NORTH CAROLINA COURT OF APPEALS REPORTS

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1978

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36 N.C. App.

TABLE OF CONTENTS

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

WALTER E. BROCK

Judges

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NAOMI E. MORRIS
FRANK M. PARKER
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1. Appointed 29 September 1978 to succeed Harry C. Martin who was appointed to the Court of Appeals 1 September 1978.
2. Retired 1 August 1978.
3. Appointed 25 August 1978.

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1. Appointed Chief Judge 18 September 1978.
2. Appointed 25 September 1978 to succeed Robert B. Morgan, Sr. who retired 31 August 1978.
3. Appointed Chief Judge 29 September 1978.
4. Appointed 5 October 1978 to succeed Cary Walter Allen who was appointed to the Superior Court 29 September 1978.

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CASES REPORTED

CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINION

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GENERAL STATUTES CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.	
55(a)	Sawyer v. Cox, 300
55(b)(2)	Sawyer v. Cox, 300
56	Goode v. Tait, Inc., 268
59	Howard v. Mercer, 67
59(a)(6), (7)	Currence v. Hardin, 130
60(b)(1)	Sawyer v. Cox, 300

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

Art. I, § 10, Cl. 1	Mazda Motors v. Southwestern Motors, 1

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

Case	*Reported*	*Disposition in Supreme Court*
Airport Authority v. Irvin	36 N.C. App. 662	Denied, 295 N.C. 548 Appeal Dismissed
Alexiou v. O.R.I.P., Ltd.	36 N.C. App. 246	Denied, 295 N.C. 465
Auman v. Easter	36 N.C. App. 551	Denied, 295 N.C. 548
Brooks v. Brown	36 N.C. App. 738	Denied, 295 N.C. 548
Cardwell v. Ware	36 N.C. App. 366	Denied, 295 N.C. 548
Carroll v. Rountree	36 N.C. App. 156	Denied, 295 N.C. 549
Craig v. Kessing	36 N.C. App. 389	Appeal Dismissed Allowed for Limited Purpose, 295 N.C. 549
Dew v. Shockley	36 N.C. App. 87	Denied, 295 N.C. 465
Dockery v. Table Co.	36 N.C. App. 293	Denied, 295 N.C. 465
Edwards v. Means	36 N.C. App. 122	Denied, 295 N.C. 260
Finance Co. v. Finance Co.	36 N.C. App. 401	Denied, 295 N.C. 549
Fonvielle v. Insurance Co.	36 N.C. App. 495	Allowed, 295 N.C. 465
Goode v. Tait, Inc.	36 N.C. App. 268	Denied, 295 N.C. 465
Hamilton v. Hamilton	36 N.C. App. 755	Allowed, 295 N.C. 549
Howard v. Mercer	36 N.C. App. 67	Allowed, 295 N.C. 466
In re Hill	36 N.C. App. 765	Denied, 295 N.C. 550
In re Sarvis	36 N.C. App. 476	Allowed, 295 N.C. 550
Jacobs v. Sherard	36 N.C. App. 60	Denied, 295 N.C. 466
Kloster v. Council of Governments	36 N.C. App. 421	Denied, 295 N.C. 466
Lail v. Woods	36 N.C. App. 590	Denied, 295 N.C. 550
Lucas v. Trailer Sales	36 N.C. App. 388	Denied, 295 N.C. 466
McBride v. Camping Center	36 N.C. App. 370	Denied, 295 N.C. 550
Mazda Motors v. Southwestern Motors	36 N.C. App. 1	Allowed, 295 N.C. 466 Appeal Dismissal Denied
Mills v. Enterprises, Inc.	36 N.C. App. 410	Denied, 295 N.C. 551
Montford v. Grohman	36 N.C. App. 733	Appeal Dismissed, 295 N.C. 551
Mosley v. Finance Co.	36 N.C. App. 109	Denied, 295 N.C. 467
Murphy v. Edwards and Warren	36 N.C. App. 653	Denied, 295 N.C. 551

Case	*Reported*	*Disposition in Supreme Court*
Pope v. Wright	36 N.C. App. 651	Denied, 295 N.C. 551
Price v. Dept. of Motor Vehicles	36 N.C. App. 698	Denied, 295 N.C. 551 Appeal Dismissed
Ready Mix Concrete v. Sales Corp.	36 N.C. App. 778	Allowed, 295 N.C. 552
Ridge v. Wright	35 N.C. App. 643	Denied, 295 N.C. 467
Sawyer v. Cox	36 N.C. App. 300	Denied, 295 N.C. 467
State v. Abernathy	36 N.C. App. 527	Denied, 295 N.C. 552 Appeal Dismissed
State v. Bass	36 N.C. App. 500	Denied, 295 N.C. 467
State v. Black	36 N.C. App. 651	Denied, 295 N.C. 552 Appeal Dismissed
State v. Boyd	36 N.C. App. 155	Denied, 295 N.C. 467
State v. Brogden	36 N.C. App. 118	Denied, 295 N.C. 553
State v. Bunn	36 N.C. App. 114	Denied, 295 N.C. 261
State v. Burden	36 N.C. App. 332	Denied, 295 N.C. 468
State v. Carswell	36 N.C. App. 377	Allowed, 295 N.C. 468
State v. Chappel	36 N.C. App. 608	Appeal Dismissed 295 N.C. 553
State v. Chrisp	36 N.C. App. 387	Denied, 295 N.C. 468
State v. Clifton	36 N.C. App. 155	Denied, 295 N.C. 262
State v. Collins	36 N.C. App. 651	Denied, 295 N.C. 468
State v. Creech	36 N.C. App. 651	Denied, 295 N.C. 554
State v. Donley	36 N.C. App. 387	Denied, 295 N.C. 468
State v. Easterling	36 N.C. App. 155	Denied, 295 N.C. 469
State v. Evans	36 N.C. App. 166	Denied, 295 N.C. 469
State v. Forney	36 N.C. App. 388	Denied, 295 N.C. 469
State v. Hairston	36 N.C. App. 641	Denied, 295 N.C. 469
State v. Hall	36 N.C. App. 652	Denied, 295 N.C. 554
State v. Hamilton	36 N.C. App. 538	Denied, 295 N.C. 554
State v. Hebert	36 N.C. App. 783	Denied, 295 N.C. 554
State v. Hill	36 N.C. App. 652	Denied, 295 N.C. 555
State v. Hines	36 N.C. App. 33	Denied, 295 N.C. 262 Appeal Dismissed
State v. Hoskins	36 N.C. App. 92	Denied, 295 N.C. 469
State v. Jackson	36 N.C. App. 126	Denied, 295 N.C. 470
State v. Jacobs	36 N.C. App. 387	Denied, 295 N.C. 470
State v. Jenkins	35 N.C. App. 758	Denied, 295 N.C. 470
State v. Lane	36 N.C. App. 565	Denied, 295 N.C. 555

Case	*Reported*	*Disposition in Supreme Court*
State v. Louchheim	36 N.C. App. 271	Denied, 295 N.C. 263 Appeal Dismissed Allowed on Reconsideration, 295 N.C. 470
State v. McLeod	36 N.C. App. 469	Denied, 295 N.C. 555
State v. Monds	36 N.C. App. 510	Denied, 295 N.C. 556
State v. Moore	36 N.C. App. 388	Denied, 295 N.C. 470
State v. Nelson	36 N.C. App. 235	Denied, 295 N.C. 471
State v. Patterson	36 N.C. App. 74	Allowed, 295 N.C. 263 Appeal Dismissal Denied
State v. Pearce	36 N.C. App. 652	Allowed, 295 N.C. 556 Appeal Dismissed
State v. Sneed	36 N.C. App. 341	Denied, 295 N.C. 471 Appeal Dismissed
State v. Spence	36 N.C. App. 627	Denied, 295 N.C. 556
State v. Townsend	36 N.C. App. 388	Allowed, 295 N.C. 471
Thompson v. Ward	36 N.C. App. 593	Denied, 295 N.C. 556
Trust Co. v. Murphy	36 N.C. App. 760	Denied, 295 N.C. 557 Appeal Dismissed
Williams v. Greene	36 N.C. App. 80	Denied, 295 N.C. 471 Appeal Dismissed
Williams v. Power & Light Co.	36 N.C. App. 146	Allowed, 295 N.C. 471
Wyatt v. Imes	36 N.C. App. 380	Denied, 295 N.C. 557

DISPOSITION OF APPEALS OF RIGHT TO THE SUPREME COURT

Case	*Reported*	*Disposition on Appeal*
Beasley v. Beasley	37 N.C. App. 255	Pending
Hensley v. Caswell Action Committee	35 N.C. App. 544	Pending
Herff Jones Co. v. Allegood	35 N.C. App. 475	Pending
Husketh v. Convenient Systems	35 N.C. App. 207	295 N.C. 459
In re Byers	34 N.C. App. 710	295 N.C. 256
Moore v. Fieldcrest Mills	36 N.C. App. 350	Pending
Murphy v. Murphy	34 N.C. App. 677	295 N.C. 390
Rappaport v. Days Inn	36 N.C. App. 488	Pending
Smith v. State	36 N.C. App. 307	Pending
State v. Headen	34 N.C. App. 750	295 N.C. 437
State v. Snead	35 N.C. App. 724	Pending
Townsend v. Railway Co.	35 N.C. App. 482	Pending
Wood v. Stevens & Co.	36 N.C. App. 456	Pending

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

MAZDA MOTORS OF AMERICA, INC. v. SOUTHWESTERN MOTORS, INC., D/B/A MAZDA OF RALEIGH

No. 7710SC299

(Filed 18 April 1978)

1. **Constitutional Law § 23; Contracts § 6— right to contract—statutory restrictions**

The right to make contracts is subject to the power of the General Assembly to impose restrictions for the benefit of the general public in areas of public interest and to prevent business practices deemed harmful.

2. **Constitutional Law §§ 14, 25.1; Contracts § 17.2— termination of automobile dealership franchise—notice to Commissioner of Motor Vehicles—constitutionality**

The statute requiring a filing of notice with the Commissioner of Motor Vehicles prior to the termination of an automobile dealership franchise agreement, G.S. 20-305(6), does not impair the obligation of contracts in violation of Art. I, § 10, Cl. 1 of the U. S. Constitution or amount to a taking without compensation; rather, the statute constitutes a reasonable exercise of the police power by the State in futherance of the public welfare.

3. **Statutes § 8.1— notice of termination of automobile dealership franchise—retroactive application**

The statute requiring the filing of notice prior to termination of automobile dealership franchise agreements, G.S. 20-305(6), is not made unconstitutional by retroactive application to contracts existing before the statute became effective.

4. **Constitutional Law § 33— automobile dealership franchise—notice of termination—no ex post facto law**

Although criminal sanctions are provided for violations of G.S. 20-305(6), application of the statute to existing contracts does not constitute an ex post facto law prohibited by Art. I, § 10, Cl. 1 of the U. S. Constitution since that

clause applies only in cases in which a crime is created or punishment for a criminal act is increased after the fact and does not speak to the effect of statutes passed after the fact when employed in civil cases.

5. Contracts §§ 6, 17.2— automobile dealership franchise—failure to give notice of termination—attempted termination void

An agreement to terminate an automobile dealership franchise contract was contrary to public policy, illegal and void *ab initio* where the notice required by G.S. 20-305(6) was not given to the Commissioner of Motor Vehicles prior to termination of the contract. Similarly, plaintiff distributor's notice to defendant dealer by letter of the termination of the franchise was also void where it did not comply with the notice requirements of G.S. 20-305(6).

6. Contracts § 17.2— termination of automobile dealership franchise—contract provisions contrary to statute

An automobile dealership franchise agreement did not terminate pursuant to provisions of the agreement calling for its automatic termination on a certain date where the notice of termination required by G.S. 20-305(6) was not given to the Commissioner of Motor Vehicles, since the statute expressly provides that its terms will predominate over contrary contractual agreements, and the statute cannot be nullified by contract.

7. Contracts § 6— contract provisions against public policy—severability of valid provisions

Where certain provisions of a contract are against public policy and will not be enforced, their invalidity will not invalidate the remaining valid provisions of the contract if the valid provisions are severable and may be enforced independently of the illegal provisions.

8. Contracts §§ 6, 17.2; Injunctions § 8—attempted termination of automobile dealership franchise—failure to give notice

The trial court erred in failing to rule as a matter of law that attempts by plaintiff distributor to terminate an automobile dealership franchise agreement without giving the notice required by G.S. 20-305(6) were void as against public policy and in enjoining defendant from representing itself as an automobile dealer and from continuing to refuse to allow plaintiff to conduct an inventory of its parts, accessories and equipment.

9. Uniform Commercial Code § 75— perfection of security interest—filing—relevancy only to third-party claims

The perfection of a security interest pursuant to G.S. 25-9-302 and G.S. 25-9-401(1)(c) by filing a financing statement with the Secretary of State is relevant only to third-party priority claims and not to disputes between the secured party and the debtor.

10. Uniform Commercial Code § 73— security interest—giving of value

There was sufficient evidence to support a finding that a bank had given value for its security interest in defendant's inventory where the security agreement between defendant and the bank showed that the inventory was to serve as additional collateral for a $110,000 bank loan. G.S. 25-9-204(1); G.S. 25-1-201(37).

11. Accounts § 2— account stated

An account is an account stated when a balance is struck and agreed upon as correct, and the agreement may be either an express agreement or an agreement implied by failure to object within a reasonable time after the other party has calculated the balance and submitted a statement of the account.

12. Accounts § 2—account stated—letter not stating specific amount owed

A letter from plaintiff to defendant stating that parts and tools from another dealer had been placed in defendant's inventory and that the indebtedness for these parts and tools would be transferred to defendant's account could not be the basis for a finding that defendant was liable to plaintiff for a certain sum upon an account stated where the letter stated no specific balance or amount owed by defendant.

APPEAL by defendant, Southwestern Motors, Inc., d/b/a Mazda of Raleigh, from *Bailey, Judge.* Judgment entered 24 November 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 2 February 1978.

This is an action for breach of contract. It arose from a dispute involving the termination of an automobile dealership franchise agreement.

During the Fall of 1971 the plaintiff appellee's predecessor in interest, Mazda Motors of Florida, Inc., granted the defendant appellant a franchise to open a dealership in Raleigh, North Carolina for the sale of Mazda automobiles. The defendant appellant, Southwestern Motors, Inc., d/b/a Mazda of Raleigh, began its activities as an authorized Mazda dealer early in January of 1972. At some point in 1973, defendant and Mazda Motors of Florida, Inc., plaintiff's predecessor in interest, entered into a written contract titled "Mazda Direct Dealer Agreement" which was dated 1 January 1973. This agreement incorporated by reference the "Mazda Direct Dealer Agreement Terms and Provisions" dated 1 May 1971. The plaintiff, Mazda Motors of America, Inc., assumed all rights and obligations of Mazda Motors of Florida, Inc. on 1 May 1971 by virtue of a corporate merger of the two effective on that date.

In May 1974 the plaintiff requested the defendant enter into an agreement with the plaintiff mutually terminating any and all agreements the parties had at anytime entered. The defendant refused.

By letter dated 3 June 1974, the defendant was notified that any and all agreements with the plaintiff for the conduct of a

Mazda dealership were terminated effective 18 June 1974. Notice of the contents of this letter was sent to the Commissioner of Motor Vehicles by a representative of the plaintiff in a letter dated 7 June 1974.

The defendant and the plaintiff executed a document on 10 July 1974 declaring that, effective 31 August 1974, they mutually terminated all agreements at anytime entered into between them including the Mazda Direct Dealer Agreement dated 1 January 1973. Notice of this document was sent to the Commissioner of Motor Vehicles on 14 October 1974.

The defendant continued its operations as a Mazda dealer after 31 August 1974 and refused to let representatives of the plaintiff enter its premises to take an inventory of parts. The plaintiff filed this action in the Superior Court of Wake County alleging the defendant had breached the terms of the Mazda Direct Dealer Agreement and of the 1971 Mazda Direct Dealer Agreement Terms and Provisions. The plaintiff prayed that the defendant be permanently enjoined from representing itself as a Mazda dealer in any manner and from preventing the plaintiff from taking an inventory of parts, accessories, special tools and equipment, and authorized signs. The plaintiff also sought a temporary restraining order and preliminary injunction to the same effect pending a final determination on the merits. The plaintiff sought leave to amend its complaint to plead damages after having completed its inventory.

The plaintiff's motion for a temporary restraining order was granted, and its motion for a preliminary injunction was later heard and granted. The trial court preliminarily enjoined the defendant from representing itself as a Mazda dealer and from continuing to refuse to allow the plaintiff to conduct an inventory. After obtaining extensions of time in which to answer, the defendant answered the plaintiff's complaint and counterclaimed against the plaintiff for compensatory and punitive damages. The plaintiff replied to the counterlcaim, and the case came on for trial before the court without a jury on 15 November 1976. At this time the trial court allowed the plaintiff's motion to amend its complaint to allege specific damages. In its final judgment entered on 24 November 1976, the trial court, *inter alia*, made permanent the injunctive relief previously granted the plaintiff

against the defendant. The final judgment also determined all remaining questions as to the rights and duties of the parties raised by the pleadings. From this judgment the defendant appealed.

Other relevant facts are hereinafter set forth.

Poyner, Geraghty, Hartsfield & Townsend by John J. Geraghty, David W. Long and Cecil W. Harrison, Jr., for plaintiff appellee.

Newsom, Graham, Strayhorn, Hedrick, Murray, Bryson & Kennon by Josiah S. Murray III, and Lewis A. Cheek, for the defendant appellant.

MITCHELL, Judge.

The defendant first assigns as error the failure of the trial court to rule that, as a matter of law, the franchise agreement between the parties was wrongfully terminated, canceled or not renewed. For reasons which will be discussed hereinafter, we find this assignment to be meritorious and hold that the trial court committed error in failing to so rule.

By the enactment of Article 12 of Chapter 20 of the General Statutes, the Motor Vehicle Dealers and Manufacturers Licensing Law, the General Assembly sought to regulate and license motor vehicle manufacturers, distributors, dealers and salesmen in the conduct of their business in North Carolina. We are here concerned with G.S. 20-305(6) which became effective upon ratification on 16 March 1973. By enactment of that section, the General Assembly declared:

> It shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or any representative whatsoever of any of them:
>
> . . . .
>
> (6) Notwithstanding the terms of any franchise agreement to terminate, cancel, or refuse to renew the franchise of any dealer, without good cause, and unless (i) the dealer and the Commissioner have received written notice of the franchisor's intentions at least 60 days prior to the effective date of such termination, cancellation, or the expiration date of the franchise, setting forth the specific grounds for such

> action . . . except in the event of fraud, insolvency, closed doors, or failure to function in the ordinary course of business, 15 days' notice shall suffice; provided that in any case where a petition is made to the Commissioner for a determination as to good cause for the termination, cancellation, or nonrenewal of a franchise, the franchise in question shall continue in effect pending the Commissioner's Decision. . . .

The trial court found and concluded that the franchise agreement between the parties to this action was terminated both by its own terms calling for its expiration on 31 December 1973 and by the "mutual agreement" effective on 10 July 1974. In arriving at these findings and conclusions, the trial court found the requirements of G.S. 20-305(6) to be unconstitutional as impairing the obligations of contracts. We hold these findings and conclusions by the trial court to be erroneous. We further hold that G.S. 20-305(6) is not a state "law impairing the obligations of contracts" in the constitutional sense.

The authority of the courts of this State to declare an act of the General Assembly unconstitutional was established in *Bayard v. Singleton*, 1 N.C. 5 (1787). In that case the courts of North Carolina adopted the doctrine of judicial review, which was recognized sixteen years later by the Supreme Court of the United States in *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803).

In order to determine the rights and the liabilities or duties of the parties, our courts must often determine which of two conflicting rules of law is superior. Should there be a conflict between a statute and the Constitution, courts must determine the rights and the liabilities or duties of the parties before them in accordance with the Constitution, as it is the superior rule of law in such situations. In these situations, however, courts will not anticipate other questions of constitutional law not necessary to the determination of issues presented by the litigation before them. *Nicholson v. Education Assistance Authority*, 275 N.C. 439, 168 S.E. 2d 401 (1969). With these rules for our guidance, we undertake an analysis of the constitutional issue here presented.

[1] The Constitution of the United States specifically forbids any state law impairing the obligations of contracts. U.S. Const. art. I, § 10, cl. 1. It has long been recognized, however, that the "con-

tracts clause" grants a qualified and not an absolute right. Clearly, the right to make contracts is subject to the power of the General Assembly to impose restrictions for the benefit of the general public in areas of public interest and to prevent business practices deemed harmful. *Morris v. Holshouser*, 220 N.C. 293, 17 S.E. 2d 115 (1941).

The General Assembly, within Article 12 of Chapter 20 (G.S. 20-285), made specific legislative findings of fact as follows:

> The General Assembly finds and declares that the distribution of motor vehicles in the State of North Carolina vitally affects the general economy of the State and the public interest and public welfare, and in the exercise of its police power, it is necessary to regulate and license motor vehicle manufacturers, distributors, dealers, salesmen, and their representatives doing business in North Carolina, in order to prevent frauds, impositions and other abuses upon its citizens.

By these legislative findings of fact, the General Assembly specifically based its action on the police power and declared the requirements of the statute here in question to promote the vital interests of the public and the public welfare. The initial responsibility for determining the public welfare unquestionably rests with the legislature, and its findings with reference thereto are entitled to great weight. Additionally, the presumption is that the judgment of the General Assembly is correct and constitutional, and a statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise. *Mitchell v. Financing Authority*, 273 N.C. 137, 159 S.E. 2d 745 (1968).

It has been recognized for at least two decades that automobile franchises are in reality unilateral contracts, as the terms are dictated by the manufacturers and distributors with the avowed purpose of protecting themselves to the utmost and granting as little protection as possible to the dealer. *Buggs v. Ford Motor Co.*, 113 F. 2d 618 (7th Cir. 1940), *cert. denied*, 311 U.S. 688, 85 L.Ed. 444, 61 S.Ct. 65 (1940); Annot., 7 A.L.R. 3d 1173 (1966). The disparity of bargaining power between a manufacturer or distributor on the one hand and a local dealer on the other has caused automobile franchise agreements to be referred to as "contracts of adhesion." Local dealers entering into automobile fran-

chise arrangements were so systematically denied redress in cases of arbitrary termination or nonrenewal, that the franchise agreements were sometimes referred to as an "economic death sentence." Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 Yale L.J. 1135, 1156 (1957). It would be safe to say that there was near unanimity in the view that, due to the tremendous disparity in the bargaining powers of the parties, automobile franchise agreements uniformly worked to the detriment of the local dealers and, thereby, the general public. See Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 Yale L.J. 1135 (1957); Brown and Conwill, *Automobile-Dealer Legislation*, 57 Columbia L. Rev. 217 (1957); Weiss, *The Automobile Dealer Franchise Act of 1956—An Evaluation*, 48 Cornell L.Q. 711 (1963).

Agreement that automobile franchise contracts had been used to the public detriment was not limited to legal scholars. As early as 1939, the Federal Trade Commission had indicated its feeling that these franchises were being used to the detriment of smaller economic entities. 1939 FTC Rep. 139-46. In 1956 these concerns were reiterated by the United States Senate. S. Rep. No. 3791, 84th Cong., 2d Sess. 3-4 (1956); See, *e.g.*, Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 Yale L.J. 1135, 1139-40 (1957).

The intricacies of the economic and legal problems raised by the national trends in automobile franchising agreements led courts quickly to recognize that they, unlike commissions and legislative bodies, were unable to weigh the various subtle and conflicting factors involved. As was expressly stated by the court in *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F. 2d 675, 677 (2d Cir. 1940):

> To attempt to redress this balance by judicial action without legislative authority appears to us a doubtful policy. We have not proper facilities to weigh economic factors, nor have we before us a showing of the supposed needs which may lead the manufacturers to require these seemingly harsh bargains.

Faced with this background, the General Assembly determined that Article 12 of Chapter 20 of the General Statutes, seeking to regulate such automobile franchises and the parties thereto,

was vital to the general economy of the State and to the public welfare. G.S. 20-285. Acting pursuant to its police powers, the General Assembly passed Article 12 in 1955. After almost two decades of additional experience with the economic and social factors involved in automobile franchises, the General Assembly amended Article 12 to include G.S. 20-305(6).

During the New Deal era, the Supreme Court of the United States, speaking through Chief Justice Hughes, emphasized that the states had clear authority under their police powers to regulate contract rights in the interest of insuring the public's economic well-being. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 78 L.Ed. 413, 54 S.Ct. 231 (1934). Judicial scrutiny of economic legislation has been consistently relaxed since that time, as reflected in the more recent cases concerning the contract clause. *City of El Paso v. Simmons*, 379 U.S. 497, 13 L.Ed. 2d 446, 85 S.Ct. 577 (1965), *reh. denied*, 380 U.S. 926, 13 L.Ed. 2d 813, 85 S.Ct. 879 (1965); *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 1, 89 (1977).

During its 1976 Term, the Supreme Court of the United States, by its decision in *United States Trust Co. v. New Jersey*, 431 U.S. 1, 52 L.Ed. 2d 92, 97 S.Ct. 1505, *reh. denied*, 431 U.S. 975, 53 L.Ed. 2d 1073, 97 S.Ct. 2942 (1977), "revived the all-but-moribund contract clause" by striking down a state effort to repeal retroactively a statutory bondholders' convenant precluding a public port authority from investing its revenues or reserves in railway mass transit facilities. *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 1, 84 (1977). In *United States Trust*, however, the Court specifically indicated that legislative modification of private contracts should be viewed with the deference that courts have accorded economic regulation since the 1930's. The majority, speaking through Justice Blackmun, explained the heightened standard of scrutiny of state regulation in that case by referring to the greater "self-interest" involved on the part of a state when it is a party to the contract to be altered. This factor of "self-interest" is absent in the present case, and *United States Trust* provides us little assistance here.

[2] The more recent decisions involving contracts between private parties tend to concentrate upon whether the state law in question involves a disturbance of essential or core expectations

arising from the particular type of contract. Those cases tend to indicate that such expectations are not disturbed unless the demoralizing effects of state legislation are so great as totally to discourage the parties and others from entering such contracts and to constitute, thereby, a taking. *City of El Paso v. Simmons*, 379 U.S. 497, 13 L.Ed. 2d 446, 85 S.Ct. 577 (1965), *reh. denied*, 380 U.S. 926, 13 L.Ed. 2d 813, 85 S.Ct. 879 (1965); *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 379, 41 L.Ed. 2d 132, 140, 94 S.Ct. 2291, 2297 (1974) (Powell, J., concurring); *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 1, 91 n. 59. Although it is true that any alteration of a contract is, to some extent, an "interference" with the contract, we find that G.S. 20-305(6) does not involve any disturbance of essential or core expectations or amount to a taking without compensation. Rather, it constitutes a reasonable exercise of the police power by the State in furtherance of the public welfare.

We find additional support for our conclusion of constitutionality in cases dealing with similar federal and state acts. The Federal Automobile Dealers' Day in Court Act (15 U.S.C. §§ 1221-1225) is somewhat analogous to Article 12 of Chapter 20 of our General Statutes. It goes beyond the provisions of that article, however, and provides the local dealer with an integrated system of remedies against the larger economic entities involved in franchise agreements. No court has declared the federal act unconstitutional. Several courts have found it to support the public welfare. *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F. 2d 437 (1st Cir. 1966), *cert. denied*, 385 U.S. 919, 17 L.Ed. 2d 143, 87 S.Ct. 230 (1966); Annot., 7 A.L.R. 3d 1173, 1178 (1966). Additionally, at least one court has specifically held that act does not unconstitutionally restrict the freedom of contract or take property without due process of law. *Blenke Brothers Co. v. Ford Motor Company*, 203 F. Supp. 670 (N.D. Ind. 1962).

The federal act specifically provides that it shall not invalidate the provisions of any law of a state except in cases of direct and irreconcilable conflict. 15 U.S.C. § 1225. In light of this tacit approval by Congress, several states have adopted similar statutes regulating automobile franchises. Annot., 7 A.L.R. 3d 1173, 1192 (1966). The courts which have considered these statutes have generally found them constitutional. *Ford Motor Co. v. Pace*, 206 Tenn. 559, 335 S.W. 2d 360, *app. dismissed*, 364

U.S. 444, 5 L.Ed. 2d 192, 81 S.Ct. 235 (1960), *reh. denied*, 364 U.S. 939, 5 L.Ed. 2d 371, 81 S.Ct. 377 (1961); *Louisiana Motor Vehicle Com. v. Wheeling Frenchman*, 235 La. 332, 103 So. 2d 464 (1958); *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71 N.W. 2d 420 (1955); *Buggs v. Ford Motor Co.*, 113 F. 2d 618 (7th Cir. 1940), *cert. denied*, 311 U.S. 688, 85 L.Ed. 444, 61 S.Ct. 65 (1940); *E. L. Bowen and Co. v. American Motors Sales Corp.*, 153 F. Supp. 42 (E.D. Va. 1957); *Willys Motors v. Northwest Kaiser-Willys*, 142 F. Supp. 469 (D.C. Minn. 1956).

For the reasons previously stated, we find the greater weight of both reason and authority to give added emphasis in this case to the presumption that the judgment of the General Assembly is correct and constitutional. Certainly we cannot say, as we must before declaring the statute unconstitutional, that it so clearly violates the Constitution that no reasonable doubt can arise. *Mitchell v. Financing Authority*, 273 N.C. 137, 159 S.E. 2d 745 (1968).

[3] The plaintiff contends that, even though the statute may be a valid exercise of the police power by the General Assembly, its application in the present case would be retroactive and unconstitutional. In support of this contention, the plaintiff directs our attention to the finding of the trial court that the Mazda Direct Dealer Agreement was dated 1 January 1973. As G.S. 20-305(6) did not become effective until its ratification on 16 March 1973, plaintiff contends its application in the present case would be unconstitutionally retroactive. We do not agree.

Although the written agreement did bear a date of 1 January 1973 and provide that it would be effective from that date through 31 December 1973, the otherwise uncontested evidence of the defendant indicates otherwise. Mr. Jack Carlisle, formerly a principal in the defendant corporation, testified under oath that the agreement was not signed on 1 January as indicated on its face. His testimony was that the document was signed "some months later" and probably not until December of 1973. During oral arguments counsel quite forthrightly indicated to us that the document was not signed on 1 January 1973, but they were unable to recall the exact date on which it was in fact signed. They did indicate, however, that their best recollection was that it was signed after 16 March 1973.

We do not find the date to be crucial in any event. Assuming arguendo that the date of 1 January 1973 set forth on the face of the dealer agreement is correct, we do not feel the application of G.S. 20-305(6) to this contract would be unconstitutional despite the fact that the statute became effective upon its ratification on 16 March 1973. The Supreme Court of the United States has held that regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution of the United States. *Fleming v. Rhodes*, 331 U.S. 100, 107, 91 L.Ed. 1368, 1373, 67 S.Ct. 1140, 1144 (1947). In another opinion that Court found it inconceivable that the exercise of the commerce power by federal authorities could be hampered or restricted to any extent by contracts previously made between individuals or corporations. *Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467, 482, 55 L.Ed. 297, 303, 31 S.Ct. 265, 270 (1911). We conclude that the same holding should extend to actions by the states under the police power.

It has long been recognized that existing state laws are to be read into contracts in order to fix the obligations of the parties. Additionally, the Supreme Court of the United States specifically held in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 435, 78 L.Ed. 413, 427, 54 S.Ct. 231, 239 (1934):

> Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.

This statement by Chief Justice Hughes in *Blaisdell* has in no way been weakened by age. Judicial scrutiny of economic legislation dealing with contracts between private parties has been consistently relaxed since that decision. *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 1, 89 (1977). We find that G.S. 20-305(6), which requires a filing of notice prior to termination of

automobile franchise contracts, is not made unconstitutional by retroactive application to existing contracts. See *Willys Motors v. Northwest Kaiser-Willys*, 142 F. Supp. 469 (D.C. Minn. 1956). But see, *General Motors Corporation v. Blevins*, 144 F. Supp. 381 (D.C. Colo. 1956). Whether the statute is applied retroactively or prospectively, the test of constitutionality remains whether the core expectations of the contract have been disturbed, and here they have not.

[4] We additionally find that, although Article 12 provides criminal sanctions for violations of G.S. 20-305(6), its application here does not constitute it an ex post facto law prohibited by the Constitution of the United States. U.S. Const. art. I, § 10, cl. 1. That clause applies only in cases in which a crime is created or punishment for a criminal act is increased after the fact and does not speak to the effect of statutes passed after the fact when employed in civil cases. See 3 Strong, N.C. Index 3d, Constitutional Law, § 33, pp. 266-68.

For the reasons previously stated, we find that the General Assembly reasonably concluded that G.S. 20-305(6) promotes the public welfare in an area vitally affecting the general economy of the State. We hold that statute to be constitutional. The trial court's findings and conclusions to the contrary were erroneous and must be reversed.

[5] We turn now to the applicability *vel non* of the statute to the contract presented by this case. The trial court concluded and held that the 10 July 1974 agreement between the parties was a voluntary mutual agreement to terminate their contractual relationship and that notice thereof was not required to be given to the Commissioner of Motor Vehicles pursuant to G.S. 20-305(6). The defendant assigns this as error.

The evidence that the plaintiff did not at anytime comply with the notice requirements of the statute is uncontested. This statute specifically commands that the Commissioner of Motor Vehicles be given the required notice prior to termination or expiration of an automobile dealership franchise. Failure to give the required notice prior to termination or expiration is specifically declared to be unlawful. The voluntariness of such agreements is irrelevant. Apparently it was just such "voluntary agreements", which were in fact contracts of adhesion, that caused this State

and others, as well as the federal government, to enact this and similar regulatory statutes. As failure to give the required notice to the Commissioner was unlawful, the "voluntary agreement" without such notice was contrary to the statutory provisions and, thereby, to public policy. It was therefore illegal and void *ab initio*. 3 Strong, N.C. Index 3d, Contracts, § 6, pp. 374-5. Those portions of the conclusions and order giving effect to the 10 July 1974 agreement were erroneous and must be reversed.

Similarly, the plaintiff's notice to defendant by letter dated 3 June 1974 of the termination of the franchise effective 18 June 1974 did not comply with the notice requirements of the statute. It was, therefore, unlawful and violative of public policy, and we declare it void. See *Cycles, Inc. v. Alexander, Comr. of Motor Vehicles*, 27 N.C. App. 382, 219 S.E. 2d 282 (1975).

[6] The defendant also assigns as error the ruling of the trial court that the provisions of the direct dealer agreement calling for automatic expiration of the franchise agreement on 31 December 1973 control, and the dealer agreement terminated on that date without notice or action on the part of either party. This assignment is also meritorious.

The statute expressly provides that its terms will predominate over any contrary contractual agreements. We must assume the General Assembly intended what it said in this clear and unambiguous language. *Davis v. Granite Corporation*, 259 N.C. 672, 131 S.E. 2d 335 (1963). To hold otherwise would be to allow the parties to do indirectly that which they cannot lawfully do directly. This would merely encourage the drafting of contracts aimed at frustrating the legislative purpose and lead to unjust or absurd results which we cannot condone. *Cycles, Inc. v. Alexander, Comr. of Motor Vehicles*, 27 N.C. App. 382, 219 S.E. 2d 282 (1975). See, *King v. Baldwin*, 276 N.C. 316, 172 S.E. 2d 12 (1970). As the State itself cannot contract away its police powers or other powers reserved to it by the Constitution of the United States, we see no reason to permit the parties to nullify by contract the State's exercise of those powers. See, *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 1, 86 n. 25, and cases cited. Those portions of the trial court's conclusion and order holding that the dealer agreement terminated on 31 December 1973 were erroneous and must be reversed.

The defendant contends that the temporary restraining order, preliminary injunction and permanent injunction issued by the trial court and restraining and enjoining the defendant from representing itself to the public as plaintiff's dealer or using the registered trademark "MAZDA" and from otherwise conducting its business in a manner which implies or represents that the defendant is a dealer, was erroneously entered. The defendant further contends that the trial court should have ruled as a matter of law that the franchise agreement was wrongfully terminated, canceled or not renewed by virtue of the plaintiff's failure to comply with the terms of G.S. 20-305(6).

[7] Where, as here, certain provisions of a contract are against public policy and will not be enforced, their invalidity will not invalidate the remaining valid provisions of the contract, if the valid provisions are severable and may be enforced independently of the illegal provision. 3 Strong, N.C. Index 3d, Contracts, § 6, p. 375 and cases cited. We find the remainder of this contract to be easily severable and independently enforceable.

[8] The contract remains a logical whole with only the time for its expiration to be deleted. The time and manner of termination are specifically set by the terms of G.S. 20-305(6). In cases in which proper notice is given the Commissioner and the dealer requests a hearing, the statute specifically provides the franchise shall continue in effect pending his decision. It was unnecessary for the General Assembly to employ this language when referring to situations in which no notice had been given, as the statute specifically declares attempted termination, cancellation or even expiration in such situations to be unlawful and, for reasons previously discussed, void and ineffective. In such situations the franchise continues in effect until the notice requirements of the statute are properly followed. We hold that the trial court erred in failing to rule as a matter of law that the attempts by the plaintiff to terminate the franchise agreement were void as against public policy. We additionally hold that the trial court erred in granting the plaintiff injunctive relief and that the injunction must be dissolved.

Upon the call of this case for trial, the plaintiff tendered to the trial court a motion to amend its complaint to allege, *inter alia*, that First Citizens Bank and Trust Company [hereinafter

"Bank"] had a security interest in all of the Mazda automobile parts located in the inventory of the defendant and that, subject to the security interest of the Bank, defendant was entitled to recover $19,554.31 from the plaintiff. The trial court allowed the motion. After hearing the evidence, the trial court, as a part of its order, granted the relief sought by the amendment and held the defendant, subject to the security interest of the Bank, to be entitled to such recovery.

[9] The defendant contends this part of the trial court's order was erroneously entered for two reasons. First, it contends there was insufficient evidence to support a finding that the Bank had given value for the security interest pursuant to G.S. 25-9-204(1) and G.S. 25-1-201(37). Second, it contends there was insufficient evidence to support a finding that public notice had been given by the filing of a financing statement so as to perfect the security interest pursuant to G.S. 25-9-302 and G.S. 25-9-401(1)(c).

The plaintiff concedes there was no evidence which would indicate that a financing statement was filed with the Secretary of State. It contends, however, that, whether the Bank's security interest was perfected is of no consequence with regard to the Bank's rights against the defendant. The plaintiff takes the position that the requirement of perfection of such interests is relevant only to third-party priority claims and not to disputes between the secured party and the debtor. We find the plaintiff's contention correct. As stated in Spivack, *Secured Transactions*, 74-85 (3rd Ed. 1963):

> Section 9-201, in substance, provides that the attachment of the security interest is sufficient to create enforceable rights in the secured party with respect to the collateral without anything further being required. It is when the rights of other creditors of the debtor are involved or when the collateral has been transferred to or encumbered by other persons that mere attachment of the security interest may not be sufficient to protect the rights of the secured party. It is for this reason that a distinction is made between the rights of the secured party whose interest has attached and the rights of the secured party whose interest is perfected.

[10] We find no merit in the defendant's contention that there was insufficient evidence to support a finding that it was given

value by the Bank. Evidence of this prerequisite was introduced in the form of the security agreement between the defendant and the Bank. That security agreement provides:

> 1. SECURITY INTEREST. The collateral provided by this Security Agreement is provided as additional collateral for and in consideration for a loan by First-Citizens Bank and Trust Company to University Garden Apartments, Inc. (which is the sole shareholder of Southwestern Motors, Inc.) in the amount of $110,000.00.

The quoted section of the security agreement was sufficient evidence of the existence of a binding loan commitment constituting value given by the Bank to support the ruling of the trial court. See, Appeal of Copeland, 531 F. 2d 1195 (3d Cir. 1976); White and Summers, *Uniform Commercial Code*, §§ 23-4, at 792-93 (1st ed. 1972) and cases cited. The defendant's assignment of error on this point is overruled.

[11] The trial court erred, however, in finding that the defendant, through Sentry Mazda, a Mazda dealership in Greensboro, North Carolina, owes the plaintiff on account $8,795.09. The plaintiff introduced into evidence a letter from one of its agents to the defendant which was dated 15 August 1974. The letter purported to inform the defendant that, due to termination of Sentry Mazda, parts and tools had been taken to the defendant and partially integrated into its inventory. The letter stated that the plaintiff would transfer the indebtedness for these parts and tools from the account of Sentry Mazda to the account of the defendant. The letter indicated that the plaintiff would credit the Sentry Mazda account and debit a like amount to the defendant's account within the month. The plaintiff also offered evidence that it had never received any response to the letter of 15 August 1974. The plaintiff contends that the defendant was, therefore, liable to it upon an account stated, and that the judgment of the trial court was proper in this regard.

The defendant contends that it cannot be held liable upon the theory of an account stated for a debt incurred by another. See Annot. 6 A.L.R. 2d 113 (1949). Additionally, the defendant directs our attention to a billing introduced into evidence by the plaintiff which indicates that the indebtedness of $8,795.09 was carried on the Sentry Mazda account billings as late as 30 June 1975.

[11, 12] An account is an account stated when a balance is struck and agreed upon as correct. The agreement may be either an express agreement or an agreement implied by failure to object within a reasonable time after the other party has calculated the balance and submitted a statement of the account. 1 Strong, N.C. Index 3d, Accounts, § 2, p. 39. The creditor is only entitled to judgment, however, in the amount stated. Here, the letter of 15 August 1974 stated no specific balance or amount whatsoever. In fact, the exhibits introduced by the plaintiff, indicate that as late as 30 November 1975 the amount claimed had not been debited to the defendant's account.

As the letter on which the plaintiff bases its theory of indebtedness by the defendant upon an account stated did not state a specific amount to be added to the defendant's account and indicated only the manner in which some future balance of the account would be struck, the finding by the trial court that the defendant owed the plaintiff $8,795.09 was erroneous and must be reversed.

For the reasons previously set forth, the judgment appealed from must be reversed in part, affirmed in part and the cause remanded for proceedings consistent with this opinion.

Reversed in part, affirmed in part and remanded.

Judges MORRIS and CLARK concur.

OLD SOUTHERN LIFE INSURANCE CO. v. BANK OF NORTH CAROLINA, N.A., AND ALL STATES LIFE INSURANCE COMPANY

No. 7726SC292

(Filed 18 April 1978)

1. **Uniform Commercial Code § 25— certificate of deposit—governed by Uniform Commercial Code**

A certificate of deposit which certified that "Allstate Life Ins. Co. or Commissioner of Ins. of Alabama as their interest may appear . . ." had deposited with defendant's Charlotte office $100,000 which specified that payment could be obtained "upon surrender of [the] certificate properly endorsed twelve months after date . . ." and which provided that the certificate was automatically renewed for a like term and interest rate if not presented for

payment within ten days after maturity was an instrument within the meaning of G.S. 25-9-105(1)(g) and was therefore governed by the Uniform Commercial Code.

2. **Rules of Civil Procedure § 56.4; Uniform Commercial Code § 25— certificate of deposit—assignment—no issue of fact raised—summary judgment proper**

In an action to recover on a certificate of deposit issued by defendant to "Allstate Life Ins. Co. or Commissioner of Ins. of Ala." and allegedly assigned to plaintiff, summary judgment was properly entered for plaintiff, since evidence presented by plaintiff at the summary judgment hearing included its unverified complaint alleging that on 11 October 1975 All States assigned the certificate to plaintiff and that it was the lawful owner and holder of the certificate; a copy of the certificate attached to the complaint indicating on its face a valid assignment; and plaintiff's interrogatory and deposition of defendant, through one of its officers, in which defendant failed to offer any fact which would place the validity of the assignment in issue and failed to deny specifically the validity of the signature made in connection with the assignment.

3. **Corporations § 1.1; Rules of Civil Procedure § 56.4— one corporation as alter ego of another—no issue of fact raised—summary judgment proper**

In an action to recover on a certificate of deposit issued by defendant to "Allstate Life Ins. Co. or Commissioner of Ins. of Ala." and allegedly assigned to plaintiff, there was no merit to defendant's contention that its evidence raised an issue of fact as to whether All States was operating as the alter ego of Insurance Industries, Inc., a corporation which had borrowed $370,000 from defendant, and as to whether defendant was entitled to setoff All States' $100,000 certificate of deposit against Insurance Industries' $370,000 debt on the ground the two corporations were in effect one entity, since (1) defendant failed to show that All States was acting as the alter ego of Insurance Industries at the time the $370,000 loan was made to Insurance Industries or at the time the certificate of deposit was issued to All States or the Commissioner of Insurance of Alabama, and evidence for both plaintiff and defendant indicated that at the time of the $370,000 loan All States was not affiliated with or exercising control over Insurance Industries and that the certificate of deposit was issued to All States or the Commissioner of Insurance of Alabama pursuant to a statutory requirement placed on All States by the State of Alabama; (2) defendant failed to allege sufficient facts even to raise an inference of illegality or fraud on the part of All States or Insurance Industries in obtaining the $370,000 loan or the certificate of deposit; and (3) since the evidence presented by defendant was insufficient to raise the alter ego question, no mutuality of debts could be established between All States and defendant and the setoff against All States on Insurance Industries' debt was improper; moreover, defendant's argument that mutuality of debts was not required because of the fact that Insurance Industries and All States were insolvent was also without merit.

4. **Rules of Civil Procedure § 56.4— certificate of deposit as security for loan—no issue of fact raised—summary judgment proper**

In an action to recover on a certificate of deposit issued by defendant to "Allstate Life Ins. Co. or Commissioner of Ins. of Ala." and allegedly assigned

to plaintiff, there was no merit to defendant's contention that its evidence raised a question of fact as to whether the deposit by All States was security for a loan made by defendant to Insurance Industries, Inc., since the note in question did not list the certificate of deposit as security; plaintiff's evidence showed that the certificate was to fulfill an Alabama statutory posting requirement; and defendant's affidavit that All States' certificate of deposit was security for Insurance Industries' loan was incompetent, as it added to or varied the terms of the promissory note and certificate of deposit.

APPEAL by defendant bank from *Snepp, Judge.* Judgment entered 17 December 1976. Heard in the Court of Appeals 2 February 1978.

On 20 January 1976, plaintiff, an Alabama Life Insurance Company, filed a complaint against defendant bank (hereinafter referred to as defendant) and All States Life Insurance Company (All States). In its claim against defendant, plaintiff alleges that it is an assignee of a $100,000 certificate of deposit (CD) issued by defendant to "Allstate Life Ins. Co. or Commissioner of Ins. of Ala." and that defendant has refused to honor its demand for payment. The assignment found on the back of the CD provides:

> Pay to the order of OLD SOUTHERN LIFE INSURANCE COMPANY, INC.
>
> ALL STATES LIFE INSURANCE COMPANY
>
> Allstate Life Ins. Co.
>
> BY: Edwin K. Livingston (signature)
> Attorney for ALL STATES Life Insurance Company

Plaintiff contends that under the terms of the assigned CD defendant is indebted to it in the amount of $117,000.

In its claim against All States, plaintiff alleges that the CD was issued to All States on or about 19 January 1972; that plaintiff instituted two civil actions against All States in Alabama which were settled in a stipulated consolidated judgment for $100,000; that no appeal has been taken from that judgment; and that the time for appeal has expired. Based on the two claims plaintiff seeks to recover $117,000 plus interest from defendant or, in the alternative, to recover $100,000 plus interest from All States.

In its answer, defendant denies that All States deposited $100,000 with defendant and that it issued a CD therefor. In response to plaintiff's allegations concerning the assignment of the CD, defendant alleges that the CD as a writing is the best evidence of its contents. Defendant also alleges that since it is without information or knowledge concerning plaintiff's claim against All States, all allegations with respect to that claim are denied.

As a further defense, defendant alleges that it extended a loan to Insurance Industries, Inc. (III), and the proceeds were used to purchase the CD in the name of All States; that on and after 19 January 1972, Ernest Harris was the chief executive officer, chairman of the board of directors, and principal stockholder of III and All States; that All States was operated as the alter ego of Ernest Harris and/or III; that on 19 November 1975, the loan to III was in default and that defendant applied the $100,000 represented by the CD as a setoff on the loan; that on the same date defendant notified All States and the Commissioner of Insurance of Alabama that the CD had been used as a setoff on III's debt and would not be honored upon presentment; and that since the CD funds were applied to the debt of III defendant is not indebted to any party on the CD.

From the interrogatories, depositions and affidavits filed by plaintiff and defendant, the following appears:

In early January 1972, Ernest Harris, president and director of III, applied to defendant for a loan for III in the amount of $370,000 for the purpose of purchasing the controlling stock in All States. Pursuant to this application, defendant loaned III said amount as evidenced by a note and security agreement executed on 19 January 1972. Security for the loan listed on the promissory note included: 69,299.17 shares of All States; assignment of lease on Asheville Airport Property; assignment of certain promissory notes; and a mortgage on Sara Lynn Motel, Rockingham, N. C. On 19 January 1973, the loan was refinanced and the new note listed the same security. Ernest Harris signed as president of III on both notes, but the only common endorsers on the two notes were Ernest and Carolyn Harris. The original handwritten notes of defendant's official who made the loan state: "Collateral: 1. Assignment of various notes totaling over $200,000 (with wives)

2. 98.2% stock of Allstate Life insurance (sic) of alabama (sic) 3. assignment of lease of property in Ashville (sic) 4. mortgage of motel in Rockingham. Purpose: To purchase 98.4% of stock of Allstate Life Insurance Company of Alabama. Background: Mr. Harris has been our customer for 1 year. He is president of III and once this purchase is concluded, he will move the main operations to Charlotte. This life insurance company will also maintain their primary account with us as well as maintain a CD of $100,000, that is pledged to the State of Alabama."

After acquiring the $370,000 loan and purchasing All States, Ernest Harris became president and a member of the board of directors of All States. On 19 January 1972, All States deposited $200,000 in a new checking account with defendant and purchased a $100,000 CD in the name of "Allstate Life Ins. Co. or Commissioner of Ins. of Alabama." The CD was posted by All States with the Commissioner of Insurance of Alabama to fulfill a statutory requirement for conducting insurance business in that state.

Ernest Harris testified in his deposition that the CD was purchased to comply with Alabama law requiring $100,000 or the equivalent to be pledged to the Alabama Commissioner of Insurance; that "[t]he Bank never asked [him] on behalf of Insurance Industries or Allstates to pledge the certificate of deposit as security for the loan"; that he did not at any time consider the CD as security for the $370,000 loan; that he owned some stock in III and All States; and that III was the majority stockholder in All States following the purchase of the controlling interest on 19 January 1972.

Defendant paid interest on the CD to All States on 29 January 1974, 27 February 1974, and 22 January 1975. All States and plaintiff entered into a re-insurance agreement on 31 December 1973 whereby plaintiff took over all of All States' life insurance business. As part of the consideration for that agreement, All States executed a note to plaintiff for $85,691 with interest at 8%. As security for the note, All States pledged to plaintiff its statutory deposit (the CD) with the State of Alabama. All States defaulted on the note to plaintiff and plaintiff brought suit against All States. The suit was settled by stipulation of the parties and final judgment for $100,000 in favor of plaintiff was entered 16 October 1975. Pursuant to the settlement, All States

assigned the CD to plaintiff after the Commissioner of Insurance of Alabama had released his interest.

According to its records, defendant first considered the $370,000 loan to III a bad loan on 6 May 1974. A loan critique on that date indicates that the primary security on the loan included the assignment of the Asheville airport lease, 69,229 shares of All States stock, 48,000 shares of III stock, 10,000 shares of International Speedways stock, and as secondary security, 9 Ouachita Lots in Monroe, La. The security interest in the Sara Lynn Motel had been realized on 18 June 1973, and the remaining security was insufficient to cover the debt of III. On 7 June 1974, defendant advised an indorser on the note that if the balance due was not paid, the pledged security, which did not include the CD, would be sold at private sale.

