting

Trial court did not err in holding that plaintiff lessor's refusal to consent to a proposed sublease was reasonable. *Jones v. Products, Inc.*, 170.

LARCENY

§ 4. Warrant and Indictment

It was not necessary for an indictment to charge larceny "by trick" in order for the State to prove that the property was obtained by trick. *S. v. Harris*, 401.

MASTER AND SERVANT—Continued

§ 55.3. Particular Injuries as Constituting Accident

Plaintiff was injured by accident when an air hammer which he was using to break the concrete over a well suddenly broke through the concrete and jerked him. *Searsey v. Construction Co.*, 78.

§ 55.5. Meaning of "Arising Out Of" the Employment

The death of an employee of a sanitary district by drowning while he was attempting to wade across a reservoir so he could cut weeds on the other side of the reservoir did not arise out of his employment. *Hensley v. Caswell Action Committee*, 544.

§ 60.4. Recreation or Amusement

The death of a 15-year-old laborer by drowning while swimming in a lake on his employer's premises during his lunch hour arose out of and in the course of his employment. *Martin v. Bonclarken Assembly*, 489.

§ 65.2. Back Injury

Industrial Commission properly concluded that plaintiff's back injury did not result from an accident. *Smith v. Burlington Industries*, 105.

§ 69. Amount of Recovery Generally

Evidence was sufficient to support the Industrial Commission's finding that plaintiff had reached maximum recovery on a specified date. *Perry v. Furniture Co.*, 518.

§ 71.1. Computation of Average Weekly Wage in Particular Cases

The Industrial Commission properly determined that a deceased employee's average weekly wage was the aggregate of wages he received from both a contractor and a subcontractor where the Commission found that decedent in fact was an employee only of the subcontractor and that the subcontractor ultimately paid the contractor for wages it paid to the decedent. *Britt v. Construction Co.*, 23.

Evidence supported an award for the death of a minor employee based on a wage for a class of work which the minor employee "would probably have been promoted to." *Martin v. Bonclarken Assembly*, 489.

§ 72. Partial Disability

Plaintiff's contention that the Industrial Commission erred in finding that he had a 50% permanent partial disability of the back because all the evidence established that plaintiff was unable to perform any common labor and because the true measure of disability is not the degree of physical impairment but the degree by which ability to earn wages has been diminished is without merit, since, under G.S. 97-31, a disability is made compensable without regard to the loss of wage-earning power and in lieu of all other compensation. *Perry v. Furniture Co.*, 518.

§ 81. Insurer's Liability for Workmen's Compensation

A contractor's workmen's compensation carrier was estopped to deny it was liable for a portion of workmen's compensation benefits due for the death of a subcontractor's employee if it accepted premiums for workmen's compensation on the deceased employee. *Britt v. Construction Co.*, 23.

MINES AND MINERALS

§ 2. Liabilities in Connection With Mining Operations

Plaintiff's complaint failed to state a cause of action based on G.S. 74-4 and G.S. 74-13 making it a criminal offense to fail to fence the opening of mines to prevent inadvertent entrance into them. *Kelly v. Briles*, 714.

Licensee's complaint was insufficient to state a claim against mine owners based on negligence where there was no allegation of wilful and wanton negligence. *Ibid.*

MORTGAGES AND DEEDS OF TRUST

§ 29. Bids and Rights of Bidders at the Sale

A trustee in a deed of trust did not breach his duty by failing to require the successful bidder at a foreclosure sale to make a cash deposit of its bid or by crediting the indebtedness with the amount of the bid rather than requiring the bidder to pay the bid in cash. *White v. Lemon Tree Inn*, 117.

§ 32. Deficiency and Personal Liability

In an action to recover on a promissory note, G.S. 45-21.38 was inapplicable since the transaction between plaintiff and defendant with respect to the promissory note was not a purchase money transaction within the meaning of the statute. *Management Corp. v. Stanhagen*, 571.

MUNICIPAL CORPORATIONS

§ 16.1. Contributory Negligence of Person Injured on City Street or Sidewalk

Plaintiff was not contributorily negligent as a matter of law when he tripped and fell over a flag bracket placed against a light pole by defendant city's employees. *McKay v. City of Charlotte*, 562.

§ 17.1. Sufficiency of Evidence in Action to Recover for Injury on City Street

Plaintiff's evidence was sufficient for the jury on the issue of negligence by defendant city and defendant construction company in leaving a manhole cover protruding three inches above the level of a road under construction without any warning to motorists. *Holt v. City of Statesville*, 381.

§ 30.6. Special Permits and Variances in Zoning

The section of a city code which provided that the Board of Adjustment must state reasons for its denial of a special use permit but which did not require that such reasons be stated when the Board approved an application did not violate equal protection and due process guarantees. *Neighborhood Assoc. v. Bd. of Adjustment*, 449.

§ 30.20. Procedure for Enactment or Amendment of Zoning Ordinance

Actual personal notice to owners of land affected by a rezoning proposal is not necessary in order for the defense of laches to be available in an action attacking the rezoning ordinance. *Capps v. City of Raleigh*, 290.

Notice published in a newspaper was sufficient to give property owners constructive notice that their property might be rezoned. *Ibid.*

MUNICIPAL CORPORATIONS—Continued

§ 30.22. Judgment and Sufficiency of Evidence to Support Judgment in Zoning Cases

Evidence was sufficient to support five affirmative findings required by city ordinance before issuance of a special use permit. *Neighborhood Assoc. v. Bd. of Adjustment*, 449.

§ 31. Judicial Review of Zoning

Plaintiffs were barred by laches from attacking a rezoning ordinance where they did nothing to invalidate the ordinance until five years and nine months after the ordinance was adopted. *Capps v. City of Raleigh*, 290.

NARCOTICS

§ 1.3. Elements and Essentials of Statutory Offenses Relating to Narcotics

Possession of marijuana with intent to sell and deliver is not a lesser included offense of sale and delivery to a minor. *S. v. Saunders*, 359.

§ 3.1. Competency and Relevancy of Evidence

Although officers may have violated federal regulations when they used an outpatient at a drug rehabilitation center to purchase methadone from another outpatient, suppression of the evidence thereby obtained was not required. *S. v. Bethea*, 512.

§ 4. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for possession of heroin found in an envelope which defendant dropped. *S. v. Howard*, 762.

§ 4.5. Instructions Generally

Defendant is entitled to a new trial where the trial court erroneously summarized the contents of a stipulation between defendant and the State. *S. v. Saunders*, 359.

NEGLIGENCE

§ 51.3. Attractive Nuisances

Summary judgment was improperly entered for defendants in an action to recover under the attractive nuisance doctrine for injuries sustained by the five-year-old plaintiff when he fell through a skylight on the roof of a building owned by one defendant and being repaired by the second defendant. *Forte v. Paper Co.*, 340.

§ 57.2. Action by Invitee in Fall From Chair

In an action to recover for personal injuries allegedly sustained by plaintiff when she fell from a barstool in defendant's establishment, trial court properly directed verdict for defendant. *Husketh v. Convenient Systems*, 207.

§ 59.2. Duty of Care Owed to Licensees

Licensee's complaint was insufficient to state a claim against mine owners based on negligence where there was no allegation of wilful and wanton negligence. *Kelly v. Briles*, 714.

PARTITION

§ 3. Proceeding for Judicial Partition

Trial court erred in denying defendant a jury trial in an action in which plaintiff sought partition of property formerly held by the parties as tenants by the entirety on the ground that she had obtained a divorce from defendant in Florida and was entitled to partition as a tenant in common where defendant alleged the Florida divorce was invalid because plaintiff was not legally domiciled in Florida at the time of the divorce. *Burke v. Harrington*, 558.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 6.2. Evidence—Revocation of License

Evidence of a pharmacist's guilty plea in a federal court to a charge of unlawfully refusing to keep an accurate record of controlled substances in his possession was competent evidence which supported the conclusion of the Board of Pharmacy that the pharmacist wilfully refused to comply with the law governing the practice of pharmacy. *White v. Board of Pharmacy*, 554.

§ 15.1. Expert Testimony

Trial court properly allowed an expert witness to answer a hypothetical question based on evidence placed before the jury in a malpractice action. *O'Quinn v. Dorman*, 500.