Plaintiff notified defendant by telephone and letter dated 17 October 1975 of its interest in the $100,000 CD and made demand for payment. According to a file memorandum of defendant dated 19 November 1975, defendant decided to set off the $100,000 CD against the $370,000 loan to III since they "considered Insurance Industries and Allstates to be mere instrumentalities or alter egos of each other, and/or shield for the activities of Ernest Harris, who was president of both companies" due to the purported commingling of funds between the three entities. On 20 January 1976, plaintiff's attorneys presented the CD to defendant for collection and payment was refused on the ground that the CD had been setoff against the loan to III.

Additional pertinent facts are set forth in the opinion. On the basis of the pleadings, interrogatories, exhibits and deposition, the court allowed plaintiff's motion for summary judgment against defendant.

James, McElroy and Diehl, by James H. Abrams, Jr., for plaintiff appellee.

Griffin, Gerdes, Harris, Mason and Brunson, by N. Deane Brunson and C. Michael Wilson, and Fleming, Robinson and Bradshaw, by A. Ward McKeithan, for defendant appellant.

BRITT, Judge.

Defendant contends in its sole assignment of error that the trial court erred in granting plaintiff's motion for summary judgment. Defendant argues: (1) that plaintiff was not entitled to summary judgment as a matter of law since it offered no affidavits, depositions or evidence of its unverified allegations which were all denied by defendant; and (2) that plaintiff was not entitled to summary judgment since defendant raised genuine issues of material facts on three questions: (a) whether plaintiff is the lawful owner and holder of the CD pursuant to a proper and valid assignment, (b) whether All States was a mere instrumentality or alter ego of III, and (c) whether the deposit by All States was security for the $370,000 loan of III.

Summary judgment is controlled primarily by G.S. 1A-1, Rule 56. Subsection (a) provides that a claimant may move with or without supporting affidavits for a summary judgment in his favor. Subsection (c) provides, among other things, that the judgment shall be rendered 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. Subsection (e) provides that any supporting or opposing affidavits shall be made on personal knowledge, "shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein". Subsection (e) also provides that when a motion for summary judgment is made and supported as provided by Rule 56, an adverse party may not rest upon the mere allegations or denials in his pleading, but his response, by affidavits or as otherwise provided in the rule must set forth *specific facts* showing that there is a genuine issue for trial.

In addition, *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E. 2d 392, 410 (1976), sets forth the following standards for determining when summary judgment is appropriate for the claimant.

> Nothing in our State Constitution nor in our decisions precludes summary judgment in favor of a party with the burden of persuasion when the opposing party has failed to respond to the motion in the manner required by Rule 56(e) or (f) and no "genuine issue as to any material fact" arises

> out of movant's own evidence or the situation itself challenges credibility. Under these circumstances Rule 56(e) provides that summary judgment *shall be entered.*
>
> * * *
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> The purpose of Rule 56 is to prevent unnecessary trials when there are no genuine issues of fact and to identify and separate such issues if they are present. To this end the rule requires the party opposing a motion for summary judgment —notwithstanding a general denial in his pleadings—to show that he has, or will have, evidence sufficient to raise an issue of fact. If he does not, "summary judgment, if appropriate, shall be entered against him." To hold that courts are not entitled to assign credibility as a matter of law to a moving party's affidavit when the opposing party has ignored the provisions of (e) and (f) would be to cripple Rule 56. *See* 10 Wright and Miller § 2740.
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> * * *
>
> To be entitled to summary judgment the movant must still succeed on the basis of his own materials. He must show that there are no genuine issues of fact; that there are no gaps in his proof; that no inferences inconsistent with his recovery arise from his evidence; and that there is no standard that must be applied to the facts by the jury. . . .

See also 10 Wright & Miller, Federal Practice and Procedure: Civil § 2727 (1973).

In order to determine whether the movant has complied with the above requirements of Rule 56 and standards set forth by case law, North Carolina courts have followed the interpretation of similar provisions in Federal Rule 56 and allowed the court to consider the pleadings, affidavits that meet the requirements of G.S. 1A-1, Rule 56(e), depositions, answers to interrogatories, admissions, oral testimony, documentary materials, facts which are subject to judicial notice, and such presumptions as would be available at trial. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); *Butler v. Berkeley*, 25 N.C. App. 325, 213 S.E. 2d 571 (1975). Affidavits may be relied upon by the parties, but are not required, since the parties may rely upon matters in the record.

However, Rule 56(e) does require an adverse party to do more than merely rely on his pleading if the movant supports his motion by *affidavit or otherwise*. Shuford, N.C. Civil Practice and Procedure § 56-6 (1975).

"[T]he question of when the burden will shift to the opposing party may depend on the type of proof utilized by the moving party. . . . '[I]f the proof in support of the motion is largely documentary and has a high degree of credibility the opponent must produce convincing proof attacking the documents in order to sustain his burden * * * . . . .'" If the moving party makes out a prima facie case that would entitle him to a directed verdict at trial, summary judgment will be granted unless the opposing party presents some competent evidence that would be admissible at trial and that shows that there is a genuine issue as to a material fact. 10 Wright and Miller, Federal Practice and Procedure: Civil § 2727, pp. 536, 537 (1973). In addition, as is true of other material introduced on a summary judgment motion, uncertified or otherwise inadmissible documents may be considered by the court if not challenged by means of a timely objection. 10 Wright and Miller, Federal Practice and Procedure: Civil § 2722 (1973).

Applying these principles to the present factual situation, we conclude that plaintiff presented sufficient competent evidence to support a summary judgment (in the form of a deposition and interrogatory of defendant, documentary exhibits and an affidavit) and that defendant failed to offer competent evidence to contradict plaintiff's evidence and raise a genuine issue of fact. An examination of the applicable law governing the CD and a close analysis of the three questions of fact which defendant contends it raised by presenting competent contradictory evidence to overcome plaintiff's summary judgment motion, supports this conclusion.

[1] The crux of this case evolves around the CD which ". . . certifies that Allstate Life Ins. Co. or Commissioner of Ins. of Alabama as their interest may appear . . ." has deposited with defendant's Charlotte office $100,000. By the terms on the certificate, payment could be obtained "[u]pon surrender of [the] certificate properly endorsed 12 months after date, with interest of 4¼ percent per annum for the time specified only." However, the ". . . certificate [was] automatically renewed for a like term and interest rate if not presented for payment within 10 days after maturity."

By its terms the CD falls within the G.S. 25-9-105(1)(g) definition of instrument which states " 'Instrument' means a negotiable instrument (defined in § 25-3-104), or a security (defined in § 25-8-102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment." Since this certificate is an instrument within the scope of the U.C.C., it is governed by the principles stated in G.S. 25-3-805 applying Article 3 to instruments which are non-negotiable only because they are not payable to order or bearer. *Savings and Loan Association v. Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972), and the rules stated under G.S. 25-9-304 regarding perfection of security interests in instruments.

[2] Defendant first asserts that he has raised an issue of fact with respect to the validity of the assignment of the CD. We find no merit in this assertion because defendant failed to offer some competent evidence that could be admitted at trial which would raise a question of fact with respect to plaintiff's evidence that the assignment was valid or show a good reason in accordance with Rule 56(f) why it was unable to present facts justifying its opposition to the plaintiff's assertion. G.S. 1A-1, Rule 56, 10 Wright and Miller, Federal Practice and Procedure: Civil § 2727, p. 532 (1973).

Evidence presented by plaintiff at the hearing included its unverified complaint alleging that on 11 October 1975 All States assigned the CD to plaintiff and that it was the lawful owner and holder of the CD; a copy of the CD attached to the complaint indicating on its face a valid assignment; and plaintiff's interrogatory and deposition of defendant, through J. Larry Harrill, in which defendant failed to offer any fact which would place the validity of the assignment in issue. Defendant's evidence which allegedly raised a question of fact with respect to the validity of the assignment included its general denial of the assignment, based on information and belief, and the following statement in the plaintiff's deposition of defendant's J. Larry Harrill:

> The Bank further contends that Old Southern Life Insurance Company (Old Southern) is not the lawful owner and/or holder of the certificate of deposit. We have no way to

> determine that Old Southern is or is not the lawful owner. Although there is a purported assignment on the back of the certificate of deposit, which I have seen, we have no reason to believe that this is a valid and lawful assignment. Such assignments are generally made in front of us, i.e., the parties sign in the presence of a bank officer. This was not done in my presence. Clearly the certificate of deposit was not issued to Old Southern Life Insurance Company. . . .

Defendant also submitted affidavits in opposition to the summary judgment motion, but the only reference to the assignment of the CD was a statement to the effect that on or about October 1975, defendant received notice that All States had assigned the CD to plaintiff.

Rule 56(e) states that "[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." (Emphasis supplied.) U.C.C. provision G.S. 25-3-307 provides that unless a signature is *specifically* denied in the pleadings, it is deemed admitted; and that when signatures are admitted, production of the instrument entitles a holder to recover on it unless the defendant can establish a defense. 2 Anderson UCC § 3-307-3-307:6 (2d ed. 1971). In the present case, defendant failed to set forth specific facts which would place the validity of the assignment in issue and failed to specifically deny the validity of the signature made in connection with the assignment. Consequently, pursuant to the Rules of Civil Procedure and the U.C.C. provisions, the assignment is deemed valid, the holder of the CD is entitled to recover unless defendant has raised a valid defense which would prevent recovery, and summary judgment is not precluded since no issue of fact with respect to the validity of the assignment was presented by defendant.

[3] Defendant next contends that its evidence raised an issue of fact as to whether All States was operating as the alter ego of III. Defendant argues that it was entitled to setoff All States' $100,000 CD against III's $370,000 debt since the two corporations

were in effect one entity, and that even if the two corporations were not acting as one, plaintiff still took the CD subject to defendant's right of setoff and other defenses. We find no merit in these contentions.

First, with respect to the alter ego argument, the general rule as stated in *Insurance Co. v. Bank*, 11 N.C. App. 444, 450, 181 S.E. 2d 799, 803 (1971), provides:

> The "alter ego" or "instrumentality" doctrine states that: "[W]hen a corporation is so dominated by another corporation, that the subservient corporation becomes a mere instrument, and is really indistinct from the controlling corporation, then the corporate veil of the dominated corporation will be disregarded, if to retain it results in injustice." *National Bond Finance Co. v. General Motors Corp.*, 238 F. Supp. 248 (W.D. Mo. 1964), aff'd, 341 F. 2d 1022 (8th Cir. 1965). In accord: *Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E. 2d 570.
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> * * *
>
> Stock ownership alone, however, is not a determining fact. There must be "[c]ontrol, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own. . . ." *Lowendahl v. Baltimore & O.R. Co.*, 247 App. Div. 144, 287 N.Y.S. 62, 76 aff'd, 272 N.Y. 360, 6 N.E. 2d 56; *Acceptance Corp. v. Spencer, supra.*

In addition, ". . . [t]he fact that one corporation and its officers own substantially all of the stock of another corporation does not justify a disregard of the separate corporate entities unless there are additional circumstances showing fraud, actual or constructive, or agency." 3 Strong's N.C. Index 3d, Corporations § 1.1, p. 474.

In the present case, plaintiff argues and shows by its evidence that All States' business was transferred to it pursuant to a re-insurance agreement and that the $100,000 CD which was in the possession of the Commissioner of Alabama was assigned to it by All States on 11 October 1975. Plaintiff makes no

reference to any involvement by III. Under the alter ego test stated above, defendant's evidence fails to allege sufficient facts to raise the alter ego question in two respects.

First, defendant failed to show that All States was acting as the alter ego of III at the time the $370,000 loan was made to III or at the time the CD was issued to All States or the Commissioner of Insurance of Alabama. Evidence for both plaintiff and defendant indicates that at the time of the $370,000 loan All States was not affiliated with or exercising control over III and that the CD was issued to All States or the Commissioner of Insurance of Alabama pursuant to a statutory requirement placed on All States by the State of Alabama. There is no evidence that these two transactions were financial moves in which All States was operating as the alter ego of III.

Second, defendant failed to allege sufficient facts even to raise an inference of illegality or fraud on the part of All States or III in obtaining the $370,000 loan or the CD. Evidence for plaintiff and defendant shows that defendant was aware at all times that the purpose of the $370,000 loan was to acquire control of All States; that the stated collateral for the loan were those items listed on the promissory note signed by III, and that the purpose of the CD was to provide the statutory deposit required by the State of Alabama for the protection of All States' policyholders. In addition, the evidence indicates that without the posting of the CD as required by the State of Alabama, the stated security on the promissory notes of 69,229.17 shares of All States stock would have been worthless since All States would not have been allowed to conduct business in Alabama.

In connection with the alter ego argument, defendant relied heavily on the case of *United States National Bank of Galveston, Texas v. Madison National Bank*, 355 F. Supp. 165 (D.D.C. 1973), *aff'd* 489 F. 2d 1273 (D.C. Cir. 1974). We have carefully considered that case but find it easily distinguishable from the instant case.

In order to invoke the right of setoff, a debtor-creditor relationship must exist between the parties. In *Coburn v. Carstarphen*, 194 N.C. 368, 370, 139 S.E. 596 (1927), the court stated:

> As a general rule a bank may apply the amount due by the bank to its depositor as a payment on a debt of the

> depositor to the bank, at any time after the debt becomes due; this rule, however, applies only when the amount due as a deposit belongs to the depositor. It does not apply where the bank has knowledge that the money deposited belongs, not to the depositor, but to another, and was deposited in trust for the owner. 7 C.J., 653 and 658. The right of set-off arises and can be enforced only where there are mutual debts between the parties. The party invoking the right cannot maintain it, unless he could also maintain an action against the other party to recover the amount which he seeks to have allowed as a set-off or counterclaim. . . .

Since the evidence presented by defendant in the instant case was insufficient to raise the alter ego question, no mutuality of debts can be established between All States and defendant and the setoff against All States on III's debt was improper.

Defendant's next argument that mutuality of debts is not required in the present case because of the fact that III and All States are insolvent is equally without merit. In the cases in which that rule has been applied, the facts indicate that the deposit against which the setoff is applied is usually made in the name of the depositor for a third person who also maintains an independent cause of action against the depositor, *Coburn v. Carstarphen*, *supra*, or that some other close relationship exists between the depositor of the setoff funds and the indebted party. An example of the latter situation is where a bank is allowed to apply a deposit to the credit of an insolvent corporation against the debt due on a personal note given by the directors of the insolvent corporation to cover the insolvent corporation's prior note which was also kept as collateral security. *Trust Company v. Spencer*, 193 N.C. 745, 138 S.E. 124 (1927). Since All States and III were not involved in an exceptional situation similar to those recognized under N.C. law and cited by defendant in its brief, we find no merit in this contention.

[4] Finally, we find no merit in defendant's contention that its evidence raises a question of fact as to whether the deposit by All States was security for the loan made to III.

The refinancing note dated 19 January 1973 and the original note dated 19 January 1972 list as security 69,229.17 shares All States stock, assignment of a lease, assignment of certain promis-

sory notes, and an assignment of a mortgage on a motel but make no mention of the CD issued to All States. Plaintiff's evidence showed that the CD was to fulfill an Alabama statutory posting requirement. Defendant argues that this evidence is controverted by Gary Cooey's affidavit which stated that at the time of the loan to III, $100,000 represented by the CD issued to All States or the Commissioner of Insurance of Alabama was placed on deposit with defendant as a compensating balance, that defendant "looked to" the CD as security for the loan, and said amount was to remain on deposit so long as III owed money on the loan.

Rule 56(e) requires that affidavits set forth facts which would be admissible in evidence. Under the parol evidence rule, statements which contradict, add to, take from or in any way vary the express terms of a written instrument are not admissible in evidence. 2 Stansbury's N.C. Evidence §§ 251, 253, 256 (Brandis Rev. 1973). As a result, the assertion in defendant's (Cooey's) affidavit that the All States' CD was security for III's loan is incompetent as it adds to or varies the terms of the promissory note and the CD. Since plaintiff presented evidence showing that the CD was to fulfill Alabama statutory requirements, not as security on III's loan, and defendant failed to offer competent rebuttal evidence as required by Rule 56(e), no genuine issue of fact was raised as to whether All States' CD deposit was security for the III loan. Even if defendant could establish a security interest in the CD pursuant to the promissory note given by III, it failed to present any facts showing that it properly perfected its security interest in the CD by taking possession of it as required by U.C.C. 25-9-304.

For the reasons stated, we conclude that summary judgment for plaintiff was properly granted as no genuine issue of fact was raised by the pleadings or any additional evidence.

Affirmed.

Judges HEDRICK and WEBB concur.

STATE OF NORTH CAROLINA v. RALPH GLENN HINES

No. 771SC768

(Filed 18 April 1978)

1. **False Pretense § 2— indictment—allegation that victim was deceived**

An indictment for false pretense need not allege specifically that the victim was in fact deceived Nhen the facts alleged suggest that the false pretense was the probable motivation for the victim's conduct.

2. **False Pretense § 2.1— indictment—facts showing victim was deceived**

An indictment for false pretense alleged facts sufficient to suggest that defendant's false pretense was the probable motivation for the victim's conduct where it alleged that defendant falsely represented to the victim that he was an employee of the Administrative Office of the Courts and had received authorization to hire the victim as a State employee; defendant was not so employed and had no such authority; defendant purported to hire the victim as a State employee at a certain salary; and defendant obtained secretarial services from the victim as a purported State employee.

3. **False Pretense § 1— elements of crime—"without compensation"**

"Without compensation" is not an element of the crime of false pretense which must be alleged and proved by the State.

4. **False Pretense § 1— payment of some compensation**

A defendant can be convicted of obtaining goods by false pretense in violation of G.S. 14-100 even though adequate compensation (in an economic sense) is actually paid if the compensation actually paid is less than the amount represented.

APPEAL by defendant from *Albright, Judge*. Judgment entered 18 May 1977 in Superior Court, DARE County. Heard in the Court of Appeals 19 January 1978.

By bill of indictment defendant was charged with obtaining secretarial services from Karen Ann Etheridge by false pretenses. Defendant pled not guilty, was convicted by the jury, and judgment was entered on the verdict sentencing him to imprisonment in the Dare County jail for a term of not less than 5 nor more than 7 years. From this judgment, defendant appealed.

Evidence presented by the State is summarized as follows: During the fall of 1976, John A. Krider asked the defendant Ralph Glenn Hines if he could help his (Krider's) granddaughter, Karen Ann Etheridge, get a job. The defendant said he might be able to help. The defendant told Mr. Krider he was "co-ordinator" of a district of the judicial system. On 2 October 1976, defendant

brought Mr. Krider and Miss Etheridge an application for employment with the State of North Carolina. Mr. Hines told Miss Etheridge that he was employed by the Administrative Office of the Courts as co-ordinator for the clerks of court of the various counties in the judicial district. He further told her that he needed an assistant and that he would like to employ her. Miss Etheridge filled out the application and returned it to Mr. Hines.

In early December 1976, Mr. Hines brought to Mr. Krider and Miss Etheridge a letter on stationery purporting to be that of the Administrative Office of the Courts and supposedly signed by Franklin E. Freeman, Jr. The letter was addressed to Ralph G. Hines, "Special Inspector in Charge". Mr. Hines was not so employed; indeed, there was no such position. Evidence tended to show that Mr. Hines had photocopied genuine stationery and had signed Mr. Freeman's name. The letter which Mr. Hines presented to her contained a statement that Miss Etheridge would be employed on 1 January 1976 as "Co-ordinator Region 1" by the State and that she would be employed at "Pay Grade 10" and would receive an annual salary of $10,089.56 plus all the "normal benefits" of State employees. Later that same month, Mr. Hines presented a second falsified document which purported to be correspondence from Franklin E. Freeman which set out additional requirements for the job.

Mr. Hines was employed by W. L. Wilson Bonding Company and also served as State Treasurer of the North Carolina Association of Professional Bondsmen. Mr. Hines was never employed by the Administrative Office of the Courts.

The starting date of her employment was postponed from 1 January until 10 January. However, Mr. Hines had delivered three books to Miss Etheridge which she was to read prior to reporting for work. Prior to 10 January, Mr. Hines also gave Miss Etheridge instructions as to her duties. Pursuant to Mr. Hines's instructions, Miss Etheridge "checked the docket" for Wilson Bonding Company at the 10 January Special Session of Dare County Superior Court. Mr. Hines indicated to her that these services were part of her new employment with the State when, in fact, these services were solely for his own benefit. On two other days after 10 January 1977, Mr. Hines obtained Miss Etheridge's services by having her type up a report for Wilson Bonding Com-

pany. Again, Mr. Hines indicated that these secretarial services were part of her new State job when, in fact, the services were solely for his own benefit. Miss Etheridge thought the work she was doing was as an employee of the State.

On 18 January 1977 Miss Etheridge accompanied Mr. Hines on a business trip to Chapel Hill and Raleigh. Miss Etheridge received $200 in cash for her expenses. Mr. Hines told her that the purpose of the trip was to allow her to attend a training program in Chapel Hill for her new State job. The trip in reality was a business trip for Mr. Hines. When she returned to Manteo and investigated the situation, Miss Etheridge refused to have any further dealings with Mr. Hines until he got the matters "straightened out".

Miss Etheridge was never employed by the State of North Carolina and never received any money or employee benefits from the State. Miss Etheridge received a check from Mr. Hines in the amount of $148.48 drawn on the account of the North Carolina Association of Professional Bail Bondsmen. The check "bounced", but Mr. Hines later had the money wired to her account. Miss Etheridge had performed all these services believing they were part of the duties of her new job with the State of North Carolina. When she finally concluded that she had been deceived, Miss Etheridge reported the matters to the authorities.

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

Aldridge and Seawell, by G. Irvin Aldridge, for defendant appellant.

MORRIS, Judge.

Defendant has raised three primary issues in his brief: (1) Is it necessary that the bill of indictment specifically allege that the victim was in fact deceived? (2) Can there be a conviction under G.S. 14-100 when some compensation is given for the services obtained by false pretenses? (3) Can the defendant be convicted of a violation of G.S. 14-100 when adequate compensation is in fact given but the compensation actually paid is less than the compensation promised?

[1] First, defendant strongly urges that the failure of the bill of indictment to charge that Miss Etheridge was in fact deceived necessitates the dismissal of the charges against him. He contends (1) that *State v. Hinson*, 17 N.C. App. 25, 193 S.E. 2d 415 (1972), *cert. denied* 282 N.C. 583 (1973), *cert. denied* 412 U.S. 931 (1973), should be overruled but (2) that even if it is not overruled it is distinguishable.

In *Hinson* this Court squarely confronted the question of whether the indictment had to charge specifically that the victim was in fact deceived when the indictment clearly showed a relationship between the false pretense and the victim's conduct. We concluded that the specific allegation was unnecessary. In the present case, the relationship between the false pretense and the victim's conduct is clear. The defendant, pretending to have the authorization to do so, offered the victim a State job, and the victim went to work. Thus, *Hinson* is controlling under the facts in this case, and defendant's arguments for our overruling it are not persuasive. Therefore, for the reasons stated in *Hinson*, we again hold that the specific allegation in the bill of indictment that the victim was in fact deceived is unnecessary when the facts alleged suggest that the false pretense was the probable motivation for the victim's conduct.

[2] Defendant has urged that *Hinson* is distinguishable. He argues that the facts alleged in the indictment do not suggest that the victim was motivated by the fraudulent representations. The indictment alleged that Mr. Hines

> ". . . did unto Karen Ann Etheridge falsely pretend that, he, the said, RALPH GLENN HINES, was employed by the Administrative Office of the Courts of the State of North Carolina as Special Inspector in charge of the Region I Field Office, Manteo, North Carolina, and that, he, the said, RALPH GLENN HINES, had received authority to employ Karen Ann Etheridge as an employee of the State of North Carolina at an annual salary of $10,089.56 in the position of Co-ordinator of Region I pursuant to a letter dated December 7, 1976 from Franklin E. Freeman, Jr., Acting Director of the Administrative Office of the Courts of the State of North Carolina; whereas in truth and in fact, he, the said, RALPH GLENN HINES, was not employed by the Administrative Office

> of the Courts of the State of North Carolina as a Special Inspector in charge of the Region I Field Office, and he, the said, RALPH GLENN HINES, did not receive authority from Franklin E. Freeman, Assistant Director of the Administrative Office of the Courts pursuant to a letter dated December 7, 1976 to employ Karen Ann Etheridge as an employee of the State of North Carolina in the position of the Co-ordinator of Region I at an annual salary of $10,089.56. By means of which said false pretense, he, the said, RALPH GLENN HINES, knowingly, designedly and feloniously, did then and there unlawfully attempt to obtain and did obtain from Karen Ann Etheridge services, goods, and things of value, to wit: secretarial services as a purported employee of the State of North Carolina . . . ."

The indictment, thus, alleges facts sufficient to suggest that the false pretense was the probable motivation for the victim's conduct. Applying the principles enunciated in *Hinson*, we are of the opinion that the indictment was sufficient in this regard.

[3] Next, defendant contends that one cannot be lawfully convicted of a violation of G.S. 14-100 if any compensation is given. He relates this argument to three facets of the case. First, he contends that his motion to dismiss should have been allowed because the indictment did not allege that the services were obtained "without compensation". Next he argues that his motion for nonsuit should have been allowed because the State failed to prove that the services were obtained "without compensation". Finally, he urges that the instructions to the jury were erroneous because the court failed to instruct the jury that a verdict of not guilty must be returned if the jury should find that any compensation at all was paid. This contention of defendant's is necessarily premised upon the position that "without compensation" is an element of the crime of false pretense which must be proved by the State and found by the jury.

Defendant relies on *State v. Agnew*, 33 N.C. App. 496, 500-501, 236 S.E. 2d 287 (1977), *rev'd on other grounds*, 294 N.C. 382, 241 S.E. 2d 684, where this Court, quoting with approval from *State v. Davenport*, 227 N.C. 475, 495, 42 S.E. 2d 686, 700 (1947), said:

"The essential elements which the State must prove to the satisfaction of the jury beyond a reasonable doubt in order to convict one of the crime of false pretense are as follows:

> '". . . [A] false representation of subsisting fact [or of a future fulfillment or event as provided in G.S. 14-100 as amended in 1975], calculated to deceive, and which does deceive, and is intended to deceive, whether the representation be in writing, or in words, or in acts, by which one man obtains value from another, without compensation. . . ."' *State v. Davenport*, 227 N.C. 475, 495, 42 S.E. 2d 686, 700 (1947); see also *State v. Roberts*, 189 N.C. 93, 126 S.E. 161 (1925); *State v. Wallace*, 25 N.C. App. 360, 213 S.E. 2d 420 (1975); *State v. Banks*, 24 N.C. App. 604, 211 S.E. 2d 860 (1975)."

It does appear that this Court in *Agnew* and the Supreme Court in *Davenport* have recognized "without compensation" as an element of the crime. We think a closer look at the cases will show that this is not the case. The phraseology used in both cases came as a direct quote from *State v. Phifer*, 65 N.C. 321, 323 (1871). There the facts were these: Defendant went to the store of one Leopold Rosenthal and represented that he was the son of P. Phifer of New York and offered to sell to Rosenthal the goods of P. Phifer and Company. He also asked Rosenthal to cash several drafts on P. Phifer and Company but his request was refused. Subsequently he offered to buy a diamond ring and did obtain the ring paying for it by a draft on P. Phifer and Company. He represented to Rosenthal that the draft would be paid on presentation and Rosenthal delivered the ring to him in reliance on his representation that the draft would be paid on sight. The draft was returned protested and unpaid. Defendant was not the son of P. Phifer and knew the draft would not be paid. The words of the statute which the Court was asked to construe were ". . . by means of any forged or counterfeited paper in writing or in print, or by any false token, *or other false pretense* whatsoever, obtain . . . any money, goods, property, or other thing of value. . . ." (Emphasis supplied.) Rev. Code, Chapter 34 § 67. The defendant contended at trial, and the trial court agreed, that false pretense means the same as false token and that, regardless of how false the words, the use of mere words could never be sufficient to

make out a case against the defendant. The Court discussed the offense at common law under Hen. 8, and 30 George II, and concluded that a promise to do something in the future or a representation of a future event would not come within the statute, but "a false allegation of some subsisting fact" would be indictable, and there need not be a token. The Court then stated the rule and included therein were the words "without compensation". Obviously in *Phifer* the victim received absolutely nothing, as is the case in a great many false pretense cases. The fact was certainly applicable. The Court did not discuss the question of the victim's compensation, nor was it before the Court. Because of Justice Reade's full and clear discussion of the offense, *Phifer* became the leading case in this State and has been cited and quoted many times since the opinion was delivered. Our research indicates that in those cases wherein *Phifer* has been quoted, the quotation has included the phrase "without compensation". In those cases wherein the Court cites *Phifer* as the leading case but does not quote directly from it, the elements do not include "without compensation". For example, in *State v. Hefner*, 84 N.C. 751 (1881), and *State v. Mikle*, 94 N.C. 843 (1886), Justice Ashe quoted the entire paragraph from *Phifer*, but in *State v. Eason*, 86 N.C. 674 (1882); *State v. Dickson*, 88 N.C. 643 (1883); and *State v. Mathews*, 91 N.C. 635 (1884), he sets out the elements of the offense under § 67, Chapter 32, Battle's Revisal and cites *Phifer* but nowhere does the phrase "without compensation" appear. *See also State v. Smith*, 78 N.C. 462 (1878); *State v. Mangum*, 116 N.C. 998, 21 S.E. 189 (1895); *State v. Matthews*, 121 N.C. 604, 28 S.E. 469 (1897); *State v. Whedbee*, 152 N.C 770, 67 S.E. 60 (1910); *State v. McFarland*, 180 N.C. 726, 105 S.E. 179 (1920); *State v. Yarboro*, 194 N.C. 498, 140 S.E. 216 (1927). An interesting treatment is found in *State v. Carlson*, 171 N.C. 818, 89 S.E. 30 (1916). Justice Walker, speaking for a unanimous Court, said:

> "A criminal false pretense may be *defined* to be the false representation of a subsisting fact, whether by oral or written words or conduct, which is calculated to deceive, intended to deceive, and which does in fact deceive, and by means of which one person obtains value from another without compensation. *S. v. Phifer*, 65 N.C., 321; *S. v. Whedbee*, 152 N.C., 770. *In order to convict* one of this crime *the State must satisfy the jury beyond a reasonable doubt* (1) that the

representation was made as alleged; (2) that property or something of value was obtained by reason of the representation; (3) that the representation was false; (4) that it was made with intent to defraud; (5) that it actually did deceive and defraud the person to whom it was made. *S. v. Whedbee, supra.*" (Emphasis supplied.) 171 N.C. at 824.

It seems abundantly clear that the Court never intended the victim's failure to receive compensation to be an element of the offense. Certainly, beginning with the statute codified as Potter's Revisal of 1819, laws of 1811, Ch. 814 § 2, through the present G.S. 14-100, there is and has been no statutory requirement that the State must prove that the defendant obtained the goods, property, things of value, services, etc., without compensation to the victim. Nor has our research disclosed a case in which the question of the victim's compensation was before the Court, although in some cases the victim received nothing at all, and in some the victim did receive some compensation of a sort. We conclude that the phrase "without compensation" has constituted *obiter dictum* in the cases where it has been used, and it is not an element of the offense of false pretense.

[4] Finally, defendant argues that if the compensation paid the victim was adequate in an economic sense (that is, the fair market value) then there could be no intent to defraud. In defendant's view, if he intended to pay the fair market value for the services of Miss Etheridge even if that is less than the amount he represented she would receive, then there was no intent to defraud, and the court's failure to instruct the jury with regard to the adequacy of compensation would then be reversible error.

In both *State v. Wallace*, 25 N.C. App. 360, 213 S.E. 2d 420, *cert. denied* 287 N.C. 468 (1975), and *State v. Banks*, 24 N.C. App. 604, 211 S.E. 2d 860 (1975), this Court upheld convictions for violations of G.S. 14-100 even though there was some compensation. These two cases, however, did not involve a situation in which the compensation was arguably adequate. It appears that the particular issue raised by the defendant has never been squarely addressed by this Court.

The question most often arises in cases dealing with security for loans. In the typical case, the defendant represents that property is unencumbered when he pledges it as security for a loan.

The victim later discovers that the property was in fact encumbered when the defendant secured the loan. The courts frequently then must determine whether the defendant can be convicted without a showing of an actual economic loss.

> "It has been held by a majority of courts that have considered the problem that a pecuniary loss by the victim is not an essential element of the crime and that the adequacy of the security offered to obtain a loan or credit, if materially misrepresented, constitutes no defense." Annot., 53 A.L.R. 2d 1215 (1957). *See also United States v. Nelson*, 97 App. D.C. 6, 227 F. 2d 21 (D.C. Cir. 1955), *cert. denied* 351 U.S. 910 (1955); *People v. Talbot*, 65 Cal. App. 2d 654, 151 P. 2d 317 (1944), *cert. denied* 324 U.S. 845 (1944). *But see Wilson v. State*, 84 Ga. App. 703, 67 S.E. 2d 164 (1951).

Though the courts of this State have not directly addressed the issue, the Supreme Court did affirm a conviction for obtaining money by false pretenses where the defendant falsely represented that the property pledged as security for a loan was unencumbered when in fact there was a prior lien. The Court did not deem it necessary to investigate the adequacy of the security. *State v. Howley*, 220 N.C. 113, 16 S.E. 2d 705 (1941). Thus, North Carolina appears to align itself with the majority position.

The majority rule, then, is that a showing of actual pecuniary loss by the victim/prosecuting witness is not necessary to sustain a conviction for obtaining property through false pretenses. *See, e.g., State v. Meeks*, 30 Ariz. 436, 247 P. 1099 (1926); *State v. Moss*, 194 Ark. 524, 108 S.W. 2d 782 (1937); *People v. Bartels*, 77 Colo. 498, 238 P. 51 (1925); *State v. Green*, 144 Tex. Crim. 186, 161 S.W. 2d 114 (1942); *State v. Sargent*, 2 Wash. 2d 190, 97 P. 2d 692 (1940); *State v. Anderson*, 27 Wyo. 345, 196 P. 1047 (1921). The states which require a showing of actual economic loss are clearly in the minority. *See State v. McGee*, 97 Ga. 199, 22 S.E. 589 (1895). While North Carolina has not expressly adopted either position, we believe that cases such as *Howley*, *Wallace*, and *Banks* do suggest that North Carolina is more closely aligned with the majoirty position.

Additionally, sound reasoning supports the majority position. First of all, there is a type of economic harm in cases such as the case now before this Court. Here the victim was to have a job

with the State, a position which included the actual cash income, job security, and all the fringe benefits. Instead of the State job, she received compensation for a few days work from the individual who had, representing himself as employed by the State with authority to hire, promised her a State job. One cannot realistically argue that the difference between the representations made and what she actually received did not amount to an economic loss. The real question, therefore, is whether there is the requisite fraudulent intent if there was adequate compensation.

A careful examination of G.S. 14-100 reveals that the essense of the crime is the intentional false pretense—not the resulting economic harm to the victim. *See State v. Garris*, 98 N.C. 733, 4 S.E. 633 (1887). A civil action for damages would be the proper vehicle for remedying any pecuniary loss. The gravamen of the criminal offense, however, is making the false pretense and, thereby, obtaining another person's property or services. The simple purpose of G.S. 14-100 is to prevent persons from using false pretenses to obtain property. The ultimate loss to the victim, therefore, is an issue which is irrelevant to the purpose of the criminal statute and is an issue properly within the province of the civil courts.

Furthermore, when G.S. 14-100 is applied in accordance with the majority rule set out above, it functions in a manner quite like other criminal laws. The criminal law cannot and should not rush to the aid of every citizen who strikes a bad bargain. The criminal law, however, is the proper mechanism to insure that goods and services are freely surrendered and not taken away, irrespective of the economic realities. Thus, theft is punished even if the property stolen is worthless on the open market. Similarly, to protect the interest of the victim in her personal services, the criminal law will intervene because those services were obtained by a false representation even though some compensation was paid.

[4] Therefore, we hold that a defendant can be convicted of obtaining goods by false pretenses in violation of G.S. 14-100 even though some compensation is paid if the compensation actually paid is less than the amount represented. In this case, the amount

paid was clearly not what the defendant represented to the victim that she would receive.

We think the Court in *State v. Walton*, 114 N.C. 783, 787, 18 S.E. 945 (1894), succinctly stated the law:

> "The intent to deceive was established to the satisfaction of the jury by the proof of the false representation that the paper presented was a genuine order, when, whatever may have been the motive of the defendant, this representation was to his own knowledge false, the commissioners never having made such order. It was calculated to deceive, because it was apparently genuine and attested by the proper officer. It did deceive, because by means of it the defendant obtained the money. *S. v. Phifer*, 65 N.C., 321."

Here the intent to deceive was established to the satisfaction of the jury by the proof that the defendant falsely represented that he was a State employee possessing authority to contract with the prosecuting witness for a State job, when, "whatever may have been the motive of the defendant" this representation was false and he knew it to be false. It was calculated to deceive. He presented what appeared to be an authentic letter from a State official. It did deceive, because the prosecuting witness performed services for him without obtaining a State job.

We have carefully reviewed all of the defendant's assignments of error and find no reversible error.

No error.

Judges CLARK and MITCHELL concur.

STATE OF NORTH CAROLINA v. JOHN T. CONNALLY

No. 7717SC864

(Filed 18 April 1978)

1. Criminal Law § 66.17 – unfair in-custody show-up – in-court identification based on observation at crime scene

Though an in-custody "one-man lineup" conducted without informing defendant of his right to have counsel present was unconstitutional, evidence

was sufficient to support the trial court's finding that an in-court identification of defendant was of independent origin and was not tainted by the illegal in-custody confrontation where such evidence tended to show that the witness observed defendant for about twenty minutes in a well lighted store, and she never identified as the perpetrator of the crime any of the other persons whose photographs were shown her by police.

2. **Criminal Law § 66.18—unfair in-custody show-up—in-court identification—failure to hold voir dire—error**

The trial court erred in failing to conduct a voir dire hearing for the purpose of determining whether a witness's in-court identification of defendant should have been excluded because it was tainted by an unnecessarily suggestive in-custody confrontation where there was clear evidence of an unfair one-on-one in-custody confrontation; the witness's observation of defendant at the crime scene lasted for only a few minutes at a time when there were many other people around; the witness had no reason to pay particular attention to defendant; there was no evidence that the witness gave an accurate description of the perpetrator of the crime to anyone; and there was a time lapse of two months between the observation at the crime scene and the unfair "show-up" confrontation.

APPEAL by defendant from *Seay, Judge*. Judgment entered 27 May 1977 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 7 February 1978.

Defendant pled not guilty to charges of (1) breaking or entering Lawsonville Avenue School and (2) larceny of checks therefrom and (3) forgery of a check drawn on the School and (4) uttering said check at the Jewel Box in Reidsville, all on or about 9 April 1976. The jury returned verdicts of not guilty on the charges of breaking or entering and larceny, and guilty of forgery and uttering. Defendant appeals from judgment consolidating the charges and imposing imprisonment of four to six years.

The evidence for the State tended to show that on Friday night, 9 April 1976, Lawsonville Avenue School was broken into and several of the school's blank checks were stolen. Barbara Harris testified that during the afternoon of the following day (Saturday) she was in charge of the Jewel Box when defendant (identified by her after voir dire) asked to see a ring, gave her a check for $145.78 which she cashed, and accepted $10.00 to lay away the ring. A week or so later the check was returned as a forgery to the store, and Ms. Harris reported the incident to the Reidsville Police Department.

William T. Robinson was arrested and charged with the four crimes listed above in early May, 1976. He first denied that defendant was involved in the crimes. But in early June, 1976, he made a statement to officers implicating defendant, who was arrested. Robinson testified that he and defendant were together and acted in concert in the entry of the school on 9 April and larceny of the checks, and were together the following day when checks, forged by defendant, were uttered at the Jewel Box and at the nearby Bestway Store.

Defendant's evidence tended to show that he and his girl friend, Debbie Keen, were together at defendant's home in Caswell County with his mother and brothers on the night of 9 April 1976, and that on the following day she accompanied defendant on his route to Caswell, Person and Alamance Counties for the collection of insurance premiums, finishing about 1 or 2 o'clock in the afternoon. On that day they were never closer than 30 miles to Reidsville. Defendant's mother testified that defendant and Debbie Keen were at her home on Friday night, left together the next morning, and returned and stayed there Saturday afternoon. Several witnesses testified that they paid insurance premiums to defendant on the morning of 10 April. And several witnesses testified that defendant had a good reputation.

In rebuttal for the State, Brian Moody testified that on 10 April 1976 at about 7:00 p.m. defendant and Robinson together came to the Bestway Store in Reidsville and cashed a check.

Attorney General Edmisten by Associate Attorney Christopher P. Brewer for the State.

Bethea, Robinson, Moore & Sands by Alexander P. Sands III for defendant appellant.

CLARK, Judge.

First, the defendant challenges the admissibility of the eyewitness identification testimony of (1) the prosecuting witness Barbara Harris, and (2) Brian Moody, who was called as a witness for the State in rebuttal after defendant offered alibi evidence.

(1) *The Identification Testimony of Barbara Harris*

The identification testimony of Ms. Harris was admitted on *voir dire* along with the testimony of Ms. Harris and Officers

Huskey and Lambert, both of the Reidsville Police Department, which, in summary, tended to show the following:

> The lights in the store were bright; defendant was in the presence of Ms. Harris for about 20 minutes, and most of this time his face was two or three feet from hers. A week or so passed before the check was returned to the store by the bank with notice that it was forged. The matter was reported to the police, and Ms. Harris gave a description of the perpetrator. The police brought a group of several photographs to the store for inspection by Ms. Harris, but she did not find the photograph of the perpetrator among them. A week or so later (in early May) she went to court to view William Robinson, told officers Robinson was not the perpetrator, and she was asked to look at other photographs in an office. She did not find a photograph of the perpetrator among them, but as she was leaving she glanced down at a photograph on the desk, recognized it as the photograph of the perpetrator and so advised Officer Lambert. He testified that he did not recall a photographic identification by Ms. Harris. On 16 June Officer Lambert arrested defendant on information of William Robinson, an accomplice, and at the jail defendant was advised of his *Miranda* rights and he signed written waiver. On the following day Ms. Harris was requested to come to the police office. Defendant was told that the same rights he was told about the night before applied. Defendant said he understood. Defendant was asked if he minded if someone looked at him and he replied, "No, let anybody come, I didn't do anything." Defendant was not advised of his right to have counsel present for the "one-man lineup." Ms. Harris was brought to an office where she identified defendant, who was the only black in the office.

[1] The defendant offered no evidence on *voir dire*. The trial court found facts, including defendant's consent to the "lineup," and concluded that Ms. Harris's courtroom identification of defendant was based on her observation of him in the store at the time of the crime and "not tainted by any out-of-court proceedings."

The in-custody identification conducted at or after the initiation of adversary judicial criminal proceedings when defendant

was not warned of his right to have counsel present during the confrontation is in violation of the Sixth Amendment. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967); *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (1972). Before such criminal proceedings have been initiated Due Process protects the accused against the introduction of evidence of, or evidence tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967); *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968).

The *Wade* and *Gilbert* cases held that an in-court identification following an uncounseled lineup was allowable only if the prosecution could clearly and convincingly demonstrate that it was not tainted by the constitutional violation. Since these decisions, North Carolina has directed that the trial court conduct a *voir dire* hearing as soon as the identity issue is raised, and if it is determined that the in-custody confrontation is in violation of constitutional rights, then the in-court identification is admissible only if the hearing judge finds that by clear and convincing evidence the State has established that the in-court identification is of independent origin and thus not tainted by the illegal pretrial identification procedure. *State v. Wright*, 274 N.C. 84, 161 S.E. 2d 581 (1968), *cert. den.* 396 U.S. 934, 90 S.Ct. 275, 24 L.Ed. 2d 232 (1969); *State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968); *State v. Stamey*, 3 N.C. App. 200, 164 S.E. 2d 547 (1968), *retrial*, 6 N.C. App. 517, 170 S.E. 2d 497 (1969).

In *Simmons v. United States*, *supra*, a new rule was announced to deal with the admission of in-court identification testimony that the accused claimed had been fatally tainted by a previous suggestive confrontation, the court holding that due process was violated by in-court identification if the pretrial procedure had been "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *See State v. McKeithan*, 293 N.C. 772, 239 S.E. 2d 254 (1977).

In the case *sub judice* the trial judge ordered a *voir dire* hearing, found facts, and concluded that the in-court identification was of independent origin and not tainted by the illegal in-

custody confrontation. We confess to some confusion from the *voir dire* testimony of Ms. Harris that, about a month after the crime in question, she saw a single photograph on a desk in the police station and observed to Officer Lambert that it was a photograph of the perpetrator (defendant). However, Officer Lambert testified that he did not recall such photographic identification by Ms. Harris. Trial evidence established that Officer Lambert arrested defendant about a month after Ms. Harris's purported identification, the basis for the arrest being information furnished by co-perpetrator Robinson, not her identification. This somewhat bizarre twist does not negate her testimony relative to the excellent lighting conditions in the store, the perpetrator's closeness to her for a period of about 20 minutes and other evidence which gives her eyewitness identification reliability and fully supports the conclusion of the trial court that her in-court identification was not tainted by the unconstitutional in-custody "show-up" confrontation.

Since the findings and conclusions of the trial court are supported by competent evidence, they are conclusive on appeal and must be upheld. *State v. McKeithan, supra.*

(2) *The Identification Testimony of Brian Moody*

[2] The State's witness Brian Moody testified that he saw defendant and Robinson together in his Bestway Store in Reidsville about 7:00 p.m. on Saturday, 10 April 1976. The State offered this testimony in rebuttal after defendant had offered alibi evidence tending to show that he was not in Reidsville or even in Caldwell County on that day. Defendant aptly objected to the identification question and moved for a *voir dire*. The trial court denied the motion, but in the charge to the jury the court instructed that "This evidence was received solely for the purpose of showing the identity of the person who was present in Reidsville on April 10th, 1976, with Robinson."

This evidence related to a material feature of the case. Defendant relied on the defense of alibi. The evidence was offered in rebuttal to attack and negate this defense. The instructions of the trial court which attempted to limit the purpose of the evidence had no curative effect. We are unable to see that different rules or standards should be applied to the identification testimony of Ms. Harris and Brian Moody. Both witnesses were called to the police station on the same day for a "show-up" confrontation with the defendant which was unnecessarily suggestive and in violation of the Sixth and Fourteenth Amendments. The

testimony of both witnesses raises the same problem, the danger of mistaken eyewitness identification.

The admission of the identification testimony by Moody is not *per se* error, as defendant argues, because of the trial court's denial of defendant's request for *voir dire*. The recent decision in *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed. 2d 140 (1977), represents a modification of the ten-year-old doctrine of the *United States v. Wade*, *supra; Gilbert v. California*, *supra*; and *Stovall v. Denno*, *supra*, cases. The language of the decision is somewhat guarded and difficult in application, but we gather from the decision that even an unnecessarily suggestive identification procedure may produce admissible evidence if the court finds from the totality of the circumstances that the eyewitness identification possesses certain features of reliability. The totality of the circumstances test was adopted as set forth in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972), which test has the following factors: (1) the witness's opportunity to view the perpetrator of the crime, (2) the witness's degree of attention, (3) the accuracy of his description of the criminal, (4) the level of certainty demonstrated by the witness, and (5) the time that elapses between the crime and the confrontation.

In *Manson*, an undercover police officer bought heroin from the defendant through an open doorway, observed him under good lighting conditions for two or three minutes, and shortly thereafter described him accurately. Two days later a single photograph was given to the officer who identified it as a photograph of the defendant. The Supreme Court held that the Due Process Clause did not compel the exclusion of the identification evidence since under the totality of the circumstances in the case there does not exist "a very substantial likelihood of irreparable misidentification," citing *Simmons v. United States*, *supra*.

In the case *sub judice*, the question before us is whether the eyewitness identification possessed the features of reliability to meet the test adopted in *Manson*. There was clear evidence of an unfair "one-on-one" in-custody confrontation, without emergency or exigent circumstances. *Moore v. Illinois*, --- U.S. ---, 98 S.Ct. 458, 54 L.Ed. 2d 424 (12 December 1977). The State did not offer this confrontation evidence, but the defendant in cross-

examination of Moody elicited the circumstances of his observation of defendant, both in the store and in the "show-up" confrontation at the police station, possibly because he was denied the opportunity of doing so in *voir dire* hearing. In applying the *Manson* totality of the circumstances test to the case before us we find material weaknesses in the eyewitness identification by Moody. He observed the defendant for only a few minutes at a time when there were many others in the store; he had no reason to pay particular attention; there is no evidence that he gave an accurate description of the perpetrator to anyone; and there was a time lapse of two months between the observation and the "show-up" confrontation. We note that State's witness Robinson, an accomplice, testified that defendant alone went in the Bestway Store, but Moody testified that both defendant and Robinson entered the store together and Robinson presented the check for payment.

We conclude that the evidence relating to Moody's observation of defendant at the Bestway Store on the afternoon of 10 April 1976 did not meet the standards of reliability imposed by *Biggers-Manson*, was in violation of the Due Process Clause, and that the trial court erred in not conducting a *voir dire* hearing for the purpose of determining if Moody's in-court identification should have been excluded because it was tainted by the unnecessarily suggestive in-custody confrontation. *See Moore v. Illinois*, *supra*.

This error was probably harmful to the defendant in the trial of the case. The erroneous ruling deprived defendant of any opportunity of presenting to the court, in the absence of the jury, the totality of the circumstances surrounding the initial observation by Moody and the subsequent suggestive confrontation. Defendant was thus forced to develop this evidence by cross-examination of Moody in the presence of the jury. We can only speculate as to defendant's trial tactics if the court had granted his request for *voir dire*, but a remand to the trial court for the limited purpose of conducting a *voir dire* to determine the admissibility of Moody's in-court identification would not render harmless the error in failing to conduct such *voir dire* during trial.

On retrial, if the State elects to offer the in-court identification testimony of Brian Moody, the trial court, by *voir dire*, must

determine its admissibility. However, the standards for its admissibility and the *Biggers-Manson* standards are similar, and the trial court's finding of admissibility would have to be supported by competent evidence.

The judgment is reversed and we order a

New trial.

Judges MORRIS and MITCHELL concur.

IN THE MATTER OF THE DEED OF TRUST OF: MARVIN SIMON, HERBERT CASHVAN AND CLAUDE HARRIS, PARTNERS T/A LEA COMPANY, GRANTORS, TO ARCHIE C. WALKER, TRUSTEE, RECORDED IN DEED OF TRUST BOOK 2703, PAGE 481, GUILFORD COUNTY REGISTRY

No. 7718SC151

(Filed 18 April 1978)

1. **Injunctions § 16; Mortgages and Deeds of Trust § 19— remedies for person wrongfully restrained**

For many years the law in N.C. has provided that a person wrongfully restrained could elect either (1) to recover only the amount of the bond for the damages he has suffered simply by petitioning the trial court in that action for recovery or (2) to forego his action on the bond and bring an independent tort suit for malicious prosecution; therefore, petitioner in this action who sought to recover on bonds posted by respondents to protect petitioner from probable loss by reason of delay in the foreclosure on a deed of trust was entitled to recover, upon a showing that he was damaged by the delay, only the amount of the bonds, which was $34,500.

2. **Mortgages and Deeds of Trust § 19— foreclosure restrained—appeal bonds**

G.S. 45-21.16 governs only bonds covering appeals from the clerk to the trial court in foreclosure actions, while bonds for appeals from the traditional trial court to the Court of Appeals in foreclosure actions are governed by G.S. 1-292.