PLEADINGS

§ 9.1. Extension of Time to File Answer

Trial court properly found that defendant's failure to file answer resulted from excusable neglect where defendant failed to give his liability insurer adequate time to file because of his erroneous belief that he had 30 days in which to deliver the summons and complaint to his insurance agent. *Norris v. West*, 21.

§ 10. Form and Content of Answer Generally

An order allowing defendants to file responsive pleadings after additional parties plaintiff filed an amendment to the complaint did not permit defendants to respond only to the new matter alleged in the amendment but permitted further answers and defenses and a counterclaim. *Development Corp. v. James*, 272.

§ 33.3. Motion to Amend Answer Disallowed

In an action for breach of a construction contract, trial court did not abuse its discretion in denying defendants' motion to amend their answer to allege a defense that plaintiff's license as a general contractor limited his recovery for construction of a dwelling to $75,000 and a counterclaim for the sum defendants had paid to plaintiff in excess of that amount. *Hudspeth v. Bunzey*, 231.

§ 34. Amendment as to Parties

Trial court properly permitted the complaint to be amended to substitute as plaintiff a subsidiary of the original corporate plaintiff in an action to recover for damage to yarn stored in defendant's warehouse. *Industries Corp. v. Warehousing Co.*, 122.

PROCESS

§ 12. Service on Domestic Corporations

Corporate defendant was properly served with process by leaving copies thereof at the registered agent's home with the agent's wife. *Trailers, Inc. v. Poultry, Inc.*, 752.

§ 16. Service on Nonresident in Action to Recover for Negligent Operation of Automobile in this State

Where service of process on nonresident motorists was defective without affidavits of compliance required by G.S. 1-105(3), it was proper for the trial court on remand to consider plaintiffs' affidavits of compliance which had been filed pending the first appeal of the case but which were not considered by the court on appeal. *Ridge v. Wright*, 643.

RAILROADS

§ 5.8. Sufficiency of Evidence of Contributory Negligence

The driver of a tractor-trailer was not contributorily negligent as a matter of law in colliding with a train. *Townsend v. Railway Co.*, 482.

RAPE

§ 5. Sufficiency of Evidence

Evidence of force used by a 28-year-old defendant upon the 14-year-old victim was sufficient to support a second degree rape charge. *S. v. Williams*, 216.

REFORMATION OF INSTRUMENTS

§ 1.1. Mutual or Unilateral Mistake

Defendant's attempt to reform a deed by claiming mistake was ineffectual. *Investments, Inc. v. Enterprises, Ltd.*, 622.

ROBBERY

§ 1.1. Nature and Elements of Offense of Armed Robbery

A taking is from the "presence" of the victim within the purview of the armed robbery statute if the force or intimidation by the use of firearms for the purpose of taking personal property has been used and caused the victim in possession or control to flee the premises and this is followed by the taking of the property in a continuous course of conduct. *S. v. Clemmons*, 192.

§ 3.2. Admissibility of Physical Objects

Trial court in an armed robbery case did not err in allowing evidence relating to the clothing defendant was wearing at the time of his arrest. *S. v. Collins*, 250.

§ 4.1. Variance Between Indictment and Proof

There was no fatal variance between indictment and proof where the indictment alleged money was taken from the presence of a named female and the evidence showed that the female and her husband were present in a store when robbers entered and announced it was a holdup, the female was shot by one of the robbers when she entered an adjoining room, and the husband gave the robbers money from the cash register. *S. v. Clemmons*, 192.

SEARCHES AND SEIZURES—Continued

§ 11. Search of Vehicle Without Warrant

Air Force security policemen had probable cause to search defendant's car for marijuana, and exigent circumstances justified a search of defendant's car without a warrant. *S. v. Summerlin*, 522.

§ 13. Consent to Search

A warrantless search of defendant's barn for stolen tobacco was lawful where a tenant in possession of the barn consented to the search. *S. v. Reagan*, 140.

§ 18. Consent to Warrantless Search Given by Owner of Vehicle

Where an officer had probable cause to search defendant's car, the officer's threat to impound the car did not constitute duress and negate the voluntary character of defendant's consent to the search. *S. v. Paschal*, 239.

§ 20. Requisites of Affidavit for Warrant

The wrong year date in the affidavit for a warrant did not invalidate the warrant. *S. v. Beddard*, 212.