3. **Injunctions § 16; Mortgages and Deeds of Trust § 19— foreclosure restrained—appeal from clerk to trial court—bond posted— interest as part of damages**

Interest accruing on the indebtedness during the pendency of a stay of foreclosure would be a proper measure of damages under a bond conforming to the language of G.S. 45-21.16.

4. Injunctions § 16; Mortgages and Deeds of Trust § 19— foreclosure restrained—appeal from trial court to Court of Appeals—bond posted—proper measure of damages

In an action on a bond drawn in the language of G.S. 1-292 covering an appeal from the trial court to the Court of Appeals in a foreclosure action, the only measure of damages is waste plus the value of the use and occupation of the property.

5. Injunctions § 16; Mortgages and Deeds of Trust § 19— foreclosure restrained—bond to protect from any loss by reason of delay—interest as part of damages

Where respondents posted a bond to protect petitioner from "any probable loss by reason of delay" in the foreclosure on a deed of trust, interest accruing on the debt would be a proper measure of damages, though not required by G.S. 1-292, since, regardless of the statutory language, a surety is liable on his bond under the language of the bond he has actually given rather than the most restricted language which would suffice under the statute.

6. Rules of Civil Procedure § 6— affidavits not served prior to hearing—opportunity for examination

Respondents were not prejudiced where the trial court considered affidavits not served on them prior to the hearing, since respondents had twelve days from the beginning of the hearing to its completion to review the affidavits.

APPEAL by respondents from *Crissman, Judge.* Judgment entered 24 September 1976, Superior Court, GUILFORD County. Heard in the Court of Appeals 8 December 1977.

On 1 October 1974, Marvin Simon, Herbert Cashvan, and Claude G. Harris, partners trading as Lea Company, executed and delivered to Virginia National Bank a note in the face amount of $2,100,000 secured by a deed of trust on real and personal property owned by them and located in Guilford County. Default was made in the payment of the note, and, on 21 November 1975, petition for hearing on right to foreclose was filed by the trustee. At the time of default, Monumental Life Insurance Company and Volunteer State Life Insurance Company were the holders of the note. Notice of hearing, dated the same day, set the time for the hearing as 8 December 1975. On 5 December 1975, the Clerk, on motion of Claude G. Harris, entered an order postponing the hearing to 18 December 1975. On 17 December, after a hearing held by agreement of the parties, an order authorizing foreclosure was entered. The order required respondents to "post a total bond of $2500.00 to protect the petitioner from *any probable loss by*

reason of delay in the foreclosure, if a final judgment is entered authorizing said foreclosure after all appeals have been concluded." (Emphasis added.)

On 30 December respondents filed a bond secured by cash deposit of $2500. The pertinent provisions of the bond were that "the bond to protect Archie C. Walker, Trustee, from any probable loss by reason of delay in the foreclosure has been set at $2500.00", and "if said appellants shall pay all such losses not exceeding the amount of this bond, as the Court ultimately finds resulted from delay in the foreclosure by reason of their appeal. . . ."

On 26 January 1976, the Superior Court entered an order authorizing foreclosure. Respondents gave notice of appeal. The court ordered that "respondents should post a total bond of $32,000.00 to protect the petitioner from *any probable loss by reason of delay in the foreclosure, if a final judgment is entered authorizing said foreclosure after all appeals have been concluded.*" (Emphasis added.) The bond was filed on 26 January 1976, again secured by cash deposit. Again it recited that "the bond to protect Archie C. Walker, Trustee, from *any probable loss by reason of delay in the foreclosure* has been set at $32,000.00", and was to be null and void "if said appellants shall pay all losses not exceeding the amount of this bond, as the court ultimately finds resulted from delay in the foreclosure by reason of their appeal. . . ."

On 28 January 1976, the trustee filed a motion asking for the appointment of a receiver to take possession of the real estate. This motion was denied and, in the order denying it, the court concluded that the court had previously required respondents to post bonds of $2500 and $32,000 as security for the trustee for probable losses by reason of delay in the foreclosure caused by appeal, and trustee was, therefore, secured.

On 23 March 1976, this Court allowed the trustee's motion to dismiss respondents' appeal as frivolous. On 30 March 1976, respondents sought discretionary review by the Supreme Court.

On 9 April 1976, trustee filed a motion for determination of damages and costs resulting from the delay in foreclosure. In that motion, trustee recited that the sale was then set for 26 April;

that a total of 109 days would have elapsed from the date of the first scheduled sale; that the damages and costs trustee would have suffered would be accrued interest for 109 days @ $499.28 or a total of $54,481.30, accrued ad valorem taxes for 109 days in the total amount of $10,113.02, publication cost of $99, attorney fees and expense in the amount of $9,075, and fee of $10 to the Court of Appeals for filing motion.

The foreclosure sale was held on 26 April 1976, and Monumental Life Insurance Company was the highest bidder at $1,930,321.58. On 26 April, Wachovia Mortgage Company notified respondents that the holders of the indebtedness would take possession of the property on 27 April, under the provisions of the deed of trust, to collect rents and preserve the property pending the completion of the foreclosure. On the day of the sale, respondents served on the trustee a protest and objection to the sale, and on 29 April, they filed a motion for an order requiring Monumental Life Insurance Company, Wachovia Mortgage Company, and Irvin W. Grogan III to show cause why they should not be held in contempt for violating the stay order of 26 January 1976. In that motion they recited that the court had required a bond of $32,000 to protect the trustee from "any probable loss" by reason of delay in foreclosure if a final order is entered authorizing the foreclosure "after all appeals have been concluded" and that the court had stayed foreclosure pending appeal; that the trustee had held a foreclosure sale and then agents of the high bidder had attempted to take possession of the property; that an appeal to the Supreme Court was pending. A show cause order was entered on 29 April, and Monumental Life Insurance Company, Wachovia Mortgage Company, and Grogan (as agents for Monumental), filed a response. Hearing on the show cause order was had, and an order was entered on 7 May 1976 denying the motion. From that order respondents noted an appeal.

On 14 July 1976, the Supreme Court denied respondents' petition for a writ of certiorari, and dismissed their appeal. On 20 July 1976, petitioner filed an application for writ of assistance to obtain possession of the property. The Clerk issued the writ of assistance on 2 August 1976, and, on the same date, the parties stipulated that possession would be delivered to petitioner on that date, respondents reserving certain rights.

On 6 August 1976, respondents filed a motion for return of security and notice of the taking of the deposition of Irvin W. Grogan III. They also filed a request for the production of documents. On 10 August, petitioner filed his response and objection to the request for production of documents and motion for return of security and moved for a protective order under G.S. 1A-1, Rule 26(c).

On 10 September 1976, and continuing on 22 September 1976, a hearing was had on all the motions then pending. The court heard evidence and had before it the entire record in this matter. The court entered its order on 24 September 1976. After finding facts, the court denied the motions of respondents for production of documents, for return of security, and for further discovery. The court allowed the trustee's motion for protective order and his motion for determination of damages, concluded that the bonds do not limit the liability of respondents, and ordered that the trustee should have and recover of the respondents, jointly and severally.

> "(a) The full sum of $48,983.14, for increased debt by the addition of interest;
>
> (b) The full sum of $8,743.56, for increased ad valorem tax liability;
>
> (c) The full sum of $10.00 for Court costs in the Court of Appeals;
>
> (d) The full sum of $99.00 for loss of advertisement costs;
>
> (e) The full sum of $7,000.00 for counsel fees incurred with Dees, Johnson, Tart, Giles & Tedder, Attorneys;
>
> (f) Interest on the total of the foregoing amounts at 6% per annum from the date of this Judgment; and
>
> (g) The costs of this matter as taxed by the clerk."

Respondents appeal, excepting to almost every finding of fact, conclusion of law, and every numbered part of the judgment.

Dees, Johnson, Tart, Giles & Tedder, by J. Sam Johnson, Jr., Charles M. Tate and Charles R. Tedder, for petitioner appellee.

Turner, Enochs, Foster & Burnley, by C. Allen Foster, James L. Burnley IV, and Eric P. Handler, for respondent appellants.

MORRIS, Judge.

[1] Although appellants concede that appellee is entitled to damages, they contend that the damages must be limited by the amount of the bond. We are constrained to agree. For many years, the law in North Carolina has provided that a person wrongfully restrained could elect either (1) to recover only the amount of the bond for the damages he has suffered simply by petitioning the trial court in that action for recovery or (2) to forego his action on the bond and bring an independent tort suit for malicious prosecution. *Electical Works Union v. Country Club East*, 283 N.C. 1, 194 S.E. 2d 848 (1973); *Shute v. Shute*, 180 N.C. 386, 104 S.E. 764 (1920). Petitioner's position in this case is no different. By petitioning the trial court in the present action for a recovery on the bond, the petitioner limited his recovery to the amount of the bond. The reason underlying the rule is obvious. The trial court has the power to award only the amount which the surety has contractually bound himself to pay. In the absence of a bond, the court could award no recovery at all in that action. The injured party would be forced to file a new and independent action, and a full trial on that action would be necessary. The process of recovering on the bond involves a compromise. One can recover on the bond in the same action simply by showing that he was damaged by the restraint, but to do so he must limit his recovery to the amount of the bond. *Bank v. Hicks*, 207 N.C. 157, 176 S.E. 249 (1934), and *Gruber v. Ewbanks*, 199 N.C. 335, 154 S.E. 218 (1930). Therefore, petitioner's recovery in this case is limited to $34,500, the amount of the two bonds.

We now determine whether the court correctly allowed interest as an item of damages.

In determining whether interest on the indebtedness is a proper measure of damages, we must look both to the statutes which required the bonds and to the language of the bonds.

Respondents argue that the initial $2500 bond was issued pursuant to G.S. 45-21.16 but that the subsequent $32,000 bond was issued pursuant to G.S. 1-292. We agree.

[2] What is now G.S. 45-21.16 was first enacted by the First Session of the 1975 General Assembly. G.S. 45-21.16 provides for a right to appeal the clerk's decision to allow foreclosure to the district or superior court. The appeal automatically entitles the appealing party to a stay provided that he posts "a bond with sufficient surety to protect the prevailing party from any probable loss by reason of the delay in the foreclosure." G.S. 45-21.16(d). The language of G.S. 45-21.16(d) makes reference only to an appeal from the clerk of court. Inasmuch as G.S. 45-21.16 was the first legislation enacted which affected foreclosure proceedings after the decision in *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975) (which held the then existing procedures before the clerk unconstitutional), it is safe to assume that the legislature was responding to the due process requirements set out in that case. G.S. 45-21.16, therefore, would be concerned solely with procedures taking place before the clerk of court and appeals therefrom to the district or superior court, not with the more traditional and constitutionally permissible procedures for appeal from the district court or the superior court to the Court of Appeals. Thus, we conclude that G.S. 45-21.16 governs only the bond covering the appeal from the clerk to the trial court; bonds for appeals from the traditional trial courts to the Court of Appeals in foreclosure actions are governed as they previously were by G.S. 1-292.

[3] G.S. 45-21.16(d) requires a bond "to protect the prevailing party from any probable loss by reason of delay in the foreclosure." This language deviates substantially from the language used in other bond statutes. G.S. 1-292, which covers bonds for appeals from the trial courts to the Court of Appeals, requires a bond to cover "waste" and "the value of the use and occupation of the property". G.S. 45-21.34, which covers injunctions against the confirmation of sales, requires a bond covering "costs, depreciation, interest and other damages." The language of G.S. 45-21.16 is considerably broader than the language under either G.S. 45-21.34 or G.S. 1-292. We must, therefore, conclude that the legislature intended that the courts have great latitude in measuring damages under G.S. 45-21.16. In actions involving in-

junctions against foreclosure, our Supreme Court has in *Bank v. Hicks*, *supra*, approved the use of interest on the value of the land, and in *Gruber v. Ewbanks*, *supra*, approved the use of the interest accruing on the indebtedness during the period of the injunction. Under the very broad langauge of G.S. 45-21.16, we believe that either one of these measures of damage would be proper. Therefore, interest accruing on the indebtedness during the pendency of stay would be a proper measure of damages under a bond conforming to the language of G.S. 45-21.16.

[4] It is obvious that the only proper measure of damages under a bond using the very same language as G.S. 1-292 would be waste plus the value of the use and occupation of the property.

[5] Regardless of the statutory language, a surety is liable on his bond under the language of the bond he has actually given rather than the most restricted language which would suffice under the statute. The surety is liable on the instrument in accordance with the language he actually used. *See generally Town of Hillsborough v. Smith*, 10 N.C. App. 70, 178 S.E. 2d 18 (1970), *cert. denied* 277 N.C. 727, 178 S.E. 2d 831 (1971). Therefore, in this case, respondent is liable on the bond for "any probable loss by reason of the delay." Although G.S. 1-292 does not require a bond which uses language as expansive as respondents used in the $32,000 bond, the language actually used in the bond entitles petitioner to use interest accruing on the indebtedness as the measure of damages. *Gruber* approved accrued interest as an acceptable measure of damages where the bond, pursuant to C.S. § 854 (now repealed), protected the other party against "such damages . . . as he sustains by reason of the injunction." The language the court confronted in *Gruber* closely parallels the very broad language ("any probable loss") used in this bond. Therefore, interest accruing on the debt would be a proper measure of damages. Since the language used for both the $2500 bond and the $32,000 bond is the same, the petitioner is entitled to use the same measure of damages in both instances. Thus, there was no error in the trial court's use of interest on the indebtedness as the measure of damages.

Petitioner in this case proved to the satisfaction of the trial court damages in the amount of $48,983.14 as measured by interest accruing on the indebtedness. We have held that peti-

tioner's recovery is limited to $34,500, the total amount of the two bonds. Because petitioner's recovery cannot exceed $34,500 and because petitioner has already proved damages in excess of that amount, it is unnecessary for this Court to decide whether the trial court's allowance of ad valorem taxes and attorney's fees was appropriate since any error would be harmless. *Insurance Co. v. Tire Co.*, 286 N.C. 282, 210 S.E. 2d 414 (1974).

Respondents have also assigned as error the trial court's refusal to allow further discovery by the respondents. It appears that the primary purpose of this effort was to determine facts with respect to the billing procedures of the petitioner's attorney. Respondents do not seriously argue that the calculation of accrued interest was erroneous. Because accrued interest exceeds the amount of the bonds, respondents cannot show wherein they have been harmed by the trial court's refusal to permit further discovery. Thus, there is no reversible error. *Insurance Co. v. Tire Co., supra.*

[6] Finally, respondents argue that the decision of the trial court should be reversed because the trial court considered affidavits not served on them prior to the hearing. While it may be true that the affidavits were not served on them prior to the hearing, respondents had a period of 12 days between 10 September 1977, the date on which the hearing was commenced, and 22 September 1977, the date on which the hearing was completed, to review the affidavits. While we do not approve this procedure, we do not find prejudice to respondents sufficient to warrant reversal. *Story v. Story*, 27 N.C. App. 349, 219 S.E. 2d 245 (1975).

For the reasons we have previously stated, the petitioner is entitled to recover $34,500, the amount of the two bonds, with interest thereon as provided in the judgment entered. The case, therefore, will be remanded to the trial court for entry of judgment in the amount of the total of the two bonds, plus interest thereon. The judgment of the trial court is

Affirmed in part; reversed in part; and remanded.

Judges HEDRICK and ARNOLD concur.

Jacobs v. Sherard

STATE OF NORTH CAROLINA ON RELATION OF DONALD M. JACOBS, DISTRICT ATTORNEY OF THE EIGHTH JUDICIAL DISTRICT, PLAINTIFF v. WILMAN E. SHERARD, SINGLE; AND LOLA SHERARD CRAWFORD, WIDOW, DEFENDANTS AND THIRD PARTY PLAINTIFFS v. DONALD M. JACOBS, JAMES SASSER, ROBERT E. DAVIS, DAVID CARL WILEY, KENNETH PENNINGTON, DONALD PARKER, LEROY LOCKLAIR, WILLIAM TILGHMAN, AND BILL UZZELL, THIRD PARTY DEFENDANTS

No. 778SC362

(Filed 18 April 1978)

1. **Nuisance § 10— abatement of public nuisance—ex parte order of removal from premises**

In an action to abate a public nuisance, the trial court had no authority to issue an *ex parte* order directing officers to remove defendants from possession of the premises since an order of abatement may be entered only in a final judgment after the existence of the nuisance has been admitted or established. Former G.S. 19-5.

2. **Nuisance § 10; Solicitors § 1— abatement of public nuisance—duty of district attorney**

The district attorney had the authority and duty to maintain an action to abate a public nuisance created by defendants' use of their dwelling for the sale of taxpaid liquor.

3. **Public Officers § 9.1; Solicitors § 1— official action by district attorney—absolute immunity**

The district attorney who brought an action to abate a nuisance created by defendants' use of their residence for the sale of taxpaid liquor was protected by absolute immunity against a suit brought by defendants based on the district attorney's procurement of an illegal *ex parte* judicial order entered prior to trial removing defendants from possession of their residence.

4. **Public Officers § 9.1— action by officers under illegal court order—qualified immunity**

Law officers who ejected defendants from their residence pursuant to an illegal *ex parte* order entered in an action to abate a nuisance created by defendants' use of their residence for the sale of taxpaid liquor were protected by qualified immunity against a suit by defendants based on the wrongful ejectment where the officers acted pursuant to an order valid on its face.

APPEAL by Third Party Plaintiffs from *Smith, Judge (David I.)*. Order entered 4 March 1977, Superior Court, WAYNE County. Heard in the Court of Appeals 9 February 1978.

For the State the original plaintiff, District Attorney Jacobs, instituted action to abate a public nuisance action under G.S.

19-2.1 against defendants on the grounds that defendants were using their residence to sell taxpaid alcoholic beverages and that the residence was maintained so as to encourage the congregation of drunken and disorderly persons. The complaint prayed that defendants (1) be restrained "from maintaining, residing in, and operating the said dwelling house . . ." and (2) "from continuing to reside in and operating as described above the aforesaid dwelling house and property; . . ." The complaint was supported by affidavits of four law enforcement officers, three of whom were subsequently made third party defendants. On 29 April 1976, Judge Small held an *ex parte* hearing, found that the premises constituted a nuisance, and issued an order restraining defendants from using their residence "so as to constitute a nuisance," and removing defendants from possession of their residence. On 3 May 1976 Judge Small, upon motion of defendants, rescinded that part of the 30 April order directing the ejectment of defendants because "the provisions of Chapter 19 of the General Statutes of North Carolina do not authorize the above portion of the Order except after a final judgment on the merits."

The defendants then filed a third party complaint naming as third party defendants District Attorney Jacobs, the original plaintiff, and the officers who boarded and padlocked the premises, and alleging that the third party defendants had maliciously prosecuted them in seeking the removal injunction and had trespassed upon their property in order to enforce the maliciously motivated removal, and praying for actual and punitive damages. District Attorney Jacobs singly and the other third party defendants jointly made motions to dismiss the third party complaint for failure to state a claim upon which relief could be granted because all third party defendants were immune from such action. After hearing on 4 March 1977, the court granted the motions of the third party defendants and dismissed the third party complaint with prejudice. From this order defendants, as third party plaintiffs, appeal.

Attorney General Edmisten by Special Deputy Attorney General Jacob L. Safron for defendant appellee Jacobs.

Herbert B. Hulse for defendant and third party plaintiff appellants.

Taylor, Warren, Kerr & Walker by Robert D. Walker, Jr. for third party defendant appellees.

CLARK, Judge.

[1] The trial court had the authority under G.S. 19-2 to issue an *ex parte* temporary "writ of injunction" preserving the status quo and restraining the defendants from removing or interfering with the contents of the place where the nuisance was alleged to exist.

But the trial court had no authority to issue an *ex parte* order directing law officers "to forthwith remove the said defendants from the possession of the said premises, . . ." A trial court has authority to enter an order of abatement only in a final judgment after the existence of the nuisance has been admitted or established. G.S. 19-5.

The trial court upon motion by original defendants recognized its error and corrected its original order of 29 April 1976 with its order of 3 May 1976. The complaint filed by District Attorney Jacobs for the State prayed that the court "properly enjoin and restrain the defendants from maintaining, *residing in*, and operating the said dwelling house. . . ." (Emphasis added.) It is noted that there was no prayer that this relief be granted in an *ex parte* temporary restraining order. However, original defendants allege in their complaint that District Attorney Jacobs in obtaining the order acted with malice toward the third party plaintiffs, and to "humiliate, vex and to illegally seize the property . . . casting them out into the streets." In ruling on the motions of third party defendants to dismiss the complaint for failure to state a claim upon which relief could be granted under Rule 12(b)(6), all well-pleaded allegations of the complaint are taken to be true. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

All of the third party defendants claim immunity from damages for actions committed in the discharge of their official duties.

[2] Before discussing the question of immunity, it is appropriate that the kind and nature of this action against the third party defendants be examined. District Attorney Jacobs initiated the padlock proceeding against the original defendants. Under G.S. 19-2 such proceeding may be maintained by "the district attorney or any citizen. . . ." The proceeding is a civil action which may be instituted by a citizen in the name of the State, and it must be based upon allegation and proof of the specific acts denounced by

G.S. 19-1. *State v. Alverson*, 225 N.C. 29, 33 S.E. 2d 135 (1945). If instituted by a private citizen, the court may order the District Attorney to prosecute the action to judgment. G.S. 19-3. The case *sub judice* is based on the allegation that the dwelling house was being used and operated by defendants as a place to sell tax paid whiskey. This is an act denounced by G.S. 19-1, and a public nuisance, *State v. Brown*, 221 N.C. 301, 20 S.E. 2d 286 (1942); it is also a violation of the criminal law. G.S. 18A-25. Under the circumstances the District Attorney not only had authority to maintain the action but it was his implied duty to do so as an advocate of the State's interest in the protection of society. *See* G.S. 7A-61, and *State v. Best*, 280 N.C. 413, 186 S.E. 2d 1 (1972).

The third party complaint is based not on malicious prosecution, but on the wrongful ejectment of the original defendants from their residence by District Attorney Jacobs who obtained the illegal order, and by the law officers who in executing the order went to the premises, required original defendants to vacate the premises, and then boarded up and padlocked the residence. *See* Prosser, Torts, 1971 Ed., Misuse of Legal Procedure, § 121, p. 856. This ejectment of the original defendants was done pursuant to the *ex parte* order of the trial judge. A temporary restraining order removing them from their residence was not authorized under G.S. 19-1 and was in violation of Due Process; such removal could have been validly ordered by the trial judge under G.S. 19-5 only when the nuisance had been established after due notice and hearing or trial. But it is not alleged in the third party complaint that this invalid *ex parte* restraining order was entered by the trial judge pursuant to a conspiracy between the trial judge and any one or more of the third party defendants, or that the third party defendants by fraud or undue influence had the trial judge issue the removal order. So in the case *sub judice* the claim of immunity is supported by the order of the trial judge which, though invalid, was made within the scope of his judicial duty and served to insulate the alleged wrongful conduct of the third party defendants.

We note that G.S. 19-2 was repealed effective 1 August 1977, and replaced by G.S. 19-2.1 through G.S. 19-2.5, which more sharply defines padlock procedures and the authority of the trial court to enter the temporary restraining order and preliminary injunction. And the last sentence of G.S. 19-2.1, effective 1 August 1977,

provides, in part, that "no action shall be maintained against the public official for his official action." Those replacement statutes are not applicable to the proceeding before us which was instituted on 30 April 1976, and the alleged illegal conduct in removing original defendants from their residence occurred a few days thereafter.

[3] Though the statutory provision for absolute immunity to the District Attorney is not applicable to the proceeding before us, the provision accurately states the law, which has established absolute immunity for a district attorney acting in his official capacity. No officer, of course, as *Prosser* points out "is absolved from liability for his private and personal torts merely because he is an officer, and the question arises only where he performs, or purports to perform, his official functions." Prosser, Torts, 1971 Ed., Immunities, § 132, p. 987. The policy behind granting any immunity at all to public officers, judicial or otherwise, is stated in *Prosser, supra,* as follows:

> "The complex process of legal administration requires that officers shall be charged with the duty of making decisions, either of law or of fact, and acting in accordance with their determinations. Public servants would be unduly hampered and intimidated in the discharge of their duties, and an impossible burden would fall upon all our agencies of government if the immunity to private liability were not extended, in some reasonable degree, to those who act improperly, or exceed the authority given. The development of a system of administrative law, insuring a reasonable opportunity to be heard before action is taken, and resulting in effect in the creation of a subordinate body of courts, affords a strong argument for the recognition of an immunity in the individual officers concerned."

Judges and judicial officers have always been awarded "absolute" immunity for their judicial acts. Absolute immunity covers even conduct which is corrupt, malicious or intended to do injury. *Foust v. Hughes*, 21 N.C. App. 268, 204 S.E. 2d 230, *cert. den.* 285 N.C. 589, 205 S.E. 2d 722 (1974); *Prosser, supra.* Prosecutorial immunity is likewise absolute because it is really but a particular manifestation of judicial immunity. *Imbler v. Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed. 2d 128 (1976); *McCray v.*

Maryland, 456 F. 2d 1 (4th Cir. 1972); *Mazzucco v. Board of Medical Examiners*, 31 N.C. App. 47, 228 S.E. 2d 529 (1976); Prosser, Torts, 1971 Ed., Misuse of Legal Procedure, § 119, pp. 837-838. Contending that prosecutorial immunity may be only "qualified," or malice-destroyed, defendant relies on the following language in *State v. Swanson*, 223 N.C. 442, 444, 27 S.E. 2d 122, 123 (1943):

> "[I]n cases where a public officer, even judicial or *quasi*-judicial, instead of acting in an honest exercise of his judgment, acts corruptly or of malice, such officer is liable in a suit instituted against him by an individual who has suffered special damage by reason of such corrupt and malicious action. . . ."

However, the public officer in *Swanson* was a sheriff, a "public officer" acting judicially and not a district attorney, who is a specially classed and privileged "judicial officer." *Swanson's* grant of only qualified immunity to public officers does not affect the general grant of absolute immunity to district attorneys. District Attorney Jacobs is clearly protected, and the trial court properly dismissed the third party complaint against him.

[4] The other third party defendants are law enforcement officers and as such are "public officers." *Blake v. Allen*, 221 N.C. 445, 20 S.E. 2d 552 (1942). Public officers enjoy no special immunity for unauthorized acts, or acts outside their official duty. *Gallimore v. Sink*, 27 N.C. App. 65, 218 S.E. 2d 181 (1975). In examining appellants' contention that their third party complaint against the public officers should not have been dismissed we must decide whether appellants' complaint alleges that these officers acted outside their official duty in carrying out the removal order of the trial court.

The officers cannot be deemed to act maliciously when they enforce a court order that is valid on its face. They are not to be expected to go behind the face of the order. *Greer v. Broadcasting Co.*, 256 N.C. 382, 124 S.E. 2d 98 (1962); *Alexander v. Lindsey*, 230 N.C. 663, 55 S.E. 2d 470 (1949). It is generally held that public officers are acting "ministerially," and are qualifiedly immune even when:

> "[A]cting under an unconstitutional statute, which can confer no jurisdiction at all, the courts are being driven slowly to

> the view that the officer cannot be required to determine legal questions which would often perplex a court, and that if he has acted in good faith he should not be liable." *Prosser*, Torts, 1971 Ed., Immunities, § 132, p. 991.

See also *Prosser*, *supra*, Note 22, and law review articles cited therein.

In paragraph 27 of their third party complaint the appellants sum up their allegation against the law officer defendants as follows:

> "27. That the other named defendants have evidenced their malice toward the third party plaintiffs by their zeal in which they undertook the padlocking of the premises and statements they have made in the presence of the third party plaintiffs, and by their total failure to assist or offer to assist in mitigating the damages suffered by the third party plaintiffs when the order of May 3, 1976, was entered placing them back into their dwelling house."

But there is no allegation that the law officers exceeded their authority or acted outside the scope of the duty imposed upon them by the removal order of the trial court. Though the removal order was in excess of the court's authority, the acts of the law officers in carrying out the court order were not "illegal and unlawful," as alleged. And if they acted within the scope of their duty, it does not subject them to liability if they acted with "zeal" or made statements in the presence of appellants indicating joy in carrying out their duties.

We find that the third party defendants are protected against the allegation in the complaint by their plea of immunity, District Attorney Jacobs by his absolute immunity, and the law enforcement officers by their qualified immunity.

The order dismissing the third party complaint with prejudice is

Affirmed.

Judges MORRIS and MITCHELL concur.

SIMPSON HOWARD v. CHRIS MERCER

No. 778SC472

(Filed 18 April 1978)

Rules of Civil Procedure § 59— injuries to pedestrian—new trial on damages issue— abuse of discretion

In an action to recover for personal injuries sustained by plaintiff in a pedestrian-automobile accident where the jury awarded plaintiff $20,000, the trial court abused its discretion in setting aside the verdict on the issue of damages on the grounds that the verdict was against the greater weight of the evidence and that it was excessive, since plaintiff offered strong evidence, including that of medical experts, that he sustained a permanent injury, lost considerable wages, and endured pain and suffering; defendant offered very little evidence in opposition; the amount of the verdict was clearly within the maximum limit of a reasonable range, plaintiff having shown that he incurred medicial expenses of $2,265 and lost $3,308 in wages and arguing that $14,355 was not unreasonable to compensate him for pain, suffering and permanent disability; and there was no appearance that the verdict was given under the influence of passion or prejudice. G.S. 1A-1, Rule 59.

APPEAL by plaintiff from *Gavin, Judge.* Judgment entered 28 February 1977 in Superior Court, LENOIR County. Heard in the Court of Appeals 8 March 1978.

Plaintiff seeks to recover for personal injuries which he alleges were caused by the negligence of defendant in a pedestrian-automobile accident. His evidence tended to show that he was walking on the left shoulder of a highway on 24 December 1971; that defendant was operating his truck in the same direction plaintiff was walking; and that as defendant was passing another vehicle, a mirror on his truck struck plaintiff's elbow, causing the injuries complained of.

The jury answered issues of negligence and contributory negligence in favor of plaintiff and awarded him $20,000.00.

Defendant moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. The court denied the motion for judgment n.o.v. but set aside the verdict and ordered a new trial on the issue of damages on the grounds that the verdict was "excessive and contrary to the weight of the evidence."

Plaintiff appealed.

Turner and Harrison, by Fred W. Harrison, for the plaintiff.

Jeffress, Morris & Rochelle, by Vernon H. Rochelle and David R. Duke, for defendant appellee.

BRITT, Judge.

The sole question presented is whether the trial court erred in setting aside the verdict on the issue relating to plaintiff's damages and awarding a new trial on that issue. We hold that the court erred.

Prior to the enactment and effective date of the Rules of Civil Procedure, G.S. Chapter 1A (effective 1 January 1970), G.S. 1-207 authorized a trial judge to set aside a verdict and grant a new trial "upon exceptions, or for insufficient evidence, or for excessive damages."

G.S. 1A-1, Rule 59(a), sets out nine grounds upon which the trial judge may grant a new trial on all or part of the issues; subsections (6) and (7) provide:

> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
>
> (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law; . . . .

Prior to the effective date of G.S. Chapter 1A, it had become well established in this jurisdiction that a motion to set aside a verdict on the ground that the verdict was contrary to the weight of the evidence, or that the award of damages was excessive or inadequate, was addressed to the sound discretion of the trial judge and his ruling on the motion was not reviewable absent a showing of abuse of discretion. 7 Strong's N.C. Index 2d, Trial §§ 51 and 52, and cases therein cited.

In *Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1976), the court, speaking through Chief Justice Sharp, said (page 635):

> "The adoption of the Rules of Civil Procedure (N.C. Sess. Laws 1967, ch. 954, § 4, effective 1 January 1970; N.C. Sess. Laws 1969, ch. 803, § 1) and the repeal of G.S. 1-207 (1953) did not diminish the trial judge's traditional discretionary authority to set aside a verdict. The procedure for exercising

this traditional power was merely formalized in G.S. 1A-1, Rule 59, which lists eight specific grounds and one 'catch-all' ground on which the judge may grant a new trial. Section (a)(9) of Rule 59 authorizes the trial judge to grant a new trial for 'any other reason heretofore recognized as grounds for a new trial.' *See* Sizemore, *General Scope and Philosophy of the New Rules*, 5 Wake Forest Intramural L. Rev. 1, 42-43 (1969)."

A review of the law in North Carolina does not reveal a standard for determining what is a sufficient abuse of discretion to warrant a reversal of a trial court's ruling on a Rule 59 motion in which a new trial was granted. However, the case of *Taylor v. Washington Terminal Co.*, 409 F. 2d 145 (D.C. Cir.), *cert. denied* 90 S.Ct. 93, 396 U.S. 835, 24 L.Ed. 2d 85 (1969), decided under Federal Rule 59 which is similar to North Carolina Rule 59, has established a standard in that jurisdiction for determining when an abuse of discretion has occurred in Rule 59 orders. *See* 11 Wright & Miller, Federal Practice and Procedure: Civil § 2820 (1973).

In *Taylor* the plaintiff was awarded $80,000 by the jury and the defendant was granted a new trial unless plaintiff would remit $60,000 of the verdict on the grounds that it was excessive. A second trial was held and the plaintiff received a verdict of $25,000. On appeal the appellate court held that the district court erred in granting a new trial and ordered reinstatement of the original verdict.

The plaintiff in *Taylor* was a fireman employed by the defendant railroad company. He was injured when he tripped over an electric cable that had been left lying on the walkway between the railway tracks. As plaintiff fell he struck his arm against a steel water plug, injuring his wrist which was later fused into an immovable joint by corrective surgery. The pain and swelling in the wrist was treated with aspirin and plaintiff was limited to performing light duty on his job due to the injury. Two years later, plaintiff developed a duodenal ulcer which required that 75 percent of his stomach be removed and left him in constant pain. Plaintiff established $10,000 in medical expenses, about half of which were attributable to the wrist injury and about half to the ulcer. Conflicting medical testimony was in-

troduced on the question of whether the ulcer was related to the original wrist injury. Based on these facts, the original verdict of $80,000 was set aside as excessive by the trial court.

In holding that the trial court had abused its discretion by setting aside the original verdict and granting a new trial to the defendant, the court set forth the following guidelines for determining when an abuse of discretion has occurred:

> A more difficult question is the scope of appellate review of an order granting a new trial. It is by now standard doctrine that such orders may be reviewed for abuse of discretion, even when based upon such broad grounds as the trial judge's conclusion that the verdict was excessive or was against the weight of the evidence. There has been much discussion of the content which should be given to the elusive phrase "abuse of discretion," with the weight of learning against appellate reversal except in relatively rare cases.
>
> This learning has largely arisen from consideration of cases in which motions for new trial—especially on the ground of excessive verdict—have been *denied*. Two factors unite to favor very restricted review of such orders. The first of these is the deference due the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record. The second factor is the deference properly given to the jury's determination of such matters of fact as the weight of the evidence and the quantum of damages. This second factor is further weighted by the constitutional allocation to the jury of questions of fact.
>
> Where the jury finds a particular quantum of damages and the trial judge refuses to disturb its finding on the motion for a new trial, the two factors press in the same direction, and an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial. However, where, as here, the jury as primary fact-finder fixes a quantum, and the trial judge indicates his view that it is excessive by granting a remittitur, the two factors oppose each other. The judge's unique opportunity to consider the evidence in the living courtroom context must

be respected. But against his judgment we must consider that the agency to whom the Constitution allocates the fact-finding function in the first instance—the jury—has evaluated the facts differently.

In this jurisdiction particularly, District Court judges have given great weight to jury verdicts. They have stated that a new trial motion will not be granted unless the "verdict is so unreasonably high as to result in a miscarriage of justice," or, most recently, unless the verdict is "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate."

At the appellate level, in reviewing a trial judge's grant of a new trial for excessive verdict, we should not apply the same standard. The trial judge's view that a verdict is outside the proper range deserves considerable deference. His exercise of discretion in granting the motion is reviewable only for abuse. Thus we will reverse the grant of a new trial for excessive verdict only where the quantum of damages found by the jury was *clearly* within "the maximum limit of a reasonable range." 409 F. 2d at 147-149.

In the case at hand, evidence with respect to plaintiff's injuries tended to show:

At the time of the accident plaintiff was 59 years old and employed as a handyman-helper, earning approximately $130-$190 per week. The impact of the lick to plaintiff's arm caused a fracture of the multiple bones of his right elbow and a fracture in his forearm. He underwent corrective surgery for the injuries, causing him to remain in the hospital from 24 December 1971 until 4 January 1972. He remained in a cast until 27 January 1972 and under a physician's care until April 1972 when a portion of the metal screw holding the bones in his elbow together was removed surgically. At the time of medical discharge he had a 15 percent permanent partial disability of his right arm.

Plaintiff was out of work for approximately six months immediately following the accident. After his discharge he was able to obtain work for a short time as a janitor. In February of 1976 he returned to his physician complaining of weakness and numb-

ness in his right hand; it was determined that this was caused by irritation to his ulna nerve in his elbow. His physician testified that this condition could or might have resulted from the injuries received in the 1971 accident. The condition was treated by a second operation which Dr. Langley classified as successful even though plaintiff was still rated as having a 15 percent permanent partial disability which would prevent him from lifting heavy objects or using his right hand in an awkward position.

Plaintiff is limited in the movement of his right arm, hands and fingers and experiences a continuous stinging sensation in his right arm and hand as well as occasional pain. Since his second operation he has held a temporary job at a smaller income in a tobacco warehouse cleaning up and delivering water to other workers; however, he has been unable to obtain ordinary manual labor because the second operation resulted in the loss of strength in his right hand.

The parties stipulated that plaintiff's total medical expenses were $2,265.50.

Defendant offered no evidence contradicting plaintiff's evidence with respect to his injuries except the testimony of the rescue squad member who carried plaintiff to the hospital. He stated that plaintiff complained of pain in his shoulder; that he had plaintiff open and close his hand and examined his arm and elbow; and that while he could not find "that much damage" to plaintiff's arm, he put it in a sling.

The court charged the jury that the mortuary tables introduced into evidence indicated that plaintiff had a life expectancy of 18.29 years; that in determining the amount of damages, they would consider evidence as to plaintiff's age, occupation, the extent of his employment, the value of his services, the amount of his income at the time of his injury, and the disability or disfigurement affecting his earning capacity; and that they would consider plaintiff's life expectancy in determining the proper amount of damages for loss of earnings, pain and suffering, scars and disfigurement and loss of use of part of his body.

The trial judge overturned the verdict on the issue of damages on the grounds that the verdict (1) was against the greater weight of the evidence and (2) that it was excessive.

With respect to the first ground, the plaintiff's testimony is quite strong that he sustained a permanent injury, that he lost considerable wages and that he endured pain and suffering. His testimony is supported by expert medical testimony and defendant offered very little evidence in opposition. We do not think the record supports the trial court's ruling. It is true that the evidence on the issue of contributory negligence is relatively close but here we are concerned only with evidence relating to the issue of damages.

With regard to the second ground—the verdict was excessive—we think the rule stated in *Taylor* is sound. We also think Rule 59(a)(6) adds a new factor for consideration by the trial judge in passing upon a motion to set aside a verdict on the ground of excessive or inadequate damages, namely, that the damages were awarded "under the influence of passion or prejudice". We do not consider our holding in conflict with the quoted statement from *Britt v. Allen, supra,* since the court in that case was dealing solely with Rule 59(a)(7). *See Samons v. Meymandi,* 9 N.C. App. 490, 177 S.E. 2d 209 (1970), *cert. denied* 277 N.C. 458, 178 S.E. 2d 225 (1971), and *Setzer v. Dunlap,* 23 N.C. App. 362, 208 S.E. 2d 710 (1974), where the court used the new language set forth in Rule 59(a)(6).

Plaintiff argues that the evidence showed that he lost $3,308 in wages; that this amount added to the $2,265 in medical expenses showed "specials" of $5,645; and that the remainder of the $20,000 verdict, $14,355, was not unreasonable to compensate him for pain, suffering and permanent disability. We find this argument persuasive.

The foregoing considered, we conclude that the verdict was *clearly* within "the maximum limit of a reasonable range", and that there was no appearance that the verdict was given under the influence of passion or prejudice. We therefore hold that the able trial judge abused his discretion in setting aside the verdict.

For the reasons stated, the order setting aside the verdict and awarding defendant a new trial on the issue of damages is reversed, the verdict is reinstated and this cause is remanded to the superior court for entry of judgment in accordance with the verdict returned by the jury.

Reversed and remanded.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. GREGORY DEAN PATTERSON

No. 7725SC723

(Filed 18 April 1978)

1. **Homicide § 28.3— instructions on self-defense—reasonableness of apprehension—whether deceased had weapon**

The trial court in a homicide case did not err in instructing the jury that, in determining the reasonableness of defendant's apprehension for his safety, one circumstance for the jury to consider was whether deceased had a weapon in his possession.

2. **Homicide § 24.3— self-defense—instructions—burden of proof—burden of going forward with evidence**

The trial court's charge in a homicide case did not improperly place on defendant the burden of rebutting the presumption of unlawfulness but clearly placed on the State the burden of proving beyond a reasonable doubt all the elements of murder, including unlawfulness, and the charge was not improper in placing on defendant the burden of presenting evidence of self-defense.

3. **Criminal Law § 65; Homicide § 15.2— exclusion of evidence as to physical and mental state—harmless error**

While the failure of the trial court in a homicide case to admit evidence pertaining to defendant's physicial condition and state of mind at the time of the killing might have been error, it cannot be determined whether such error was prejudicial to defendant where defendant failed to make an offer of the evidence.

4. **Homicide § 19— self-defense—prior incidents of violence—improper questions**

In a homicide prosecution in which defendant presented evidence tending to show self-defense, the trial court did not improperly limit testimony concerning prior incidents of violence by deceased against defendant where one excluded question attempted to introduce new evidence on redirect examination, two questions called for hearsay answers, and the fourth question attempted to elicit evidence previously admitted.

APPEAL by defendant from *Snepp, Judge*. Judgment entered 6 April 1977, in Superior Court, CATAWBA County. Heard in the Court of Appeals 13 January 1978.

Defendant was charged under a proper bill of indictment with the murder of Michael Millsap. Since defendant stipulated that Michael Millsap died 2 March 1976 as a proximate result of gunshot wounds inflicted upon him by defendant, the sole question of fact for the jury involved the presence or absence of circumstances mitigating defendant's act. Defendant alleged and sought to prove self-defense. The jury, however, returned a verdict of guilty of second degree murder. From this judgment defendant appeals.

Attorney General Edmisten, by Assistant Attorney Archie W. Anders, for the State.

Chambers, Stein, Ferguson & Becton, P.A., by J. Levonne Chambers and Louis L. Lesesne, Jr., and Young M. Smith for defendant appellant.

ARNOLD, Judge.

I.

[1] There is no merit in defendant's argument that the court erred in instructing the jury with respect to one of the elements of self-defense. The basis of defendant's argument is that the trial court instructed the jury that it would have to consider, in determining the reasonableness of defendant's apprehension for his safety, whether the deceased had a weapon, not whether defendant reasonably believed that the decedent had a weapon. Defendant, however, fails to consider the trial court's complete charge on the element of defendant's apprehension:

> "For a killing to be justified or excused on the grounds of self defense, the law requires that four requirements be met:
>
> * * * *
>
> "Second, the circumstances as they appeared to the defendant at the time must have been sufficient to create such a belief in the mind of a person of ordinary firmness. It is for you to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time. In making this determination you should consider the circumstances as you find them to have existed

from the evidence, including the size, age and strength of the defendant as compared to Millsap's; the fierceness of the attack, if any of the defendant upon the deceased; whether or not Millsap had a weapon in his possession and whether or not there were past occurrences between the two which had resulted in some violence. . . ."

II.

[2] It is next asserted that the trial court impermissibly placed on defendant the burden of rebutting the presumption of unlawfulness. In *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975), the United States Supreme Court held that a Maine jury instruction requiring a defendant on trial for murder to prove by a preponderance of the evidence that he acted in the heat of passion on sudden provocation, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as that clause was interpreted in *In re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970), to require the prosecution to prove beyond a reasonable doubt every fact necessary to constitute a crime.

Subsequently, the North Carolina Supreme Court, applying *Mullaney* in *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), held that the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that a defendant, in order to rebut the presumption of malice, must prove to the satisfaction of the jury that he killed in the heat of sudden passion, and to rebut the presumption of unlawfulness, that he killed in self-defense. The Supreme Court stated at 651-52, 220 S.E. 2d at 589:

"*Mullaney*, then, as we have interpreted it, requires our trial judges in homicide cases to follow these principles in their jury instructions: the State must bear the burden throughout the trial of proving each element of the crime charged including, where applicable, malice and unlawfulness beyond a reasonable doubt. The decision permits the state to rely on mandatory presumptions of malice and unlawfulness upon proof beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately resulted in death. If, after the mandatory presumptions are raised, there is no evidence of a

heat of passion killing on sudden provocation and no evidence that the killing was in self-defense, *Mullaney* permits and our law requires the jury to be instructed that defendant must be convicted of murder in the second degree. *If, on the other hand, there is evidence in the case of all the elements of heat of passion on sudden provocation the mandatory presumption of malice disappears but the logical inferences from the facts proved remain in the case to be weighed against this evidence. If upon considering all the evidence, including the inferences and the evidence of heat of passion, the jury is left with a reasonable doubt as to the existence of malice it must find the defendant not guilty of murder in the second degree and should then consider whether he is guilty of manslaughter. If there is evidence in the case of all the elements of self-defense, the mandatory presumption of unlawfulness disappears but the logical inferences from the facts proved may be weighed against this evidence. If upon considering all the evidence, including the inferences and evidence of self-defense, the jury is left with a reasonable doubt as to the existence of unlawfulness it must find the defendant not guilty.*" [Emphasis added.]

In *Hankerson v. North Carolina*, --- U.S. ---, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977), the United States Supreme Court reversed that portion of our Supreme Court opinion which interpreted *Mullaney* as not being retroactive. Moreover, the Court rejected the State's argument that even if *Mullaney* were retroactive the jury instructions requiring a defendant to "satisfy" the jury that he acted in self-defense is not a violation of the rule announced in *Mullaney*. The Supreme Court noted that the State's argument was contrary to the construction of the jury charge given by the North Carolina Supreme Court, to wit: that a burden to "satisfy" the jury of self-defense places a burden on a defendant "no greater and at the same time one not significantly less than persuasion by a preponderance of the evidence." The United States Supreme Court did not disagree with this interpretation of the charge, which is essentially a question of state law.

In the present case, the trial court did not charge that defendant had to satisfy the jury on self-defense; rather, it made the following instruction to the jury on the elements of unlawfulness and malice:

"Now if the State satisfies you beyond a reasonable doubt that Gregory Patterson intentionally shot Michael Millsap with a deadly weapon or that he intentionally inflicted a wound upon Millsap with a deadly weapon and thereby proximately caused Millsap's death, and there is no evidence which raises in your mind a reasonable doubt that the defendant acted without malice or without justification or excuse, that is, I say, that if the State satisfies you beyond a reasonable doubt that Gregory Patterson intentionally shot Michael Millsap with a deadly weapon or that he intentionally inflicted a wound upon Millsap with a deadly weapon thereby proximately causing Millsap's death, and there is no evidence which raises in your mind a reasonable doubt that the defendant acted without malice, you may infer that the defendant acted unlawfully and with malice.

"However, if there is other evidence, then you will also consider it in determining whether the State has proved beyond a reasonable doubt that the defendant acted with malice and without justification and excuse."

While not expressly approved, the instructions of Judge Snepp nevertheless are without error prejudicial to defendant. In spite of defendant's well-reasoned arguments to the contrary, the charge is not in conflict with *Mullaney* or *Hankerson*. In construing the charge as a whole it is clear that the State, throughout the trial, had the burden of proving beyond a reasonable doubt all the elements of murder. No burden of proof was placed on defendant. Even if it be argued that Judge Snepp did charge defendant with the burden of presenting evidence of self-defense there is no violation of the Due Process Clause of the Fourteenth Amendment. In *Mullaney*, with respect to the defense of acting in the heat of passion, the United States Supreme Court said:

"Many states do require the defendant to show that there is 'some evidence' indicating that he acted in the heat of passion before requiring the prosecution to negate this element by proving the absence of passion beyond a reasonable doubt. [Citations omitted.] Nothing in this opinion is intended to affect that requirement."

Mullaney v. Wilbur, supra, n. 28.

Therefore, there is no error prejudicial to defendant in the trial court's charge to the jury.

III and IV.

[3] Defendant's third and fourth questions involve alleged errors of the trial court in excluding evidence pertaining to defendant's physical condition and defendant's state of mind at the time of the killing. The rule concerning the admissibility of such evidence is found in *State v. Leak*, 156 N.C. 643, 647, 72 S.E. 567, 568 (1911) quoting McKelvey on Evidence, p. 220 *et seq.*:

> " 'The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence.' "

The trial court's failure to allow such evidence in the present case might have been error. However, since defendant failed to make an offer of evidence it cannot be determined if such error was prejudicial to defendant. *State v. Robinson*, 280 N.C. 718, 187 S.E. 2d 20 (1972).

V.

[4] Defendant's final argument is that the trial court committed prejudicial error by limiting testimony concerning prior incidents of violence by deceased against the defendant. In *State v. Arnold*, 26 N.C. App. 484, 216 S.E. 2d 164 (1975), this Court stated the rule that in a prosecution for homicide where there is evidence tending to show self-defense, evidence of the character of the deceased as a violent and dangerous fighting man is admissible if (1) such character was known to the accused, or (2) the evidence is wholly circumstantial or the nature of the transaction is in doubt.

Defendant argues that the trial court erred at four different times in refusing to allow such evidence. Defendant, however, fails to recognize that answers to his questions were disallowed for other valid reasons. The first question to which the court refused to allow the answer was directed to defendant, and related to whether decedent had picked defendant up and put him in a waste basket some six to eight weeks prior to the deceased's

death. This question was asked during defense counsel's redirect examination of defendant and was an attempt to elicit new evidence. The introduction of new evidence on redirect examination is left to the discretion of the trial judge and we find no abuse of discretion.

The second and third questions, directed to the defendant and to the magistrate respectively, called for hearsay answers and those answers were properly excluded for that reason.

The fourth question to which the court refused answer involved an attempt by defendant to elicit testimony from one of his witnesses about a prior incident involving a threat against defendant by decedent. Since that same evidence had already been admitted there is no prejudicial error. It is well established that a trial court's refusal to permit questions which would elicit merely repetitious and cumulative evidence is not error. *State v. Lindsey*, 25 N.C. App. 343, 213 S.E. 2d 434 (1975).

In defendant's trial there is no error sufficient to grant a new trial.

No error.

Judges PARKER and MARTIN concur.

ROBERT P. WILLIAMS v. G. PERRY GREENE, EDWARD W. JONES AND J. D. CABE

No. 7714SC447

(Filed 18 April 1978)

1. Administrative Law § 5; Injunctions § 11— dismissal of state employee—civil rights violations asserted—no exhaustion of administrative remedies required

Where a state employee asserts civil rights violations under 42 U.S.C. § 1983 for his wrongful dismissal, the Superior Court retains its traditional power to grant preliminary injunctive relief without requiring him to exhaust the administrative remedies provided in Chapter 126 of the General Statutes.

2. Injunctions § 13— preliminary injunction—conditions of issuing

A preliminary injunction should issue pending trial on the merits only when (1) there is probable cause that plaintiff will be able to establish the rights which 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 plaintiff's rights during the litigation.

3. **Injunctions § 13.1— preliminary injunction—show of substantial, irreparable injury required**

In determining whether to grant a preliminary injunction, the judge in exercising his discretion should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted; in effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability.