§ 24. Probable Cause for Warrant; Information From Informers

An affidavit for a search warrant based on an informant's tip contained sufficient facts from which the issuing official could determine that there were reasonable grounds to believe illegal activity was being carried on at the place to be searched and that the informant was reliable. *S. v. Beddard*, 212.

§ 39. Execution of Search Warrant; Places Which May be Searched

The search of a bedroom and closet in the bedroom rented by defendant in his uncle's home pursuant to a warrant to search the uncle's home was lawful, and stolen clothing seized from the closet was properly admitted in evidence against defendant. *S. v. Woodard*, 605.

§ 41. Knock and Announce Requirements in Execution of Search Warrant

Where an officer, in executing a search warrant, gave notice of his identity and purpose at a dwelling house, suppression of marijuana seized from an outbuilding was not required because of the officer's failure to give a second notice before entering the outbuilding. *S. v. Fruitt*, 177.

Officers violated G.S. 15A-249 in the execution of a warrant to search defendant's residence for marijuana when an officer who was not in uniform forcibly entered defendant's residence without giving notice of his identity and purpose, and such violation required the suppression of the marijuana seized during the search. *S. v. Brown*, 634.

§ 42. Conduct of Officers in Exhibiting or Delivering Warrant

An officer's violation of G.S. 15A-252 by carrying seized marijuana from unoccupied premises without leaving a copy of the search warrant affixed to the premises, and his violation of G.S. 15A-254 by failing to leave in the premises an itemized receipt of the items taken, did not constitute a "substantial" violation of G.S. Ch. 15A so as to require suppression of the marijuana. *S. v. Fruitt*, 177.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1. Generally

Plaintiff's Old Age Assistance lien against defendant's property which had been reduced to judgment but had not been enforced against the property was voided by Session Laws 1975. *Swain County v. Sheppard*, 391.

TAXATION

§ 22. Exemption From Taxation of Property of Religious, Charitable, and Educational Institutions

Forest land owned by a nonprofit corporation and leased to a packaging manufacturer was not exempt from ad valorem taxes as property used exclusively for educational, charitable or scientific purposes. *In re Forestry Foundation*, 414; *In re Forestry Foundation*, 430.

§ 25. Assessment and Levy of Ad Valorem Taxes

A foundation which owned forest land was not entitled to have the value of a long-term lease of the property excluded from the valuation of the property for ad valorem taxes. G.S. 105-273(8). *In re Forestry Foundation*, 430.

TELECOMMUNICATIONS

§ 1.4. Evidence of Fair Value in Rate Case

In determining the fair market value of a telephone company's property, the Utilities Commission did not err in using a weighting process based on a debt-equity ratio. *Utilities Comm. v. Telephone Co.*, 588.

§ 1.6. Property "Used" and "Useful" in Providing Service

Finding by the Utilities Commission that petitioner telephone company had excess plant investment consisting of 1000 lines and terminals which was not used and useful in rendering telephone service and which should therefore be excluded in arriving at the rate base was supported by substantial evidence. *Utilities Comm. v. Telephone Co.*, 588.

§ 1.8. Determination of Rate of Return

Finding by the Utilities Commission that a return of 14.76% on original cost equity would be fair and reasonable to a telephone company was supported by competent evidence. *Utilities Comm. v. Telephone Co.*, 588.

TORTS

§ 7. Release from Liability and Covenants Not to Sue

Original defendant's ratification of her insurance carrier's settlement with the third-party defendant barred the original defendant's claim against the third-party defendant for both contribution and property damages. *Lyon v. Younger*, 408.

TRESPASS TO TRY TITLE

§ 2. Presumptions and Burden of Proof

Court erred in granting summary judgment for plaintiff in an action in which plaintiff claimed superior title from a common source where plaintiff's evidence failed to fit the description in her chain of title to the land claimed. *Faucette v. Griffin*, 7.

TRIAL

§ 58. Findings by the Court

Findings by the trial court as to the values of parcels of real estate owned by testator at his death were supported by evidence where they fell within the range of values presented by the witnesses for both sides. *Sutton v. Sutton*, 670.