4. **Injunctions § 13.2— dismissal of highway patrolman—no substantial, irreparable injury—preliminary injunction improper**

A former State highway patrolman who alleged that he was wrongfully discharged from his employment after his involvement in a roadblock in which a hostage was killed failed to show substantial, irreparable injury entitling him to a preliminary injunction, since plaintiff claimed that he would be without income and his reputation would be damaged if he were not reinstated, but a state employee who has been wrongfully discharged is entitled, pursuant to G.S. 126-4(9) and (11), to reinstatement, back pay and attorney's fees, and thus plaintiff's temporary loss of income would not constitute irreparable loss; furthermore, any damage to the plaintiff's reputation resulting from a denial of the preliminary injunction must be balanced against the possible harm to the State in retaining plaintiff on the N.C. State Highway Patrol.

ON certiorari to review the order of *Lee, Judge*. Order entered 24 January 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 6 March 1978.

Civil action wherein plaintiff seeks damages and a permanent injunction against defendants, G. Perry Greene, Secretary of the North Carolina Department of Transportation; Edward W. Jones, Commander of the North Carolina State Highway Patrol; and J. D. Cabe, Acting Commander of the North Carolina State Highway Patrol. In his complaint the plaintiff alleged that he was wrongfully discharged from the State Highway Patrol in violation of his constitutional rights, 42 U.S.C. § 1983 (1970).

After a hearing on 7 January 1977 the trial judge found facts which are summarized and quoted as follows: On 22 December 1976 the plaintiff was dismissed from his employment as a trooper of the State Highway Patrol

> by order of the defendant Perry G. Greene [sic] on the alleged grounds that he was imprudent and careless in the use

of his weapon at a roadblock on Interstate 85 at or about 1:04 a.m. on the 15th day of November, 1976; and that he jeopardized the safety of a hostage on that date by firing into a vehicle, and that he used excessive force while attempting to apprehend a dangerous criminal.

The hostage, a Virginia State Patrolman, was killed in the incident. The order dismissing the plaintiff culminated an investigation conducted by the Department of Transportation of which the plaintiff was not informed until his dismissal. At the time of his dismissal the plaintiff was advised of his right to appeal to the State Personnel Commission. He promptly requested a hearing before the Commission but none has been scheduled at this time. Subsequently, the plaintiff's dismissal was disclosed to the media and widely publicized. The adverse publicity has damaged the plaintiff's professional reputation and foreclosed other employment opportunities.

The court further found that the plaintiff had been deprived of liberty without due process of law in violation of 42 U.S.C. § 1983, the 14th Amendment to the United States Constitution, and Article I, Section 1 of the North Carolina Constitution; that "[u]nless the defendants are restrained from terminating the plaintiff's employment and depriving him of his rights . . . [he] will suffer irreparable injury in that he is without his employment, no income [sic], and has financial obligations which he cannot meet if his livelihood is withheld," and "that immediate and irreparable injury to . . . [his] professional reputation will continue"; and that the plaintiff has no remedy affording review of his dismissal prior to a hearing before the State Personnel Commission.

On the basis of these findings the trial judge concluded that the plaintiff was entitled to a preliminary injunction "pending the exhaustion of his administrative remedies and further proceedings in this cause" and ordered the defendants "to reinstate the plaintiff to full duty as a member of the North Carolina State Highway Patrol" and to continue to pay him his normal salary including back pay. The court added that the defendants in their discretion could place the plaintiff "on administrative leave pending the final determination of this matter." From this order, the defendants appealed.

Blackwell M. Brogden for the plaintiff appellee.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin, for the defendant appellants.

HEDRICK, Judge.

It is uncontroverted that the plaintiff in this case is a permanent state employee as defined in G.S. 126-39 and is entitled to all statutory rights which accompany his status. Specifically, the State Personnel Act, enacted in Chapter 126 of the General Statutes, provides that a permanent state employee shall not be discharged "except for just cause" and in the event of his discharge he must be furnished with a written statement of the acts or omissions which led to such action. G.S. 126-35. Thereafter, he may appeal to the head of the department and to the State Personnel Commission which has the authority under G.S. 126-4(9) to investigate and take corrective action concerning discharges of employees. An employee who is dissatisfied with the decision of the Commission may seek judicial review thereof in accordance with provisions in the Administrative Procedure Act, G.S. 150A-43, *et seq.*, which is expressly applicable to state employees by the terms of G.S. 126-43.

Defendants, citing *Stevenson v. Department of Insurance*, 31 N.C. App. 299, 229 S.E. 2d 209, *cert. denied*, 291 N.C. 450, 230 S.E. 2d 767 (1976), contend that the trial court was without authority to grant relief in this proceeding until the plaintiff had exhausted these administrative remedies. In *Stevenson* the plaintiff, who had been discharged from a position in the Department of Insurance, sought and obtained preliminary injunctive relief in the Superior Court prior to a hearing before the State Personnel Commission. On appeal Judge Britt, speaking for this Court, discussed Article 4 of the Administrative Procedure Act entitled "Judicial Review" upon which plaintiff was asserting his right to an injunction, and concluded that the statutes in that Article authorize "a stay order only of those final agency decisions in which the person aggrieved has exhausted his administrative remedies." 31 N.C. App. at 302-3, 229 S.E. 2d at 211. Thus, the narrow holding of *Stevenson* is that a party must exhaust his administrative remedies before he seeks judicial review under Chapter 150A of the General Statutes.

The plaintiff acknowledges the *Stevenson* decision but contends that the principles therein are not applicable to the present case since "he neither sought nor obtained relief under G.S. 150A-48." In *Stevenson* the plaintiff alleged that there was no just cause to support his dismissal and sought injunctive relief in the Superior Court solely on that basis. His complaint contained no allegations stating a claim under the United States Constitution or any federal statute. In contrast, the plaintiff in this case alleges an improper dismissal in violation of his civil rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983.

Congress, in the enactment of 28 U.S.C. § 1343, conferred on the United States District Courts original jurisdiction of claims arising under 42 U.S.C. § 1983. According to common interpretation "original jurisdiction" should be distinguished from "appellate jurisdiction" and means that the federal District Court shall have the power to hear such cases in the first instance. It follows that since the phrase does not contemplate "exclusive jurisdiction," the state courts have concurrent jurisdiction with the federal court to entertain § 1983 claims. *New Times, Inc. v. Arizona Board of Regents*, 20 Ariz. App. 422, 513 P. 2d 960 (1973), *vacated on other grounds*, 110 Ariz. 367, 519 P. 2d 169 (1974); *Brown v. Pitchess*, 13 Cal. 3d 518, 119 Cal. Rptr. 204, 531 P. 2d 772 (1975); *Alberty v. Daniel*, 25 Ill. App. 3d 291, 323 N.E. 2d 110 (1974); *Holt v. City of Troy*, 78 Misc. 2d 9, 355 N.Y.S. 2d 94 (1974). Thus, unless the principle enunciated in *Stevenson* is applicable to a § 1983 action, the Superior Court had jurisdiction to grant preliminary relief in this case.

[1] The exhaustion doctrine has been employed by the courts in appropriate cases to require a plaintiff to take advantage of available administrative remedies before resorting to the courts for redress of his grievances. K. C. Davis, Administrative Law of the Seventies, Supplementing Administrative Law Treatise § 20.01 (1976). However, as a general rule the failure of a plaintiff to exhaust his state administrative remedies has not been considered a bar to a claim asserted under § 1983. Davis, *supra* § 20.01-1, at 452. In *McCray v. Burrell*, 516 F. 2d 357 (4 Cir. 1975) (en banc), the United States Court of Appeals for the fourth circuit after a comprehensive discussion recognized the general rule emanating from recent Supreme Court decisions that exhaustion of state administrative remedies is not required in a § 1983 action

by state prisoners. In *Phillips v. Puryear*, 403 F. Supp. 80 (W.D. Va. 1975), a federal District Court followed *McCray* holding that the exhaustion doctrine was inapplicable in a § 1983 action by a state teacher contesting his dismissal. In view of the foregoing authority we are compelled to conclude that where as in the present case a state employee asserts civil rights violations under § 1983 for his wrongful dismissal, the Superior Court retains its traditional power to grant preliminary injunctive relief without requiring him to exhaust the administrative remedies provided in Chapter 126 of the General Statutes.

[2] The defendant also contends that the trial court erred in its entry of a preliminary injunction since the plaintiff has failed to demonstrate any irreparable injury. The North Carolina courts have adhered to the familiar rule that a preliminary injunction should issue pending trial on the merits only when "(1) there is probable cause that plaintiff will be able to establish the rights which 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 plaintiff's rights during the litigation." *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E. 2d 348, 351 (1975). In our review of the entry of the injunction by the Superior Court we are not bound by its findings of fact but may consider the evidence and determine independently the plaintiff's right to preliminary injunctive relief. *Waff Bros. v. Bank*, 289 N.C. 198, 221 S.E. 2d 273 (1976).

[3] Without examining the prospects of plaintiff's eventual success, we think he has failed to show any irreparable loss which would likely result in the absence of injunctive relief. In *Sampson v. Murray*, 415 U.S. 61 (1974), the United States Supreme Court confronted the claim of a federal probationary employee who challenged her dismissal in the United States District Court prior to a hearing pursuant to her right of appeal to the Civil Service Commission. The trial court granted a preliminary injunction against her discharge, and the Court of Appeals affirmed. The Supreme Court acknowledged that the District Court had the equitable power to grant a preliminary injunction in such a case but emphasized that it "is bound to give serious weight to the obviously disruptive effect which the grant of the temporary relief awarded . . . was likely to have on the administrative process."

415 U.S. at 83. The Court concluded that the plaintiff "at the very least must make a showing of irreparable injury sufficient in kind and degree to override these factors." 415 U.S. at 84. According to this analysis, the element of irreparable harm cannot be considered in a vacuum. A trivial harm, although it may be irreparable, would not necessarily entitle a plaintiff to injunctive relief. The judge in exercising his discretion should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability. This view comports with principles recognized by our own Supreme Court. *Huggins v. Board of Education*, 272 N.C. 33, 157 S.E. 2d 703 (1967). *See also* D. Dobbs, Remedies § 2.10, at 108-9 (1973); J. Leubsdorf, The Standard for Preliminary Injunctions, 91 Harv. L. Rev. 525 (1978).

[4] In this case the trial court found a likelihood that plaintiff would suffer irreparable injury if he were not reinstated in that he would be without income and his reputation would be damaged. It is significant in this regard that our legislature has provided a means of compensating a state employee who has been wrongfully discharged with reinstatement, back pay and attorneys' fees. G.S. 126-4(9) and (11). In view of the fact that the plaintiff is assured that he will be compensated for all loss of income and attorneys' fees if he should ultimately succeed on the merits, it can hardly be maintained that the plaintiff's temporary loss of income constitutes an irreparable loss. *Sampson v. Murray, supra* at 90. Furthermore, any damage to the plaintiff's reputation resulting from a denial of the preliminary injunction must be balanced against the possible harm to the State in retaining plaintiff on the North Carolina State Highway Patrol. When all factors are weighed, we think that the plaintiff's evidence falls short of showing irreparable harm sufficiently substantial to override the countervailing considerations.

We hold that the preliminary injunction was improperly granted. The order appealed from is vacated and the cause is remanded to the Superior Court for further proceedings.

Vacated and remanded.

Chief Judge BROCK and Judge MITCHELL concur.

Dew v. Shockley

CHESTER F. DEW, UNMARRIED; CHARLES B. DEW ET UX, ESTELLE G. DEW; BARBARA ANN D. SHOCKLEY ET VIR, ROBERT H. SHOCKLEY; JOHN BROOK DEW ET UX, BEATRICE THAYER DEW; JANET MARIE D. DONNELLY ET VIR, EDWIN REGAN DONNELLY; GRACE DEW EDWARDS, ET VIR, REDGER L. EDWARDS; R. L. EDWARDS, JR., UNMARRIED; DORIS DEW MATTHEWS ET VIR, RUSSELL THOMAS MATTHEWS; ERMINEE J. DEW WADE, WIDOW; J. ELAINE POTERE ET VIR, WILLIAM N. POTERE, JR.; WILLA BELLE DEW WILLIS ET VIR, CHESTER WILLIS; DIANA GAIL W. WELCHER ET VIR, RONALD A. WELCHER; PATRICIA JEAN W. LYONS ET VIR, PATRICK LYONS v. TAMARA MARIE SHOCKLEY; BRIAN HARRISON SHOCKLEY; JUSTIN BROOKS DEW; TIMOTHY BRIAN MATTHEWS; MICHAEL TODD MATTHEWS; GRETCHEN KAY POTERE; WILLIAM NICHOLAS POTERE, ALL MINORS; THE UNBORN CHILDREN OF CHESTER F. DEW; CHARLES B. DEW; GRACE DEW EDWARDS; ERMINEE J. DEW WADE; AND WILLA BELLE DEW WILLIS; AND THE UNBORN CHILDREN OF BARBARA ANN D. SHOCKLEY; JOHN BROOKS DEW; JANET MARIE D. DONNELLY; R. J. EDWARDS, JR.; DORIS D. MATTHEWS; J. ELAINE POTERE; DIANE GAIL WELCHER; AND PATRICIA JEAN LYONS

No. 777SC320

(Filed 18 April 1978)

1. **Wills § 34— life estate to class—presumption of joint tenancy with survivorship**

Under North Carolina law, joint tenancies with survivorship are presumed when a life estate is deeded or bequeathed and a tenancy in common is not expressly created.

2. **Wills § 44— per capita or per stirpes distribution**

Per capita distribution is, generally, favored over *per stirpes* and will be presumed the distributive plan absent explicit *per stirpes* direction or intent.

3. **Wills § 44— creation of joint life estate with survivorship—per capita remainder—per stirpes representation**

A devise to testatrix' "two brothers and three sisters, to have and to hold the same for and during the term of their natural lives with remainder in fee to their children, in equal shares, the children of any deceased child to take the share the parent, if living, would take" *is held* to give a joint life estate with survivorship to the brothers and sisters of the testatrix and a remainder in fee to the children of the brothers and sisters *per capita*, with the children of any deceased child taking *per stirpes* what its parent would have taken *per capita* had the parent survived.

APPEAL by all guardians ad litem representing *per capita* positions, from *Martin (Perry), Judge*. Judgment entered 8 March 1977, in Superior Court, NASH County. Heard in the Court of Appeals 7 February 1978.

This is an action under the Declaratory Judgment Act for the interpretation of the will of Gladys D. Saunders, whose husband predeceased her. The rights of the parties under the will are to be determined by construction of the following will provision:

> "ITEM THREE: In the event my husband, M. H. Saunders, shall predecease me, then, and in that event, I give, bequeath and devise all my property of every kind and character and wherever situate, both real and personal, subject to the provisions of Item One, to my two brothers and three sisters, to have and to hold the same for and during the term of their natural lives with remainder in fee to their children, in equal shares, the children of any deceased child to take the share the parent, if living, would take."

After hearing, the court entered judgment, finding from uncontradicted evidence that testatrix was survived by all two brothers and three sisters, that brother Charles Dew died prior to trial, leaving children and grandchildren, that brother Chester Dew is unmarried and without children, that sisters Grace Dew Edwards and Erminee J. Dew Wade have children and grandchildren, and that sister Willa Belle Dew Willis has two children. The court concluded that the living brothers and sisters take the property as life tenants in common, and that the children of the brothers and sisters living at the time of testatrix's death take a vested remainder in their parent's share and take *per stirpes* upon the death of that parent. All guardians ad litem representing joint tenancy with survivorship and *per capita* positions appealed.

Fields, Cooper & Henderson by Leon Henderson, Jr. for appellants.

Battle, Winslow, Scott & Wiley by Samuel S. Woodley for appellees.

CLARK, Judge.

Appellants press the *per capita* position, under which the brothers and sisters of the testatrix would hold a life estate in joint tenancy with survivorship; no child would take any immediate interest in the property until all the brothers and sisters had died. The roll would then be called and the children of the

brothers and sisters would take *per capita.* Appellees press the *per stirpes* position, under which the brothers and sisters would hold a life estate as tenants in common; at the death of each brother or sister, his or her children would take his or her share *per stirpes.*

[1] It is clear that, under North Carolina law, joint tenancies with survivorship are presumed when a life estate is deeded or bequeathed and a tenancy in common is not expressly created. *Burton v. Cahill,* 192 N.C. 505, 135 S.E. 332 (1926). G.S. 41-2, which abolished the right of survivorship in joint tenancies in estates of inheritance, does not apply to a joint tenancy in a life estate where no estate of inheritance is involved. *Powell v. Allen,* 75 N.C. 450 (1876); *Burton, supra.* Professor Link, in his illuminating article on the Rule in Wild's Case in North Carolina, suggests that a concurrent joint tenancy for life *might* be seen as a series of life estates *pur autre vie,* measured by the life of the last co-tenant to die. Life estates *pur autre vie* are estates of inheritance, and G.S. 41-2 abolishes survivorship. 55 N.C.L. Rev. 751, 787-791. But such construction is clearly contrary to the case law as it now stands. 55 N.C.L. Rev. 751, 790. Concurrent life estates still stand untouched by G.S. 41-2, and the old feudal presumption in favor of joint tenancies with survivorship remains.

[2] It is also clear that *per capita* distribution is, generally, favored over *per stirpes,* and will be presumed the distributive plan, absent explicit *per stirpes* direction or intent, although it is less clear exactly what constitutes such direction or intent. *In Re Battle,* 227 N.C. 672, 44 S.E. 2d 212 (1947); 80 Am. Jur. 2d, Wills, § 1449, p. 520. These two presumptions create a pattern of late distribution. No remainderman can take any present interest until the death of the last life tenant, when the roll is called. Such pattern is clearly antithetical to the modern policy of free alienation of land. 61 Am. Jur. 2d, Perpetuities and Restraints on Alienation, §§ 93, et seq. But the pattern of presumptions is rebuttable and the intent of the testator, as revealed by the clear language of the will, is, of course, the ultimate determinant.

[3] In the case *sub judice,* there is no explicit indication as to what sort of life estate the brothers and sisters are to take. The language reads "to my two brothers and three sisters, to have and to hold the same for and during the term of their natural

lives . . . ." There is no ambiguity in this language as would permit us to bring in extrinsics such as the nature of the property involved. *See* 80 Am. Jur. 2d, Wills, § 1282, p. 390. The presumption in favor of joint tenancy with survivorship is unrebutted by any language in the bequest of the life estate.

It is generally the rule that a tenancy in common is the first part of a testamentary plan that is completed by the remaindermen taking *per stirpes*, that a joint tenancy is completed, by the remaindermen taking *per capita*. Annot., Taking Per Stirpes or Per Capita, 13 A.L.R. 2d 1023, § 55, pp. 1062, *et seq.*; 80 Am. Jur. 2d, Wills, § 1472, p. 541. Therefore, the distributive pattern may determine the type of life estate when, as in the case *sub judice*, there is no clear intent expressed in the specific bequest of the life estate. The presumption in form of joint tenancy could thus be rebutted by a clear pattern of *per stirpes* distribution. The testatrix gives "remainder in fee to their [the brothers' and sisters'] children, *in equal shares, the children of any deceased child to take the share the parent, if living, would take.*" [Emphasis added.] Her intent was clearly expressed by this language. She gave the remainder to the children of the brothers and sisters *per capita*, with the roll called at the death of the last life tenant. Therefore, the life estate is a joint tenancy with survivorship. The direction that the children of the brothers and sisters are to take "in equal shares" is clearly a *per capita* direction. Such language is not *determinative* of *per capita* intent. 13 A.L.R. 2d 1023, § 10, pp. 1035 *et seq.* It may be rebutted by clear *per stirpes* language. There is *per stirpes* language present in the will *sub judice*, but it does not contradict the *per capita* language of the bequest to the children. Rather, it speaks to grandchildren, to "the children of any deceased child," and gives them their dead parent's share. Were the distribution purely *per capita*, with the roll called at the falling in of the life estate, children of brothers and sisters, alive at testatrix's death, or born during the life estate, but dead by the falling in of the life estate, would not be in the class of takers, and their children would take nothing. The *per stirpes* direction preserves the grandchildren's share. It should be noted that, had the testatrix intended on overall *per stirpes* distribution, no such separate device would have been necessary. The testatrix clearly intended *per capita* distribution following a joint tenancy with survivorship, and used a *per*

stirpes device to save shares for children of deceased children of brothers and sisters. The intent of the testatrix clearly supports the presumptions in favor of joint tenancy and *per capita* distribution. *See Trust Co. v. Bryant*, 258 N.C. 482, 128 S.E. 2d 758 (1963), where Justice (now Chief Justice) Sharp creates a hypothetical distributive pattern, almost identical to the one in the case *sub judice* which she considers clearly a *per capita* pattern with a *per stirpes* device:

> ". . . It would have saved litigation had he [the testator] written 'to my nephews and nieces share and share alike (*per capita*), the child or children of any deceased nephew or niece to receive his share (*per stirpes*)'; . . ." 258 N.C. at 486, 128 S.E. 2d at 762.

The life estate in *Bryant* was held to be a joint tenancy.

The parties involved are also concerned with the classification of the remainder held by the unborn children of the brothers and sisters, specifically those of testatrix's brother Chester, who alone of the brothers and sisters, had no children born at testatrix's death. The rule favoring early vesting grants to all children born at testatrix's death a vested remainder subject to open. *See Trust Co. v. Taylor*, 255 N.C. 122, 120 S.E. 2d 588 (1961). Their remainder was *not* subject to *complete* defeasance, should they fail to survive the falling in of the life estate, because of the *per stirpes* device discussed above. Their remainder remains open and subject to *partial*, quantitative defeasance, upon the birth of more children, until the falling in of the life estate. All surviving children will take the fee simple absolute *per capita*, the children of deceased children taking *per stirpes* what their parents would have taken *per capita* had they survived. Clearly, unborn *and* unadopted children have a contingent remainder, which will become vested subject to open upon their birth or adoption. This contingent remainder is destroyed if the unborn or unadopted is not born or adopted upon the falling in of the life estate. The contingent remainder of the unborn or unadopted children of Chester will be destroyed if no children are born to or adopted by Chester before he dies.

Because the testatrix left a joint estate with survivorship to her brothers and sisters, with the remainder in fee to the children of the brothers and sisters *per capita*, the children of any de-

ceased child taking *per stirpes* what its parent would have taken *per capita*, had the parent survived, the trial court's judgment is

Reversed.

Judges MORRIS and MITCHELL concur.

STATE OF NORTH CAROLINA v. KENNETH HOSKINS

No. 777SC770

(Filed 18 April 1978)

1. **Criminal Law § 99.5— court's admonition to counsel—no error**

Defendant was not prejudiced where the trial court admonished both the prosecutor and defense counsel in the absence of the jury for their lack of cooperation with each other and the court.

2. **Criminal Law § 99.6— trial judge's remark—no expression of opinion**

The trial judge did not express an opinion in violation of G.S. 1-180 and invade the province of the jury when one witness testified on voir dire that he did not want to dispute the word of another witness, defense counsel asked him why, and the judge responded, "that was just an expression. And your question is argumentative."

3. **Criminal Law § 80.2— police complaint and investigation report—testimony properly admitted—discovery available**

The trial court did not err in refusing to require a police detective to read into the record a police department complaint and investigation report, since the court ordered a copy of the report itself placed in the record on appeal if the defendant wished; moreover, defendant's contention that he was surprised to his prejudice by the report is without merit, since the report was at all times available to him at the police department and since defendant made no attempt to discover the report, as was his right pursuant to G.S. 15A-902 and 903.

4. **Criminal Law § 66.16— pretrial photographic identification—in-court identification based on observation at crime scene**

The trial court did not err in allowing the victim of an armed robbery to make an in-court identification of defendant where evidence was sufficient to support the court's finding that the identification was based on the victim's observation of defendant at the crime scene and was not tainted by a proper pretrial photographic identification procedure.

5. Criminal Law § 89.5— corroborating testimony—slight variations

Slight variations between the testimony of a witness to be corroborated and the testimony of the corroborating witness will not render the latter inadmissible.

6. Criminal Law §§ 102.2, 168— jury arguments—review on appeal

The trial court in its discretion controls the arguments of counsel, and the court's rulings will not be disturbed absent a gross abuse of discretion; moreover, when a portion of the argument of either counsel is omitted from the record on appeal, the arguments must be presumed proper.

APPEAL by defendant from *Smith (Donald L.), Judge*. Judgment entered 6 May 1977 in Superior Court, WILSON County. Heard in the Court of Appeals 19 January 1978.

Defendant was indicted and tried for robbery with a firearm. Upon his plea of not guilty, the jury returned a verdict of guilty as charged. From judgment sentencing him to imprisonment as a committed youthful offender for a period of twelve years, the defendant appeals.

The State's evidence tended to show that, at 11:00 a.m. on 17 November 1976, Harriett Anderson was working alone in Dawson's Peanut Shop in Wilson, North Carolina. She was putting up stock when the defendant walked into the store. She recognized him as having been in the store "off and on" throughout the two years of her employment there, although she did not know his name. When asked what he wanted, the defendant pulled a pistol and commanded Harriett Anderson to give him the money from the store. She gave the defendant all of the money in the cash register and asked him not to harm her. The defendant was in the store for a total of approximately five minutes. Immediately following the robbery, the police were called. The witness, Harriett Anderson, gave a description of the robber to the police at that time.

The defendant's evidence was in the nature of alibi testimony tending to show that he was with his girl friend at the time of the robbery and was not present in the store. The defendant's evidence also tended to show that he had been convicted of only one minor violation of law.

Other relevant facts are hereinafter set forth.

Attorney General Edmisten and Associate Attorney Robert W. Newsom III for the State.

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

MITCHELL, Judge.

[1] Defendant first assigns as error the action of the trial court in admonishing both the prosecutor and defense counsel during voir dire for their lack of cooperation with each other and the court. Out of the presence of the jury, the trial court specifically warned both of them that, upon future bantering or failure to abide by the court's instructions, either or both would be held in contempt and jailed. The trial court also indicated that, if necessary, a mistrial would be declared.

Every person charged with a crime has a right to trial before an impartial judge and an unprejudiced jury. G.S. 1-180. *State v. Belk*, 268 N.C. 320, 150 S.E. 2d 481 (1966). Any intimidation or expression of opinion by the trial court which prejudices the jury against the accused is ground for a new trial *State v. Frazier*, 278 N.C. 458, 180 S.E. 2d 128 (1971). Here, however, the remarks of the trial court were clearly addressed to *both* the district attorney and defendant's counsel for purposes of insuring an orderly trial. They did not, therefore, constitute error. *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973).

Additionally, the remarks to counsel were made out of the presence of the jury. Both G.S. 1-180 and G.S. 15A-1232, which will replace G.S. 1-180 on 1 July 1978, prohibit the expression of an opinion by the trial court to the jury. Where, as here, there is no reason to believe that jurors were informed of the fact that counsel had been chastised or rebuked by the trial court, no error was committed. *Hill v. Corcoran*, 15 Colo. 270, 25 P. 171 (1890), *aff'd.*, 164 U.S. 703, 41 L.Ed. 1182, 17 S.Ct. 994 (1896); *Ryan v. City of Crookston*, 225 Minn. 129, 30 N.W. 2d 351 (1947).

[2] The defendant also contends the trial court impermissibly expressed an opinion and invaded the province of the jury by commenting on the testimony of Detective Phil Houchens. The detective testified on voir dire for the purpose of corroborating the testimony of Harriett Anderson concerning an identification by

her of the defendant during a photographic lineup. At one point, however, it was obvious that his testimony would vary from Harriett Anderson's. She had stated that she did not remember giving this particular detective a description of the defendant. Detective Houchens testified that: "If I am not mistaken, I talked to her previously to this and she had given me a description. I don't want to dispute what she said, but I believe I talked to her before." The detective then outlined a description of the robber given him by the witness.

Counsel for the defendant then asked: "Why don't you want to dispute her word, Mr. Houchens?" The State's objection to the question was sustained. Counsel for the defendant then stated: "If your Honor please, I would like to be heard. He said, 'I don't want to dispute her word.'" To this the trial court responded: "Mr. Farris, that was just an expression. And your question is argumentative."

The defendant contends this statement by the trial court was an impermissible expression of opinion and invaded the province of the jury. This contention is without merit, as it was the province of the trial court, not the jury, to determine preliminary questions of fact upon which the admissibility of the witness' testimony depended. 12 Strong, N.C. Index 3d, Trial, § 18.1, p. 387. In makng its findings of fact and conclusions of law as to the admissibility of evidence, a trial court must necessarily express an opinion on the evidence presented on voir dire. The statement by the trial court was a proper exercise of its duty as the finder of fact and of its duty to supervise and control the conduct of the trial.

[3] The defendant next assigns as error the refusal of the trial court to require Detective Houchens to read into the record a "Wilson Police Department Complaint and Investigation Report." Rather than have the officer read the report, which the defendant concedes was a public record of a type frequently used by local newspapers to prepare news articles, the court ordered a copy of the report itself placed in the record on appeal if the defendant wished. We find the action of the trial court granted the substance of the defendant's motion and was not error.

The defendant seems to contend that he was surprised to his prejudice by the report. He contends that, as the report contained

a description of the robber by a witness never called by the State, the report was material to his defense and was improperly denied him. The record indicates, however, that the report was at all times available to the defendant at the police department as a matter of public record. Additionally the defendant made no attempt to discover this report, as was his right pursuant to G.S. 15A-902 and 903. The failure to seek discovery pursuant to the terms of G.S. 15A-902 and 903 constituted a waiver of the right to discovery pursuant to those statutes.

[4] The defendant next assigns as error the failure of the trial court to exclude the in-court identification of the defendant by the witness Harriett Anderson. He contends that her identification was tainted by a prior photographic identification. This assignment is without merit.

The record reveals that the witness testified that she had worked in the store approximately two years, and during that time the defendant was an occasional customer. She observed him for approximately five minutes during a midday robbery with additional illumination provided by fluorescent lighting. She testified that her in-court identification before the jury was based upon her observation of the defendant at the time of the robbery.

Both Detective Houchens and the witness Anderson testified on voir dire that, after the robbery and before trial, she was shown six black and white photographs uniform in size and containing likenesses of males of the defendant's race. From this group she picked out the defendant's photograph and indicated that he was the man who had robbed her. Both Anderson and Houchens testified that no suggestion had been made to her as to which photograph to pick or that a photograph of the robber was, in fact, included in the group of photographs.

From this evidence, the trial court found the facts to be "as testified to" by the officer and Mrs. Anderson. Based on those findings the trial court concluded that Mrs. Anderson's identification was not the result of any suggestive procedure utilized by law enforcement officers and was not tainted in any way. The trial court held the in-court identification of the defendant by Mrs. Anderson to be proper and allowed it into evidence. Although we do not encourage such brevity in the trial court's findings of facts, they were adequate to support its conclusions

and were completely supported by the evidence. This assignment of error is overruled.

We note that the trial court, after making its findings and conclusions as to the admissibility of the in-court identification of the defendant, permitted Mrs. Anderson to testify before the jury as to her prior identification of the defendant's photograph. The trial court had not, however, made findings of fact and conclusions of law as to the propriety of the out-of-court identification of the defendant's photograph. Instead, the court merely determined that the in-court identification was not the result of any suggestive procedure.

Assuming arguendo that the identification of the defendant's picture in the photographic lineup was unnecessarily suggestive, the admission of Mrs. Anderson's testimony concerning that identification would not, under the totality of the circumstances, require a new trial in this case. *Manson v. Brathwaite*, 432 U.S. 98, 53 L.Ed. 2d 140, 97 S.Ct. 2243 (1977); *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972). In any event, it is clear that the photographic identification was not so suggestive as to give rise to the likelihood of irreparable misidentification, and we find no prejudicial error.

[5] Defendant also assigns as error the failure of the trial court to exclude the testimony of Detective Houchens' offered to corroborate the testimony of Mrs. Anderson. This contention is based upon minor variations in the testimony of the two witnesses as to the date of one of their conversations. The defendant argues that this variation is fatal, and that the detective's testimony was inadmissible. We do not agree, as such slight variations between the testimony of the witness to be corroborated and the testimony of the corroborating witness will not render the latter inadmissible. *State v. Walker*, 226 N.C. 458, 38 S.E. 2d 531 (1946). Such variations in testimony affect only the credibility to be given the evidence by the jury. *State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354 (1963).

[6] The defendant also assigns as error the overruling of his motion for a new trial based upon statements by the district attorney during arguments to the jury. The trial court in its discretion controls the arguments of counsel, and the court's rulings will not be disturbed absent a gross abuse of discretion. *State v.*

Maynor, 272 N.C. 524, 158 S.E. 2d 612 (1968). Further, appellate courts do not ordinarily interfere with the trial court's control of jury arguments, unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations. We are unable to make any such determination here, as both the arguments of counsel for the defendant and of the district attorney are omitted from the record. When a portion of the argument of either counsel is omitted from the record on appeal, the arguments must be presumed proper. *See State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976); *State v. Dew*, 240 N.C. 595, 83 S.E. 2d 482 (1954); 1 Strong, N.C. Index 3d, Appeal and Error, § 42.2, pp. 293-4. This assignment of error is overruled.

The defendant has presented other assignments of error and contentions. We have reviewed them carefully and find them each to be without merit.

The defendant had a fair trial free from prejudicial error, and we find

No error.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE v. COMPENSATION RATING AND INSPECTION BUREAU OF NORTH CAROLINA

No. 7710INS256

(Filed 18 April 1978)

1. **Master and Servant § 80— workmen's compensation—erroneous denial of rate increase**

Order of the Commissioner of Insurance denying an increase in workmen's compensation rates is vacated where the findings of fact upon which the order was based were not supported by material and substantial evidence.

2. **Master and Servant § 80— workmen's compensation rates—benefit cost projections—methods used in other states—adjustment based on experience**

The Commissioner of Insurance erred in finding that projections of increased workmen's compensation benefit costs were speculative because they were based on the same methods used to project costs in 11 other states in which subsequent experience showed a need for a downward adjustment in 6

of the states and upward adjustment in 5 of the states, since the fact that experience might require an adjustment in rates does not invalidate a projection of rates.

APPEAL from the Commissioner of Insurance. Order dated 14 October 1975, as revised 11 February 1977. Heard in the Court of Appeals 31 January 1978.

This is the second time this case has been before this Court. *See Commissioner of Insurance v. Rating and Inspection Bureau*, 30 N.C. App. 332, 226 S.E. 2d 822 (1976). On 18 June 1974, the Compensation Rating and Inspection Bureau of North Carolina (hereinafter referred to as Bureau) made a filing with the Commissioner of Insurance (hereinafter referred to as Commissioner) seeking approval of a revised premium rate for workmen's compensation insurance written in North Carolina. This filing (pursuant to Article 2 of Chapter 97 of the General Statutes, which has since been repealed) proposed an average increase of 11.8% in the overall level of workmen's compensation insurance rates and rating values. It was based on a proposed decrease of 9% resulting from a review of policy year and calendar year workmen's compensation experience in the State, and a proposed reduction in the loss adjustment expense by .4%, and a proposed increase in the rate level of 23.4% brought about by the effect of legislation increasing workmen's compensation benefits, increases in the North Carolina Industrial Commission medical, dental, nursing and hospital fee schedules, and an increase in the North Carolina Industrial Commission assessment. In addition to the 11.8% rate increase, the filing further proposed an increase in the United States Longshoremen's and Harbor Workers' Compensation Coverage Percentage, changes in the excess loss premium factors, and changes in the minimum premium formula.

Prior to the 18 June 1974 filing, the Bureau had made a filing on 13 June 1973 requesting approval of revised rates and rating values representing an average increase of 18.4% in the overall rate of workmen's compensation insurance rates based on the estimated effect of benefit level increases enacted by the Legislature and a revision of medical, dental, nursing and hospital fee schedules adopted by the Industrial Commission. No action was taken on this filing. On 19 March 1974, the Bureau made another filing superseding the filing of 13 June 1973, and the 18

June 1974 filing superseded the 19 March 1974 filing. The 18 June 1974 filing took into account experience factors and additional legislative changes which were not present in the 13 June 1973 filing. While this case has been in litigation, a new filing for workmen's compensation insurance rates has been made pursuant to Article 13C of Chapter 58 of the General Statutes.

At hearings on the rate changes proposed by the 18 June 1974 filing, the Bureau offered much statistical evidence and oral testimony including the testimony of Anthony J. Grippa. Mr. Grippa is an associate actuary with the National Council on Compensation Insurance, which is a national rate-making organization. The National Council is the primary rating organization for workmen's compensation insurance in the United States. In his testimony, Mr. Grippa explained the rate-making formula upon which the filing was based. In general, based upon statistics compiled as to premiums received and claims paid, the experience of the companies over a two-year period was used to recommend the total 9.4% reduction. The 23.4% recommended increase was arrived at by calculating what the losses during this period would have been had the increased legislative benefits, the increased medical benefits, and the assessment been in effect during this period. Among other things, Mr. Grippa testified that in compiling statistics no adjustment was made for increased payrolls as a separate factor, but payroll changes were reflected in additional premiums since premiums were based on payrolls and also in additional claims since claims were based on wages in many cases. Mr. Grippa also testified the frequency of any type claim is reflected in the experience statistics used by the Council. He testified the Council did not "try to project frequency by factors, but simply rather by what happened in the state."

Also testifying before the Commissioner was Mr. W. J. Burton III, Safety Director of Carolinas' Branch Associated General Contractors of America, Incorporated, and Mr. R. M. Boyce, a pulpwood dealer in Catawba County. Both these witnesses testified against any raise in rates. Mr. Burton testified as to the effect of a change on the construction business, and Mr. Boyce testified as to its effect on the pulpwood business.

On 14 October 1975, the Commissioner ruled on the filing. He found as a fact that the proposed rate and rate value changes for the effect of a legislative change in benefits, the changes in

hospital and medical fee changes and the assessment were not based on any actual loss or underwriting experience and that there was no credible evidence in the record justifying the changes. He found that a reasonable allowance for the effect of those factors on loss experience would be an allowance of an increase in the rates and rating values sufficient to offset the 9.4% rate reduction requested in the filing. The Commissioner further found that the current rates were reasonable, adequate, not unfairly discriminatory and in the public interest.

The Bureau appealed to the Court of Appeals from the Commissioner's order of 14 October 1975. This Court, in an opinion rendered 4 August 1976, remanded the case with directions to the Commissioner to make findings of fact to support his conclusions to the end that this Court could review the order. The Commissioner made such findings of fact on 11 February 1977. The findings of fact covered more than 22 pages. The Commissioner found facts to the effect that the portion of the Bureau's filing was correct so far as it justified a reduction of rates based on experience in the amount of 8.7%, but was incorrect so far as it supported an increase. He allowed an increase in an amount sufficient to offset the reduction of 8.7% and left the rates unchanged. The Commissioner has not ruled on the requested increases in the United States Longshoremen's and Harbor Workers' Compensation Coverage, changes in the excess loss premium factors, or the changes in the minimum premium formula.

To support his conclusion that no rate increase was justified, the Commissioner made the following findings of fact which we have divided into four separate categories: (1) The filing dated 13 June 1973 requested an approval of a rate increase of 18.4%. The filing of 18 June 1974 requested approval of a rate increase of 11.8%, which is approximately 33⅓% less than that requested earlier, although benefits had been increased for 1974. The same methodology was used in both and they cannot both be correct. (2) The same methodology used in the 18 June 1974 filing has been used in 11 other states to project the effect of benefit changes. Based on subsequent studies in those states of cumulative experience, a need for a downward change was shown in six states and a need for an upward change was shown in five states. Projections based on this methodology are, therefore, speculative and there is no clear indication available that the pricing of the effect

of the legislation was accurate. (3) There was no factor used in the filing to reflect changes in payroll conditions. (4) There was no factor used in the filing to reflect a trend in the frequency of accidents.

Based on his findings of fact, the Commissioner found there was no credible evidence in the record that the proposed rate meet the statutory requirements of reasonable, adequate, not unfairly discriminatory and in the public interests. The Bureau has again appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, for John Randolph Ingram, Commissioner of Insurance, appellee.

Allen, Steed and Allen, P.A., by Thomas W. Steed, Jr., for Compensation Rating and Inspection Bureau, appellant.

WEBB, Judge.

[1] We hold that the facts found by the Commissioner, on which he based his conclusion that a rate change should be denied, were not supported by material and substantial evidence, and his order must be vacated.

As to the Commissioner's finding that the 13 June 1973 filing and the 18 June 1974 filing cannot both be correct because the 1974 filing requested an increase of approximately 33⅓% less than the 1973 filing, although the benefits had been increased for the 1974 filing, the Commissioner has failed to take into account the fact that the 18 June 1974 filing included an experience review and a reduction in loss adjustment expense. The evidence does not support a finding that the two filings are inconsistent.

[2] We do not believe the Commissioner's conclusion is justified that the projections of the Bureau as to increased benefit costs are speculative because they are based on the same methods used to project costs in 11 other states, in which subsequent experience showed a need for a downward adjustment in six of the states and upward adjustment in five of the states. Parenthetically, we might say the fact that the upward and downward adjustments were almost equal between the 11 states in some support for the argument that it is a valid method of projection. We do not rest on this, however. The fact that experience might

require an upward or downward adjustment in rates does not invalidate a projection of rates. Retroactive rate-making has been disapproved in this State. *Commissioner of Insurance v. Automobile Rate Office*, 292 N.C. 1, 231 S.E. 2d 867 (1977). Prognostication of insurance rates can hardly be expected to achieve exact precision. Our system provides that if experience shows rates have been set at too high a level, they can be reduced.

We also hold the Commissioner erred in holding that there were no factors used in the filing to reflect changes in payroll conditions or frequency of accidents. The testimony of the only witness who testified as to the method of compiling the projected rates was that both the payroll and frequency factors were taken into account by the calendar year and policy year experiences of the companies. It may be that a trend factor was not necessary to support the filing, *Commissioner of Insurance v. Rating Bureau*, 292 N.C. 70, 231 S.E. 2d 882 (1977), but since we hold that the trend factor was taken into account in the filing, we do not pass on this.

The order of the Commissioner is vacated. Since a proceeding for new rates under a new statute has been initiated, we do not remand the case to the Commissioner. *Commissioner of Insurance v. Automobile Rate Office*, 294 N.C. 60, 241 S.E. 2d 324 (1978).

Order vacated.

Judges BRITT and HEDRICK concur.

RONALD ROBINSON, ADMINISTRATOR OF THE ESTATE OF DORIS V. ROBINSON v. DR. ARNOLD DUSZYNSKI, SEA LEVEL HOSPITAL, DUKE UNIVERSITY MEDICAL CENTER AND DUKE UNIVERSITY, INC.

No. 773SC455

(Filed 18 April 1978)

1. Damages § 11.1— punitive damages—when appropriate

Generally, punitive damages are recoverable where the tortious conduct which causes the injury is accompanied by an element of aggravation, as when the wrong is done wilfully or under circumstances of rudeness or oppression,

or in a manner evincing a wanton and reckless disregard of the plaintiff's rights.

2. **Death § 3.5; Physicians, Surgeons and Allied Professions § 16.1—wrongful death action against physician—summary judgment improper**

In an action to recover actual and punitive damages from defendant doctor for the alleged wrongful death of plaintiff's intestate, the trial court erred in granting summary judgment for defendant on the issue of punitive damages where plaintiff's allegations, affidavits and depositions tended to show that defendant wilfully and negligently prescribed drugs for plaintiff's intestate without first performing blood analysis and without warning intestate or her nurses of the dangers and possible effects of the drugs; defendant had a general reputation of misprescribing medications to his patients; defendant wilfully and wantonly failed to respond for seven hours to the emergency situation created by intestate's bleeding which resulted from the medication prescribed by defendant; and defendant's affidavit and deposition filed in support of his motion for summary judgment tended mainly to conflict with plaintiff's evidence relative to the apparent seriousness of the intestate's condition and defendant's knowledge thereof immediately prior to her death.

3. **Death § 3.5; Hospitals § 3.3— wrongful death action against hospital—summary judgment proper**

In an action to recover actual and punitive damages for the alleged wrongful death of plaintiff's intestate, the trial court properly allowed defendant Duke Hospital's motion for summary judgment, since plaintiff alleged that Duke was grossly negligent in failing adequately to investigate the credentials of the individual defendant before allowing him to join the staff of the hospital but defendant Duke's evidence effectively pierced this allegation so as to reveal the lack of any genuine factual controversy thereon.

APPEAL by plaintiff from *Peel, Judge.* Judgment entered 16 February 1977 in Superior Court, CARTERET County. Heard in the Court of Appeals 7 March 1978.

Plaintiff, administrator, instituted this civil action to recover actual and punitive damages from defendants Dr. Duszynski and Duke University for the alleged wrongful death of the intestate, Doris V. Robinson.

Plaintiff's complaint contained allegations summarized as follows: Duke University Medical Center, a division of Duke University, owns and operates Sea Level Hospital in Carteret County. On 12 January 1976, the intestate was admitted to said hospital, under the care and supervision of Dr. Duszynski, for the treatment of arthritis. Early in the morning of 7 February 1976, the intestate displayed symptoms of internal bleeding and her condition rapidly worsened. Dr. Duszynski, who was also the

emergency room physician at this time, was notified twice of this situation but did not arrive at the hospital until approximately 9:30 a.m., some seven hours after his first notification. By this time, intestate's condition had become so critical that she was transferred to Craven County Hospital where she died after emergency surgery.

As the basis for his claim for relief, plaintiff alleged that Dr. Duszynski did wilfully and with gross negligence misprescribe and improperly supervise the administration of certain drugs—including Tandearil, Prednisone, and Celestone—thereby inducing the hemorrhaging of the intestate's ulcers and causing her death. Additionally, it is alleged that Dr. Duszynski did wilfully and wantonly, for at least seven hours, fail to respond to the emergency situation created by the intestate's internal bleeding. As to defendant Duke University, plaintiff first alleged that Duke was derivatively liable under the doctrine of *respondeat superior* for the aforementioned conduct of Dr. Duszynski. In addition, plaintiff alleged that Duke was grossly negligent in the selection and employment of Dr. Duszynski in that Duke failed adequately to investigate the background, training, skills and reputation of Dr. Duszynski.

Defendants duly filed answers denying any negligence or other basis for liability.

Discovery proceedings, including interrogatories and depositions, were initiated by all parties. Subsequent thereto, defendants filed motions for summary judgment, each seeking dismissal of plaintiff's claim for punitive damages. In addition, defendant Duke's motion for summary judgment sought dismissal of plaintiff's claim based on Duke's liability under the doctrine of *respondeat superior*. The trial court allowed both motions and entered judgment in accordance with the relief requested therein. Plaintiff appealed.

McNeill, Graham, Coyne & Kirkman, by Kenneth M. Kirkman for the plaintiff.

Wheatly, Mason, Wheatly & Davis, by Warren J. Davis, and Smith, Anderson, Blount & Mitchell, by James D. Blount, Jr., for defendant Dr. Arnold J. Duszynski; Newsom, Graham, Strayhorn, Hedrick, Murray, Bryson & Kennon, by E. C. Bryson, Jr., for defendant Duke University.

MARTIN, Judge.

The sole question before this Court is whether the trial court erred in granting summary judgment dismissing plaintiff's claim for punitive damages against the respective defendants.

Under the provisions of Rule 56 of the North Carolina Rules of Civil Procedure, the party moving for summary judgment has the burden of clearly establishing that there is no genuine issue as to any material fact and that as a result, he is entitled to a judgment as a matter of law. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). In previewing the pleadings, affidavits and other papers which constitute the record before the court on the motion for summary judgment, the court should carefully scrutinize the materials filed by the moving party, while indulgently regarding those filed by the opposing party. 6 Moore's Federal Practice, § 56.15[8] (2d ed. 1976); *accord, Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972).

[1] Our courts have generally held that punitive damages are recoverable where the tortious conduct which causes the injury is accompanied by an element of aggravation, as when the wrong is done wilfully or under circumstances of rudeness or oppression, or in a manner evincing a wanton and reckless disregard of the plaintiff's rights. *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976). In cases where plaintiff's action was grounded on negligence, our courts have referred to *gross* negligence as the basis for recovery of punitive damages, using that term in the sense of wanton conduct. *Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393 (1956). In *Hinson*, the Court explained that "[c]onduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others."

[2] In light of these principles, we must first determine whether defendant Dr. Duszynski carried his burden of proof so as to entitle him to summary judgment on the issue of punitive damages.

Pertinent to this issue, plaintiff made allegations summarized as follows:

(1) Dr. Duszynski did wilfully and with gross negligence prescribe certain drugs—including Tandearil, Prednisone and Celestone—dangerous to the health of the intestate because of

their tendency to induce the hemorrhaging of ulcers and retard blood clotting.

(2) Dr. Duszynski was grossly negligent in his supervision of the administration of these drugs to the intestate in that he did not perform sufficient blood analysis prior to prescribing said drugs; he did not perform or cause to be performed any blood analysis during the administration of the drugs despite his awareness of the intestate's vaginal bleeding; he did not warn the intestate or her attending nurses of the dangers and possible effects of the drugs; and he failed to adhere to the warnings and recommendations published by the manufacturers of the drugs.

(3) Dr. Duszynski did wilfully and wantonly, in complete disregard of the intestate's health, fail to respond for some seven hours to the emergency situation created by the intestate's bleeding.

In support of these allegations, and in opposition to defendants' respective motions, plaintiff submitted the affidavits of two doctors who worked closely with Dr. Duszynski on the staff of Sea Level Hospital and a summary of relevant portions of other depositions. These affidavits established that several doctors at Sea Level Hospital had expressed concern over Dr. Duszynski's improper and unusual drug prescriptions and that in the local medical community, Dr. Duszynski had a general reputation of misprescribing medications to his patients.

The evidence contained in the summary of other depositions tended to show that Dr. Duszynski was notified sometime shortly after 1:30 a.m. on 7 February 1976 that the intestate's blood pressure was low and her pulse very weak, that her stool contained fresh blood and that there was a small amount of blood on the bed on her pillow and under her buttocks. She had been already placed in shock position and had been put on nasal oxygen because she appeared "shocky." Ann Styron, a registered nurse, went on duty about 8:00 a.m. on 7 February and became alarmed at the intestate's condition. Shortly thereafter, she called Dr. Duszynski and informed him of the intestate's condition. After attempting, without success, to find the proper blood type for a transfusion, Styron again called Dr. Duszynski around 8:45 a.m. When it finally became apparent that the intestate should be transferred to another hospital, Styron again called Dr. Duszyn-

ski. Dr. Duszynski arrived at the intestate's hospital room between 9:00 a.m. and 9:45 a.m. In the opinion of Dr. Rick Moore, an expert in hematology and internal medicine, the drugs given the intestate were improperly administered by Dr. Duszynski, with respect to the manner in which they were combined and the duration of dosage. It is his belief that these drugs, because of their ulceragenic characteristics, in fact caused the intestate's death.

The affidavits and deposition summaries filed by defendant Dr. Duszynski in support of his motion for summary judgment tended mainly to conflict with plaintiff's evidence relative to the apparent seriousness of the intestate's condition and Dr. Duszynski's knowledge thereof during the early morning hours of 7 February 1976. In view of the strong factual showing made by plaintiff's opposing materials, we find the evidence offered by defendant Dr. Duszynski inconsequential on the issue at hand. His factual showing does not reveal that plaintiff is wholly unable to sustain his allegations with proof. *See Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976).

Thus, we conclude that defendant Dr. Duszynski has failed to carry his burden of establishing that plaintiff cannot prove entitlement to punitive damages. The trial court erred in granting summary judgment for defendant Dr. Duszynski dismissing the plaintiff's claim for punitive damages.

[3] Turning to defendant Duke University's motion for summary judgment and applying the same principles discussed above, we find that the motion was properly allowed. Although plaintiff's complaint alleged that Duke was grossly negligent in failing adequately to investigate Dr. Duszynski's credentials before allowing him to join the staff at Sea Level Hospital, defendant Duke's evidence effectively pierced this allegation so as to reveal the lack of any genuine factual controversy thereon. Duke's evidence showed that it retained a reputable agency, the Corson Group, to locate a qualified physician to practice in Sea Level. That agency's investigation revealed that Dr. Duszynski was of good moral character and a very competent practicing physician in New York State. Duke's evidence further showed that Dr. Stuart Sessoms, Director of Duke Hospital, received an informal complaint regarding Dr. Duszynski's competency and upon contacting the State Board of Medical Examiners, determined that Dr.

Duszynski's file was complete and satisfactory. Plaintiff's factual showing merely reiterates the instances in which complaints were made regarding Dr. Duszynski's drug prescription practices. From this preview of the proof, we agree with the trial court that it affirmatively appears that plaintiff cannot prove entitlement to punitive damages against defendant Duke University.

Accordingly, the order granting summary judgment for defendant Dr. Duszynski is reversed. We find no error in the order granting summary judgment for defendant Duke University.

Reversed in part.

Affirmed in part.

Judges MORRIS and ARNOLD concur.

PAUL MOSLEY, AND ALICE MOSLEY, HIS WIFE, INDIVIDUALLY AND ON BEHALF OF OTHERS UNDER THE PROVISIONS OF RULE 23 OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE v. NATIONAL FINANCE COMPANY, INC.; NORTHWESTERN INSURANCE COMPANY; AND EDWIN M. ROLLINS, INC.

No. 7719SC267

(Filed 18 April 1978)

1. **Rules of Civil Procedure § 56— summary judgment—findings of fact not required**

A trial judge is not required to make findings of fact and conclusions of law in determining a motion for summary judgment because, if findings of fact are necessary to resolve an issue, summary judgment is improper.

2. **Uniform Commercial Code § 75— non-filing insurance—premium charged to borrower**

The practice of charging a borrower sixty cents for non-filing insurance is fully supported by G.S. 53-177.

3. **Unfair Competition; Uniform Commercial Code § 75— filing fee waived—non-filing insurance—unfair trade practice alleged—standing of borrower to sue**

Plaintiff borrowers from defendant finance company had no standing to challenge a sixty cent fee for non-filing insurance since (1) the fee was less than the $2.00 filing fee required by the Uniform Commercial Code and plaintiffs benefited by paying the lower fee, and (2) even if defendant was not en-

titled to keep back fifty-four of the sixty cents and pay only six cents for the insurance coverage, plaintiffs were in no way concerned as they were in no way beneficiaries of the policy.

4. Damages § 1; Equity § 1.1— de minimis non curat lex—when applicable

The maxim *de minimis non curat lex* applies only when the gist of an action is damage, and it does not apply when the construction of a statute is involved or where the wrong is of the sort where nominal damages are presumed upon the allegation and proof of wrongdoing.

APPEAL by plaintiffs from *McConnell, Judge*. Orders entered 1 February 1977, in Superior Court, CABARRUS County. Heard in the Court of Appeals 31 January 1978.

The named plaintiffs bring this action on behalf of themselves and others unnamed, alleging that named plaintiffs, on two occasions in 1975, borrowed $1,500 from defendant Finance Company, and were charged 60 cents in each loan, under the pretext that it was for non-filing insurance, but that non-filing insurance was not written and not intended to be written; that the fee charged was part of a plan of the defendants to take money from plaintiffs as borrowers and divide it among themselves.

The plaintiffs allege unfair and deceptive trade practices and seek treble damages and attorney's fees under Chapter 75 of the General Statutes, and other relief, including that to which they may be entitled under the North Carolina Consumer Finance Act, Chapter 53 of the General Statutes.

Defendants made motions to strike, to dismiss under G.S. 1A-1, Rule 12(b)(6) and, in the alternative, for summary judgment pursuant to Rule 56. Plaintiffs also moved for summary judgment.

The court granted summary judgment to defendants and denied it to plaintiffs. From this order plaintiffs appealed.

Wesley B. Grant for plaintiff appellants.

Williams, Willeford, Boger & Grady by Samuel F. Davis, Jr.; Webb, Lee, Davis, Gibson & Gunter by Joseph G. Davis, Jr., for defendant appellee, National Finance Company, Inc.

Jordan, Wright, Nichols, Caffrey & Hill by Edward L. Murrelle and Robert D. Albergotti for defendant appellee, Northwestern Insurance Company.

CLARK, Judge.

Matters supporting the motions for summary judgment were affidavits, interrogatories, and the non-filing insurance policy issued by defendant Insurance Company to defendant Finance Company and countersigned by defendant Rollins, Inc., as agent.

These supporting matters established that defendant Insurance Company had issued a non-filing insurance policy to defendant Finance Company; that the policy was in effect when the loans were made; that the policy and the 60 cent rate was approved by the Commissioner of Insurance on 20 September 1961; that defendant Finance Company retained 54 cents of the 60 cents as commission and paid 6 cents to defendant Rollins, Inc. as agent for defendant Insurance Company.

[1] The named plaintiffs requested that the trial court, in rendering summary judgment, find facts specifically and express its conclusions of law pursuant to G.S. 1A-1, Rule 52. A trial judge is not required to make finding of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal. Shuford, N.C. Practice and Procedure, § 56-6 (1977 Supp.). Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of fact are necessary to resolve an issue, summary judgment is improper. However, such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment. *Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 215 S.E. 2d 162 (1975).

In the case *sub judice*, the facts found by the trial court shed some light on the court's reasoning in rendering summary judgment for defendants. The trial court found, in pertinent part:

> "4. The 60¢ premium charged the plaintiffs for non-filing insurance was paid by National Finance Company, Inc. to Edwin M. Rollins, Inc. and Northwestern Insurance Company after National Finance Company, Inc. deducted the commission to which it was entitled;
>
> . . . .
>
> 6. The plaintiffs have failed to allege in their complaint their authority to sue on behalf of the purported unnamed plaintiffs;

7. Any recovery by the plaintiffs, or the purported unnamed plaintiffs would be de minimis; . . ."

[2, 3] The practice of charging a borrower 60 cents for non-filing insurance is fully supported by G.S. 53-177, which provides:

> "The licensee may collect from the borrower the actual fees paid a public official or agency of a county or the State, for filing, recording, or releasing any instrument securing the loan. A licensee shall not collect or permit to be collected any notary fee in connection with any loan made under this Article. In lieu of recording any instrument and in lieu of collecting any recording fee herein authorized, a lender may take out nonrecording or non-filing insurance on the instrument securing the loan and charge to the borrower the amount as fixed by the Commissioner of Insurance, but the amount so charged to the borrower shall not in any event exceed sixty cents (60¢) with respect to any one loan."

The purpose of the 60 cent charge for non-filing insurance is to protect the lender, not the borrower. In order to have a protected security interest, the lender has to file a Uniform Commercial Code financing statement with the appropriate register of deeds. G.S. 25-9-302 *et seq.* It is established that the borrower pay the $2.00 fee (standard size form) for the filing of a financing statement. G.S. 25-9-403. The non-filing insurance charge of 60 cents is beneficial to the borrower in the sense that he enjoys a net savings of $1.40, the difference between the non-filing insurance charge and the U.C.C. filing fee. The non-filing insurance policy does not fully protect the defendant Finance Company against all risks, and recovery is limited to $900 of loss on any loan to any one customer. Thus, the defendant Finance Company was a partial self-insurer.

Plaintiffs' complaint and defendants' affidavits and other material make it clear that plaintiffs failed to show injury resulting from defendant Finance Company's retention of 54 cents of the 60 cent non-filing insurance premium charged. Plaintiffs paid 60 cents in each loan, the statutory maximum under G.S. 53-177, and defendant Finance Company kept 54 cents and paid only 6 cents for the insurance. The coverage under the policy was limited. But, regardless of whether defendant Finance Company was entitled to keep back 54 cents, plaintiffs were in no way con-

cerned as they were in no way beneficiaries of the policy. They did not lose anything; they suffered no damage. They have no standing to sue, and lack of standing is a matter for dismissal. *Mozingo v. Bank*, 31 N.C. App. 157, 229 S.E. 2d 57 (1976). As matters were accepted by the court outside the pleading, defendants' motion for summary judgment, rather than a Rule 12(b)(6) motion to dismiss, was properly considered and granted. G.S. 1A-1, Rule 12(b)(6).

Plaintiffs' complaint fails to allege their authority to sue on behalf of the purported unnamed plaintiffs, and therefore is insufficient to raise a class action. G.S. 1A-1, Rule 23(a); Rule 9(a); *Nodine v. Mortgage Corp.*, 260 N.C. 302, 132 S.E. 2d 631 (1963), decided under G.S. 1-70 but still controlling. *See* Shuford, N.C. Practice and Procedure § 23-1. The trial court considered this insufficiency in its Finding of Fact No. 6. We note that even were plaintiffs to cure this defect and support their request for class action, their complaint alleges no more injury to the unnamed plaintiffs than to themselves, and their pleading should still be dismissed with prejudice.

[4] Though not necessary to disposition on appeal, we note that the trial court also considered the issue of the amount of plaintiffs' recovery and judged it "de minimis." We disagree. The maxim *de minimis non curat lex* permits a court to dismiss, presumably on a Rule 12(b)(6) motion, or, possibly even on its own, an action based upon a wrong which constitutes only a trifling invasion of the plaintiffs' rights or results in only trifling damage. 1 Am. Jur. 2d, Actions, § 67, p. 596. But "[i]t is only when the *gist* of the action is damage that the maxim *de minimis non curat lex* applies, and that the law no longer distinguishes between no appreciable damage and no damage at all." [Emphasis added.] *Eller v. R.R.*, 140 N.C. 140, 143, 52 S.E. 305, 306 (1905). It does not apply when the construction of a statute is involved, as in the case *sub judice*, or where the wrong is of the sort where nominal damages are presumed upon the allegation and proof of wrongdoing. Dobbs, Remedies, § 3.8, p. 191. If only the named plaintiffs had had standing to sue, and even if their action were not covered by Chapter 75, permitting treble damages and attorney's fees, their loss of 108 cents would not be *de minimis*.

Because plaintiffs did not show injury, the order granting defendants' motion for summary judgment is

Affirmed.

Judges MORRIS and MITCHELL concur.

STATE OF NORTH CAROLINA v. VIRGINIA HINSON BUNN

No. 778SC813

(Filed 18 April 1978)

1. **Constitutional Law § 67; Searches and Seizures § 43— motion to suppress—identity of informant—evidence of existence of informant**

In a proceeding on a motion to suppress, there was sufficient corroboration of an informant's existence independent of testimony by the officer to whom the informant gave information about defendant's possession of marijuana so that the identity of the informant was not required to be disclosed to defendant pursuant to G.S. 15A-978(b) where a second officer's testimony established that he knew of the existence of the informant on the day of defendant's arrest, and where the second officer and an SBI agent testified that the first officer correctly predicted that defendant would be leaving her home at a certain time with marijuana in her possession and stated that he had received such information from the informant.

2. **Searches and Seizures § 11— warrantless search of automobile—probable cause**

Officers had probable cause to search defendant's automobile without a warrant for marijuana where an officer twice received information from a reliable informant concerning defendant's possession of marijuana; the informant told the officer that he had learned from overhearing one end of a telephone conversation that defendant would move the marijuana from her residence to the north end of town within 30 minutes; and defendant left her house at the time indicated carrying a large paper bag and drove off toward the north end of town.

APPEAL by defendant from *Browning, Judge*. Judgment entered 19 May 1977 in Superior Court, WAYNE County. Heard in the Court of Appeals 1 February 1978.

Defendant was indicted for possession of marijuana with intent to sell the same. She moved to suppress the State's evidence, and after a hearing, the motion was denied. Defendant, thereupon, entered a plea of guilty and judgment was entered. The appeal is

from the order denying the motion to suppress and is taken pursuant to G.S. 15A-979(b).

Attorney General Edmisten, by Special Deputy Attorney General Robert P. Gruber, for the State.

Hulse & Hulse, by Herbert B. Hulse, for defendant appellant.

VAUGHN, Judge.

The State offered evidence at the suppression hearing tending to show the following. At approximately 6:00 a.m. on 1 December 1976, Officer Uzzell received a call from a confidential informant advising him that he had information that defendant was holding some marijuana. Uzzell had received reliable information from this informant for a period of three years. The information so given had led to five or six arrests. The informant did not say where defendant was holding the marijuana but gave the impression she had it at her house. Uzzell told the informant to get more information. Uzzell set up surveillance of defendant's house and, at 9:30 a.m., called the informant on the telephone. He was told by the informant that he had just been in a house on Lime Street and had overheard someone talking to defendant on the telephone. The informant said that he could tell from the conversation that defendant was planning to move the marijuana to the north end of town within thirty minutes. About twenty-five minutes later, defendant was observed leaving her house carrying a large brown paper bag. She got into her car and began driving toward the north end of town. At that time Uzzell and other officers stopped defendant's car and searched it. They found one pound of marijuana in the brown paper bag. Defendant was then arrested. About thirty minutes after defendant's arrest, Uzzell had his informant repeat the information which he had given Uzzell to Officer Parker for verification of the informant's existence. Officer Parker subsequently died. Because of Parker's death Uzzell, in March, 1977, called the informant and had him repeat the information to Officer Jones. Jones had participated in the search and arrest of defendant. Before the arrest, Uzzell had told Jones about the informant and the information he had given

him about defendant. Jones knew the informant and had received information from him which had led to at least three arrests.

[1] Defendant first argues that the judge erred when he refused to compel Officer Uzzell to disclose the identity of his confidential informant. The request was made under the provisions of G.S. 15A-978(b) which provides, in pertinent part, as follows:

> "In any proceeding on a motion to suppress evidence . . . in which the truthfulness of the testimony presented to establish probable cause is contested and the testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, the defendant is entitled to be informed of the informant's identity unless . . . (2) There is corroboration of the informant's existence independent of the testimony in question."

Defendant argues that there is no evidence of the informant's existence independent of Uzzell's testimony. We disagree. The *reliability* of the informant is not relevant on the question of whether the statute requires that his identity be disclosed. As the State points out, the statute only requires corroboration of the informant's *existence* at the time he is supposed to have given the confidential information. The testimony of Officer Jones tends to establish that he knew of the existence of the informant on the day of the arrest and was well acquainted with the informant. The State need not rest on what the informant told Jones at some later date. The existence of the informant may be corroborated in many ways. The official commentary following the statute points out that the section was derived from the American Law Institute's Model Code of Pre-Arraignment Procedure. In reviewing the comments to that code, it is clear that the drafters envisioned much more flexibility in corroborating testimony, including such things as the officer's prediction to others of certain events of which he could not personally know, accompanied by a declaration that his informant has told him so. A.L.I., Model Code of Pre-Arraignment Procedure (1975), § SS 290.4 at 575. Officer Jones also testified that early on the morning of 1 December, Officer Uzzell told him that the informant had said that defendant had marijuana. He also testified that Uzzell radioed him before he went to contact the informant again at 9:30 a.m. and called back shortly to say, "he had made contact with the

informer and that Mrs. Bunn [defendant] would be leaving her residence within the next thirty minutes with the marijuana." Special Agent Surratt watched from a nearby car as Officer Uzzell made a telephone call. The officer came to the car afterwards and told him that, "he had received word from the informant that Mrs. Bunn [defendant] was going to leave her house in about thirty minutes to make a delivery of marijuana on the other side of town." These predictions of defendant's future behavior tend to show the existence of the informant. The corroboration was sufficient to meet the statutory requirement of G.S. 15A-978(b). The State was not, therefore, required to identify the informant.

[2] Defendant also assigns as error the finding of the court that a warrantless search of defendant's automobile was constitutionally permissible. "[A]n automobile or other vehicle may be searched without a warrant when the officers have a reasonable or probable cause to believe that the vehicle is illegally transporting contraband materials." *State v. Allen*, 282 N.C. 503, 515, 194 S.E. 2d 9, 18 (1973); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 453 (1925). Probable cause to search has been defined as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *State v. Allen, supra*, at 516, 194 S.E. 2d at 18-19. In this case, Officer Uzzell had twice received information concerning defendant's possession of marijuana from an informant he had reason to trust. The informant told him that the marijuana would be moved in about thirty minutes to the north end of town and explained that he had learned this by overhearing one end of a telephone conversation and named the place where he had heard it. When defendant left her house at approximately the time indicated carrying a bag large enough to contain the indicated drugs and drove off toward the north end of town, the officers who had her under surveillance had both a reasonable suspicion of her guilt and circumstances which reasonably reinforced their belief. Therefore, they had probable cause to make the search. *See State v. Ketchie*, 286 N.C. 387, 211 S.E. 2d 207 (1975); *State v. Frederick*, 31 N.C. App. 503, 230 S.E. 2d 421 (1976).

Defendant's remaining assignments of error have been carefully considered. We find no prejudicial error.

Affirmed.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. JAMES LORENZA BROGDEN

No. 779SC848

(Filed 18 April 1978)

1. **Criminal Law § 35— offense committed by another—insufficiency of evidence to show**

The trial court in a murder prosecution did not err in excluding evidence that a State's witness and the deceased argued about cars and money on the evening preceding the shooting, since the excluded testimony did not point to the guilt of another.

2. **Homicide § 16.1— statement by deceased—admissibility as dying declaration or spontaneous utterance**

The trial court in a murder prosecution did not err in allowing a witness to testify concerning a declaration made by deceased shortly after he was shot, since the evidence was sufficient for the court to infer that deceased had knowledge of his imminent death, and the statement was therefore admissible as a dying declaration; however, the statement would have been admissible as a spontaneous utterance even if it did not qualify as a dying declaration, since the statement was made in immediate response to the stimulus of the occurrence and without opportunity to reflect or fabricate.

3. **Homicide § 24.1— intentional use of deadly weapon—presumptions of malice and unlawfulness—jury instructions proper**

The trial court in a homicide prosecution properly instructed the jury on the presumptions of malice and unlawfulness arising upon proof beyond a reasonable doubt that defendant intentionally wounded deceased with a deadly weapon.

APPEAL by defendant from *Canaday, Judge*. Judgment entered 12 May 1977 in Superior Court, PERSON County. Heard in the Court of Appeals 6 February 1978.

Defendant was indicted for the murder of Bonnie Wayne Thorpe. He was placed on trial for murder in the second degree. Evidence for the State, in summary, tends to show the following. In the early morning hours of 28 March 1976, deceased and about forty other people were gathered at a three-room house in Person County where alcoholic beverages were sold and facilities for

dancing were available. A fight broke out between persons other than deceased and defendant. Defendant then brandished a .25 caliber automatic pistol. The operator of the house, Gene Faison, testified that defendant shot the deceased. Faison and one Newman grabbed defendant and took him outside. Newman then took the gun. Other witnesses saw defendant with the pistol immediately after they heard the shot. While Newman was struggling with defendant, defendant was heard to threaten to "shoot somebody else." Before deceased was taken to the hospital, he told Carver that defendant had shot him. The bullet that was taken from the body of deceased was fired from the pistol that was taken from defendant. Two days earlier, defendant had purchased a box of .25 caliber ammunition similar to that used in the killing.

Defendant testified that he did not own a .25 caliber pistol and did not have a pistol with him at the time of the killing. He had been drinking and could not remember going to the place where the killing took place or anything that may have occurred while he was there.

Defendant was convicted of murder in the second degree, and judgment imposing a prison sentence was entered.

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

Ramsey, Hubbard & Galloway, by James E. Ramsey and Mark E. Galloway, for defendant appellant.

VAUGHN, Judge.

[1] Defendant argues that the court erred in excluding evidence that he contends implicates a State's witness, Newman, as the killer. The excluded evidence tended, at best, to show that Newman and Thorpe had argued about cars and money on the evening preceding the shooting. The same witnesses said, however, that the two were not angry, that they were merely "carrying on." The excluded testimony did not point to the guilt of another and was properly excluded. In a similar case, *State v. Jones*, 32 N.C. App. 408, 232 S.E. 2d 475 (1977), *cert. den.*, 292 N.C. 643, 235 S.E. 2d 63, this Court held that it was not error to exclude evidence that another had a motive that the defendant

did not. The Court pointed out that this was not evidence that the crime in quesiton was committed by another and was, therefore, not relevant to the question of defendant's guilt.

[2] Defendant also assigns as error the admission of a declaration made by the deceased to Keester Carver shortly after he was shot. Carver testified that Thorpe asked him to take him to the hospital. When asked how he was shot, Thorpe responded that Brogden had shot him. Defendant contends that this testimony was hearsay and did not fall within any recognized exception to the rule. The evidence was handled at trial as if it fell within the exception for dying declarations. "The admissibility of a declaration as a dying declaration is a question to be determined by the trial judge. When the trial judge admits the declaration, on appeal, the ruling of the trial judge is reviewable only to determine whether there is evidence tending to show facts essential to support the trial judge's ruling." *State v. Brown*, 263 N.C. 327, 333, 139 S.E. 2d 609, 612 (1965). The only supporting fact at issue is whether the court could infer from the evidence that the deceased had knowledge of his imminent death. Carver testified that he deceased questioned him about the severity of the wound and asked help in getting to a hospital. He was gasping for breath and seemed very nervous and concerned about his condition. Shortly after making the statement, he appeared to go into shock and began to bleed from the mouth. Considering the general knowledge of the seriousness of a gunshot wound to the torso and the other circumstances, we conclude that the court was justified in admitting the declaration into evidence.

On the authority of *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974), the statement would have been admissible as a "spontaneous utterance" even if it did not qualify as a "dying declaration." In *Deck*, defendant was on trial for murder. A witness was permitted to testify that she saw decedent and another man running up the highway, that decedent told her that the other man had tried to rob him and that he had been stabbed. The Court said:

> "We think the challenged statements were made in immediate response to the stimulus of the occurrence and without opportunity to reflect or fabricate. Further, decedent had no motive for fabrication. The time lapse between the

completion of the alleged crime, the ensuing chase and the statements made to the witness was negligible.

In our opinion, the challenged statements were spontaneous utterances and were therefore correctly admitted by the trial judge." 285 N.C. at 214, 203 S.E. 2d at 834.

The testimony in the case now under consideration meets the same standards and could have been admitted as a spontaneous utterance.

[3] Defendant contends that the court erred in failing to instruct the jury that they could return a verdict of guilty of involuntary manslaughter. In a related assignment of error, he contends that the judge erred when he instructed the jury as follows:

"Now, if the State satisfies you from the evidence beyond a reasonable doubt that the defendant Brodgen intentionally shot the decedent Thorpe with a .25 caliber pistol, which was a deadly weapon inflicting a wound upon the person of Thorpe, which would proximately caused the death of Thorpe, then you may, but need not imply or infer, that the killing was unlawful and done with malice."

Defendant contends that the instruction allows an impermissible use of a presumption and violates the principles of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975). He concedes, nevertheless, that the instruction is consistent with the decisions of the Supreme Court of North Carolina in *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed. 2d 306 (1977) and *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975). In *Hankerson*, the Supreme Court said:

"*Mullaney*, then, as we have interpreted it, requires our trial judges in homicide cases to follow these principles in their jury instructions: the State must bear the burden throughout the trial of proving each element of the crime charged including, where applicable, malice and unlawfulness beyond a reasonable doubt. The decision permits the state to rely on mandatory presumptions of malice and unlawfulness upon proof beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately resulted in death. If, after the

mandatory presumptions are raised, there is no evidence of a heat of passion killing on sudden provocation and no evidence that the killing was in self-defense, *Mullaney* permits and our law requires the jury to be instructed that defendant must be convicted of murder in the second degree." 288 N.C. at 651, 220 S.E. 2d at 589.

The instructions given in the case now under consideration were in complete accord with the foregoing, both as to the possible verdicts and presumptions arising from the evidence.

We have considered defendant's remaining assignments of error. We find no error that requires a new trial.

No error.

Judges HEDRICK and ERWIN concur.

CLAUDEAN E. EDWARDS v. DR. ROBERT L. MEANS

No. 7721SC242

(Filed 18 April 1978)

Physicians, Surgeons and Allied Professions § 16.1— surgery without consulting x-ray—summary judgment for surgeon improper

In an action against defendant surgeon to recover damages for injury to plaintiff's finger, the trial court erred in entering summary judgment for defendant where plaintiff's complaint and deposition raised an issue as to whether defendant acted properly in attempting to remove a foreign body from plaintiff's finger without first consulting x-rays.

APPEAL by plaintiff from *Albright, Judge*. Judgment entered 13 January 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 20 January 1978.

This is an action for malpractice against defendant, a physician engaged in the general practice of surgery. Plaintiff appeals from the allowance of defendant's motion for summary judgment.

White and Crumpler, by Michael J. Lewis, for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by James H. Kelly, Jr., for defendant appellee.

VAUGHN, Judge.

Summary judgment is an extreme remedy and should be awarded only where the truth is quite clear and undisputed. It is improper unless the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). In the case at bar, we conclude that the pleadings and other documents relied on by the judge are insufficient to carry defendant's burden of showing the absence of a triable issue and do not show that defendant is entitled to judgment as a matter of law.

Plaintiff's deposition, in part, is as follows. In March, 1973, she got a piece of glass in her right index finger. She could not see the object or any cut on the finger, but she had discomfort in the finger for several weeks. On 10 April 1973, she had her finger x-rayed at the hospital emergency room and learned that the x-ray revealed a foreign body in her finger. On 12 April 1973, she visited defendant, a surgeon, seeking removal of the foreign body. She showed defendant as best she could where the foreign body had gone into her finger, informed defendant that x-rays had been taken and asked whether these should be examined before removal of the foreign body. Defendant stated that such examination was not necessary because he thought he could feel the foreign body. Defendant then made an incision in the finger, probed for 45 minutes, stated that he had removed a tiny hair and sewed up the finger. Plaintiff continued to have the sensation of some foreign body in the finger, and more x-rays were made. These x-rays revealed the presence of a foreign body in the finger so defendant again cut open plaintiff's finger and removed some tissue. This second incision was made at the hospital with the use of a visual intensifier and x-rays and was made along the same lines as the first incision. After the second operation, x-rays no longer showed a foreign body in the finger although defendant

stated that he never saw a foreign body in the tissue which he removed. Plaintiff's finger healed and caused her no problem until July, 1973, when she suddenly began experiencing continued pain in the finger. Defendant referred plaintiff to another doctor, a plastic surgeon. Plaintiff was also referred to three additional doctors, who all prescribed use of the finger and massage, before being referred to Dr. Goldner, an orthopaedic hand specialist, in February, 1974.

Dr. Goldner treated her for two years, prescribing use and massage of the finger and various medications for the pain, until additional surgery was performed by him in April, 1976. The surgery resulted in some diminution of the pain and improvement in the appearance of the finger. Dr. Goldner testified on deposition that when he first began treating plaintiff an examination of her finger revealed that tissues in the tip of the finger had shrunk slightly, there was a slight loss of bone density due to limited use of the finger and there was tenderness over the bone. He prescribed an exercise program and various other treatments until 1976 when he agreed to operate because plaintiff was still experiencing pain. In the operation he removed scar tissue and elevated pulp or soft tissue onto the tip of the finger. No foreign material was found and his diagnosis at the time of surgery was fibrosis, or scar tissue caused by the original entry of the foreign body into the finger and the incisions to remove the foreign body, atrophy of the subcutaneous fat and chronic pain syndrome related to thin skin on the pad of the finger. He further stated that he is familiar with the standard medical practice in the community for removal of a foreign body from a finger and it includes the obtaining of x-rays to determine if the foreign body is present followed by a decision as to whether to remove it. In his opinion an examination of an x-ray prior to removal is desirable and helpful but may not be absolutely necessary where one knows that an x-ray has revealed a foreign body, there is a point of tenderness and one can feel where the foreign body is located. In his opinion plaintiff's fibrosis was caused by a series of events including the original entry of the foreign body, the incisions to remove the foreign body and the resulting change in the size and shape of the fingertip.

Defendant's affidavit stated that he did not feel it necessary to examine the x-rays of plaintiff's finger prior to attempting

removal of the foreign body because he could feel the scar tissue in her finger which normally surrounds a foreign body, could see a scar on plaintiff's finger where the foreign body had entered and was informed by plaintiff as to what had entered her finger and where.

Defendant also filed affidavits of two surgeons practicing in the area, Drs. Nolan and Rabil. Each states that he is familiar with the standards of surgical practice utilized and accepted in the community. They further state that, having reviewed plaintiff's complaint and deposition and defendant's affidavit, they are of the opinion that the procedures followed by defendant were in accordance with that standard and accepted practice and that the condition of plaintiff's finger was not the result of defendant's failure to use x-rays during the first removal procedure.

As indicated, we conclude that it was error to enter summary judgment in favor of defendant. Indeed, it is only in exceptional negligence cases that Rule 56 can be invoked. "This is so because even in a case in which there may be no substantial dispute as to what occurred, it usually remains for the jury, under appropriate instructions from the court, to apply the standard of the reasonably prudent man to the facts of the case in order to determine where the negligence, if any, lay and what was the proximate cause of the aggrieved party's injuries." *Robinson v. McMahan*, 11 N.C. App. 275, 280, 181 S.E. 2d 147, 150 (1971). In our view, defendant has not, by competent evidence, conclusively shown that his conduct, alleged to be a proximate cause of plaintiff's distress, was in all respects that of a reasonably prudent person under the circumstances. For that reason, the judgment is reversed.

Reversed.

Judges BRITT and ERWIN concur.

STATE OF NORTH CAROLINA v. MELVIN JACKSON

No. 7728SC892

(Filed 18 April 1978)

1. **Homicide § 28.8— defense of accident—instructions**

The trial court's instructions on accidental homicide were sufficient and not misleading.

2. **Homicide § 11— defense of accident—denial of guilt**

The contention of a defendant charged with homicide that a killing was accidental is not an affirmative defense, but rather a denial of guilt by denying the element of intent.

3. **Homicide § 28.8— defense of accident—application of law to facts**

The trial judge sufficiently applied the law of accident to the facts in a first degree murder prosecution where he admonished the jury that if a reasonable doubt existed as to one or more of the elements of the crime charged and lesser included offenses a not guilty verdict would be required, and the charge as a whole clearly placed the burden upon the State to prove there was no accidental killing.

APPEAL by defendant from *Long, Judge*. Judgment entered 24 August 1977 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 28 February 1978.

Defendant was indicted for first-degree murder. Upon his plea of not guilty, the jury returned a verdict of guilty of voluntary manslaughter. From judgment sentencing him to imprisonment for a term of not less than fourteen years nor more than eighteen years, defendant appeals.

State's evidence tended to show that on 14 March 1977 Officer Kenneth Waldroup, a Buncombe County Deputy Sheriff, answered a call to the apartment of Joyce Peak at 9:53 p.m. accompanied by off-duty police officer Larry Phillips. When they arrived at the residence, the defendant, Melvin Jackson, was standing in the yard. After being advised of his rights, he said: "I shot the man. He was coming on me." The officers entered the apartment to find Winston Lordman at the foot of the stairs apparently dead from what later testimony revealed to be a shotgun wound to the upper left chest. There was blood on the stairs and on the body. No weapon was found about the body.

Evidence for the State further tended to show that a small child on the scene handed Officer Phillips a twelve-gauge shotgun and that a box containing twelve-gauge shotgun shells was found on a bed in an upstairs bedroom by Officer Waldroup. The opinion of an examining pathologist was that Lordman was highly intoxicated at the time of death with a blood alcohol content of .32% and that the wound causing death was a shotgun wound. It was the opinion of the officers that the defendant had not been drinking when they observed him at the scene.

Evidence for the defendant tended to show that Lordman had lived with Joyce Peak for about six and a half years. About one month prior to 14 March 1977, she made him leave. Later, when the defendant started dating Joyce Peak, Lordman often came to her apartment while both were there. Upon arrival he would beat and kick on the door until admitted. Upon admission Lordman several times threatened to kill defendant and Peak if they continued to date. Lordman was much bigger than the defendant and, defendant, to prevent attack, had held a shotgun on him several times.

Further evidence for the defendant tended to show that on 14 March 1977 Lordman came to the apartment while both defendant and Peak were there and banged on the door. They decided to admit him hoping to have a reasonable discussion. Soon, however, defendant and Lordman were engaged in an argument. Lordman began pushing defendant's chest, putting his finger in defendant's face, and attempted to hit him. He also renewed his threat to kill them. Lordman finally went into the kitchen, at the request of Joyce Peak, to talk with her. He insisted that she ask the defendant to leave, but she refused and asked him to leave instead. Lordman refused to leave but the defendant, to avoid further trouble, agreed to leave and went upstairs to get his clothes and shotgun. Lordman started up the stairs making threats as defendant started down with his things. Joyce Peak and her son attempted to stop Lordman but he pulled away. Defendant, on the stairs, threw his clothes down and pointed his shotgun at Lordman. He then told Lordman to leave him alone, and that he did not want to hurt him. Lordman continued up the stairs toward the defendant. The defendant, backing up the steps, fell backward on the steps and the shotgun accidentally fired striking Lordman in the chest.

Additional evidence for the defendant tended to show that Lordman had a reputation for being mean and violent when drinking. Lordman had threatened him on a number of occasions and the defendant knew him to be mean and violent when drinking. Lordman had been drinking heavily on the night of 14 March 1977. The defendant told officers on the scene that night that the shooting was an accident.

Attorney General Edmisten by Associate Attorney Rudolph A. Ashton III for the State.

Peter L. Roda, Public Defender for the Twenty-Eighth Judicial District, for defendant appellant.

MITCHELL, Judge.

The sole question presented by the defendant is whether the court erred in its instruction to the jury regarding the law of accidental homicide and in its final mandate to the jury which did not specifically mention accidental homicide.

[1] Defendant first contends that the court's definition of accident was so condensed that it was probably overlooked by the jury since the other "possible crimes involved were defined at great length as was the defense of self-defense." Defendant further argues that "[t]he court's reference to accident was such that a juror hearing the charge would hardly realize that an accident would excuse the defendant." We do not agree.

The language used by the trial court in the case *sub judice* is as follows:

> Now, members of the jury, I will give to you the law of accident, which is very simple. If Lordman died by accident or misadventure, that is, without wrongful purpose of criminal negligence on the part of the defendant, the defendant would not be guilty. The burden of proving accident is not on the defendant. His assertion of accident is merely a denial that he has committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.

This Court has recently approved an instruction on accidental homicide virtually identical to that used here by the trial court.

State v. Collins, 29 N.C. App. 478, 224 S.E. 2d 647 (1976); *accord*, *State v. McLamb*, 20 N.C. App. 164, 200 S.E. 2d 838 (1973). We find this to be a proper statement of the law and, therefore, sufficient and not misleading.

Defendant next contends that when the trial judge applied the law to the facts no mention was made of accident. He argues that accident was his main defense to the charges against him and that the omission was a matter of law and, therefore, unaffected by trial counsel's failure to object and request further instructions. We do not agree.

[2, 3] The contention of a defendant charged with homicide that a killing was accidental is not an affirmative defense, but rather a denial of guilt by denying the element of intent. *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969); 6 Strong, N.C. Index 3d, Homicide, § 11, p. 549 and cases cited therein. All portions of a trial court's charge to the jury must be construed contextually. *State v. Utley*, 223 N.C. 39, 25 S.E. 2d 195 (1943). 1 Strong, N.C. Index 3d, Appeal and Error, § 50, p. 317. Upon a defendant's assertion that a killing was an accident, the denial of guilt applies to all the charges against the defendant regarding the transaction in question. *State v. McLamb*, 20 N.C. App. 164, 200 S.E. 2d 838 (1973). Therefore, we think and so hold that a sufficient charge was made by the trial court in its final mandate as to first-degree murder, all lesser included offenses, and to self-defense. It admonished the jury that if a reasonable doubt existed as to one or more of the elements a not guilty verdict would be required. We think that this admonition was a sufficient application of the law to the facts here in regard to accident and that the jury was not misled thereby. The trial court clearly put the burden upon the State to prove there was no accidental killing. We also point out that the trial court specifically asked counsel for the defendant if he requested any further instructions to which he replied in the negative.

For the reasons stated, we find

No error.

Judges MORRIS and CLARK concur.

SAMUEL Q. CURRENCE v. FAYE ALICE HARDIN

No. 7726DC477

(Filed 18 April 1978)

1. **Appeal and Error § 49.1— chiropractor's diagnosis excluded—failure of record to show what testimony would have been**

In an action to recover damages for personal injury sustained by plaintiff in an automobile accident, plaintiff failed to show that he was prejudiced by the trial court's refusal to allow a chiropractor to testify with respect to his diagnosis of plaintiff, since plaintiff failed to include in the record what the chiropractor's testimony would have been if he had been allowed to testify.

2. **Rules of Civil Procedure § 59— motion for new trial—discretionary matter**

A motion for a new trial under G.S. 1A-1, Rule 59(a)(6),(7) is addressed to the sound judicial discretion of the trial judge whose ruling in the absence of an abuse of discretion is not reviewable on appeal.

Judge CLARK dissenting.

APPEAL by plaintiff from *Sentelle, Judge*. Judgment entered 4 March 1977 in District Court, MECKLENBURG County. Heard in the Court of Apeals 8 March 1978.

Plaintiff sued defendant for personal damages in the amount of $4,000 and property damages in the amount of $900 which he allegedly suffered as a result of an automobile accident caused by defendant's negligence. Defendant denied liability and asserted as a defense plaintiff's contributory negligence.

Plaintiff's evidence consisted of his testimony and the testimony of Dr. J. Timothy Logan, a chiropractor, who treated plaintiff for the injuries which he received. Plaintiff testified concerning his version of the accident and stated that immediately before the accident his 1970 Ford, which had been wrecked twice before and had approximately 86,000 miles on it, had a fair market value of $1,250 and immediately thereafter had a fair market value of $775; that he sold the car two months after the accident for $775 or $785; that he was treated once by a dentist for his injuries and 20 times by a chiropractor. Dr. Logan testified with respect to his treatment of plaintiff but was not allowed to state a diagnosis.

Defendant testified concerning her version of the accident.

The jury found for plaintiff and awarded him $300 for property damage but nothing for personal injuries. Plaintiff appealed.

Paul J. Williams for plaintiff appellant.

Caudle, Underwood & Kinsey, by C. Ralph Kinsey, Jr., for defendant appellee.

BRITT, Judge.

[1] By his first assignment of error, plaintiff contends the trial court erred in not allowing Dr. Logan to testify with respect to his chiropractic diagnosis of plaintiff. We find no merit in this contention.

In North Carolina chiropractors are allowed to testify as experts in their special field as defined and limited by statute. *Allen v. Hinson*, 12 N.C. App. 515, 183 S.E. 2d 852, *cert. denied* 279 N.C. 726, 184 S.E. 2d 883 (1971). The scope of testimony limited by the *Allen* case was recently expanded by G.S. 90-157.2. However, this statute is not applicable to the present case since it was not ratified until 1 July 1977. 1977 Session Laws C. 1109. (This case was tried in March 1977.) Nevertheless, we are unable to determine whether the proposed testimony of Dr. Logan comes within the case law standard in effect at the time of trial because plaintiff failed to include in the record what Dr. Logan's testimony would have been if he had been allowed to testify. "An exception to the exclusion of evidence will not be sustained when it is not made to appear what the excluded evidence would have been. *Heating Co. v. Construction Co.*, 268 N.C. 23, 149 S.E. 2d 625 (1966)." *State v. Hedrick*, 289 N.C. 232, 237, 221 S.E. 2d 350, 354 (1975). *See Clark v. Clark*, 23 N.C. App. 589, 209 S.E. 2d 545 (1974), *Barringer v. Weathington*, 11 N.C. App. 618, 182 S.E. 2d 239 (1971).

[2] By his second assignment of error, plaintiff contends the trial court erred in failing to grant his Rule 59 motion to set aside the verdict and grant a new trial. We find no merit in this assignment.

We note that at trial plaintiff moved that the verdict be set aside and a new trial be granted on the ground that errors were committed in the trial. On appeal plaintiff does not argue this ground but argues that the court should have granted his motion

on the grounds that the verdict was inadequate and against the greater weight of the evidence.

Assuming, *arguendo*, that plaintiff has properly presented the question he argues in his brief, we conclude that it has no merit. A motion for a new trial under Rule 59(a)(6),(7) is addressed to the sound judicial discretion of the trial judge, whose ruling in the absence of an abuse of discretion is not reviewable on appeal. *Goldston v. Chambers*, 272 N.C. 53, 157 S.E. 2d 676 (1967); *Redevelopment Commission v. Holman*, 30 N.C. App. 395, 226 S.E. 2d 848, *cert. denied* 290 N.C. 778, 229 S.E. 2d 33 (1976); *In re Brown*, 23 N.C. App. 109, 208 S.E. 2d 282 (1974). We perceive no abuse of discretion in this case.

No error.

Judge ERWIN concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

The trial court sustained defendant's objection to the following question: Would you state what your chiropractic diagnosis was after your initial examination of Mr. Currence on this occasion? In my opinion this was prejudicial error.

Dr. Logan examined plaintiff in his office on the same day of the collision in question and regularly thereafter. He previously testified that he had made an initial chiropractic diagnosis. After the ruling of the trial court, the jury was excused for the purpose of discussing the ruling; the trial judge referred to *Allen v. Hinson, supra*, and stated: "I don't think you can get the diagnosis in unless you have competent medical evidence. . . . I don't think you can go any further with this doctor."

I am aware of the basic rule that an exception to an exclusion of evidence will not be sustained when it is not made to appear what the excluded evidence would have been, but this basic rule does not apply when the exclusion is based on the competency of the witness to testify as distinguished from the admissibility of his testimony. Stansbury's N.C. Evidence (Brandis Ed.) § 26.

The question asked for his opinion as to plaintiff's injury or condition within the scope of the field of chiropractic, and not far beyond this field as in *Allen v. Hinson, supra.* Dr. Logan was qualified and competent to answer the question and should have been allowed to do so. I vote to reverse and remand for a new trial.

IN THE MATTER OF: TEMPIE J. JOHNSON

No. 773SC213

(Filed 18 April 1978)

1. **Insane Persons § 12— sterilization proceeding—sufficiency of evidence for jury**

The evidence was sufficient to be submitted to the jury in a proceeding to authorize the sterilization of a mentally retarded person.

2. **Evidence § 14; Insane Persons § 12— sterilization proceeding—examination at instance of petitioner—no physician-patient privilege**

The relationship of physician and patient did not exist within the meaning of G.S. 8-53 where a county department of social services caused respondent to be examined by a mental health clinic staff psychiatrist, and the psychiatrist was properly permitted to testify as to the results of his examination of respondent in a proceeding to authorize the sterilization of respondent.

3. **Insane Persons § 12— sterilization proceeding—instructions on quantum of proof**

The trial judge in a proceeding to authorize sterilization erroneously equated proof by clear, strong and convincing evidence and proof by the greater weight of the evidence when he instructed that proof by clear, strong and convincing evidence "means that you must be persuaded considering all of the evidence that the necessary facts are more likely than not to exist."

4. **Insane Persons § 12— sterilization proceeding—instruction on unsupported theory**

The trial judge in a proceeding to authorize sterilization erroneously instructed the jury on a theory not supported by the evidence when he instructed that the jury should authorize sterilization if it found that respondent would be likely, unless sterilized, to procreate a child who would probably have serious mental, physicial or nervous disease or deficiency.

5. **Insane Persons § 12— sterilization proceeding—instructions on necessity for sterilization laws—expression of opinion**

The trial judge in a proceeding to authorize sterilization expressed an opinion when he gave an explanation in his instructions on the necessity and effect of laws authorizing sterilization.

In re Johnson

APPEAL by respondent from *Walker (Ralph), Judge.* Judgment entered 17 October 1976 in Superior Court, CRAVEN County. Heard in the Court of Appeals 17 January 1978.

The appeal is from a judgment authorizing a sterilization procedure to be performed upon the body of respondent pursuant to G.S. 35-36 et seq. Facts that are considered to be necessary to an understanding of the questions raised on appeal will be set out in the opinion.

Attorney General Edmisten, by Associate Attorney Isaac T. Avery III, for the State.

Beaman, Kellum, Mills & Kafer, by Charles William Kafer and Ronald T. Lindsay, for respondent appellant.

VAUGHN, Judge.

[1] Although we do not set out all of the evidence, we conclude that when the evidence is considered in the light most favorable to petitioner, it is sufficient to take the case to the jury. Respondent's assignments of error based on the alleged insufficiency of the evidence are overruled.

[2] Petitioner, the Craven County Department of Social Services, caused respondent to be examined and evaluated by a staff psychiatrist at the Neuse Mental Health Clinic. He testified that respondent functions at a mildly to moderately retarded level, that she has a functionally limited attention span and that she would be materially impaired in her ability to care for a child. One of respondent's assignments of error is that her objections to the testimony should have been sustained and the evidence excluded because it was privileged under G.S. 8-53. We hold that under the circumstances of this case, the relationship of physician and patient did not exist within the meaning of the statute. *See State v. Hollingsworth*, 263 N.C. 158, 139 S.E. 2d 235 (1964); *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928). Moreover, the judge can compel the testimony notwithstanding a patient-physician relationship if, in his opinion, the same is necessary to a proper administration of justice. Although the trial judge made no express recital of findings that the testimony was necessary to the proper administration of justice, his opinion that such was the case was implicit when he overruled respondent's objection. "It

must be assumed that the judge was aware of the statute when he made the ruling, and that under these circumstances the very act of ruling . . . was in itself a finding that its admission was necessary to a proper administration of justice." *State v. Bryant*, 5 N.C. App. 21, 28-29, 167 S.E. 2d 841, 847 (1969). The assignment of error is overruled.

[3] Respondent does, however, bring forward several assignments of error directed to the judge's charge that do require a new trial. The judge instructed the jury that petitioner had the burden to prove the required facts by clear, strong and convincing evidence. This was in keeping with the mandate of the Supreme Court when it said:

> "[t]he statute does not specify the burden of proof that the petitioner must meet before the order authorizing the sterilization can be entered. In keeping with the intent of the General Assembly, clearly expressed throughout the article, that the rights of the individual must be fully protected, we hold that the evidence must be clear, strong and convincing before such an order may be entered."

In re Moore, 289 N.C. 95, 108, 221 S.E. 2d 307, 315 (1976). After properly instructing the jury that the evidence must be clear, strong and convincing, however, the judge then added:

> "It means that you must be persuaded considering all of the evidence that the necessary facts are more likely than not to exist."

Respondent's exception to that instruction is well taken. The judge, in effect, erroneously equated proof by clear, strong and convincing evidence and proof by the greater weight of the evidence. Indeed, the instruction appears to come verbatim from N.C.P.I.—Civil 101.10, which sets out the suggested instruction on proof by the mere greater weight of the evidence. Moreover, the judge should not attempt to define the term "clear, strong and convincing" in his charge. *McCorkle v. Beatty*, 225 N.C. 178, 33 S.E. 2d 753 (1945). Whether the evidence is clear, strong and convincing is for the jury to resolve.

[4] Another exception to the charge correctly points out that the judge erroneously instructed the jury on a theory not supported by the evidence. The statute provides that before sterilization

procedures can be authorized for a mental defective subject to the act there must be a finding that:

> ". . . because of a physical, mental or nervous disease or deficiency which is not likely to materially improve, the person would probably be unable to care for a child or children, *or* because the person would be likely, unless sterilized, to procreate a child or children which probably would have serious physical, mental, or nervous diseases or deficiencies. . . ." (Emphasis added.) G.S. 35-43.

There was no allegation and no evidence to support a finding on the second ground, the likelihood of procreating a mentally defective child. The judge, nevertheless, repeatedly gave instructions on that part of the statute and included in his final mandate an instruction that the jury answer the issue in favor of petitioner if it found that respondent "would be likely, unless sterilized, to procreate a child who would probably have serious mental, physical, or nervous disease or deficiency." The instruction was erroneous and prejudicial to respondent.

[5] Respondent also excepts to a portion of the charge wherein the judge, at some length, gave an explanation of the necessity and effect of laws authorizing sterilization. Most of what the judge said came directly from the opinion of the Supreme Court on the subject in the case of *In re Moore*, *supra*. The error, however, does not lie in the accuracy of the analysis. The dissertation on the subject by the Supreme Court was appropriately given in support of its legal conclusion that the statute is not repugnant to the Constitutions of the State of North Carolina and the United States of America. When the same argument, however, was made to the jury by the trial judge, it could only result in prejudice to the respondent. It is very likely that it led the jury to believe that the judge felt it should answer the issue in favor of petitioner. It could hardly be said that it aided the jury in finding the truth of the matter at issue. The Supreme Court, of course, "is not bound by the rule forbidding an expression of opinion, and its discussions may not always be embodied in instructions to the jury *in ipsissimis verbis* without danger of infringing the rule." *Carruthers v. R.R.*, 218 N.C. 49, 54, 9 S.E. 2d 498, 501 (1940).

For the reasons stated, there must be a new trial.

New trial.

Judges PARKER and ERWIN concur.

STATE OF NORTH CAROLINA v. LONNIE B. NEWCOMB

No. 7726SC962

(Filed 18 April 1978)

1. **Criminal Law § 10— accessory before the fact—elements**

To justify a conviction of defendant as an accessory before the fact, the jury must find that he aided or advised the party who committed the offense, that he was not present when the offense was committed, and that the principal did commit the offense.

2. **Criminal Law § 10.2— accessory before the fact—sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of being an accessory before the fact to the felonious sale of marijuana.

3. **Criminal Law § 42.6— chain of custody of marijuana**

Where a package of marijuana was sealed by the officer who seized it and was still sealed with no evidence of tampering when it arrived at a laboratory for analysis, the fact that unknown persons may have had access to it does not destroy the chain of custody.

4. **Criminal Law § 102.5— remark by district attorney—absence of prejudice**

Defendant, who was a police officer at the time of the alleged crime, was not prejudiced when the district attorney first referred to him as "Officer" and then stated that he had better say "Mr."

5. **Criminal Law § 96— nonresponsive answers—withdrawal and instruction—absence of prejudice**

Defendant was not prejudiced by a witness's nonresponsive answers where the court on each occasion struck the nonresponsive answer from the record and instructed the jury to disregard it.

APPEAL by defendant from *Lewis, Judge.* Judgment entered 23 August 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 March 1978.

Defendant was indicted and tried for the offense of being an accessory before the fact to the felonious sale of marijuana.

The State's evidence, in summary, tends to show the following. Louise Freeman worked at a cleaning establishment in Charlotte during April, 1977. Defendant was a police officer with whom she was acquainted. She had a conversation with defendant on 13 April 1977 and told defendant that she wanted to buy some marijuana. Defendant agreed to bring marijuana to her at 11:30 a.m. on 15 April. She then called the police, and they sent officers to listen secretly during the 15 April meeting. Defendant appeared at the cleaners at about 11:45 a.m. on 15 April, and Freeman asked for $25.00 worth of marijuana. Defendant expressed concern that Freeman was trying to "bust" him but promised to "have you some brought up here in a little while." Defendant left and a young girl named Venecia Jean Crews appeared in about five minutes. Venecia said, "Lonnie sent me." Shortly thereafter she produced a quantity of marijuana for which Freeman paid her $30.00. Venecia testified that she knew defendant, had worked for him, and that when she saw defendant on 15 April 1977, he asked her to go to the cleaners "and see Louise about $25.00." She went to the cleaners, and Louise Freeman asked for some marijuana. She got some marijuana and sold it to Freeman for $30.00.

Defendant's evidence tended to show that he received information in January, 1977 "that Louise Freeman and some members of the Police Department were going to try to set me up," and that on 21 March 1977, he wrote a letter setting forth this suspicion and gave it to Sherman Sides to hold for him. He got many calls from Louise Freeman asking him to meet her. When he met Freeman she asked to buy marijuana. He "planned to see that Mrs. Freeman got her pot and arrest her for it." He met Venecia Jean Crews and "sent Venecia up there to see if I could get Mrs. Freeman to buy anything, actually buy some grass or pot." He contended that, at all times, he was acting as a police officer.