UTILITIES COMMISSION

§ 6. Hearings and Orders; Rates

Evidence supported an order of the Utilities Commission basing the volume variation adjustment factor for the rates of a natural gas company on both historical and future entitlement periods and requiring a true-up adjustment for past periods. *Utilities Comm. v. Public Service Co.*, 156.

Finding by the Utilities Commission that petitioner telephone company had excess plant investment consisting of 1000 lines and terminals which was not used and useful in rendering telephone service and which should therefore be excluded in arriving at the rate base was supported by substantial evidence. *Utilities Comm. v. Telephone Co.*, 588.

In determining the fair market value of a telephone company's property, the Utilities Commission did not err in using a weighting process based on a debt-equity ratio. *Ibid.*

Finding by the Utilities Commission that a return of 14.76% on original cost equity would be fair and reasonable to a telephone company was supported by competent evidence. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 42. Relationship Between Payor Bank and Its Customer

When a bank pleads non-loss by a bank customer in an action by the customer to recover damages caused by the bank's payment of a check contrary to a valid stop payment order, the customer must show some loss other than the mere debiting of his bank account in the amount of the check. *Mitchell v. Trust Co.*, 101.

§ 78. Enforcement of Security Interest; Default

Plaintiff who was the assignee of a note and purchase money security agreement on a mobile home purchased by defendants was not under an obligation to take possession of the collateral after default upon request or demand of defendant debtor. *Bank v. Sharpe*, 404.

In an action to recover on a promissory note, G.S. 45-21.38 was inapplicable since the transaction between plaintiff and defendant with respect to the promissory note was not a purchase money transaction within the meaning of the statute. *Management Corp. v. Stanhagen*, 571.

VENUE

§ 9. Hearing of Motions

Trial court did not err in postponing consideration of defendant's motion for a change of venue as a matter of right pending a ruling on whether a restraining order would be continued until trial. *Herff Jones Co. v. Allegood*, 475.

WILLS

§ 10. Probate of Holographic Wills

An expert in handwriting analysis was properly allowed to state his positive opinion that an alleged holographic will could not have been written by decedent. *In re Ray*, 646.

WILLS—Continued

§ 16. Parties in Caveat Proceedings

G.S. 31-32 gave caveators, who were children of testatrix, standing to maintain a caveat to the will. *In re Joyner*, 666.

§ 19. Evidence in Caveat Proceedings

Testimony as to the relationship between testator and another was not relevant to show testator's intent. *Sutton v. Sutton*, 670.

§ 22. Mental Capacity

Witnesses in a caveat proceeding observed or had contacts with testatrix on dates or occasions sufficiently close to the date of the execution of the purported will to express their opinions as to testatrix' mental capacity on that date. *In re Worrell*, 278.

Trial court in a caveat proceeding did not commit prejudicial error in allowing a witness to testify that testatrix was not mentally competent "to make a will." *Ibid.*

§ 23. Instructions in Caveat Proceedings

Trial court in a caveat proceeding did not err in instructing the jury that the question of mental capacity involves an issue of whether testatrix recognized her obligations to the objects of her bounty. *In re Worrell*, 278.

Caveators were not prejudiced by the trial court's instruction on the purpose of the law permitting the probation of holographic wills although such instruction should not have been given. *In re Ray*, 646.

§ 41. Rule Against Perpetuities

A testamentary trust providing for the payment of trust income for life to testator's brothers, sisters, nieces, nephews, great nieces and great nephews did not violate the rule against perpetuities. *Wing v. Trust Co.*, 346.

§ 54. Whether Beneficiary Takes Devise or Bequest

Testator's devise to his wife of "a sufficient amount of my real and personal property when added to the value of my home, and other property that she will receive outside of this Will, that will equal one-third of my net estate" gave to the wife an undivided interest in testator's realty. *Sutton v. Sutton*, 670.

§ 57. Description of Amount or Share

Findings by the trial court as to the values of parcels of real estate owned by testator at his death were supported by evidence where they fell within the range of values presented by the witnesses for both sides. *Sutton v. Sutton*, 670.

WITNESSES

§ 1. Competency of Witness

Where a party seeking to challenge the competency of a witness makes objection but fails to state any basis therefor, trial court does not err in refusing to hold a voir dire to determine the competency of the witness. *S. v. Harrill*, 222.

WORD AND PHRASE INDEX

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