Defendant was convicted as charged, and judgment imposing a prison sentence was entered.

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

E. Clayton Selvey, Jr., for defendant appellant.

VAUGHN, Judge.

[1, 2] Several of defendant's assignments of error are directed to the sufficiency of the evidence. To justify the conviction of defendant as an accessory before the fact, the jury must find that he aided or advised the parties who committed the offense, that he was not present when the offense was committed, and that the principal did commit the offense. *State v. Sauls*, 291 N.C. 253, 230 S.E. 2d 390 (1976), *cert. den.*, 431 U.S. 916, 97 S.Ct. 2178, 53 L.Ed. 2d 226 (1977); *State v. Bass*, 255 N.C. 42, 120 S.E. 2d 580 (1961). Venecia Crews admitted that she sold marijuana. All the witnesses agreed that defendant was not present when the sale was made. Defendant testified that, "I sent Venecia up there to see if I could get Mrs. Freeman to buy anything, actually buy some grass or pot." This evidence was sufficient to present to the jury.

[3] Defendant also assigns as error the admission of the marijuana into evidence. He argues that "a constant chain of custody" was not established. Although we have not recited all of the evidence, it suffices to say that the chain of custody was properly established. Where a package of evidence is properly sealed by the officer who gathered it and is still sealed with no evidence of tampering when it arrives at the laboratory for analysis, the fact that unknown persons may have had access to it does not destroy the chain of custody. *State v. Jordan*, 14 N.C. App. 453, 188 S.E. 2d 701 (1972), *cert. den.*, 281 N.C. 626, 190 S.E. 2d 469.

[4] During cross-examination of defendant the district attorney referred to him as Officer Newcomb and then corrected himself with "I better say Mr. Newcomb . . . ." Objection was sustained. Defendant now argues that the district attorney intended to humiliate him and that the prejudice could not be removed from the jury's consideration. We doubt that addressing defendant as "Mr." instead of "Officer" had the slightest influence on the jury in favor of either defendant or the State. Certainly, it is not cause for a new trial.

[5] Defendant makes assignments or error relating to the effect on the jury of certain nonresponsive answers to the State's questions. The court repeatedly cautioned the witness Freeman to limit her answers to the question asked. Each time she did not do so, the court promptly struck her answer from the record and in-

structed the jury to disregard it. "Ordinarily it is presumed that the jury followed such instruction and the admission [of evidence later struck from the record] is not held to be reversible error unless it is apparent from the entire record that the prejudicial effect of it was not removed from the minds of the jury by the court's admonition." *Smith v. Perdue*, 258 N.C. 686, 690, 129 S.E. 2d 293, 297 (1963). There is no reason to believe, based on this record, that the jury depended upon this evidence in any way to arrive at the verdict. *See also State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970).

Many of defendant's other exceptions are taken to the district attorney's argument to the jury. He contends that the district attorney argued matters that were not in evidence and matters of personal opinion. We first point out that ordinarily it is the defendant's duty to object to improper argument. *State v. Peele*, 274 N.C. 106, 161 S.E. 2d 568 (1968), *cert. den.*, 393 U.S. 1042, 89 S.Ct. 669, 21 L.Ed. 2d 590 (1969). In this case, where defendant objected to argument based on facts he contended were not in evidence, his objection was sustained, and the jurors were cautioned to find the facts from their own recollection.

> "The manner of conducting the argument of counsel, the language employed, the temper and tone allowed, must be left largely to the discretion of the presiding judge. He sees what is done, and hears what is said. He is cognizant of all the surrounding circumstances, and is a better judge of the latitude that ought to be allowed to counsel in the argument of any particular case." *State v. Barefoot*, 241 N.C. 650, 657, 86 S.E. 2d 424, 429 (1955).

We have considered defendant's remaining assignments of error. No error that would require a new trial has been shown.

No error.

Judges PARKER and WEBB concur.

STATE OF NORTH CAROLINA v. GEORGE HOWARD TILLMAN

No. 7726SC931

(Filed 18 April 1978)

1. **Narcotics § 4.5— defendant as agent of drug enforcement administration—instruction on entrapment improper**

In a prosecution for possession of heroin and possession of heroin with intent to sell, where defendant attempted to show that his possession was a legitimate part of his work with drug law enforcement, the trial court erred in instructing the jury on the defense of entrapment rather than in charging them on the lawful possession of drugs by one working for a law enforcement agency.

2. **Narcotics § 4.5— defendant as agent of drug enforcement administration—requested instruction improper**

In a prosecution for possession of heroin and possession of heroin with intent to sell, defendant who claimed to work as an informant for the Drug Enforcement Administration and the Charlotte Police Department was not entitled to an instruction that he should be found not guilty if he "possessed heroin with the intention of making a case against someone, regardless of whether or not he had been advised to do so by the officers," but defendant was entitled to an instruction that under the provisions of G.S. 90-101(c)(5) he might lawfully possess the heroin if he were acting as an agent of an agency charged with enforcing the drug laws of this State and he were acting within the course and scope of his official duties.

APPEAL by defendant from *Lewis, Judge*. Judgment entered 26 August 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 March 1978.

Defendant was indicted for possession of heroin and possession of heroin with intent to sell. He had been apprehended at the residence of his co-defendant, Gloria Williams, on 28 June 1977 by officers serving a search warrant on Williams. He had heroin in his possession at that time.

The defendant offered testimony that he was a paid informant for the Drug Enforcement Administration and also worked with the Charlotte Police Department and the State Bureau of Investigation. He further testified that he worked by purchasing some drugs and taking them back to the D.E.A. office where they were evaluated. If the D.E.A. approved, he would then take an undercover agent to his source to make another purchase. He asserted that the heroin in his possession had been purchased by

him for delivery to the D.E.A. and that shortly before his arrest he had attempted to call the D.E.A. in Phoenix and in Greensboro but had been unable to reach his contact at either office.

A Charlotte police officer and two employees of the Drug Enforcement Administration testified that defendant was, indeed, an informant whose testimony had been used in several drug trials. The two men from the D.E.A. testified that other field offices, including those in Washington, Phoenix and Philadelphia, had employed defendant's services in connection with the traffic in illegal drugs. One of the agents admitted that he had paid defendant $300.00 just four days prior to his arrest on the present charge. Both of the agents testified that they had never authorized defendant to possess or sell heroin when not accompanied by a D.E.A. employee.

Defendant was found guilty of possession of heroin with intent to sell it. He was sentenced to eight to ten years in prison.

Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin, for the State.

Harkey, Faggart, Coira & Fletcher, by Philip D. Lambeth, for defendant appellant.

VAUGHN, Judge.

[1] Defendant brings forward one assignment of error. He contends that the court erred in instructing the jury on the defense of entrapment rather than in charging them on the lawful possession of drugs by one working for a law enforcement agency. We agree. There is no evidence of entrapment in this case. Before a court should instruct a jury concerning the defense of entrapment, there must be some evidence to support the contention that the defendant's criminal intent was formed by him only after such persuasion or inducement or trickery that except for such persuasion or trickery he would not have committed the crime. *State v. Burnette*, 242 N.C. 164, 87 S.E. 2d 191, 52 A.L.R. 2d 1181 (1955); *see State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975). In this case defendant alleged and offered evidence to prove that he had no criminal intent at all, not that his criminal intent was formulated at the insistence of some law enforcement official. He attempted to show that his possession was a legitimate part of his work with drug law enforcement.

In addition to showing that an instruction was erroneously given, the defendant must show that the instructions as given materially prejudiced him. *Garland v. Penegar*, 235 N.C. 517, 70 S.E. 2d 486 (1952). The record shows such prejudice. Defendant had admitted possession of the heroin. He had offered evidence attempting to show that his possession was lawful. An entrapment defense excuses otherwise *unlawful* possession. Since the challenged charge on entrapment was the only instruction given on lawful possession, the jury could only have understood that unless defendant were entrapped (with no evidence that he was), he could not have been in lawful possession of the drug.

[2] Defendant also asked for an instruction that he should be found not guilty if he "possessed heroin with the intention of making a case against someone, regardless of whether or not he had been advised to do so by the officers." The requested instruction was clearly incorrect. Defendant was, however, entitled to an instruction that under the provisions of G.S. 90-101(c)(5) he might lawfully possess the heroin if he were acting as an agent of an agency charged with enforcing the drug laws of this State and he were acting within the course and scope of his official duties. There is some evidence, however dubious, that he was an agent of the Drug Enforcement Administration and the Charlotte Police Department. Whether he was such an agent and was acting within the course and scope of his duties at the time of his arrest is a question for the jury to decide upon proper instructions from the court.

New trial.

Judges PARKER and WEBB concur.

STATE OF NORTH CAROLINA v. RUSSELL NATHANIEL COCHRAN

No. 7726SC786

(Filed 18 April 1978)

Burglary and Unlawful Breakings § 5.8— breaking and entering—intent to commit larceny—sufficiency of evidence

The evidence was sufficient to support an inference that a breaking and entering was with an intent to commit larceny where it tended to show that

defendant and a companion discussed breaking into a dwelling; defendant acted as a lookout while his companion pushed in the glass on a door of the dwelling and reached in to unlock the door; and only the sounding of a burglar alarm caused defendant and his companion to leave the scene.

APPEAL by defendant from *Baley, Judge.* Judgment entered 12 July 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 30 January 1978.

Defendant was charged in a bill of indictment with feloniously breaking and entering a building occupied by Douglas M. Bostic with intent to commit the felony of larceny therein. Defendant entered a plea of not guilty. Evidence for the State, which must be taken as true in ruling on a motion for judgment as of nonsuit, is summarized below.

Douglas Bostic, resident of Mecklenburg County, turned on his burglar alarm when he left home at approximately 7:00 a.m. 16 December 1976. A neighbor heard the alarm go off about 1:00 p.m. that day and called the police. One of the back doors had a panel pushed out. Shortly after the alarm was heard, witnesses observed a white 1969 Chevrolet station wagon with two C.B. radio antennae near the house.

The same day Officer D. R. McCrary stopped a car answering that description. Defendant was in the back seat of the car when it was stopped, and there were three other occupants. In response to questioning, defendant stated that he and Miller were involved in the break-in and that the other two passengers were not involved. Miller actually broke in while he (Cochran) was the lookout man. Defendant later signed a written statement. The statement revealed that he and Miller were looking for a Christmas tree when they began discussing the break-in. He watched while Miller pushed in the glass and reached in to unlock the door. When the burglar alarm went off, they ran.

Attorney General Edmisten by Assistant Attorney General William B. Ray, for the State.

Paul J. Williams for the defendant appellant.

MORRIS, Judge.

Defendant contends that the trial court erred in denying his motion for judgment as of nonsuit as to felonious breaking and

entering because there was insufficient evidence of intent to commit larceny. In ruling on a motion to nonsuit the court is to consider evidence in the light most favorable to the State and give the State the benefit of every reasonable inference. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). If there is more than a scintilla of competent evidence to support the allegations of the indictment, the court must submit the case to the jury. *State v. Jenkins*, 1 N.C. App. 223, 161 S.E. 2d 45 (1968). Thus, defendant's motion for judgment as of nonsuit was properly denied if, giving the State benefit of every reasonable inference, there was more than a scintilla of evidence of an intent to commit larceny.

Everyone who enters into a common plan is equally guilty whether he actually commits the acts or merely stands by with the intent to lend his aid if his aid becomes necessary. *See State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182 (1973); *State v. Lovelace*, 272 N.C. 496, 158 S.E. 2d 624 (1968). Here there was evidence of a common design or plan. The defendant admitted on the stand that he and Miller discussed breaking into the house. Both his oral and written statements to the police revealed that he functioned as the lookout man. The defendant's role was, therefore, an integral part of the common design.

It is obvious that intent ordinarily must be proved by circumstances, acts, and conduct. *State v. Accor*, 277 N.C. 65, 175 S.E. 2d 583 (1970); *State v. Bronson*, 10 N.C. App. 638, 179 S.E. 2d 823 (1971). This Court, as well as our Supreme Court, has held that in absence of any other proof or evidence of lawful intent, one can reasonably infer an intent to commit larceny from an unlawful entry into another's dwelling in the nighttime. *State v. Redmond*, 14 N.C. App. 585, 188 S.E. 2d 725 (1972). *See also State v. Accor, supra.* We see no logical reason to make any distinction when the breaking and entering is in the daytime. In this case, there was an unlawful entry into another's dwelling, and there was no showing of any lawful motive. By defendant's own statement, the sounding of the burglar alarm was the only thing which deterred them. These facts, without more, produce the reasonable inference of an intent to commit larceny. That inference was sufficient to carry the case to the jury.

We, therefore, conclude that defendant's contention is without merit. In the denial of defendant's motion we find

No error.

Judges VAUGHN and ERWIN concur.

DANIEL E. WILLIAMS v. CAROLINA POWER & LIGHT COMPANY

No. 7720SC545

(Filed 18 April 1978)

Electricity § 8— ladder coming into contact with power lines—contributory negligence of plaintiff

In an action to recover for damages sustained by plaintiff when a ladder which he was handling came in contact with an electrical line maintained by defendant, summary judgment was properly entered for defendant where it appeared that plaintiff knew of the presence of the wires, cautioned his co-worker not to allow the ladder to contact the wires, and was himself negligent in touching the wire with the ladder.

APPEAL by plaintiff from *Wood, Judge.* Judgment entered 2 March 1977, in Superior Court, ANSON County. Heard in the Court of Appeals 31 March 1978.

In summary the pertinent allegations of plaintiff's complaint are as follows:

On 22 January 1973, plaintiff undertook to repair a gutter on a house belonging to Frank Tucker. In order to repair the gutter, plaintiff had to place an aluminum ladder, 30 feet long, against the house. During the progress of plaintiff's work, the ladder came in contact with uninsulated lines and wires maintained by defendant. Defendant was negligent in maintaining uninsulated, high voltage power lines, at such a place and at such height, and in failing to warn plaintiff or Frank Tucker of the dangerous wires. Plaintiff sought $400,000 actual damages and $1,200,000 in punitive damages.

Defendant answered and averred, among other things, that plaintiff was contributorily negligent in attempting to take down the 36' aluminum ladder which had been wired so as not to be collapsible. Pursuant to G.S. 1A-1, Rule 56, defendant moved for summary judgment and, from summary judgment for defendant, plaintiff appeals.

Henry T. Drake for plaintiff appellant.

Fred D. Poisson and E. Avery Hightower for defendant appellee.

ARNOLD, Judge.

The sole question for consideration on this appeal is whether the trial judge properly entered summary judgment for defendant. Under G.S. 1A-1, Rule 56, summary judgment is proper where there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897, rehearing denied, 281 N.C. 516, --- S.E. 2d --- (1972). In a negligence action, summary judgment for defendant is proper where the evidence fails to establish negligence on the part of defendant, establishes contributory negligence on the part of plaintiff, or establishes that the alleged negligent conduct was not the proximate cause of the injury. *Bogle v. Power Co.*, 27 N.C. App. 318, 219 S.E. 2d 308 (1975), *cert. denied* 289 N.C. 296, 222 S.E. 2d 695 (1976).

Our courts, in *Floyd v. Nash*, 268 N.C. 547, 151 S.E. 2d 1 (1966) (per curiam), and *Lambert v. Power Co.*, 32 N.C. App. 169, 231 S.E. 2d 31, *cert. denied* 292 N.C. 265, 233 S.E. 2d 392 (1977), have dealt with problems similar to the one before us. In *Floyd*, plaintiff's intestate died as a result of electrical shock when the blower tank of his truck came in contact with the uninsulated electrical wires of the defendant power company. The court, in affirming a judgment of nonsuit for each defendant, held that plaintiff's intestate was contributorily negligent as a matter of law.

> "Even if negligence by either of these defendants could reasonably be inferred upon the evidence in this record, the evidence leads inescapably to the conclusion that the deceased . . . was guilty of contributory negligence. Knowing of the presence of the power line, and having filled this tank on many previous occasions, the deceased, for some unknown reason, permitted the metal blower pipe . . . to come in contact with the power line. This tragic lapse of attention to a known danger in the immediate vicinity must be deemed negligence by the deceased." 268 N.C. at 551, 151 S.E. 2d at 4.

In *Lambert, supra,* plaintiff sustained serious injuries as a result of electrical shock while he was putting a new facing on an outdoor advertising sign. Again, the evidence showed that plaintiff was aware of the electrical wire but misjudged how close he was to it. This Court held that plaintiff was contributorily negligent as a matter of law and affirmed summary judgment in favor of defendant.

Based on these cases, we conclude that the trial court properly granted summary judgment for defendant. While it appears that plaintiff in this case, unlike the injured parties in *Floyd* and *Lambert,* had not been to the scene of the accident before the day of the injury, it is clear from the record that he had knowledge of the presence of the wires. In a deposition of the plaintiff which was submitted in support of defendant's motion, the plaintiff stated:

"Q. Did you see the wires?

"A. Yes, sir.

"Q. Did you and Mr. Vickery [plaintiff's co-worker] talk about those wires?

"A. The best I remember, I told him to make sure that we didn't let the ladder hit the wires.

"Q. Why did you tell him that?

"A. Well, I don't want to hit a wire no matter where it's at, you know, with a ladder.

"Q. You know what it can do to you?

"A. Yes, sir."

Since plaintiff had previously cautioned his co-worker not to allow the ladder to contact the wires, his own conduct thereafter in removing the ladder is evidence which establishes a "tragic lapse of attention to a known danger," *Floyd v. Nash, supra,* and constituted negligence as a matter of law. *See also Bogle v. Power Co., supra.*

Summary judgment for defendant is, therefore

Affirmed.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. EARL "BUBBA" WALLACE

No. 7719SC1012

(Filed 18 April 1978)

1. **Criminal Law § 90.1— State's introduction of defendant's exculpatory statements**

The State is not bound by the exculpatory portions of a confession which it introduces if there is other evidence which tends to throw a different light on the homicide.

2. **Homicide § 21.8— second degree murder—State's introduction of defendant's exculpatory statement**

The evidence was sufficient to be submitted to the jury in a second degree murder case where the State introduced defendant's statement to an officer that he stabbed deceased with a knife after deceased attacked him with a stick; the State introduced further evidence that defendant left the scene of the killing promptly after it occurred, that when he was arrested a short time later there were no marks on his body to corroborate his statement that deceased had struck him with a stick, and that a prompt search of the area failed to reveal the presence of a stick; and the nature of the wound defendant inflicted on deceased was such as to give rise to a permissible inference that excessive force was used.

APPEAL by defendant from *Collier, Judge*. Judgment entered 9 August 1977 in Superior Court, CABARRUS County. Heard in the Court of Appeals 4 April 1978.

Defendant was indicted for the first degree murder of Howard Richard Ford. The State elected to try defendant for second degree murder or any lesser included offense. He pled not guilty.

The State presented evidence to show that Ford died as result of a stab wound in the chest, and presented the testimony of a police officer that defendant admitted he inflicted the wound after Ford had hit him with a stick. Defendant testified at the trial that he stabbed Ford in the chest with his pocket knife, but testified that he did so only after Ford had committed an unprovoked assault on him and had struck him three times on the head with a stick. Defendant testified:

> I cut him with the knife one time. I was not trying to kill the man. I was trying to get him away from me.

* * *

> . . . When I stabbed him, I meant to fight my way out of that stick hitting. I guess I intended to stab him in the chest with this knife. . . .
>
> * * *
>
> I intended to stick the knife in him anywhere because he was whupping me. He was hurting me. He liked to have buckled me to my knees.

There was evidence that prior to the fight defendant and Ford had been life-long friends, that at the time of his death Ford had .19 percent of alcohol in his blood, and that defendant had been drinking. The stabbing occurred about four o'clock on the afternoon of 7 May 1976 in the yard of the Jim Little house, a house which had "a reputation in the community as being a bootlegger house." Defendant was arrested about 4:15 on the same afternoon on the street near his home, which was about five to seven blocks from the place where the stabbing occurred.

There was also evidence that when defendant was arrested shortly after the killing, the officers did not observe any cuts or bruises on or about his body or face. The officers searched for but were unable to find the stick with which defendant said Ford had struck him. There were no eyewitnesses to the stabbing.

The jury found defendant guilty of voluntary manslaughter. From judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Associate Attorney Douglas A. Johnston for the State.

Koontz, Horton & Hawkins by Clarence E. Horton, Jr., for defendant appellant.

PARKER, Judge.

Appellant raises but one question on this appeal, whether the evidence was sufficient to take the case to the jury. Citing *State v. Johnson*, 261 N.C. 727, 136 S.E. 2d 84 (1964), he contends that the State's evidence and his own evidence is to the same effect and that all of the evidence tends to exculpate him. From this, he argues that his motions for dismissal should have been allowed. We do not agree.

State v. Johnson, supra, is easily distinguishable on its facts. In that case, a murder prosecution, the State's only evidence that defendant committed the homicide was a confession which established a perfect self-defense. Circumstantial evidence corroborated this, and defendant's evidence at trial was to the same effect. Thus, in that case there was no evidence which tended to contradict or impeach the exculpatory portion of defendant's confession or her testimony at trial that she acted lawfully in self-defense.

[1, 2] The facts of the present case are quite different and bring this case within the rule that the State is not bound by the exculpatory portions of a confession which it introduces if there is other evidence which tends to throw a different light on the homicide. *See State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds, Hankerson v. North Carolina,* 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977). In the present case there was such evidence. There was evidence that defendant left the scene of the killing promptly after the homicide, that when he was arrested a short time later there were no marks on his body to corroborate his statement that the deceased had hit him on the head with a stick, and that a prompt search of the area failed to reveal the presence of the stick. Finally, even if the deceased had assaulted defendant in the manner described by defendant, the nature of the wound which defendant admitted he inflicted on the deceased is such as to give rise to a permissible inference that excessive force was used. In view of all of the evidence, we hold that the case was one for the jury. Since no exception was taken to the court's charge to the jury, it is presumed that the case was submitted to the jury under proper instructions.

No error.

Judges VAUGHN and WEBB concur.

STATE OF NORTH CAROLINA v. JESSIE BROWN

No. 776SC993

(Filed 18 April 1978)

Narcotics § 5— possession of marijuana with intent to sell—sale of marijuana—separate offenses—conviction for only one proper

In a prosecution for possession of marijuana with intent to sell and sale of marijuana where both offenses arose out of the same course of conduct, it was not error for the court to declare a mistrial on the charge of possession with intent to sell upon the jury's inability to agree on a verdict and for the court to accept the jury's verdict finding defendant guilty of sale of marijuana, since the offenses charged were separate and distinct statutory offenses, neither being a lesser included offense of the other, and since inconsistent verdicts do not require a reversal.

APPEAL by defendant from *James, Judge*. Judgment entered 11 May 1977 in Superior Court, BERTIE County. Heard in the Court of Appeals 31 March 1978.

Defendant was tried upon his plea of not guilty to the charges contained in two indictments. The first charged him with possession of marijuana with intent to sell, and the second charged him with the sale of marijuana. At trial, the State presented evidence to show that on 15 January 1977, W. P. Bateman, an agent for the State Bureau of Investigation, purchased a plastic bag containing less than one ounce of marijuana from defendant for the price of twenty dollars. Defendant denied the transaction.

The jury, through its foreman, returned verdicts of guilty as charged. However, when the jury was polled, one juror indicated his lack of assent to one of the verdicts. The juror agreed that defendant was guilty of the sale of marijuana, but as to the charge of possession with intent to sell, the juror found defendant guilty only of possession. The court then instructed the jury to resume its deliberations, but no agreement was reached regarding a verdict on the charge of possession with intent to sell. When the jury announced that no agreement could be reached, the court withdrew the juror and declared a mistrial on the charge of possession of marijuana with intent to sell. Having previously accepted the unanimous verdict finding defendant guilty of sale of marijuana, the court entered judgment imposing a prison sentence in that case. From this judgment, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Sandra M. King for the State.

Ralph G. Willey III and Carter W. Jones for defendant appellant.

PARKER, Judge.

Both charges arose out of a single transaction, and defendant contends that the court erred when it entered judgment on the charge of sale of marijuana after declaring a mistrial on the charge of possession of marijuana with intent to sell. He contends that under the evidence he was either guilty of both offenses or not guilty of both, and that the jury could not logically find him guilty of the offense of sale of marijuana unless it also found that he illegally possessed that marijuana with intent to sell it. From this he reasons that the court should have declared a mistrial in both cases and that it erred by entering judgment on the jury's verdict finding him guilty only on the charge of the sale of marijuana. We find no error.

The offenses charged in the two indictments, though closely related, were separate and distinct statutory offenses, neither being a lesser included offense of the other. *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973); *State v. Yelverton*, 18 N.C. App. 337, 196 S.E. 2d 551 (1973). It is true that the same act led to both charges, and the evidence would logically have supported verdicts finding defendant guilty of both. Nevertheless, defendant's conviction on only one will be upheld. Inconsistent verdicts do not require a reversal. *State v. Black*, 14 N.C. App. 373, 188 S.E. 2d 634, *appeal dismissed*, 281 N.C. 624, 190 S.E. 2d 467 (1972); *State v. Lindquist*, 14 N.C. App. 361, 188 S.E. 2d 686 (1972).

No error.

Judges VAUGHN and WEBB concur.

ERVIN R. DAVIS REALTY, INC. v. CITY OF HIGH POINT

No. 7718SC585

(Filed 18 April 1978)

Appeal and Error § 6.9— pretrial orders—no immediate appeal

Pretrial orders declaring certain evidence admissible or inadmissible and purporting to fix what the rule of damages should be at trial are not immediately appealable.

APPEAL by plaintiff from *Collier, Judge.* Order entered 24 May 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 6 April 1978.

In this condemnation proceeding the plaintiff property owner filed a pretrial motion to exclude certain evidence upon the trial. After a hearing, the court entered an order denying the motion and fixing what the measure of damages should be upon the trial of the case. From this order, plaintiff filed notice of appeal.

Morgan, Post, Herring & Morgan by Edward N. Post for appellant.

Knox Walker for appellee.

PARKER, Judge.

A pretrial order declaring certain evidence admissible or inadmissible is indeterminate and subject to later modification. *Knight v. Power Co.*, 34 N.C. App. 218, 237 S.E. 2d 574 (1977). The same is true of a pretrial order purporting to fix what the rule of damages should be at the trial. *Green v. Insurance Co.*, 250 N.C. 730, 110 S.E. 2d 321 (1959). Such orders are not immediately appealable. 1 Strong's N.C. Index 3rd, Appeal and Error, § 6.9.

Appeal dismissed.

Judges VAUGHN and WEBB concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 APRIL 1978

DOYLE v. DOYLE No. 771DC524	Pasquotank (76CVM465)	No error
IN RE BRYMER No. 7727DC515	Gaston (77SP276)	Reversed
LEITH LINCOLN-MERCURY v. MOORE No. 7710SC556	Wake (73CVS11157)	Affirmed
MENDENHALL v. MENDENHALL No. 7721DC252	Forsyth (75CVD2427)	New Trial
SMITH v. SMITH No. 7719DC438	Randolph (75CVD760)	Remanded
STATE v. ALSTON No. 7718SC1039	Guilford (76CRS73207) (76CRS73208)	No error Appeal Dismissed
STATE v. BOYD No. 774SC800	Onslow (76CRS18269) (76CRS18268)	No error
STATE v. CLIFTON No. 7726SC1010	Mecklenburg (77CR27733)	No error
STATE v. EASTERLING No. 7716SC1038	Scotland (76CR5706)	No Error
STATE v. THACKER No. 7726SC921	Mecklenburg (76CR54056)	No Error
STATE v. TWIDDY No. 771SC987	Pasquotank (76CR3102)	No Error
STATE v. WAINWRIGHT No. 772SC789	Beaufort (77CRS1370)	No Error
STATE v. WORRELLS No. 7711SC891	Johnston (76CRS9882)	Affirmed
SUMMERS v. SUMMERS No. 7722DC565	Iredell (76CVD0484)	Affirmed

WILLIAM F. CARROLL v. H. HORTON ROUNTREE

No. 763SC989

(Filed 2 May 1978)

Attorneys at Law § 5.1; Fraud § 12— attorney's misrepresentation to client—rebuttal of fraud

In an action to recover punitive damages on the ground that defendant attorney breached his fiduciary obligation to plaintiff by failing to withhold delivery of a check to plaintiff's estranged wife until she had signed a separation agreement and a stipulation of dismissal of an alimony action and subsequently misrepresenting to plaintiff that his wife had signed the documents, any presumption of fraud arising from the attorney-client relationship was rebutted at the hearing on motion for summary judgment, and summary judgment was properly entered for defendant on the issue of fraud where it appears that defendant performed the services for which he was paid a reasonable fee; defendant's affidavit stated that he followed the customary practice of attorneys in his area by forwarding the check to the wife's attorney, who was responsible for obtaining the wife's signature on the documents before disbursing funds to her, and that he advised plaintiff that his wife had signed the documents because he thought everything had been accomplished; it was undisputed that as soon as defendant learned that plaintiff's wife had failed to sign the documents, he initiated successful procedures to have the wife's alimony action dismissed; it was also undisputed that plaintiff obtained a divorce without intervention by his wife; and plaintiff presented no affidavits or other materials to contradict defendant's evidence.

PLAINTIFF appealed from judgment entered by *Judge Webb* 11 October 1976 in Superior Court, PITT County. The appeal was heard in this Court on 24 August 1977, and opinion therein was filed 5 October 1977. 34 N.C. App. 167, 237 S.E. 2d 566 (1977). Plaintiff filed petition to rehear. The petition was granted, and the matter was heard on the petition to rehear on 3 February 1978.

The facts necessary for determination of this matter are set out in the previous opinion. We will not restate them here. By his petition to rehear, plaintiff contends that the Court "misapprehended points of fact and law in affirming the trial court's entry of summary judgment against the plaintiff as to Count III of plaintiff's cause of action against the defendant for punitive damages." The same contention is made with respect to Count II of plaintiff's cause of action against defendant for mental and emotional distress.

Nye, Mitchell & Bugg, by John E. Bugg, for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey and Clay, by Ronald C. Dilthey, for defendant appellee.

MORRIS, Judge.

Plaintiff, in his brief, discusses Count III first. We shall follow his order.

By Count III of his complaint after adopting the allegations of Counts I and II, plaintiff alleges that "the reckless, careless, intentional, malicious and gross actions of the defendant in violation of his fiduciary duties owed unto the plaintiff entitles the plaintiff to punitive damages in a sum of not less than $200,000.00." In his brief plaintiff argues that this Court failed to understand the allegations and erroneously applied the law. He urges that "what is material is that the plaintiff alleged that the defendant knowingly misrepresented to him on October 23, 1972, that the subject instruments had been signed when they had not been signed." We note in passing that this misrepresentation occurred several months after the alleged breach.

We think plaintiff's position was clearly encompassed in the discussion of the question of punitive damages in our original opinion when we said:

> "Here plaintiff alleges that defendant failed to hold the funds until plaintiff's wife had signed all the documents she was supposed to sign. He further alleges that subsequently defendant misrepresented the facts by advising plaintiff that everything had been done in accordance with the agreement, and that the breach of contract was in violation of defendant's fiduciary obligations which he attempted to cover up 'by misrepresentation and gross lies'. . . ." 34 N.C. App. at 176, 237 S.E. 2d at 573.

Plaintiff further contends that, because of the fiduciary relationship, a presumption of fraud exists and that this position was not discussed in the original opinion. For purposes of specificity and possible clarification, we will discuss this contention more fully.

"The law is well settled that in certain known and definite 'fiduciary relations, if there be dealing between the parties, on the complaint of the party in the power of the other, the relation of itself and without other evidence, raises a presumption of fraud, as a matter of law, which annuls the act unless such presumption be rebutted by proof that no fraud was committed, and no undue influence or moral duress exerted.' *Lee v. Pearce*, 68 N.C., 76. Among these, are, (1) trustee and *cestui que trust* dealing in reference to the trust fund, (2) attorney and client, in respect of the matter wherein the relationship exists, (3) mortgagor and mortgagee in transactions affecting the mortgaged property, (4) guardian and ward, just after the ward arrives of age, and (5) principal and agent, where the agent has entire management so as to be, in effect, as much the guardian of his principal as the regularly appointed guardian of an infant. *Abbitt v. Gregory*, 201 N.C., 577 (at p. 598); *Harrelson v. Cox*, 207 N.C., 651, 178 S.E., 361; *Hinton v. West*, 207 N.C., 708, 178 S.E., 356; *McLeod v. Bullard*, 84 N.C., 515, approved on rehearing, 86 N.C., 210; *Harris v. Carstarphen*, 69 N.C., 416; *Williams v. Powell*, 36 N.C., 460.

. . .

The doctrine rests on the idea, not that there *is* fraud, but that there *may be* fraud, and gives an artificial effect to the relation beyond its natural tendency to produce belief. *Peedin v. Oliver*, 222 N.C., 665; *Harris v. Hilliard*, 221 N.C., 329, 20 S.E. (2d), 278." *McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E. 2d 615, 616 and 617 (1943). *See also Tatom v. White*, 95 N.C. 453 (1886); 2 Stansbury, N.C. Evidence, Brandis Revision, § 225.

This presumption of fraud is a *presumption of law*, not a presumption of fact. Furthermore, it is a *rebuttable* presumption. *Lee v. Pearce*, 68 N.C. 76, 87 (1873). Thus, assuming that the presumption of fraud arises in this case, the question before this Court is whether that presumption has been rebutted. To determine whether it has been rebutted we must examine the interrogatories and affidavits presented.

Plaintiff employed defendant prior to 8 May 1972 "in order to resolve the marital problems existing between the plaintiff and

his wife". On 17 July 1972, defendant wrote to plaintiff enclosing a check for $10,469.01 and an accounting of the proceeds of the sale of the family farm. From plaintiff's share of $21,938.02, defendant showed that he had paid plaintiff's wife, in accordance with their agreement, $10,969.01 and had deducted $500 as his fee, leaving a balance of $10,469.01 to be remitted to plaintiff. He also advised plaintiff that "we have completely disposed of this case (wife's suit against plaintiff) by dismissal plus a separation agreement plus a deed to the 1/10th acre." On 23 October 1973, defendant wrote to plaintiff as follows:

> "With reference to your letter of October 14, 1972, your wife, Elizabeth *did* sign the Deed of Separation and also a Judgment dismissing the non-support action against you. I assume that it would be in order for you to go ahead and get your divorce at this time, as the year is now up. I would suggest that you get the divorce, if you possibly can, up there. I assume that Elizabeth will *not* contest it, since she *has been* paid completely."

No question is raised with respect to the last statement since the wife had been fully paid. However, the statements that "Elizabeth did sign the deed of separation and also a judgment dismissing the nonsupport action against you" were false.

Pertinent interrogatories propounded to defendant by plaintiff and the answers of defendant are here set out:

> "3. On July 17, 1972 had the defendant completely disposed of plaintiff's case by dismissal plus a Separation Agreement as set forth in the defendant's letter of July 17, 1972?"
>
> "Defendant thought the separation agreement and the stipulation of dismissal had been signed. Unknowingly to defendant, plaintiff's wife had not signed the separation agreement, although her attorney had signed the stipulation of dismissal to District Court action."
>
> "4. If the answer to the foregoing is in the negative, state whether or not it is a customary and accepted practice by attorneys to write such a letter to a client as was contained in Exhibit D to the Complaint."
>
> "Under these circumstances, yes."

"5. As of October 23, 1972 had the plaintiff's wife actually signed the Deed of Separation and also a judgment dismissing the nonsupport action against the plaintiff as represented in the defendant's letter of October 23, 1972, Exhibit E to the Complaint?"

"No."

"6. If the answer to the foregoing interrogatory is in the negative, is it customary and accepted practice by attorneys to write such a letter as the letter of October 23, 1972 to a client?"

"My letter of October 23, 1972 attempted to set forth my advice to the plaintiff in regard to his inquiries contained in his letter of October 14, 1972 concerning his obtaining a divorce from his wife. I had been assured by the attorney representing Mrs. Elizabeth Carroll that the matter was settled and there would be no further disputes between plaintiff and his wife which, up to the date of the signing of these interrogatories, proved correct. At the time this letter was prepared, Attorney Cavendish advised me that the stipulation of dismissal had been signed by him and that no further actions would be taken by Mrs. Carroll against either William Carroll or Mrs. Gwendolyn Pryor. A portion of my letter of October 23, 1972 was in error based upon my honest belief and upon assurances to me that the entire matter was settled and all documents were to be signed. In fact the stipulation of dismissal had been signed by Mrs. Carroll's attorney."

"18. Why did the defendant write the plaintiff telling him that the Deed of Separation had been signed and that the Judgment of Dismissal had been signed when the defendant knew or should have known that such statements were false and misleading?"

"Defendant thought that plaintiff's wife had signed the instruments. See preceding answers for full explanation of circumstances."

"29. Since the institution of this action, what disposition, if any, has been made concerning the suit which was pending in Pitt County against the plaintiff herein for alimony, etc.?"

"This action has been dismissed."

"30. If the said action has been dismissed, who set the same for hearing or disposition and was either the within plaintiff or the plaintiff's wife notified of the setting of the case for disposition?"

"At my request, the matter was set for hearing by Judge J. W. H. Roberts. Under the North Carolina Rules of Civil Procedure, written notice of the motion for summary judgment was mailed to plaintiff's wife."

"31. What was the final disposition, if any, of the alimony case?"

"Summary judgment was entered in favor of William F. Carroll, dismissing his wife's action against him."

In response to defendant's motion for summary judgment plaintiff filed an affidavit in which he reiterated the allegations of the complaint and the matters raised by interrogatories and stated:

"My agreement with the Defendant was that my wife was not to receive the check until all instruments were executed by her and if he decided to breach his fiduciary duty to me and was negligent in the closing of the transaction, I consider the Defendant responsible for the consequences."

In support of his motion, defendant filed affidavit of M. E. Cavendish, attorney of Greenville, the pertinent portions of which are as follows:

"Prior to August, 1971, I was retained to represent Mrs. Elizabeth R. Carroll, in connection with a domestic dispute with her husband, William F. Carroll. On or about August 13, 1971, I instituted a civil action on behalf of my client, Elizabeth R. Carroll, against William F. Carroll in Pitt County District Court, seeking alimony pendente lite, permanent alimony, attorney fees and court costs. Defendant, William F. Carroll filed answer in this action through his attorney, H. Horton Rountree.

While this action was still pending in Pitt County District Court, I conferred on numerous occasions with attorney H.

Horton Rountree concerning a settlement of this marital dispute. In the spring of 1972, settlement was arrived at whereby Elizabeth R. Carroll was to sign a stipulation dismissing the Pitt County District Court domestic case, a separation agreement to be prepared by me and a land deed in connection with land owned by the Carroll heirs.

Attorney H. Horton Rountree was to prepare the land deed for the signature of Elizabeth R. Carroll and was to deliver to me the settlement check of $10,969.01. I was to prepare the separation agreement and the stipulation of dismissal.

In June, 1972, my office received the settlement check and Mrs. Carroll executed the land deed. I had prepared the separation agreement and stipulation of dismissal which had been forwarded to attorney H. Horton Rountree for his signatures and the signatures of his client. Unknowingly to me, Mrs. Elizabeth Carroll stopped by my office in my absence at which time her settlement funds were given to her by my secretary.

Subsequently, I received from attorney H. Horton Rountree the stipulation of dismissal of the Pitt County District Court action and the separation agreement bearing the signatures of Mr. Rountree and his client.

Subsequent to receiving these signed instruments, I made efforts to have Mrs. Carroll come back to my office to sign the stipulation of dismissal and the separation agreement, but she failed to do so. At no time did Mrs. Carroll specifically tell me that she would not sign the stipulation of dismissal or the separation agreement but she just never came to the office to sign these agreements.

Sometime in the late summer or the fall of 1972, I advised Mr. Rountree that Elizabeth Carroll had not yet come to my office to sign the stipulation of dismissal or the separation agreement. Again, at this time, Mrs. Carroll never advised me that she did not intend to sign the stipulation of dismissal or the separation agreement."

In a separate affidavit, Mr. Cavendish stated that it was not until 13 January 1975, that he "pulled his file" on Elizabeth Carroll in response to a telephone request for information by Mr. Nye and

found note written by his former secretary concerning Mrs. Carroll's refusal to sign certain documents.

Defendant also filed his own affidavit, the pertinent portions of which are as follows:

> "On or prior to August, 1971, I was retained to represent William F. Carroll in an action instituted by his wife, Elizabeth R. Carroll against him. The nature of the action was for alimony, attorney fees and court costs. I proceeded to file answer to this which was pending in Pitt County District Court.
>
> During the early part of 1972, William F. Carroll requested that I talk with his wife's attorney, M. E. Cavendish, concerning the possibility of negotiating a settlement with his wife. I then proceeded negotiations with Mr. Cavendish toward a settlement of not only the domestic matters but also a land transaction in which William F. Carroll and the Carroll heirs proposed to transfer a tract of land which needed the signature of Elizabeth Carroll.
>
> While the Pitt County District Court action was still pending, a settlement was agreed upon between William F. Carroll and Elizabeth R. Carroll through their attorneys of all marital problems and the land transaction. This settlement occurred sometime in the spring of 1972. This agreement provided that Elizabeth R. Carroll was to sign the stipulation of dismissal, dismissing the Pitt County District Court domestic case, sign a separation agreement to be prepared by Mr. Cavendish, and to sign a land deed in connection with the land owned by the Carroll heirs.
>
> I was to prepare the land deed for the signature of Elizabeth R. Carroll and was to deliver to Mr. M. E. Cavendish the settlement check of $10,969.01. Mr. M. E. Cavendish was to prepare the separation agreement and stipulation of dismissal for the signatures of both he and his client.
>
> In June, 1972, the settlement check was delivered to Mr. Cavendish's office and Mrs. Carroll executed the land deed. Mr. Cavendish prepared the separation agreement and stipulation of dismissal which was forwarded to my office for signatures by both myself and my client, William Carroll. I

later was advised that while Mr. M. E. Cavendish was absent from his office, Mrs. Elizabeth Carroll stopped by his office and her settlement funds were disbursed to her by Mr. Cavendish's secretary.

The delivery of the settlement check to the office of Mr. M. E. Cavendish was done pursuant to the method and means agreed upon in accomplishing this settlement. It is both customary and the accepted practice by the attorneys in Eastern North Carolina and particularly in Pitt County, that settlement checks are forwarded to the receiving client's attorney, who in turn will be responsible for obtaining his client's signatures to the agreed documents before the disbursement of such funds. Although the funds were disbursed to Mrs. Elizabeth Carroll before she executed the separation agreement and the stipulation of dismissal, this was done without Mr. Cavendish's knowledge and while he was not present in his office."

Assuming that the pleadings are sufficient to allege punitive damages and assuming that the attorney-client relationship existed between plaintiff and defendant on 17 July 1972 and 23 October 1972, (when defendant advised plaintiff that the deed of separation had been signed) raising a presumption of fraud, we think any such presumption has been rebutted. Nowhere does plaintiff allege that defendant benefited from the alleged fraudulent misrepresentation. The statement of accounting reflects that the $500 attorney fee was for "Appearance in court; drawing suit papers; deed of separation; deed and dismissal order; conferences with client and opposing attorney, etc." These services were performed. Nothing in the record suggests that $500 was excessive compensation for these services. Defendant readily admits that his statements to plaintiff were not true, but he also says that he "thought that plaintiff's wife had signed the instruments" and that the agreed method of handling and closing the matter was "both customary and the accepted practice by the attorneys in Eastern North Carolina and particularly in Pitt County." It is uncontroverted that as soon as defendant learned that plaintiff's wife had failed and refused to sign the deed of separation, he initiated procedures, with notice to plaintiff's wife, to dismiss the action against defendant. It is also undisputed that plaintiff obtained his divorce without intervention by his wife. We

cannot perceive any intent to defraud plaintiff on the part of defendant. On the contrary, it appears to us abundantly clear that there was no intent to defraud. We reiterate what we said in *Carroll v. Rountree*, 34 N.C. App. at 176 and 177, 237 S.E. 2d at 573:

> ". . . Plaintiff presented nothing to the contrary—either by his affidavit or by the interrogatories and defendant's answers thereto. It is clear that had the same evidence been presented at trial defendant would have been entitled to a directed verdict in his favor with respect to claim for punitive damages. The court, therefore, properly allowed defendant's motion for summary judgment as to this phase of the lawsuit, since the plaintiff neither showed that additional affidavits with respect to this question were at that time unavailable to him nor came forward with affidavits or other materials showing that he was entitled to have an issue presented to the jury as to punitive damages. *First Fed. Sav. & Loan Assn. v. Branch Banking & Trust Co.*, 14 N.C. App. 567, 188 S.E. 2d 661 (1972), *rev'd on other grounds* 282 N.C. 44, 191 S.E. 2d 683 (1972); *see also Millsaps v. Wilkes Contracting Co.*, 14 N.C. App. 321, 188 S.E. 2d 663 (1972), *cert. den.* 281 N.C. 623, 190 S.E. 2d 466 (1972)."

The Court, in *Frank H. Connor Company v. Spanish Inns Charlotte, Limited et al*, 294 N.C. 661, 242 S.E. 2d 789 (1978), said:

> "Rule 56(e) requires that if a defendant, opposing a plaintiff's motion, has a plausible defense as regards an issue, he must assert it, or he must utilize Rule 56(f) to show the court why he cannot oppose it. When the movant's affidavits do not adequately support the motion, there may be no reason to file opposing affidavits. *See Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). However, when the moving party presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment. *See Nasco Equipment Co. v. Mason, supra* [291 N.C. 145, 229 S.E. 2d 278 (1976)]."

As we previously noted, plaintiff has not come forward with any facts; he has relied upon mere allegations. Inasmuch as defendant has come forward with facts clearly establishing the absence of

fraud and plaintiff has come forward with no facts, we must conclude that summary judgment as to the issue of fraud was properly entered.

Our position with respect to the count for punitive damages is certainly not to be taken as condoning the failure of Mr. Rountree to follow up on his reliance on Mr. Cavendish to get the documents properly signed by plaintiff's wife. Nor do we approve Mr. Cavendish's neglect of the duties imposed upon him. Nevertheless, in our opinion, any presumption of fraud arising from the relationship between plaintiff and defendant has, in our opinion, been adequately rebutted by undisputed evidence.

Plaintiff's remaining argument in his brief on rehearing is addressed to Count II of plaintiff's complaint wherein he sought damages for mental and emotional distress suffered by him. He contends on rehearing, as he did on appeal, that the trial court erred in entering summary judgment for defendant. As to this we conclude that the contentions of plaintiff were adequately discussed in *Carroll v. Rountree, supra.* We have been shown no reason on rehearing that that discussion should be amplified, modified, or clarified.

As to questions raised by petition to rehear, the judgment of the trial court and the opinion of this Court are

Affirmed.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. AARON EVANS

No. 774SC970

(Filed 2 May 1978)

1. Criminal Law § 76.5— voir dire on defendant's statement—no conflict in evidence—specific findings not required

Testimony by defendant on voir dire that he was under the impression that his statement made to a police officer would remain in his police file and would be seen only by the officer and testimony by defendant that an officer told him that he would get thirty years' imprisonment if he did not cooperate did not create a conflict in the evidence which the trial court was required to

resolve by a specific finding, since defendant was fully advised that anything he said could and would be used against him in court; and defendant was advised of his right to remain silent and he signed a written waiver of that right which added that "no promise or threat was made to him and no pressure or coercion had been used against him."

2. **Criminal Law § 119— request for instructions—ruling on request postponed—failure to renew request**

It was within the trial court's discretion to postpone his ruling on defendant's requested instruction; and when defendant subsequently failed to comply with the trial judge's direction to renew his request at a later time, defendant waived any right to an instruction which he might have asserted.

3. **Criminal Law § 99.8— court's examination of witnesses—no expression of opinion**

The trial court did not express an opinion in violation of G.S. 1-180 by questioning the witnesses himself where the questions asked tended to clarify the witnesses' testimony and were not aimed at discrediting or impeaching the witnesses.

4. **Criminal Law § 99.4— court's sustaining of own objections—no expression of opinion**

The trial court did not express an opinion in violation of G.S. 1-180 by sustaining his own objections to three answers given by defendant all of which were relating what someone else thought or said and by instructing the witness to refrain from testifying to the substance of another's remarks.

5. **Criminal Law § 163— misstatement of evidence in jury charge—necessity for objection**

Slight misstatements by the trial court in summarizing the evidence were more in the nature of slips of the tongue and as such could easily have been corrected by the trial judge if they had been called to his attention; therefore, by failing to object defendant lost his right to complain.

APPEAL by defendant from *Gavin, Judge*. Judgment entered 11 May 1977 in Superior Court, ONSLOW County. Heard in the Court of Appeals 30 March 1978.

Defendant was charged in proper bills of indictment with armed robbery. Upon his pleas of not guilty, the State presented evidence tending to show the following:

On 26 December 1976 at approximately 2:00 p.m., four marines were relaxing in a room at the Circle Drive Motel in Jacksonville, North Carolina. Suddenly the door swung open and several men entered, one of them drawing a pistol. The marines were ordered to lie on the beds facedown while the intruders took money from their wallets and pockets and some traveler's checks

belonging to one of the victims. After the robbers fled, the victims notified the police.

On 28 December 1976 the police, investigating an unrelated matter, were permitted to enter an apartment leased by Jack Hipp. Upon noticing some stolen furniture, the police advised Hipp and the defendant of their rights and requested permission to search the premises. With Hipp's consent, a search was conducted in which approximately fifteen hundred dollars worth of stolen property was found. Some traveler's checks bearing the name of one of the victims of the robbery were also found. Hipp and the defendant were arrested and taken to the police station where the defendant was questioned after again being advised of his rights. At the conclusion of the interrogation, the defendant signed a statement confessing to the robbery at the Circle Drive Motel.

The defendant offered evidence tending to show that at the time of the robbery he was at Hipp's apartment playing cards.

The jury found the defendant guilty of two counts of armed robbery. From judgments imposing two consecutive prison sentences of 25 years, the defendant appealed.

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

Jimmy G. Gaylor for the defendant appellant.

HEDRICK, Judge.

[1] The defendant in his first three assignments of error contends that the trial court erred in its admission of the defendant's in-custody statement in which he admitted his participation in the robbery. The defendant argues essentially that the judge's finding at the conclusion of the *voir dire* that the defendant "knowingly, voluntarily and understandingly . . . waived his right to remain silent" was not supported by the evidence and was not sufficiently specific to resolve conflicts in the evidence.

The State's evidence on *voir dire* consisted of the testimony of Levi Simmons of the Jacksonville Police Department, the arresting officer. Officer Simmons testified that he arrested the defendant at approximately 6:15 p.m. on 28 December 1976, that he fully advised the defendant of his rights at that time, and that

the defendant responded that he understood his rights. Officer Simmons further testified that upon their arrival at the police station at approximately 7:45 p.m., he again advised the defendant of his rights and that the defendant signed a waiver of rights "acknowledging that he read the statement of his rights; that he understood what his rights were; that he was willing to make a statement and answer questions; that he did not want a lawyer at that time; that he understood what he was doing; that no promise or threat was made to him and no pressure or coercion had been used against him." Officer Simmons then read the defendant's written statement confessing to the robbery of the marines.

In support of his contentions the defendant argues that his own testimony at *voir dire* controverted the State's evidence and rendered the statement inadmissible, or at least necessitated specific findings to resolve conflicts. The defendant first refers to his testimony that when he inquired of Officer Simmons as to the purpose of the statement, the police officer responded that "it would be put in my police file." We do not agree with the defendant that the simple reply of Officer Simmons would "plainly indicate that the Defendant was under the impression that his statement would remain in his police file and no one but the officer would see it." To the contrary, uncontroverted evidence reflects that the defendant was fully advised of his "right to remain silent and that anything he said could and would be used against him in court." Accordingly, we find no conflict in the evidence on this point.

The defendant also directs us to his testimony that while Officer Simmons was absent from the interrogation room Officer Hudson, another police officer, told the defendant that "if I didn't cooperate he would see to it that I got thirty years." The State failed to offer any evidence to challenge this portion of the defendant's testimony. However, the record reflects that the defendant was fully advised of his right to remain silent at least twice and signed a written waiver of that right which added that "no promise or threat was made to him and no pressure or coercion had been used against him." Thus, assuming the accuracy of the defendant's bare assertion that Officer Hudson threatened him, we find ample evidence to support the trial judge's finding that "the defendant knowingly, voluntarily and understandingly . . . waived his right to remain silent."

The defendant's contention that the conflict in the evidence created by his testimony of Officer Hudson's threats required a specific finding by the trial judge is also without merit. At the conclusion of a *voir dire* hearing to determine the admissibility of an in-custody confession, the trial judge must make findings of fact sufficiently specific to resolve any material conflicts in the evidence. *State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977). In *State v. Haskins*, 278 N.C. 52, 178 S.E. 2d 610 (1971), a defendant argued that testimony on *voir dire* that he was under the influence of drugs when he made the challenged confession created a conflict in the evidence which the trial judge was required to resolve by a specific finding. Justice Branch, speaking for our Supreme Court, reasoned that the judge's finding that the defendant " 'knowingly, intelligently and understandingly waived any constitutional rights . . .' implicitly carries the finding that his understanding and intelligence were not so adversely affected as to make him unconscious of the meaning of his words." 278 N.C. at 62, 178 S.E. 2d at 615. On the basis of *Haskins* we hold that the judge's finding in the present case that "the defendant . . . voluntarily . . . waived his right to remain silent" adequately conveyed a finding that the defendant acted on his own volition, free from any coercion on the part of Officer Hudson.

[2] In his seventh assignment of error, the defendant contends that the trial court erred in failing to instruct the jury upon the withdrawal of identification evidence which was found inadmissible. When one of the victims of the robbery identified the defendant as the perpetrator of the crime, the defendant objected. After a *voir dire* hearing, the trial judge sustained the defendant's objection and ruled the testimony inadmissible. The defendant then requested an instruction withdrawing the evidence, and the trial judge directed the defendant to renew his objection at a later time when he would rule on it. The defendant failed to renew his objection thereafter, and the requested instruction was never rendered. It is unclear why the trial judge postponed his ruling on the defendant's requested instruction. However, we think that it was within his discretion to do so, *Miller v. Greenwood*, 218 N.C. 146, 10 S.E. 2d 708 (1940); and when the defendant subsequently failed to comply with the judge's direction, he waived any right to an instruction which he might have asserted.

The defendant next contends that the trial judge improperly intimated an opinion in violation of G.S. 1-180 in his "repeated

questioning" of witnesses and in sustaining his own objections. G.S. 1-180 has been interpreted by our courts on numerous occasions to require a trial judge to evince a courtroom demeanor of absolute impartiality. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). In the performance of his many functions including his interaction with the lawyers and witnesses he must avoid the appearance of favoring one party over another. *State v. Greene, supra.*

[3] The record reflects that at several points during the trial the judge intervened in the examination of witnesses and propounded his own questions. It is established that a trial judge has the right and duty to control the examination of witnesses and to ask questions tending to clarify the witness' testimony for the jury. *State v. Tinsley*, 283 N.C. 564, 196 S.E. 2d 746 (1973). In doing so, the judge must refrain from impeaching or discrediting a witness or demonstrating any hostility toward the witness. 1 Stansbury's N.C. Evidence § 37 (Brandis Rev. 1973). The defendant refers to several exchanges between the judge and witnesses. We have examined each of these exchanges and are unable to detect an indirect expression of opinion by the judge. While the judge made no attempt to conceal his impatience at times, it was indiscriminately directed at State witnesses as well as defense witnesses. On each occasion the questions asked tended to clarify the witness' testimony and were not aimed at discrediting or impeaching the witness.

[4] The defendant also directs our attention to several instances in which the trial judge sustained his own objections. The trial judge undoubtedly has the right to exclude objectionable evidence without an objection by the opposing party. 1 Stansbury's N.C. Evidence § 27 (Brandis Rev. 1973). However, G.S. 1-180 prohibits him from doing so in such a manner as to exhibit any hostility toward the party offering the evidence thereby expressing an opinion. *State v. Staley*, 292 N.C. 160, 232 S.E. 2d 680 (1977). The defendant cites *State v. Lemmond*, 12 N.C. App. 128, 182 S.E. 2d 636 (1971), as authority for his position. In *Lemmond* the trial court sustained its own objections to 16 questions asked by defense counsel and accompanied two of the objections with admonishments. In the present case, the trial court sustained its own objections to three answers given by the defendant all of which were relating what someone else thought or said. The

judge properly instructed the witness to refrain from testifying to the substance of another's remarks. We think that *Lemmond* is clearly distinguishable and that in our case the trial judge exercised his discretion without exceeding the bounds of impartiality and cold neutrality. These assignments of error are overruled.

[5] By his sixteenth and seventeenth assignments of error, the defendant contends that the trial court misstated the evidence on material points entitling him to a new trial even in the absence of objection. As a general rule, a misstatement of the evidence or contentions by the trial judge will not entitle a defendant to a new trial unless the defendant makes a timely objection and calls it to the attention of the judge to permit him to correct it. *State v. Lambe*, 232 N.C. 570, 61 S.E. 2d 608 (1950); *Huff v. Thornton*, 287 N.C. 1, 213 S.E. 2d 198 (1975). The defendant seeks to invoke the exception to this rule found in *State v. Stroud*, 10 N.C. App. 30, 177 S.E. 2d 912 (1970). In *Stroud* the court's charge to the jury covered 66 pages in the record and was the source of 60 exceptions. The defendant in that case contended that in summarizing the contentions in the charge the trial judge expressed an opinion in violation of G.S. 1-180. After quoting a long segment of the charge and citing several examples of expressions by the judge tending to intimate an opinion, this Court held the following:

> "While ordinarily error in stating contentions of the parties must be brought to the trial court's attention in time to afford opportunity for correction, where the misstatement of a contention upon a material point includes an assumption of evidence entirely unsupported by the record, the misstatement must be held prejudicial, notwithstanding the absence of timely objection. [Citations omitted.]"

10 N.C. App. at 36-7, 177 S.E. 2d at 916.

In the present case, the defendant cites two statements by the judge which he argues are unsupported by the evidence. While summarizing the testimony of one of the victims concerning the actual perpetration of the robbery, the judge charged that "[h]e said one of the blacks that walked into that room number 15 looked like the defendant Evans." The record discloses that the witness testified that "a man that resembles Mr. Evans" was seen in the motel room a half hour before the robbery. In summarizing the defendant's testimony explaining the reason he signed the

confession, the judge instructed that "[h]e said that the participants in the robbery *with him* were his good friends, that he was covering up for them, and that this statement he made was false." The record establishes that the defendant testified that the perpetrators of the robbery were his friends, that he signed the confession "to deceive" the police and that he was not involved in the robbery.

We find this case distinguishable from *Stroud*. In *Stroud* the charge was replete with expressions by the judge tending to give emphasis to the State's contentions and containing some inaccuracies. We do not think that the two misstatements cited by the defendant rise to the level of potential harm of the overall charge in *Stroud*. The misstatements herein were more in the nature of slips of the tongue and as such could easily have been corrected by the trial judge if they had been called to his attention. Therefore, we hold that by failing to object the defendant lost his right to complain.

The remaining assignments of error which the defendant argues in his brief pertain to the admission and exclusion of evidence. We have carefully examined the relevant portions of the record and find no prejudicial error in the trial judge's rulings thereon.

We hold that the defendant received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge MITCHELL concur.

TRUDY MAE CAISON, BY HER GUARDIAN AD LITEM, CAROLYN H. CAISON v. NATIONWIDE INSURANCE COMPANY

No. 775DC335

(Filed 2 May 1978)

1. Insurance § 87.2— automobile liability insurance—omnibus clause—person in lawful possession

Where recovery within the amount of the mandatory automobile liability insurance coverage required by G.S. 20-279.21(b)(2) is sought, a plaintiff need only show lawful possession of the vehicle by the operator and is not required

to prove that the operator had the owner's permission to drive on the very trip and occasion of the collision.

2. Insurance § 87.2— automobile liability insurance—omnibus clause—coverage exceeding mandatory coverage—proof of permission of owner

Automobile liability insurance coverage in excess of the mandatory coverage required by the Motor Vehicle Safety-Responsibility Act, G.S. 20-279.21(b)(2), is voluntary and controlled by the provisions of the policy rather than by those of the Act; therefore, plaintiff could recover an amount in excess of the mandatory coverage only if she established that the actual use of the vehicle at the time of the collision was with the permission of the insured or his spouse as required by the omnibus clause of the policy rather than showing only that the operator of the vehicle was in lawful possession as required by the Act.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 13 January 1977 in District Court, NEW HANOVER County. Heard in the Court of Appeals 8 February 1978.

This is an action upon an automobile liability insurance policy issued by the defendant. The plaintiff's motion for summary judgment having been granted, the defendant appealed.

The defendant, Nationwide Insurance Company, issued an automobile liability insurance policy to Delmas Edward Babson on 20 July 1973 in which a pickup truck owned by Babson was described as the insured vehicle. The limits of liability under the policy were $25,000 for bodily injury to each person and $50,000 for bodily injury for each occurrence creating liability. The expiration date of the policy was 24 June 1974. In addition to the named insured, Delmas Edward Babson, the policy provided coverage under the omnibus clause for, "any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or such spouse or with the permission of either." When the policy was issued on 20 July 1973, the insurance coverage required by the Motor Vehicle Safety-Responsibility Act of 1953, G.S. 20-279.1 through G.S. 20-279.39 [hereinafter "the Act"], was $10,000 per person and $20,000 per occurrence.

The vehicle insured by the policy was being operated by one Larry Cliff when it was involved in a collision, on 5 April 1974, with an automobile occupied by the plaintiff, Trudy Mae Caison. An action was brought on behalf of the minor plaintiff, and a

judgment was entered in her favor in the amount of $12,000 against Larry Cliff. No judgment was entered against Babson.

The defendant paid into the office of the Clerk of Superior Court of New Hanover County the sum of $10,000 and the costs on the judgment. The plaintiff then brought this action asserting that she was entitled to recover an additional $2,000 from the defendant by virtue of its policy issued to Babson.

In her complaint, the plaintiff alleges that Larry Cliff was in lawful possession of the insured motor vehicle at the time of the collision and had the permission, express or implied, of Babson for the actual use of the vehicle at the time and place of the collision. The defendant's answer denied these allegations as well as denying further liability on the judgment against Cliff.

The defendant stipulated in the trial court that its policy issued to Babson and describing the vehicle in question was in full force and effect at the time of the collision. The defendant specifically denied, however, the allegation that Cliff had the permission of Babson for the use of the vehicle at the time and place of the collision.

The defendant filed a motion *in limine* contending that the only issue remaining for the jury was whether Cliff was in lawful possession of the Babson vehicle and had permission for its use at the time and place of the accident. By its motion the defendant requested a ruling of the trial court that evidence of the terms and conditions of the policy and of defendant's denial of liability was irrelevant and prejudicial to the defendant and should be excluded from consideration by the jury. After arguments were heard on the motion, it was denied by the trial court.

The defendant entered a stipulation that Cliff was in lawful possession of the Babson vehicle at the time of the accident, and the plaintiff moved for summary judgment. The trial court granted the plaintiff's motion and entered summary judgment in her favor in the amount of $2,000 plus interest, costs and $500 attorney's fees. From this entry of summary judgment, the defendant appealed.

Richard Stanley, Addison Hewlett, Jr., and D. Webster Trask, for plaintiff appellee.

Smith, Spivey & Kendrick, by Vaiden P. Kendrick, for defendant appellant.

MITCHELL, Judge.

The defendant first assigns as error the trial court's entry of summary judgment in favor of the plaintiff. The defendant contends that the issue of permissive use constitutes a material issue of fact between the parties which made the entry of summary judgment inappropriate.

The defendant argues that its policy of insurance issued to Babson, with policy limits of $25,000 coverage for each person involved in an accident, provided coverage "in excess of and in addition to" the $10,000 coverage required by the Act. To the extent that such coverage exceeded or added to the coverage required by the Act, the defendant contends the coverage is voluntary and is controlled by the terms of the insurance contract and not the Act.

In its judgment, the trial court made findings of fact. We find these to be harmless surplusage in the case, as summary judgment presumes that there are no material issues of fact remaining to be decided. *Hyde Insurance Agency v. Dixie Leasing Corporation*, 26 N.C. App. 138, 215 S.E. 2d 162 (1975). The trial court then concluded that, the lawful possession of the driver having been admitted, no material issue of fact remained between the parties, and the plaintiff was entitled to recovery as a matter of law.

The defendant contends, however, that the plaintiff is not entitled to recover any amount in excess of the $10,000 coverage required by G.S. 20-279.21(b)(2) unless she establishes that the actual use of the vehicle at the time of the collision was with the permission of the insured or his spouse as required by the omnibus clause of the insurance contract. The defendant, therefore, contends that the issue of permissive use remains to be decided, and summary judgment was improper.

The Act requires that specified amounts of coverage be provided in liability insurance contracts and designates those who must be covered within such limits. At the time the policy in question was issued on 20 July 1973, G.S. 20-279.21(b)(2) required automobile liability insurance policies to provide coverage of $10,000 for bodily injury or death of one person and $20,000 for bodily injury or death of two or more persons in any accident. By Section 8 of Chapter 745, 1973 North Carolina Session Laws, the

General Assembly amended that statute to increase the required coverage to $15,000 and $30,000 respectively and specifically provided that:

> "This Act shall become effective January 1, 1974, and where the manner of giving proof of financial responsibility is by automobile liability policy, the same shall apply only to policies written or renewed on or after the effective date of this Act."

The policy in question in this case was written prior to the effective date of the amendment. Therefore, it was excluded from the provisions of the 1973 amendment increasing the mandatory coverage and was governed by the prior provisions requiring coverage of $10,000 per individual and $20,000 per occurrence for bodily injury or death.

The insurance policy in the case before us exceeded the required coverage of $10,000 for bodily injury to an individual and provided coverage to a maximum of $25,000 for such injuries. The defendant conceded it was liable to the plaintiff for the entire $10,000 coverage provided by the terms of G.S. 20-279.21(b)(2) and paid that amount and costs into the court. It contends, however, that the coverage provided by its policy in excess of the amount required by the statute is voluntary and controlled by the terms of the policy and not those of the Act.

The policy of insurance issued by the defendant to Babson included within its definition of an insured, "any person while using the automobile and any person or organization legally responsible for the use thereof *provided* the *actual use* of the automobile is by the Named Insured or such spouse or *with the permission of either*." (emphasis added). If the terms of the policy control, one claiming under the policy would be required to prove that the actual use of the vehicle was with the permission of the insured or his spouse in order to be entitled to recovery of amounts in excess of coverage required by the Act.

The Act expressly provides in G.S. 20-279.21(g):

> Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such *excess or additional coverage shall not be subject to the provisions of this Article.* With

respect to a policy which grants such excess or additional coverage the term "motor vehicle liability policy" shall apply *only to that part of the coverage which is required by this section.* (emphasis added).

[2] We must determine whether the plaintiff, in seeking recovery in an amount greater than the amount of coverage required by the Act, bears the burden of proving that the operator of the vehicle was in lawful possession as required by the Act or must bear the burden of proving that the actual use was with permission of the insured as required by the policy. Since the defendant stipulated that the operator was in lawful possession, we must also determine whether these two standards differ.

[1] We have expressly held that where recovery within the amounts of the mandatory coverage required by the Act is sought, a plaintiff need show only lawful possession of the vehicle by the operator and is not required to prove that the operator had the owner's permission to drive on the very trip and occasion of the collision. *Packer v. Insurance Co.*, 28 N.C. App. 365, 221 S.E. 2d 707 (1976). In so holding we overruled dictum in *Jernigan v. Insurance Co.*, 16 N.C. App. 46, 190 S.E. 2d 866 (1972) and held that the clear intent of the legislature was that permission, express or implied, is not an essential element of lawful possession. We find the two terms are not synonymous, and parties seeking recovery under a theory of permission must meet a higher standard than those seeking recovery under a theory of mere lawful possession.

[2] In issuing its policy to Babson, the defendant provided coverage in addition to and in excess of that required by G.S. 20-279.21(b)(2). We find such additional coverage was voluntary and not controlled by the provisions of the Act. The Act specifically excludes such coverage in addition to and in excess of that required by its terms. The liability, if any, of the defendant for coverage in excess of that required by the Act must be judged according to the terms and conditions of the policy. *See, Younts v. Insurance Co.*, 281 N.C. 582, 585, 189 S.E. 2d 137, 139 (1972). We hold that the entry of summary judgment for the plaintiff by the trial court was error and must be reversed and the cause remanded in order that the contested issue of whether the operator had the permission of the insured or his spouse for the actual use of the insured vehicle may be resolved.

The defendant next assigns as error the trial court's denial of its motion *in limine*, by which the defendant sought the exclusion of evidence concerning the terms of the insurance policy and the defendant's denial of coverage. As this order is indeterminate and subject to possible modification by the trial court prior to or during trial in light of changed circumstances, we will not now consider the assignment. Instead, we deem the trial court's order interlocutory and unappealable, and the assignment is overruled. *Knight v. Power Co.*, 34 N.C. App. 218, 237 S.E. 2d 574 (1977).

The defendant next assigns as error the awarding of attorney's fees to the plaintiff by the trial court. We need not review in detail the defendant's contentions on this point. As we must reverse, no judgment for damages remains such as would authorize an order awarding attorney's fees pursuant to G.S. 6-21.1. Thus, the award of attorney's fees by the trial court must also be reversed.

For the reasons previously set forth, the judgment of the trial court must be reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges VAUGHN and ERWIN concur.

COMBINED INSURANCE COMPANY OF AMERICA v. ROBERT WAYNE McDONALD

No. 773SC338

(Filed 2 May 1978)

Master and Servant § 11.1— failure of employer to give notice of termination of employment—covenant not to compete not affected

The mere failure of an employer to give the notice of termination of employment provided for in its contract of employment with its employee, nothing else appearing, does not as a matter of law constitute a material breach which will prevent the employer's seeking equitable remedies to prevent a breach of a covenant prohibiting the employee from competing with the employer within a reasonable area and time; where such contracts are severable, covenants against competition will be defeated only if the party seeking to enforce them has engaged in a breach which is material and thus goes to the heart of the contract.

APPEAL by defendant from *Webb, Judge.* Judgment entered 1 December 1976 in Superior Court, PITT County. Heard in the Court of Appeals 8 February 1978.

This is an action in contract by which the plaintiff sought to enforce anti-competition covenants in its employment contracts with its former employee, the defendant. The defendant denied enforceability of the covenants due to a material breach of the contracts by the plaintiff's failure to give him advanced notice of termination as required by the last contract entered into by the parties. The defendant also alleged damages resulting from his having been wrongfully enjoined.

The defendant, Robert W. McDonald, was employed by the plaintiff, Combined Insurance Company of America, to sell its health and accident insurance as a commissioned agent. The plaintiff and defendant executed a "District Manager's Contract" on 16 October 1972, pursuant to which the defendant served as a district sales manager of the plaintiff until 3 June 1974. The plaintiff and defendant executed a "Representative Standard Contract" on 26 August 1974, pursuant to which the defendant continued to sell the plaintiff's health and accident policies. Both contracts contained covenants which prevented the defendant from competing with the plaintiff within the territory assigned for a period of two years after termination of the employment. The parties stipulated that these covenants were reasonable and enforceable both as to time and geographical limits. The "Representative Standard Contract" provided for termination by either party upon ten days' notice to the other.

At a meeting of the plaintiff's sales agents on 29 March 1975, the plaintiff informed the defendant and other sales agents that it was changing the status of all of its sales agents from independent contractors to employees. The new contract differed from the existing contract in numerous particulars, and the changes were primarily favorable to the plaintiff. The defendant and others attending the meeting were told that those having questions should discuss them with the plaintiff's representatives. One of these representatives stated that each sales agent would be required to enter one of the new contracts with the plaintiff in order to continue selling its policies after 31 March 1975.

The defendant did not sign the new employee contract with the plaintiff, and his employment terminated on 31 March 1975.

He began selling health and accident insurance for another insurance company on 2 April 1975. Some of his sales for his new employer were made to the plaintiff's present or former policyholders within the geographical areas designated in the defendant's contracts with the plaintiff. These sales activities were prohibited by the restrictive covenants in the contracts entered into by the defendant and the plaintiff prior to 31 March 1975.

The plaintiff commenced this action seeking injunctive and other relief. A temporary restraining order enforcing the restrictive covenants and prohibiting such competition by the defendant was entered on 21 May 1975. The temporary restraining order was later continued in effect by a preliminary injunction.

When the case came on for trial during September of 1976, the passage of time and other events had rendered the plaintiff's claim for relief moot. By consent of the parties, the case was heard by the trial court without a jury on the issue of whether the defendant had been wrongfully enjoined. The trial court was also to determine what, if any, damages to the defendant had resulted, if the injunction had been wrongfully sought and entered.

The trial court in its judgment of 1 December 1976 determined that, there being no evidence of any breach of the "District Manager's Contract" by the plaintiffs, the defendant had not been wrongfully enjoined, and the covenant therein prohibiting competition was valid and enforceable by injunction until the time of its expiration on 3 June 1976. The trial court also determined that the covenant in the "Representative Standard Contract" prohibiting competition was valid and enforceable by injunction, and that the injunction enforcing it against the defendant had not been wrongful. The trial court ordered the defendant recover nothing and that the preliminary injunction be made permanent and continue until 30 March 1977. From this judgment the defendant appealed.

Sanford, Cannon, Adams & McCullough, by H. Hugh Stevens, Jr. and J. Allen Adams, and Speight, Watson & Brewer, by W. H. Watson, for plaintiff appellee.

Boyce, Mitchell, Burns & Smith, by Eugene Boyce and Lacy M. Presnell III, for defendant appellant.

MITCHELL, Judge.

The defendant, Robert Wayne McDonald, brought forward and argued numerous exceptions and assignments of error. All of them center around the single issue of whether the trial court erred in holding that the plaintiff, Combined Insurance Company of America, forfeited its rights to enforce the covenants against competition in its two contracts with the defendant by its failure to provide him with the ten days' notice of termination of his employment provided for in the last of those contracts.

The defendant first contends that the plaintiff's failure to give ten days' notice of the termination of his employment was, as a matter of law, a material breach of the contracts which would prohibit the plaintiff from enforcing the covenants of the contracts requiring the defendant withhold from competing with the plaintiff within the specified area for two years from the date of termination of each contract.

The record before us is absolutely devoid of any evidence or other indication that the plaintiff in any way breached any of the terms or conditions of the "District Manager's Contract." We find, therefore, that the trial court properly enjoined the defendant from violating the covenant against competition in that contract and from competing with the plaintiff prior to 3 June 1976 in the geographical area designated in the contract.

During oral arguments before us, counsel for the plaintiff acknowledged, however, that the plaintiff did terminate the defendant on 31 March 1975 without the ten days' notice provided for in the "Representative Standard Contract." The defendant contends that the plaintiff's breach of this provision of the contract relieved him of his obligation not to compete with the plaintiff for two years from the date of the termination. He contends injunctive relief was, therefore, erroneously granted the plaintiff. We do not agree.

Our courts have long recognized that a party seeking equitable relief, such as injunctive relief, must come before the court with "clean hands." Those who seek equitable remedies must do equity, and this maxim is not a precept for moral observance, but an enforceable rule. 5 Strong, N.C. Index 3d, Equity,

§ 1.1, p. 623. Injunctive relief to enforce the terms of a contract will not be granted a party who has himself breached the terms of the contract when his breach is substantial and material and goes to the heart of the agreement. Where the breach by the party seeking enforcement of a contract by injunctive relief is not material, however, it will not prevent him from obtaining such equitable relief. *Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E. 2d 240, 243 (1964).

The defendant relies primarily upon the case of *Felton Beauty Supply Company v. Levy*, 198 Ga. 383, 31 S.E. 2d 651, 155 A.L.R. 647 (1944) in support of his contention that the plaintiff's failure to give the notice of termination required by the contract was a material breach as a matter of law which would bar equitable relief to enforce the defendant's covenant not to compete with the plaintiff. In that case the Supreme Court of Georgia specifically stated that its decision was, in large measure, based upon the fact that the contract before it for consideration was clearly intended by the parties to be one contract and entire and not severable. Thus, it was held that the covenants of the contract must stand or fall together, and a breach by one of the parties relieved the other party of its obligations.

We do not find the opinion of the Supreme Court of Georgia in *Felton Beauty Supply* to establish a rule substantially differing from the rule long followed by our courts in similar instances. Our courts have also held that contracts which are entire may not be violated without violating the whole, and a breach by one party of a material part will discharge the whole at the option of the other party. *Edgerton v. Taylor*, 184 N.C. 571, 577, 115 S.E. 156, 159 (1922).

The "Representative Standard Contract" in question here, however, specifically stated in its terms that it was to be "construed as being severable" and not as entire. Additionally, that contract specifically provided that the covenants prohibiting the defendant from competing with the plaintiff for two years after termination "are especially of the essence" of the contract. The provision for notice of termination was not made "of the essence." In cases involving contracts very similar to the one before us, the Supreme Court of Georgia has distinguished its prior decision in

Felton Beauty Supply and held that, in situations involving severable contracts, failure to give notice of termination as required by the contracts did not defeat the right to enforce the covenant prohibiting competition. *Orkin Exterminating Company v. Gill*, 222 Ga. 760, 152 S.E. 2d 411 (1966); *Mansfield v. B. & W. Gas, Inc.*, 222 Ga. 259, 149 S.E. 2d 482 (1966).

Other Georgia cases cited by the defendant do not indicate whether the contracts involved were by their terms made severable or entire and are of no assistance to us. We have also reviewed the cases from other jurisdictions cited by both parties and find them not to be terminative of the issues presented.

We hold that the mere failure of an employer to give the notice of termination of employment provided for in its contract of employment with its employee, nothing else appearing, does not as a matter of law constitute a material breach which will prevent the employer's seeking equitable remedies to prevent a breach of a covenant prohibiting the employee from competing with the employer within a reasonable area and time. *See*, Annot. 155 A.L.R. 652 (1945). Where such contracts are severable, covenants against competition will be defeated only if the party seeking to enforce them has engaged in a breach which is material and, thus, goes to the heart of the contract. *Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E. 2d 240, 243 (1964); *Edgerton v. Taylor*, 184 N.C. 571, 577, 115 S.E. 156, 159 (1922).

Whether a failure to perform a contractual obligation is so material as to discharge other parties to the contract from further performance of their obligations thereunder is a question of fact which must be determined by the jury or, in appropriate cases such as this case, by the trial court without a jury. *See*, Restatement of Contracts, §§ 274-275 (1932). Here, the clear intent of the parties to the contract, as expressed therein, and the stipulated fact of the defendant's employment with another company within two days, constituted evidence of the parties' intent that the notice of termination provision not be deemed material. This conclusion was also amply supported by other evidence before the trial court.

We hold that the trial court's judgment of 1 December 1976, granting injunctive relief and ordering that the defendant recover

nothing of the plaintiff by reason of the entry of the prior restraining order and injunction, was proper. For the reasons stated, the judgment of the trial court is

Affirmed.

Judges VAUGHN and ERWIN concur.

JACK D. LOVIN AND WIFE, VOYCE JO LOVIN, AND JILES O. LOVIN AND WIFE, POLLY C. LOVIN v. CARMEL CRISP AND WIFE, GENEVA CRISP

No. 7730DC324

(Filed 2 May 1978)

1. **Easements § 3— water rights easement appurtenant to lands conveyed**

A deed which conveyed a parcel of land to defendants, granted water rights to defendants in two springs on the lands of plaintiffs together with the right to construct and maintain "a water line across the lands" of plaintiffs, and provided that "the water rights conveyed shall run with the lands" of defendants created an easement appurtenant only to the land conveyed therein and to no other lands owned by defendants.

2. **Trespass § 7— water rights easement appurtenant to land conveyed—use for other lands—summary judgment**

The trial court erred in entering summary judgment in favor of defendants in a trespass action where the pleadings and other materials showed that plaintiffs conveyed to defendants a parcel of land and an easement appurtenant only to such land giving defendants water rights in two springs on plaintiffs' lands and the right to construct and maintain a water line across plaintiffs' lands to the springs, and that defendants have constructed a water line on plaintiffs' lands to direct water from the springs to other lands owned by defendants. Even if the easement should be construed as being appurtenant to defendants' other lands, plaintiffs' allegation that defendants are in the process of preparing to create a reservoir upon plaintiffs' lands to collect waters from the springs gave rise to a substantial issue of material fact as to a trespass by defendants, since such activities would not be permissible under any interpretation of the easement.

APPEAL by plaintiffs from *Leatherwood, Judge*. Judgment entered 15 February 1977 in District Court, HAYWOOD County. Heard in the Court of Appeals 7 February 1978.

On 20 June 1963 the plaintiff appellants, the Lovins, conveyed by deed a parcel of land [hereinafter "parcel no. 1"] in Graham County referred to in the deed as "a part of the Pearlie Lovin Lot" to the defendant appellees, the Crisps. The deed also purported to grant water rights to the defendants in two springs on the lands of the plaintiffs together with the right to construct and maintain "a water line over and across the lands" of the plaintiffs to these springs.

Although it is not entirely clear from the record, the defendants have apparently exercised these water rights in some manner for a period of approximately thirteen years without complaint from the plaintiffs and with their consent. The plaintiffs allege in their complaint, however, that the defendants have recently attempted to obtain water from the springs to serve lands belonging to the defendants other than parcel no. 1. These other lands [hereinafter "parcel no. 2"] include some twenty acres owned by the defendants, which lie near parcel no. 1.

The plaintiffs brought this action in the District Court of Graham County on 10 September 1976 alleging that the defendants have trespassed upon the plaintiffs' lands by constructing a water line across them in order to divert water from the springs to parcel no. 2 and refuse to remove the line despite the plaintiffs' demands. The plaintiffs allege that the laying of water lines across their property in order to provide parcel no. 2 with water from the springs was not provided for by the "water rights clause" of the deed of 20 June 1963. The plaintiffs further allege that the defendants are preparing to excavate trenches and ditches across the lands of the plaintiffs for the purpose of burying the water lines and for the purpose of constructing a reservoir upon the lands of the plaintiffs in order to collect water from the springs. Additionally the plaintiffs allege that these actions by the defendants will result in irreparable damage to the plaintiffs' lands. The plaintiffs do not contest the right of the defendants, pursuant to the water rights clause of the deed, to maintain a water line across the plaintiffs' land in order to provide water from the springs to parcel no. 1 which was conveyed by the deed of 20 June 1963.

The defendants by way of answer and affidavit allege that the deed of 20 June 1963 granted them the right to the use of the

springs for the benefit of all of their lands and did not limit their use of the springs to uses for the benefit of parcel no. 1. The defendants contend they may construct water lines across the lands of the plaintiffs for the benefit of any lands the defendants may own. The defendants also contend that, by virtue of the water rights clause of the deed which had remained unquestioned for some thirteen years, the plaintiffs were estopped to deny such water rights, and their action should be dismissed. As further defenses, the defendants pled their recorded title to the water rights under a valid legal instrument, the deed of 20 June 1963, properly executed and recorded. From the trial court's entry of summary judgment for the defendants on 15 February 1977, the plaintiffs appealed.

McKeever, Edwards, Davis & Hays, by Fred H. Moody, Jr., for plaintiff appellants.

Leonard W. Lloyd for defendant appellees.

MITCHELL, Judge.

The plaintiffs, by their single assignment of error, contend that the trial court erred in granting summary judgment for the defendants. This assignment is meritorious.

The plaintiffs contend that summary judgment for the defendants was erroneous, and that a proper construction of the deed of 20 June 1963 reveals that, as a matter of law, it created an easement appurtenant to the lands conveyed by its terms and no other lands. The plaintiffs additionally contend that their complaint and affidavits raised substantial issues of material fact as to trespasses by the defendants, and summary judgment was erroneous.

Rule 56(c) of the North Carolina Rules of Civil Procedure provides, *inter alia*, that summary judgment "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." G.S. 1A-1, Rule 56(c). Thus, the two requirements for summary judgment are that

there be no genuine issue as to any material fact and that one of the parties be entitled to judgment as a matter of law.

In order to determine whether the two requirements for summary judgment were met in this case, we first undertake an examination of the deed of 20 June 1963 and, more particularly, the "water rights" clause of the deed purporting to create an easement. The deed first purported to convey to the defendants parcel no. 1, which was described as "a part of the Pearlie Lovin Lot." The clause purporting to convey an easement provides:

> WATER RIGHTS: The parties of the first part do hereby grant and convey unto the parties of the second part water rights to a spring located on the lands of the parties of the first part and known as the Old George Blankenship Spring, and the said parties of the first part also grants and conveys [*sic*] unto the parties of the second part water rights to a spring located on the lands of the parties of the first part, said location being approximately 300 feet Northeast of the Blankenship Spring, with the further right to install and maintain a water line over and across the lands of the parties of the first part to said springs and it is understood between the parties that the water rights conveyed shall run with the lands of the parties of the second part and shall be for their benefit and the benefit of their heirs and assigns.

The plaintiffs contend that the deed and the clause granting the easement are unambiguous, and provide an easement solely for the benefit of the lands conveyed therein and constituting parcel no. 1. The defendants also contend that the deed and easement are unambiguous. They contend, however, that an easement was created for the benefit of all of their lands and not only for the benefit of parcel no. 1. The defendants have not indicated whether their view, that an easement was created for the benefit of all of their lands, is limited to those lands which they owned at the time of the deed or is to include all lands then or later acquired.

An easement deed is a contract. *Weyerhaeuser v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539 (1962). When such contracts are plain and unambiguous, their construction is a matter of law for the courts. *Price v. Bunn*, 13 N.C. App. 652, 187 S.E. 2d 423 (1972); 2 Strong, N.C. Index 2d, Contracts, § 12, p. 311.

In undertaking to construe the intent of the parties as set forth in the deed and its "water rights" clause, we are required to look to the instrument in its totality. *Reynolds v. Sand Co.*, 263 N.C. 609, 139 S.E. 2d 888 (1965). We are additionally required to give the terms used therein their plain, ordinary and popular construction, unless it appears the parties used them in a special sense. *Taylor v. Gibbs*, 268 N.C. 363, 150 S.E. 2d 506 (1966); *Weyerhaeuser v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539 (1962); *Bailey v. Insurance Co.*, 222 N.C. 716, 24 S.E. 2d 614 (1943).

[1] Looking to the deed in question in its entirety and giving the terms used a proper construction, we find the deed and easement to be possessed of neither patent or latent ambiguity. In so finding, we conclude as a matter of law that the terms "land" and "lands" must be construed as interchangeable and synonymous where, as here, there is no clear expression of intent of the parties to the contrary. We additionally conclude that those terms in their plain, ordinary and popular sense, and as specifically used in the deed before us, remain interchangeable and synonymous. From such a reading of the entire deed, and no clear intent of the parties to the contrary appearing therein, we conclude and hold as a matter of law that the deed created an easement appurtenant to the lands conveyed therein and to no others.

Although we have found the terms contained in the deed of 20 June 1963 to be unambiguous, we would be required to give the easement conveyed an identical construction even had we found its terms less clear. Conveyances of easements are to be construed so as to accomplish the intent to the parties. Where the language employed in such conveyances is ambiguous, we will give it an interpretation which will effect a rational purpose and not one which will produce an unjust result. *Hine v. Blumenthal*, 239 N.C. 537, 80 S.E. 2d 458 (1954). If the interpretation of the easement pressed by the defendants should be adopted, it would be entirely uncertain as to which of their lands were to become a portion of the dominant tenement. We would be unable to determine whether the parties intended as a part of the dominant tenement those lands owned by the defendants on 20 June 1963 or those and all after acquired lands. Additionally we would be unable to determine whether the dominant estate was limited to those lands of the defendants adjacent to the lands of the plaintiff, or included all of the defendants' lands in Graham County, in

North Carolina or in the United States. The construction pressed by the defendants would, therefore, create a patent ambiguity as to the easement and render it void. *Oliver v. Ernul*, 277 N.C. 591, 178 S.E. 2d 393 (1971). We will not construe the deed and easement in question in such manner, and we avoid such an unusual and unjust result which would deny the defendants any easement for any of their lands. *Hine v. Blumenthal*, 239 N.C. 537, 80 S.E. 2d 458 (1954).

[2] We have construed the deed and easement as creating an easement appurtenant with parcel no. 1 as the dominant tenement. When the deed and easement are so construed, the pleadings, affidavits and other materials filed by the parties raise genuine and substantial issues as to material facts relating to the plaintiffs' allegations of trespass. The trial court's entry of summary judgment in favor of the defendants must be reversed and the cause remanded for further proceedings consistent with this opinion.

We additionally note, that even should we construe the deed and easement as including parcel no. 2 within the dominant tenement, which we do not, substantial issues of material fact sufficient to prevent the proper entry of summary judgment would still arise from the pleadings. As a part of their complaint, the plaintiffs allege that the defendants are in the process of preparing to create a reservoir upon lands still owned by the plaintiffs and to collect waters from the springs upon such lands to their irreparable damage. The defendants have not contended here that such activities would be permissible under any interpretation of the deed and easement, and this allegation of the complaint gave rise to a substantial issue of material fact as to a trespass by the defendants under any of the constructions of the deed and easement urged by the parties.

For reasons previously set forth, the judgment of the trial court is

Reversed and remanded.

Judges MORRIS and CLARK concur.

KERMIT LAMAR BLACK, SR., D/B/A ROCK WOOL INSULATING COMPANY v. EDWIN M. CLARK AND WIFE, MILDRED RECTOR CLARK

No. 7722DC253

(Filed 2 May 1978)

Contracts § 21.2— contract to install aluminum siding—substantial performance—failure to instruct—error

Where a contract is substantially performed, damages equalling the contract price less allowances for defects in performance or damages for failure to comply with the contract strictly may be recovered; therefore, the trial court erred in failing to instruct the jury on a substantial performance or to submit such issue to the jury where plaintiff claimed and his evidence showed that he substantially performed his contract with defendants to install aluminum siding on their house and defendants refused to allow him to complete performance.

ON writ of certiorari to review proceedings before *Cornelius, Judge*. Judgment entered 10 November 1976 in District Court, IREDELL County. Heard in the Court of Appeals 30 January 1978.

This action was brought to recover the amount allegedly due by defendants on a contract to install aluminum siding on defendants' home in Iredell County. The complaint alleges that the parties entered into a contract under which plaintiff agreed to "[i]nstall Reynolds antique Vinyl-tuf white ivory Roughwood 8" laminated to entire home. Box in overhand with alum. Soffit and fascia. Cover front porch ceiling with vertical aluminum. Cover front porch plate. Cover window sill with alum. Trim outdoor in alum. + vents $20 + alum foil $50". Defendants agreed to pay $3927.50 plus the $70 for the vents and aluminum foil. The complaint further alleged that plaintiff proceeded to furnish building materials and labor to defendants but that on 17 November 1975, the defendants ran plaintiff's workmen off the premises and since then refused to allow plaintiff to complete the work; that the contract was then substantially (at least 80%) completed "except for the correction of certain minor items and the completion of the siding installation"; that the defendants have failed and refused to pay for the materials and labor; that notice of lien was filed in the office of the Clerk of Superior Court of Iredell County; that defendants are indebted to plaintiff in the amount of $4007.50 with interest from 17 November 1975.

Defendants answered, admitting the contract, the fact that defendants ran plaintiff's workmen from the premises, and their refusal to pay but denying that the work was substantially completed or that plaintiff had properly furnished materials and labor. By way of counterclaim the defendants alleged that the plaintiff did not use the material specified in the contract, failed to install the aluminum properly, and failed to cover the house with aluminum foil. They asked for $5500 compensatory damages, $5000 punitive damages, and $1000 attorney fee.

Plaintiff denied all material allegations of the counterclaim.

At the close of the evidence, the court granted plaintiff's motion for a directed verdict as to defendants' claim for punitive damages.

The plaintiff tendered issues which would have allowed the jury to determine whether defendants breached the contract or unreasonably prevented plaintiff from completing the contract and whether plaintiff substantially performed the contract in accordance with its terms and provisions. The court refused to submit the tendered issues and, instead, presented issues as follows:

> "1. Did the plaintiff perform the contract in accordance with the terms and conditions agreed to by the parties?
>
> 2. If so, what amount, if any is the plaintiff entitled to recover of the defendants?
>
> 3. Did the plaintiff fail to perform the contract in accordance with the terms and conditions agreed to by the parties as alleged in the Answer and Counterclaim?
>
> 4. If so, what amount, if any, are the defendants entitled to recover of the plaintiff?"

The jury answered the first issue "No", the third issue "Yes", and the fourth issue "$2500.00". From judgment entered on the verdict, plaintiff gave notice of appeal. Plaintiff docketed the record on appeal after expiration of the time provided by Rule 12(a), North Carolina Rules of Appellate Procedure, and defendants, in apt time, filed a motion to dismiss the appeal. Plaintiff concedes that the record was filed nine days late but attributed the delay to defendants' failure to stipulate to the record until the 39th day after service of the record on him. Plaintiff requests that, under

Rule 21, we treat the purported appeal as a petition for a writ of certiorari. This we have done and have allowed the petition in order that we may review the case on its merits.

Randy Duncan for plaintiff appellant.

Sowers, Avery and Crosswhite, by William E. Crosswhite, for defendant appellees.

MORRIS, Judge.

Plaintiff's evidence is summarized as follows: The contract was entered into on 16 September 1975, and the work was begun on or about 29 October 1975 and continued smoothly until Mrs. Clark, on 19 November 1975, ordered the workmen to leave the job and locked the gate. At that time the work was 75% to 80% completed. Shortly after the work was begun, Mrs. Clark called to plaintiff's attention the fact that there was some Kaiser material on the job and she wanted Reynolds. The Kaiser was taken up and Reynolds material brought to the job in its place. The work crew was changed because the original crew was not experienced in putting up soffit. The second crew was experienced and had been working for plaintiff for 20 years. The Clark job entailed the use of backer board and when that is used, aluminum foil as additional insulation is totally valueless. The Clarks wanted the aluminum foil, and plaintiff agreed to put it up virtually at cost. When all Reynolds aluminum is used, the Reynolds Company gives a 30-year guaranty. No other aluminum was used than Reynolds. Although the Reynolds specifications call for the use of aluminum nails, the Company will issue the same guarantee if a steel-coated nail is used because, although the aluminum nail won't rust, it cannot be driven in old hard pine. The Clark house was probably 100 years old and built of old hard pine. The steel-coated nails are not exposed to the weather and "it's not correct that the nails we used after a while will turn bad and rust". The Reynolds aluminum factory has verified the use of steel-coated nail. "In my experience the recommended proper spacing of nail in aluminum siding is not more than 16 inches when the application is direct to studs and not more than 20 inches when the application is over sheathing . . . And my company follows those practices." There were certain deficiencies in the job when the work was examined in January. The aluminum was not cut to fit

the porch ceiling properly, and it wasn't locked. The porch ceiling was poorly done. Mr. Clark pointed this out, and plaintiff agreed. Plaintiff was going to take it all down and redo it. There were some loose pieces of siding, because the siding didn't go up to the boxing. There were two or three feet left with no siding on it, so it was loose. This was natural since plaintiff had not been allowed to finish it. Some of the trim around the doors and windows needed reworking. When plaintiff talked to defendants in November, he offered to fix the deficiencies and his estimate of the cost to do so would be $500.

At time of trial plaintiff had, including materials and labor, between $3000 and $3500 in the job. Plaintiff did not know of any complaints until notified that workmen had been dismissed. After the workmen were dismissed, plaintiff met with defendants and attempted to work out the problems. Plaintiff made defendants three offers: (1) To finish the job with a different crew, (2) to take the siding down and make a charge at that time, (3) settle up then on a percentage basis for what had been done. Although plaintiff contacted defendants several times, no agreement was reached.

Unused materials at the site amount to $905.

A workman testified that nails in the siding were spaced approximately two feet apart, and there was foil back of all the siding.

An employee of Reynolds testified that his Company issued a warranty with either aluminum or coated nails.

When Mrs. Clark dismissed the workmen, she used abusive, profane language, cursing the workmen and blocking his truck with her car.

Defendants' evidence was in conflict with plaintiff's evidence in several respects. They testified that materials other than Reynolds were used; that the nails were over 24 inches apart; that some of the siding did not fit and there were gaps; that some of the nails were rusty and bent; that there were areas which did not have aluminum foil under the siding; that the deficiencies were pointed out to plaintiff's employee who said that it was the best he could do; that they then instructed him to stop work and locked the gate to prevent his returning; that Mrs. Clark did not curse the employee; that plaintiff never contacted defendants

about correcting the deficiencies except once in January when he asked them to sign a statement that they would not come to the site and harass the workmen while repairs were being made; that defendants had the house inspected by the County Building Inspector who found that the siding did not meet the manufacturer's specifications in several respects; three different types of siding had been used, gap in the fascia allowed water to get underneath the siding, the nails were 30 to 48 inches apart on the exposed top row of siding, the aluminum foil had not been brought around the corners of the house, the products of three different manufacturers were on the site and some pieces of aluminum were missing from some of the boxes; that in defendants' opinion the house had a fair market value of $25,000 prior to plaintiff's work and $20,000 after defendants stopped the work; that defendants have not been able to complete the house and move in because the heating system and carpet could not be put in until the aluminum siding was put on.

It appears obvious that plaintiff's complaint is bottomed on substantial performance and defendants' refusal to allow him to complete performance. His evidence supports that theory. "It is now stated as the general rule that substantial performance of a contract will support a recovery of the contract price less allowances for defects in performance or damages for failure to comply with the contract strictly." 17 Am. Jur. 2d, Contracts, § 375, p. 818; Corbin on Contracts, Vol. 3A, § 701, p. 314; 17A C.J.S., Contracts, § 508, p. 812 *et seq.* While the doctrine of substantial performance is not limited in its application to construction contracts, it is readily apparent that building and construction contracts certainly lend themselves to the application of the doctrine. It has been said that the doctrine was conceived for use in a situation where the obligor-plaintiff has given the obligee-defendant a substantial portion of that for which he bargained and the performance is of such a nature that it cannot easily be returned. *Diamond Swimming Pool Co. v. Broome*, 252 S.C. 379, 166 S.E. 2d 308 (1969). In *Lumber Co. v. Construction Co.*, 249 N.C. 680, 684, 107 S.E. 2d 538, 540 (1959), the Court said:

> "Where a building contract is substantially, but not exactly, performed, the amount recoverable by the contractor depends upon the nature of the defects or omissions. 'Where the defects or omissions are of such a character as to be

capable of being remedied, the proper rule for measuring the amount recoverable by the contractor is the contract price less the reasonable cost of remedying the defects or omissions so as to make the building conform to the contract.' Annotations: 134 Am. St. Rep. 678, *684*; 23 A.L.R. 1435, *1436*; 38 A.L.R. 1383; 65 A.L.R. 1297, *1298*."

We think this is a case in which the doctrine is applicable. Whether there has been substantial performance of a contract is one of fact for the jury under proper instructions from the court. Here the jury was not instructed with respect to substantial performance, nor was any issue presented to the jury for determination. This was error and entitles plaintiff to a new trial. We note that the Pattern Jury Instructions for Civil Cases contain suggested issues and instructions thereon for use in cases involving substantial performance of contracts.

Plaintiff has assigned as error rulings of the trial court with respect to the admission of evidence for defendants. We have examined those assignments of error and find them to be without merit.

New trial.

Judges VAUGHN and ERWIN concur.

STATE OF NORTH CAROLINA v. LEON McNAIR

No. 7713SC735

(Filed 2 May 1978)

1. Burglary and Unlawful Breakings § 5.9— breaking and entering and larceny— recent possession of instrument used in crimes

The State's evidence was sufficient to support an inference that defendant was the person who committed a breaking and entering and larceny at a bowling alley where it tended to show that the unlawful entry was effected in the early morning hours by chopping a hole through a vent in the building; an ax suitable for accomplishing this was found beneath the hole immediately after the crimes were committed; and defendant had possession of that ax on the preceding day.

2. Jury § 7.10— juror kin to member of Public Safety Commission—motion for mistrial

The trial court did not err in the denial of defendant's motion for mistrial made on the ground that defense counsel had gotten no response when he asked all jurors if any of them "were related to or good friends with anyone involved in law enforcement" and defense counsel discovered during the trial that one juror was a brother of a member of the Columbus County Public Safety Commission, since a member of the Commission was not a law enforcement officer and was not involved in criminal investigations, but only had part-time administrative duties such as supervising and hiring for the Columbus County Police force and the county jail; no Columbus County police officers were involved in the investigation or prosecution of defendant's case; a juror's close relationship with a police officer, standing alone, is not grounds for a challenge for cause in any event; and there were, therefore, no grounds for a successful challenge for cause.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 29 June 1977 in Superior Court, Columbus County. Heard in the Court of Appeals 16 January 1978.

This is a criminal prosecution for felonious breaking and entering and felonious larceny. The State presented evidence to show:

Early Saturday morning, 12 March 1977, while it was yet dark, the burglar alarm in a building housing a bowling alley in Whiteville went off. Officer McPherson of the Whiteville Police Department went to investigate. As he drove to the back of the building his car lights shone on a man up on a little scaffold beside the rear wall of the building. The man jumped off the scaffold and ran. Officer McPherson could see only that he was a black male of slender build, approximately five feet, ten inches in height, a description which fits the defendant. The officer saw no one else around. Further investigation disclosed that the scaffold was directly under an air exhaust vent. Aluminum louvers on the vent had been chopped or beaten loose, making a hole big enough to crawl through. Beneath the vent the officer found an ax which had a badly chipped handle. Inside the building the office door was open, the top desk drawer was open, and $12.00 was missing from the drawer.

Emma Bellamy, a witness for the State, identified the ax found beneath the broken vent as hers and testified she had loaned it to defendant on Friday, 11 March 1977, when defendant

came to her house saying he wanted to borrow the ax to cut wood. Defendant had promised he would return her ax either that night or in the morning, but he never returned it. Instead, Mrs. Bellamy found a red-handled ax on her porch a few days later. This was not the same ax she had loaned to the defendant, and she thought that defendant must have brought it in place of her ax.

Clarence Brown, a police detective, testified that defendant told him two conflicting stories regarding Mrs. Bellamy's ax. Defendant first told Brown that while he was cutting wood the day after borrowing the ax from Mrs. Bellamy, he broke the handle. He purchased a new handle to put in Mrs. Bellamy's ax head, and he put the repaired ax on Mrs. Bellamy's porch. The second story was that defendant loaned Mrs. Bellamy's ax to a white boy but did not know what the white boy did with the ax.

Defendant took the stand and denied he had committed the offenses for which he was charged. He admitted that he told Brown two stories about the ax. He testified that he told Brown the first story only because he was mad and shocked about being accused of the crimes. Defendant stated that he borrowed the ax from Mrs. Bellamy for a friend named Harry, who was a bushy-haired white male. He did not tell Mrs. Bellamy his real reason for borrowing her ax because he knew that she would not let anyone else use the ax. His friend did not show up to get the ax that day, so defendant left the ax on his back porch. When he woke up on the morning of 12 March, the ax was gone, so he bought a new handle and located an old ax head to put the handle in. He left the replacement ax at Mrs. Bellamy's house.

The jury found defendant guilty on both counts. From judgment imposing prison sentences, defendant appeals.

Attorney General Edmisten by Associate Attorney Lucien Capone III for the State.

Marvin J. Tedder for defendant appellant.

PARKER, Judge.

We find the evidence sufficient to warrant submission of the charges against defendant to the jury. Accordingly, we find no error in the denial of defendant's motion for directed verdict.

[1] There was ample evidence that the offenses charged against defendant were committed by someone in the darkness of the early morning hours of 12 March 1977. There was evidence that the unlawful entry was effected at that time by chopping a hole through a vent in the rear wall of the building. An ax suitable for accomplishing this was found beneath the hole immediately after the crimes were committed. Defendant was shown to have had possession of that ax on the preceding day. In our opinion a reasonable inference is that defendant was the person who brought the ax to the building and there used it to effect the unlawful entry. The jury could also reasonably infer that he was the person who committed the larceny pursuant to that breaking and entering.

It has long been recognized that possession of stolen property soon after the theft warrants an inference that the possessor is the thief and, if there is sufficient evidence that the property was stolen pursuant to a breaking and entering, that the possessor is also guilty of the breaking and entering. *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972); *State v. Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472 (1969). Inferences based on similar reasoning arise in the present case. Where, as here, the evidence shows (1) that a breaking and entering occurred; (2) that prior thereto the accused had possession of an instrument used to effect it; (3) that such possession occurred within a short time prior to the breaking and entering; (4) and that the instrument was found at the scene of the crime immediately after the crime was committed, a jury would be justified in finding that the instrument had been brought there by the person who had been shown to have previously possessed it and that such person used it to effect the breaking and entering. If the evidence is also sufficient to show that the crime of larceny was committed pursuant to the breaking and entering, then the jury may infer that the accused is guilty of larceny as well as breaking and entering.

[2] Defendant's remaining assignment of error is directed to the trial judge's denial of his motion for a mistrial made just after the jury retired to consider its verdict. The basis for defendant's motion arose out of the voir dire of prospective jurors. In his motion, defendant's attorney stated to the court that he "asked all the jurors if any of them were related to or good friends with anyone connected with or involved in law enforcement work." None of

the jurors responded at that time, but defense counsel later discovered "that one of the jurors is in fact a brother to a Police Commissioner of the Columbus County Police Department." In denying defendant's motion, the trial judge observed that the question asked of the prospective juror was "whether he was related to or a good friend of anyone involved in law enforcement."

In recalling the question asked of the prospective jurors, the defense attorney and the trial judge stated the question somewhat differently. Although the trial judge made no findings of fact denominated as such regarding the precise wording of the question, we are nevertheless bound by his statement of the facts, *i.e.*, "that the question asked was whether he [the prospective juror] was related to or a good friend of anyone involved in law enforcement."

Even if the juror's relation to "a Police Commissioner" had been disclosed on voir dire, we note that the mere existence of that relation did not disqualify the juror nor did it constitute grounds for a successful challenge for cause. "[A] juror's close relationship with a police officer, standing alone, is not grounds for a challenge for cause." *State v. Lee*, 292 N.C. 617, 625, 234 S.E. 2d 574, 579 (1977). Moreover, the juror's brother was not a police officer, as that term is generally understood. Described by defense counsel as "a Police Commissioner of the Columbus County Police Department," the position of the juror's brother is more accurately described as a member of the Columbus County Public Safety Commission. Membership on that commission is a part-time job, the commission being required only to meet once each month. A member of the commission is not a law enforcement officer and is not involved in criminal investigations. The position is administrative with such duties as supervising and hiring for the Columbus County Police Force and the county jail. 1973 N.C. Sess. Laws Ch. 101, *as amended*, 1973 N.C. Sess. Laws Ch. 311, and 1975 N.C. Sess. Laws Ch. 460. No Columbus County police officers were involved in the investigation or prosecution of the present case. Thus, the record reveals no grounds for a successful challenge for cause.

Defendant argues that had he known of the juror's affiliation with a member of the Public Safety Commission, he would have

exercised a peremptory challenge to remove the juror "on the basis that said affiliation or association may cause biased or subjective feelings," but that he was prevented from exercising such a challenge by the juror's failure to reveal the relationship. Even so, a decision as to a juror's competency, both at the time of selection and subsequently during the trial, rests in the trial judge's sound discretion and is not reviewable upon appeal absent a showing of abuse of discretion. *State v. Waddell*, 289 N.C. 19, 220 S.E. 2d 293 (1975), *death penalty vacated*, 428 U.S. 904, 96 S.Ct. 3211, 49 L.Ed. 2d 1210 (1976); *State v. Buffkin*, 209 N.C. 117, 183 S.E. 543 (1936); *State v. Gibbs*, 5 N.C. App. 457, 168 S.E. 2d 507 (1969); *State v. Blount*, 4 N.C. App. 561, 167 S.E. 2d 444 (1969). In the present case no abuse of discretion has been shown. In that connection, we note that there was no evidence that the juror deliberately misrepresented his relationship. In view of the purely administrative nature of the duties of members of the Columbus County Public Safety Commission, it would have been reasonable for the juror to conclude that his brother lacked the direct involvement in law enforcement which defense counsel sought to discover. In addition, the trial judge questioned the jurors regarding possible bias, and "[n]one of the jurors indicated that they would be influenced by anything other than evidence in the case." No abuse of discretion having been shown, defendant's assignment of error directed to the trial court's denial of his motion for mistrial is overruled.

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

No error.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. PAUL DAVID MOOSE

No. 7726SC958

(Filed 2 May 1978)

1. **Criminal Law § 73.2— facts within personal knowledge—no hearsay testimony**

In a prosecution of defendant for the willful presentation of a false and fraudulent insurance claim, an independent insurance agent could properly testify with respect to the insurance contract in question, since such testimony did not extend beyond his personal knowledge and observation of the facts so as to render his testimony incompetent or hearsay.

2. **Criminal Law § 81— insurance contract and proof of loss forms—photostatic copies admitted—best evidence rule inapplicable**

In a prosecution of defendant for filing a fraudulent insurance claim, photostatic copies of the insurance contract, defendant's claim form, and proof of loss forms were not improperly admitted because they failed to comply with the best evidence rule, since the matters sought to be proved by the documents were collateral to the contents or terms of each document and non-production of the original documents was therefore excused.

3. **Criminal Law § 169— failure of record to show excluded testimony**

The court on appeal cannot hold that the exclusion of evidence is prejudicial where the record does not show what the testimony would have been had the witness been allowed to answer.

4. **Criminal Law § 71— trailer serial number tampered with—shorthand statement of fact**

In a prosecution of defendant for filing a fraudulent insurance claim on a boat, motor and trailer, the trial court properly allowed a non-expert witness to give an opinion in the form of a shorthand statement of fact with respect to the appearance of serial numbers on the trailer.

5. **Criminal Law § 80— testimony about insurance policy—competency of witness to testify**

In a prosecution of defendant for filing a fraudulent insurance claim, defendant's contention that the vice president in charge of claims of the insurance company which wrote the policy was incompetent to testify because he had no authority to issue or approve insurance policies is without merit, since the witness testified that he was familiar with and had access to the records of the insurance company.

APPEAL by defendant from *Baley, Judge*. Judgment entered 21 July 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 March 1978.

Defendant was charged with the willful and knowing presentation of a false or fraudulent claim upon a contract of insurance in violation of G.S. 14-214. The State's evidence tended to show that defendant went to the offices of Archie L. Hargett, an independent insurance agent, on 22 April 1976 and asked Mr. Hargett to obtain insurance coverage for a 1973 Chrysler boat, serial number 1758723, a 1973 Mercury motor, serial number 948586, and a 1966 Moody trailer, serial number 662546, owned by defendant. Mr. Hargett telephoned the information to Strickland Insurance Brokers (hereinafter referred to as Strickland), an agent for Northwestern Insurance Company (hereinafter referred to as Northwestern), and Strickland bound insurance coverage of the boat, motor and trailer with Northwestern. Northwestern issued policy BOP 3072 to defendant providing coverage for one year, 22 April 1976 to 22 April 1977, and sent a copy of the policy to Mr. Hargett.

The State's evidence further tended to show that in June, 1976 defendant transferred title to the insured property to Estus Wayne Bryson. Later that month, defendant paid Mr. Bryson $50.00 to transport the boat, motor and trailer to City Auto Sales in Rock Hill, South Carolina, where Carl Bobo purchased them for $1,500.00. Mr. Bryson signed the bill of sale, but did not receive any part of the $1,500.00, which was kept by defendant.

On 30 August 1976, defendant went to Mr. Hargett's office and stated he wanted to file a claim because his boat had been stolen. Mr. Hargett obtained proof of loss forms from Northwestern, and on 8 October 1976, defendant submitted a proof of loss claim to Northwestern for $3,732.56, the alleged amount of loss resulting from the theft of his boat, motor and trailer.

In October, defendant contacted Mr. Bryson and told him the boat had been reported as stolen, but it had been found in Statesville. Defendant further instructed Mr. Bryson that if the police asked any questions, he should show the police the bill of sale, deny defendant's ownership and say he purchased the boat from another man.

Defendant's evidence tended to show that Carl Bobo paid the $1,500.00 to Estus Wayne Bryson and not to defendant. Also, Mr. Bobo testified that at no time did he see Mr. Bryson and defendant together in Rock Hill. Defendant's wife and daughter testified

that they saw the boat and rode in it subsequent to the date of the sale of the boat by Mr. Bryson to Mr. Bobo. Nathaniel Jackson, an employee of Carl Bobo, testified he was familiar with defendant's boat and the boat sold by Mr. Bryson to Mr. Bobo was not defendant's boat.

From a verdict of guilty as charged and a sentence of three years in prison, defendant appeals.

Attorney General Edmisten, by Associate Attorney R. W. Newsom III, for the State.

Haynes, Baucom, Chandler and Claytor, by W. J. Chandler, for defendant appellant.

WEBB, Judge.

[1] Defendant contends in his first assignment of error that Archie L. Hargett was not competent to testify as to the contract of insurance between defendant and Northwestern Insurance Company. He argues that the only witnesses competent to testify as to the contractual relationship between defendant and Northwestern are Northwestern or its agent, Strickland Insurance Brokers. His rationale is that Mr. Hargett as broker of the policy had no authority to act as agent for Northwestern and thus, absent the intermediary agent Strickland, Mr. Hargett had no power to procure an insurance policy with Northwestern. *See* G.S. 58-39.4(b). We hold Mr. Hargett was a competent witness to testify about the insurance contract. As a general rule, non-expert witnesses are competent to testify as to facts within their own knowledge and observation. *Peterson v. Johnson*, 28 N.C. App. 527, 221 S.E. 2d 920 (1976). It was not necessary that Mr. Hargett have the authority to contract directly with Northwestern, vis a vis, the power to broker the policy in order to be a competent witness. Mr. Hargett had first-hand knowledge of what property was to be insured; that Strickland had bound coverage with Northwestern, and in fact, had received a broker's copy of policy BOP 3072 issued to defendant by Northwestern. Testimony given by Mr. Hargett relating to the insurance contract did not extend beyond his personal knowledge and observation of the facts so as to render his testimony incompetent or hearsay.

[2] Defendant next challenges the introduction of State's Exhibits 1, 2, 3, 4 and 5 on the basis that their admission into evi-

dence violated the best evidence rule. He contends that it was improper to admit the exhibits, which were photostatic copies of the original documents, without first accounting for the failure to produce the originals. *See State v. Anderson*, 5 N.C. App. 614, 169 S.E. 2d 38 (1969). We hold that the best evidence rule is not applicable to the admission of exhibits in this case. It is well settled that the best evidence rule does not apply "to writings when their contents are not in question or when they are only 'collateral' to the issues in the case . . .", 2 Stansbury's N.C. Evidence, § 190 (Brandis Rev. 1973). The contents or terms of the exhibits introduced were not in issue in this case as would be necessary before the rule could properly be invoked. The State sought to prove: (1) that the defendant had entered into an insurance contract with Northwestern providing coverage for a certain boat, motor and trailer, exhibit 1, broker's copy of the insurance policy; (2) that a claim was made upon this policy for the loss of property insured under the contract, exhibit 2, police report, exhibit 3, claim form, and exhibits 4 and 5, proof of loss; and (3) that the claim made was false. The terms of the insurance contract, police report, claim form and proofs of loss were not in controversy. The matters sought to be proved by the writings were collateral to the contents or terms of each document and therefore, the nonproduction of the original documents was excused.

[3] In his third assignment of error, defendant asserts that he was prejudiced by the exclusion of testimony relating to the existence of civil litigation filed by him against Northwestern. On cross-examination, defendant asked E. C. Dean, a Northwestern claims adjuster, if he recalled the attorney for defendant saying that he would institute civil suit against Northwestern. The State objected to the question and the objection was sustained. The record does not disclose what the testimony would have been had Mr. Dean been permitted to answer. Even assuming that the question propounded by defendant on cross-examination was proper, we are not allowed to go further and predict what response the witness would have given. We cannot hold that the exclusion of evidence is prejudicial where the record does not show what the testimony would have been had the witness been allowed to answer. *State v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342 (1955); *State v. Robinson*, 280 N.C. 718, 187 S.E. 2d 20 (1972).

[4] Defendant also objects to the testimony of a boat repairman, William Armstrong, on the grounds that questions directed to Mr. Armstrong concerning the appearance of serial numbers on the trailer called for conclusions or opinion testimony by a non-expert witness. Mr. Armstrong testified that the numbers appeared to have been double stamped and that the second number 6 appeared to have a ball peen hammer mark. We hold that the testimony of Mr. Armstrong was properly admitted. Lay witnesses may give opinions in the form of shorthand statements of facts observed where the facts on which the opinion was based cannot practically be described so that a jury can understand them and draw their own conclusions. 1 Stansbury's N.C. Evidence, § 125 (Brandis Rev. 1973); *see Steele v. Coxe*, 225 N.C. 726, 36 S.E. 2d 288 (1945); *Peterson v. Johnson, supra.*

[5] In defendant's seventh and eighth assignments of error, he contends that it was improper to admit the testimony of K. W. Duncan, Vice President in charge of claims at Northwestern, relating to the insurance contract between defendant and Northwestern, and that the court further erred by admitting exhibit 19, cover sheet of Boat Owner Policy 3072, and exhibit 20, a standard Northwestern Boat Owner Policy. We disagree. Defendant argues that Mr. Duncan is incompetent to testify about policy BOP 3072 since he (Mr. Duncan) had no authority to issue or approve insurance policies. Mr. Duncan's competency to testify does not depend on his power to contract. Mr. Duncan testified that he was familiar with and had access to the records of the insurance company. We find that a sufficient nexus between the witness and records was shown for Mr. Duncan to testify that policy BOP 3072 insured a Chrysler boat, Mercury motor, and Moody trailer. *See State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975); *State v. Lippard*, 222 N.C. 167, 25 S.E. 2d 594 (1943). Defendant again relies on the best evidence rule in contending that exhibit 19 was improperly admitted by noting that no accounting was made for the State's failure to produce the original. The best evidence rule does not apply where no showing is made that the terms or contents of a document are in controversy. *See* 2 Stansbury's N.C. Evidence, § 190 (Brandis Rev. 1973). As to exhibit 20's introduction into evidence, defendant contends that the policy has no relevance to this suit because it is simply a form of a standard Boat Owner's Policy. He further contends that no foundation was

laid for the exhibit's admission into evidence. Defendant's arguments are specious. Mr. Duncan testified on direct examination of his familiarity and access to company records. He also testified that Northwestern had only one type of boat owner policy, and exhibit 20 was the same or similar to policy BOP 3072. We hold that an adequate foundation and relevance was shown for the admission of exhibit 20 into evidence.

This Court has thoroughly examined the defendant's remaining assignments of error and we find no merit in any of them. We hold, therefore, that defendant has had a fair trial, free from prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. STANLEY RAY BLACKMON

No. 7718SC988

(Filed 2 May 1978)

1. **Trespass § 13— forcible entry and detainer—sufficiency of warrant**

A warrant charging that defendant with force and violence trespassed upon the property of a named person in violation of G.S. 14-126 was sufficient to charge the crime of forcible entry and detainer prohibited by G.S. 14-126, although it would have been better for the warrant to have charged that the named person was in occupancy of the property at the time of the entry.

2. **Trespass § 13— forcible entry—sufficiency of evidence**

In a prosecution for forcible entry in violation of G.S. 14-126, evidence that defendant cut a screen and unlatched and opened a screen door and that he attempted to open the door by working the latch back with a plastic card was sufficient to show an entry, and evidence that there had been an altercation between the prosecuting witness and defendant earlier in the evening and that the prosecuting witness was frightened enough to have his shotgun ready in case defendant was able to get inside the house was sufficient to support a jury finding that the entry was likely to cause a breach of the peace and was, therefore, with force and violence.

3. **Criminal Law § 73.2— invitation to home—testimony not hearsay—exclusion as harmless error**

In a prosecution for forcible entry, the trial court erred in the exclusion of defendant's testimony that the prosecuting witness's daughter invited him to

the home where the incident occurred two or three days prior thereto, since the testimony was not hearsay but was competent to show that defendant went to the home as a result of the invitation; however, the exclusion of the testimony was harmless error since the alleged crime did not occur when defendant first went to the home but occurred after defendant had been ordered to leave and defendant thereafter returned to the home later the same night.

4. Trespass § 13— forcible entry—instructions

The trial judge properly explained the force necessary for defendant to be found guilty of forcible entry and detainer when he instructed the jury that the State had the burden of proving that defendant in making the entry "used such force or threatened to use such force as would tend to be a breach of the peace, and actual force or appearance tending to inspire a just apprehension of violence is necessary to constitute the offense."

5. Criminal Law § 138.11— trial de novo—more severe punishment

Upon an appeal from district court for a trial de novo in superior court, the superior court could properly impose punishment in excess of that imposed in the district court.

APPEAL by defendant from *Seay, Judge*. Judgment entered 21 July 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 31 March 1978.

The defendant was charged with forcible entry under G.S. 14-126. He was convicted in the district court and sentenced to 30 days in jail. He appealed to the superior court where he was again convicted and received a sentence of seven months with a recommendation that he be put on work release.

Mr. James D. Marshall testified for the State that he lived at Route 1, Pleasant Garden, North Carolina and had known the defendant for approximately one and a half years. Further testimony of Mr. Marshall was that he had forbidden the defendant to come in his house about six months before 19 March 1977; that on 18 March 1977, the defendant came to his home and he ordered the defendant out of his home at approximately 12:15 a.m. on 19 March 1977. The defendant left and Mr. Marshall lay on the couch with his 11-year-old daughter. They were awakened at approximately 4:00 a.m. by the defendant who was trying to force his way into the house. Mr. Marshall testified that he saw the defendant cut the screen, trip the screen door latch, open the screen, and try to open the door by working the latch back with what looked like a plastic business card. Mr. Marshall further

testified that he waited with a shotgun in case the defendant was able to get inside the house. He testified further that the defendant was not able to open the door and left. The defendant returned at 7:00 a.m. and again tried to force the door, but was unsuccessful. This time he left for good.

The defendant testified he was in Mr. Marshall's home on 19 March 1977; that he left and did not return after Mr. Marshall asked him to leave.

From the prison sentence imposed, the defendant has appealed. Other facts necessary to this case will be set forth in the opinion.

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

Cahoon and Swisher, by Robert S. Cahoon, for the defendant.

WEBB, Judge.

[1] The defendant has brought forward several assignments of error. First, he contends that the warrant does not charge a crime under G.S. 14-126, and that the proof is insufficient to sustain a conviction under that statute.

G.S. 14-126 says:

> "No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary he shall be guilty of a misdemeanor."

The warrant in this case charges:

> "On or about the 19 day of March 1977 . . . the defendant . . . did unlawfully, willfully, and with force and violence trespass upon the property of James D. Marshall located at Route 1, Box 90, Pleasant Garden, North Carolina in violation of the following law: G.S. 14-126."

There is an article at 39 N.C. L. Rev., 121 *et seq.*, by Professor David J. Sharpe, concerning three separate crimes regarding entries to property which exist in this State. These are (1)

forcible trespass, (2) entry after being forbidden, G.S. 14-134, and (3) forcible entry and detainer, G.S. 14-126, the crime with which the defendant is charged in this case. Professor Sharpe points out that forcible trespass is a common law crime which had its beginning in England; exists today in North Carolina and perhaps in England, but probably nowhere else in the world. Forcible entry and detainer was first made a crime in England in 1381 during the reign of Richard II. The North Carolina statute is a close translation of the French in which it was originally written. The principal distinctions between forcible trespass and forcible entry and detainer are that forcible trespass requires that the complaining party be an occupant of the premises while forcible entry and detainer requires occupancy plus some type of estate in the land. Forcible trespass requires an assault on the occupant of the premises while forcible entry and detainer does not require an assault on a person, but only an entry with a "strong hand", that is, something that could cause a breach of the peace. Entry after being forbidden does not involve an assault or entry with a strong hand, and it does not require actual occupancy of the land by the complaining party, but it does require the complaining party to have legal title to the land.

Examining the warrant under which the defendant was charged in this case, it appears that it meets the test of *State v. Teasley*, 9 N.C. App. 477, 176 S.E. 2d 838 (1970) by giving the defendant notice of the charge against him so that he may prepare his defense, plead double jeopardy if brought to trial again for the same offense, and enables the court to pronounce judgment in case of conviction. It would have been better for the warrant to have charged that Mr. Marshall was in occupancy of the property at the time of the entry, but we do not see how the defendant could fail to know with what crime he was charged when the warrant cited the section and charged that with "force and violence" he trespassed upon the property of James Marshall.

[2] The defendant argues that the State failed in its proof in that the cutting of a screen or removal of a lock does not constitute violence. We hold that the unlatching and opening of the screen and the attempt to open the door as shown by the State's evidence is enough to constitute entry. The fact that there had been an altercation between Mr. Marshall and the defendant earlier in the evening, together with all the circumstances in-

cluding the fact that Mr. Marshall was frightened enough to have his shotgun ready, is evidence from which the jury could conclude the entry was likely to cause a breach of the peace which would make it with force and violence.

[3] The defendant assigns as error the exclusion of offered testimony by him of an invitation Mr. Marshall's daughter extended to him to the Marshall home two or three days before the incident. We believe this was error. The testimony was not hearsay. It was offered to prove he was invited, not the truth of the daughter's extrajudicial statement and it depended on the witness not the daughter for credibility. 1 Stansbury's N.C. Evidence, § 138 (Brandis Rev. 1973). We believe this exclusion was harmless error, however. There was not a real dispute as to the defendant's being in the home the first time. It was after he was ordered to leave the home by Mr. Marshall and returned that the alleged unlawful entry occurred.

The defendant also assigns as error the rulings of the trial court on several other evidentiary matters. At one point, the defendant's counsel asked Mr. Marshall if he did not testify in district court that the defendant "busted" in the door the first time he came to the house. Mr. Marshall answered that the defendant opened the door and came in. Defendant contends this was not responsive and the court should have required the witness to properly answer the question. Continuing this line of questioning, defendant's counsel asked Mr. Marshall how he knew the defendant pushed open the door if Mr. Marshall was, as he said, in his bedroom. Mr. Marshall said he was "going by sound." Defendant contends Mr. Marshall's entire line of testimony as to how defendant first entered the house should have been struck on the basis of this answer. During cross-examination of the defendant, the Assistant District Attorney stated, "[d]uring the entire time he (Mr. Marshall) was testifying, I noticed you kept laughing as if it was a joke." The defendant contends the District Attorney was allowed to make a jury speech in the guise of a question which was error. While we might have ruled differently in all the above instances, we do not believe the court's rulings so abused its discretion to conduct the trial as to constitute reversible error. *Greer v. Whittington*, 251 N.C. 630, 111 S.E. 2d 912 (1959).

The defendant also contends the court erred in the charge in several respects. The court instructed the jury that the warrant

charged the defendant with entry by force and violence which the defendant contends was error as the warrant charged a trespass. The court instructed the jury in another part of the charge that trespass and entry were being used synonymously. We can see no error here.

[4] At one point in the charge, the court instructed the jury that the State must prove beyond a reasonable doubt that the defendant made an unpermitted and willful and wrongful entry onto the premises. The defendant contends this is error because it does not charge that the entry must be with force and violence. In explaining the type of entry required the court said, "[t]he State must satisfy you from the evidence and beyond a reasonable doubt that the defendant Blackmon in making the entry onto the premises used such force or threatened to use such force as would tend to be a breach of the peace, and actual force or appearance tending to inspire a just apprehension of violence is necessary to constitute the offense." We believe this was a clear explanation of the force necessary for the defendant to be found guilty of forcible entry and detainer.

[5] Finally, the defendant contends it was error for the superior court to impose a sentence of seven months after he had received a sentence of 30 days in the district court. In this assignment of error, we find no merit. *State v. Harrell*, 281 N.C. 111, 187 S.E. 2d 789 (1972).

No error.

Judges PARKER and VAUGHN concur.

HENRY T. TURNER, FIRST PARTY PLAINTIFF AMERICAN SECURITY INSURANCE COMPANY, SECOND PARTY PLAINTIFF v. RAYMOND MASIAS, FIRST PARTY DEFENDANT ROBERT HUGH PEARSON, SECOND PARTY DEFENDANT ALLSTATE INSURANCE COMPANY, THIRD PARTY DEFENDANT

No. 777DC363

(Filed 2 May 1978)

1. **Insurance § 92— "other insurance" clause—financial responsibility law not contravened**

A paragraph of defendant Allstate's uninsured motorist coverage contract which provided that "any amount payable to an insured under the terms of this endorsement shall be reduced by . . . the amount paid or payable to such an insured under any policy of property insurance" was a valid and enforceable provision and did not violate the terms or intent of the Motor Vehicle Safety-Responsibility Act of 1953, G.S. 20-279.1 through G.S. 20-279.39.

2. **Insurance § 92— "other insurance" clause—financial responsibility law not contravened**

"Other insurance" clauses in policies providing uninsured motorist coverage may not be enforced if such enforcement results in limiting an insured to recovery of an amount equal only to the coverage compelled by the Motor Vehicle Safety-Responsibility Act when the actual damages suffered by the insured are greater than that amount, but the use of such "other insurance" clauses to establish the rights of insurers in cases in which the damages are less than the coverage required by the Act are not offensive to either the terms or intent of the Act.

APPEAL by plaintiffs from *Carlton, Judge*. Judgment entered 15 February 1977 in District Court, EDGECOMBE County. Heard in the Court of Appeals 9 February 1978.

The material facts giving rise to this appeal are uncontested.

On 3 October 1974, Henry T. Turner's automobile was struck from behind by an automobile driven by Raymond Masias and owned by Robert Hugh Pearson. The Turner automobile was destroyed, and he and his wife were injured.

Turner carried collision insurance with American Security Insurance Company [hereinafter "American"] and liability insurance with Allstate Insurance Company [hereinafter "Allstate"]. American paid Turner $1,856.50 on 18 October 1974. This payment represented a settlement of Turner's claim for damages in the amount of $1,916.50 under his collision insurance policy with American which contained a clause providing for $50 deduction

from actual property damages and $25 deduction from actual towing costs prior to payment.

It was later discovered that Masias had stolen the Pearson automobile and that his possession and use of it at the time of the collision with the Turner automobile was neither permissive nor lawful. The parties stipulated that the vehicle driven by Masias and owned by Pearson was an uninsured motor vehicle as defined in General Statute 20-279.21(b) at the time of the collision. Additionally, it was stipulated that, at the time of the collision, Masias was wilfully or recklessly negligent, and this negligence proximately caused Turner's property damage.

American, by virtue of its payment to Turner, succeeded by subrogation to any and all rights of Turner against Allstate in connection with the accident. American, subsequent to its payment to Turner, made demand on Allstate to comply with G.S. 20-279.21 and specifically to reimburse the plaintiffs for property damage sustained in the accident. Allstate, which provided Turner's liability insurance and uninsured motorist insurance under a policy having a $100 deductible clause, refused to reimburse the plaintiffs.

The plaintiffs, Turner and American, then brought this action against Allstate for Turner's property damages. Allstate raised as its defense paragraph 5(d) of its contract of insurance providing uninsured motorist coverage which states: "Any amount payable to an insured under the terms of this endorsement shall be reduced by . . . the amount paid or payable to such an insured under any policy of property insurance." American and Allstate stipulated that, as between them, there were no questions of fact to be decided by the trial court. Allstate moved for summary judgment.

The trial court found that the damages sought by the plaintiffs were $1,916.50, and the uninsured motorist coverage undertaken by Allstate had a $100 deductible provision. The trial court concluded that the maximum amount Allstate could be held liable for was $1,816.50, which was less than that amount already paid to the plaintiff, Turner. Therefore, the trial court determined that Turner had been made whole for any damages, and that American was the only plaintiff with any interest in the outcome of the litigation.

The trial court concluded that the sole question to be decided, as between American and Allstate, was whether paragraph 5(d) of Allstate's contract for uninsured motorist coverage is a valid provision under G.S. 20-279.21. The trial court concluded this provision of the contract was valid and lawful and granted Allstate's motion for summary judgment. From this judgment, Turner and American appealed.

Grover Prevatte Hopkins, by Herbert Frank Allen, for plaintiff appellants.

Moore, Diedrick & Whitaker, by L. G. Diedrick, for defendant appellee, Allstate Insurance Company.

MITCHELL, Judge.

[1] The sole question presented by this appeal is whether paragraph 5(d) of Allstate's uninsured motorist coverage contract is a valid and enforceable provision and does not violate the terms or intent of the Motor Vehicle Safety-Responsibility Act of 1953, G.S. 20-279.1 through G.S. 20-279.39 [hereinafter the "Act"]. American contends that the reduction clause in Allstate's uninsured motorist policy frustrates the intent and violates the terms of G.S. 20-279.21(b)(3), which requires that:

> No policy of bodily injury liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this State with respect to any motor vehicle . . . unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in subsection (c) of G.S. 20-279.5. . . . Such provisions shall include coverage for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of injury to or destruction of the property of such insured, with a limit in the aggregate for all insureds in any one accident of Five Thousand Dollars ($5,000) and subject, for each insured, to an exclusion of the first One Hundred Dollars ($100.00) of such damages.

[2] It is clear that "other insurance" clauses in policies providing uninsured motorist coverage may not be enforced if such enforcement results in limiting an insured to recovery of an amount

equal only to the coverage compelled by the Act, when the actual damages suffered by the insured are greater than that amount. In *Moore v. Insurance Co.*, 270 N.C. 532, 543, 155 S.E. 2d 128, 136 (1967), the Supreme Court of North Carolina stated:

> In our opinion our statute is designed to protect the insured as to his actual loss within such limits, but being of statutory origin it was not intended by the General Assembly that an insured shall receive more from such coverage than his actual loss, although he is the beneficiary under multiple policies issued pursuant to the statute. It seems clear that our statute does not limit an insured only to one $5,000 recovery under said coverage where his loss for bodily injury or death is greater than $5,000, and he is the beneficiary of more than one policy issued under G.S. 20-279.21(b)(3).

The problem presented by the present case, however, differs from that presented in *Moore*. Here, the injured insured has been made entirely whole by the coverage provided under the collision policy of American. Although the "other insurance" clause in Allstate's uninsured motorist coverage would be invalid to prevent the insured from being made whole, we do not find the use of such clauses to establish the rights of insurers in cases in which the damages were less than the coverage required by the Act to be offensive to either the terms or intent of the Act. *See generally*, Annot. 28 A.L.R. 3d 551 (1969). The fact that two policies of insurance of different types are combined to provide the uninsured motorist coverage required by the Act does not contravene its terms and, in fact, is specifically provided for. G.S. 20-279.21(j); *see, Insurance Co. v. Insurance Co.*, 269 N.C. 341, 152 S.E. 2d 436 (1967).

The "other insurance" clause of Allstate's uninsured motorist policy does not violate the intent of the Act upon the facts presented by this case. As the Supreme Court of Florida has stated:

> There is no basis in the record before us for the conclusion that public policy will be violated by the enforcement of clause 3(b)(4) [similar to Allstate's 5(d)] although we cannot and do not hold that this will be true in every case. For aught that appears here, sufficient financial responsibility is

> provided for the protection of the public, and this is nothing more than a contest between insurance companies.

Continental Cas. Co. v. Weekes, 74 So. 2d 367, 46 A.L.R. 2d 1159 (1954), quoted with approval in *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 353, 152 S.E. 2d 436, 445 (1966).

Neither the language of the Act nor the public policy served by it is concerned with which insurance company makes the insured whole, so long as the "other insurance" clause is not used to defeat recovery of actual damages by an insured who has not rejected uninsured motorist coverage. The insured having recovered his actual damages in this action, the trial court did not err in granting summary judgment in favor of Allstate and against American.

As we have found the "other insurance" clause of Allstate's policy does not on these facts violate the Act, Allstate is entitled to have that clause enforced as written. Where, as here, a contract is not contrary to public policy or prohibited by statute, the constitutional guarantee of freedom to contract requires that it be enforced. *Muncie v. Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474 (1960).

As pointed out by the trial court, Turner has recovered more under American's $50 deductible collision policy than he would have recovered under Allstate's $100 deductible uninsured motorist coverage. As he has been made whole, the trial court committed no error in granting summary judgment in favor of Allstate and against him.

We hold the judgment of the trial court was proper, and it is

Affirmed.

Judges MORRIS and CLARK concur.

JOSEPH BROWN BECK v. AMERICAN BANKERS LIFE ASSURANCE COMPANY OF FLORIDA, JACK WALSH, INDIVIDUALLY, AND DONALD R. TENAGLIA, INDIVIDUALLY

No. 7718SC566

(Filed 2 May 1978)

1. **Appeal and Error § 6.12— partial summary judgment—immediate appeal**

Partial summary judgment was immediately appealable where it amounted to a final judgment that plaintiff is entitled to recover of defendant the sum of $21,500.73.

2. **Insurance § 2.6— *agent's right to commissions*—improper conduct in sale of policies—summary judgment**

Summary judgment was improperly entered for plaintiff on his claim against defendant insurance company to recover commissions on premiums paid on policies sold by plaintiff and his sub-agents where summary judgment was based solely on defendant's answer to an interrogatory that it was holding over $23,000 in plaintiff's account, but defendant presented affidavits that plaintiff and his sub-agents sold a number of policies by use of misrepresentations, harassment and coercion in violation of the insurance laws of North Carolina, and plaintiff's contract of employment with defendant, which was attached to the complaint, contained provisions negating plaintiff's right to commissions when policies were secured in such manner.

APPEAL by defendant American Bankers Life Assurance Company of Florida from *Collier, Judge*. Order entered 7 February 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 4 April 1978.

Plaintiff instituted this action to recover damages for alleged wrongful termination of his employment contract with the corporate defendant. (The individual defendants are employees of the corporate defendant; plaintiff's action has been dismissed as to them and they are not involved on this appeal; the corporate defendant will hereinafter be referred to simply as the defendant.)

Plaintiff was initially employed by the defendant in January 1970 and was promoted to the position of Division Manager in December 1970 with authority to sell life insurance and annuities, either in person or through his appointed sub-agents. The employment contract provided that plaintiff receive commissions on premiums paid on policies which he and his sub-agents sold. Plaintiff alleged in his complaint that after his contract was ter-

minated, the defendant wrongfully retained commissions to which he was entitled and that he will become entitled to additional commissions as renewal premiums are paid. Plaintiff sought to recover these commissions as damages and in addition prayed for punitive damages.

The defendant answered, denying plaintiff's allegation that the termination of his employment contract was wrongful. After making further investigation, defendant moved to amend its answer and to allege a counterclaim. It also moved to add certain of plaintiff's associates as additional parties. In the proposed counterclaim defendant alleged that plaintiff and his sub-agents had made many of their sales by coercion and harassment of clients and by deliberate misrepresentation of policy provisions. As a result of these actions by plaintiff and his sub-agents a number of policies they sold had to be cancelled, and in some instances defendant was required to refund all premiums paid by the policyholders. Defendant also alleged it had been forced to incur substantial expenses in investigating complaints made by policyholders who were the victims of plaintiff's harassment and misrepresentations. Defendant counterclaimed for damages in the amount of $750,000 caused by plaintiff's misconduct and asked that the sums it had been required to refund to policyholders and the expenses it had been forced to incur in investigating complaints be setoff against any money it might owe plaintiff for commissions.

The defendant maintained an account on its books to which it credited amounts accruing for plaintiff's commissions. In response to plaintiff's interrogatory, defendant stated that as of 15 April 1976 it was holding $23,009.34 in plaintiff's account.

On 17 January 1977 plaintiff moved for summary judgment, alleging that there was no dispute as to the existence of the employment contract between plaintiff and defendant and that defendant admitted it was holding approximately $23,000 belonging to plaintiff. Defendant filed affidavits in response to the motion for summary judgment stating essentially the same matters alleged in its proposed counterclaim.

By order entered 7 February 1977 the court dismissed the action as to the individual defendants and granted the defendant's motions to amend its answer, to be allowed to file its counter-

claim, and to add additional parties. As part of that same order, the court granted plaintiff's motion for summary judgment "subject to the parties determining within 15 days of the date of the entry of this order the amount or amounts being held by American Bankers Life Assurance Company of Florida as commissions earned by Joe Beck and it being further ordered that after the payment by the defendant, American Bankers Life Assurance Company of Florida, to Joe Beck of amount of commissions, that any amount paid under this order shall be considered as a credit against any recovery made by the plaintiff in this action if said commissions are considered in the further trial of this case." The court's order further expressly provided that "this matter is retained by the undersigned Judge for the determination of any amount due to the plaintiff under this order granting the plaintiff's Motion for Summary Judgment."

From so much of the order as granted partial summary judgment in favor of the plaintiff, defendant appealed.

Alspaugh, Rivenbark and Lively by James B. Rivenbark for plaintiff appellee.

Jordan, Wright, Nichols, Caffrey and Hill by Karl N. Hill, Jr., for defendant appellant.

PARKER, Judge.

[1] Defendant's sole assignment of error is directed to the portion of the court's order granting plaintiff's motion for partial summary judgment. G.S. 1A-1, Rule 56(d) allows the trial court to grant a partial summary judgment in appropriate circumstances. If the partial summary judgment is final as to the matters adjudicated therein, or if it affects a substantial right, it is immediately appealable. *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976); *Rentals, Inc. v. Rentals, Inc.*, 26 N.C. App. 175, 215 S.E. 2d 398 (1975). Although the partial summary judgment entered in the present case is somewhat ambiguous and its finality is open to question, it does appear to contemplate that defendant must make immediate payment to plaintiff of a substantial sum of money, the exact amount of which the parties were directed to determine. The record contains a supersedeas bond filed by defendant on 7 March 1977, which recites that "the amount of commissions has now been determined as $21,500.73."

This recitation, read in conjunction with the language of the partial summary judgment entered by the court, appears to have been considered by the parties to this appeal as converting the judgment into a final judgment that plaintiff is presently entitled to recover of defendant the sum of $21,500.73. We accept this interpretation and find the court's partial summary judgment presently appealable.

[2] Examining the material before the court when it passed on plaintiff's motion for summary judgment, we find that the trial court appears to have granted the partial summary judgment for plaintiff solely on the basis of defendant's answer to the following interrogatory:

> Question: How much money is the company holding in Joseph Beck's account?
>
> Answer: As of April 15, 1976, $23,009.34.

The court apparently interpreted this answer as establishing defendant's liability to pay plaintiff the amount it admitted it was "holding in Joseph Beck's account." We do not agree with the trial court's interpretation of the legal significance of defendant's answer to the interrogatory. That answer must be viewed in the light of the statements contained in defendant's affidavits, read in conjunction with the allegations in its counterclaim, all of which were before the court when it passed on plaintiff's motion for summary judgment. When so viewed, it is clear that defendant's answer did not amount to an admission that it was liable to plaintiff for all sums shown as held by it in the account which it maintained on its books in plaintiff's name. Defendant's affidavits support its allegations that plaintiff and his sub-agents sold a number of policies by use of misrepresentations, harassment, and coercion in violation of the insurance laws of North Carolina. The employment contract, which was attached to plaintiff's complaint, contains provisions negating plaintiff's right to commissions when policies are procured in a manner such as described in the affidavits. Defendant has therefore shown that there are genuine issues of material fact as to what amount of commissions, if any, plaintiff is entitled to receive, and the trial court erred in entering summary judgment on this issue.

Accordingly, the portion of the court's order granting plaintiff's motion for summary judgment on the issue of the amount of commissions he is entitled to receive from defendant is

Reversed.

Judges VAUGHN and WEBB concur.

IN THE MATTER OF THE IMPRISONMENT OF RICKY RAY TUTTLE

No. 7710SC963

(Filed 2 May 1978)

Criminal Law §§ 134.4, 144— youthful offender—notice of appeal—subsequent finding of no benefit as "committed youthful offender"

The trial judge's finding that defendant would receive no benefit from treatment and supervision as a "committed youthful offender" was effectual where it was entered before the term expired and on the same day and immediately after judgment and notice of appeal were entered, since the judgment remained *in fieri* until the expiration of the term despite the notice of appeal and could be modified in the trial judge's discretion.

ON writ of certiorari to review order entered by *Donald L. Smith, Judge.* Order entered 22 September 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 29 March 1978.

Respondent Ricky Ray Tuttle was tried and convicted of second degree rape at the 17 March 1975 Session of Superior Court in Forsyth County. At the time of his conviction, Tuttle was under 21 years of age. The trial judge, Judge W. Douglas Albright, pronounced judgment in open court on 18 March 1975 sentencing Tuttle to prison for a term of not less than forty nor more than sixty years. Immediately after this judgment was announced, respondent Tuttle, through his attorney, gave oral notice of appeal in open court.

After the oral notice of appeal was given, and while Tuttle and his attorney were still before him in open court, the trial judge made the following finding which he ordered attached to the judgment:

> Due to the facts and circumstances of this case, which the Court considers aggravated, and due to the background of the defendant insofar as he exhibits deviant sexual behavior, the Court finds that the defendant will not derive benefit from treatment and supervision pursuant to General Statute 148, Article 3-A, and, therefore, the Court specifically does not sentence the defendant as a committed youthful offender under the terms and provisions of that article.

In compliance with the judge's directive, this finding was attached to the written judgment, the judgment and the attachment thereto both being dated 18 March 1975 and signed by the trial judge.

On appeal, no argument was presented challenging the "no benefit" finding attached to the judgment. This Court found no error in the trial or in the judgment imposed, *State v. Tuttle*, 28 N.C. App. 198, 220 S.E. 2d 630 (1975), and our Supreme Court denied petition for certiorari. 291 N.C. 716, 232 S.E. 2d 207 (1977).

The present proceeding was commenced in August 1977 when Tuttle filed a petition for writ of habeas corpus in the Superior Court in Wake County. He contended his imprisonment was illegal because the trial judge had sentenced him to prison without having first made the finding required by G.S. 148-49.4 that he would not derive benefit from treatment and supervision as a "committed youthful offender" under Art. 3A of G.S. Ch. 148. He further contended that after notice of appeal was given the trial judge was deprived of all further jurisdiction and thereafter had no power to make the finding.

The writ of habeas corpus was issued. After a hearing on return of the writ, Judge Donald L. Smith entered an order finding the facts as to what had occurred when Tuttle was sentenced. On the basis of these findings, Judge Smith concluded as follows:

> 1. That after notice of appeal was entered, the attempt to correct the voidable judgment by making the "no benefit" finding of fact was erroneous and beyond the power of the trial court;
>
> 2. That the presiding judge had no authority to make any finding of fact after notice of appeal was entered;

3. That the "no benefit" finding must be made prior to the entry of a judgment or at the time thereof to indicate that the Court considered a committed youthful offender status as a sentencing option at the time of judgment as is required by Article 3A of Chapter 148 of the General Statutes of North Carolina.

4. That entry of the "no benefit" finding after judgment does not indicate that committed youthful offender status was considered prior to or at the time of judgment.

5. That the judgment entered on March 18, 1975 by the Honorable W. Douglas Albright should be vacated and the defendant, Ricky Ray Tuttle, should be returned to Forsyth County Superior Court for resentencing.

In accord with these conclusions, Judge Smith ordered that the judgment of imprisonment imposed on 18 March 1975 by Judge Albright be vacated and that Tuttle be returned to the Superior Court in Forsyth County for resentencing. We granted the State's petition for certiorari to review Judge Smith's order and stayed the order pending our review.

Attorney General Edmisten by Assistant Attorney General Ben G. Irons II for the State.

A. L. Sherk for respondent Tuttle.

PARKER, Judge.

Article 3A of G.S. Ch. 148 was repealed and replaced by Article 3B effective 1 October 1977. In this opinion reference will be made to the statute which was in effect at the time the judgment of imprisonment here under attack was imposed.

By definition in G.S. 148-49.2, a "youthful offender" was a person under the age of 21 at the time of conviction, and a "committed youthful offender" was one committed to the custody of the Secretary of Correction under provisions of Art. 3A of G.S. Ch. 148. Sentencing of a youthful offender was controlled by G.S. 148-49.4, which provided that "[i]f the court shall find that the youthful offender will not derive benefit from treatment and supervision pursuant to this Article, then the court may sentence the youthful offender under any other applicable penalty provi-

sion." Interpreting this language, we held in *State v. Mitchell*, 24 N.C. App. 484, 211 S.E. 2d 645 (1975), that the trial judge could not sentence a youthful offender as an older criminal without expressly finding he would receive no benefit from treatment and supervision as a "committed youthful offender," although such finding need not be accompanied by supporting reasons. This interpretation was followed in *State v. Jones*, 26 N.C. App. 63, 214 S.E. 2d 779 (1975), *State v. Worthington*, 27 N.C. App. 167, 218 S.E. 2d 233 (1975), and *State v. Matre*, 32 N.C. App. 309, 231 S.E. 2d 688 (1977).

In the present case, Judge Albright, in imposing the sentence of imprisonment on 18 March 1975 (just one month after our decision in *State v. Mitchell, supra*), did expressly make the requisite "no benefit" finding. The only question is whether the finding came too late. We hold that it did not, and accordingly we reverse Judge Smith's order vacating the sentence imposed.

It has long been settled law in this State that "until the expiration of the term the orders and judgments of the court are *in fieri*, and the judge has the power, in his discretion, to make such changes and modifications in them as he may deem wise and appropriate for the administration of justice." *State v. Hill*, 294 N.C. 320, 329, 240 S.E. 2d 794, 801 (1978); *accord, State v. Godwin*, 210 N.C. 447, 187 S.E. 560 (1936). This is true notwithstanding notice of appeal has been given. *State v. Belk*, 272 N.C. 517, 158 S.E. 2d 335 (1968). In the present case the sentencing judge made the "no benefit" finding on the same day and virtually at the same time that judgment and notice of appeal were entered. The term of court had not expired, the judgment remained *in fieri* despite the notice of appeal, and the "no benefit" finding was effectual.

Respondent's contention that G.S. 148-49.4 must be construed to mean that unless the sentencing judge first expressly made the "no benefit" finding he lacked all power to sentence the youthful offender under any other applicable penalty provision exalts form over substance. All that G.S. 148-49.4 required was that the sentencing judge make the "no benefit" finding at a time when he still retained control of the sentencing process. This was done by Judge Albright in the present case. Judge Smith's order vacating the judgment entered by Judge Albright on 18 March 1975 and

returning respondent Tuttle to the Superior Court in Forsyth County for resentencing is

Reversed.

Judges VAUGHN and WEBB concur.

THE TRAVELERS INSURANCE COMPANY, A CORPORATION v. ROMA B. RUSHING

No. 7726DC518

(Filed 2 May 1978)

1. **Limitation of Actions § 4— insurance overpayment—action to collect not barred by statute of limitations**

In an action to recover $980 allegedly paid by plaintiff to defendant by mistake, plaintiff's action was not barred by the three year statute of limitations, since plaintiff originally made payment to defendant for an injury compensable under workmen's compensation after payment was approved by the Industrial Commission by order entered on 30 October 1972; plaintiff subsequently discovered the $980 overpayment; on 18 February 1975 the Industrial Commission set aside its previous order and reduced defendant's award by $980; plaintiff's legal right to recover the overpayment therefore did not accrue until 18 February 1975; and this action, commenced on 22 June 1976, was well within the limitation period.

2. **Master and Servant § 95— modified order of Industrial Commission—failure to appeal—collateral attack improper**

Since defendant did not appeal from an order of the Industrial Commission, issued pursuant to G.S. 97-17 modifying its earlier award to defendant, and assert her legal defense that an overpayment for an injury compensable under workmen's compensation was made pursuant to a mistake of law rather than fact, she could not collaterally attack the Industrial Commission's modified award in plaintiff insurer's subsequent action to enforce the modified award.

APPEAL by defendant from *Sentelle, Judge*. Judgment entered 30 March 1977 in District Court, MECKLENBURG County. Heard in the Court of Appeals 28 March 1978.

In this action plaintiff seeks to recover $980 which it alleges it paid to defendant by mistake. Defendant answered, pleading the three-year statute of limitations and other defenses. Jury trial was waived.

The following was established by discovery and stipulations: On 20 March 1972 defendant was employed by a firm for whom plaintiff was the workmen's compensation insurance carrier. On said date she received a compensable injury to the middle finger of her left hand which resulted in amputation of the finger at the distal joint. Plaintiff's claims supervisor approved payment of $1,960 based upon 100 percent loss of the finger. This payment was approved by the Industrial Commission by order entered on 30 October 1972. Thereafter, plaintiff discovered that its claims supervisor had made a mistake in that defendant should have been paid $980 for 50 percent loss of her finger. On 18 February 1975, on motion of plaintiff, the Industrial Commission, because of the mistake, set aside its previous order and reduced defendant's award to $980.00. Defendant did not appeal from that order.

At trial the court ruled that the three-year statute of limitations did not apply and denied a defense motion to dismiss on that ground. Plaintiff's claims supervisor testified that he mistakenly authorized too much compensation for defendant either because he misread her medical reports or because he misinterpreted a chart which correlates certain injuries with certain disability percentages.

Judgment was entered to the effect that defendant was entitled to recover only $980 in workmen's compensation and that plaintiff had paid defendant $980 under a mistake of fact. The court adjudged that plaintiff was entitled to recover $980 from defendant "for monies had and received under a mistake of fact".

Defendant appealed.

Boyle, Alexander and Hord, by Norman A. Smith, for the plaintiff.

Kenneth W. Parsons for the defendant.

BRITT, Judge.

[1] Defendant contends first that plaintiff's action is barred by the three-year statute of limitations. We disagree with this contention.

Defendant argues that plaintiff's cause of action to recover the $980 overpayment accrued on the date that compensation was

paid under the original award of 30 October 1972, and that this action, which was instituted on 22 June 1976, is barred by the three-year statute of limitations applicable to implied contracts. We reject this argument. Until the original award was modified on 18 February 1975, plaintiff had no cause of action to recover the $980 overpayment because defendant had a workmen's compensation agreement pursuant to G.S. 97-17 for 100 percent permanent partial disability which included the $980 overpayment and was enforceable in the courts under G.S. 97-87.

"A cause of action accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. In no event can a statute of limitations begin to run until plaintiff is entitled to institute action. As has been stated generally, a right of action accrues to an injured party so as to start the running of the statute of limitations when he is at liberty to sue, being under no disability; and once the statute of limitations begins to run, it continues until stopped by appropriate judicial process." 8 Strong's N.C. Index 3d, Limitations of Actions § 4, pp. 371-72.

It was not until the plaintiff obtained a modification of the award by the Industrial Commission pursuant to G.S. 97-17 on 18 February 1975 that it had a legal right to recover the overpayment. Plaintiff instituted this action on 22 June 1976 which was well within the limitation period.

[2] Defendant contends next that plaintiff is not entitled to recover the $980 overpayment because it was made pursuant to a mistake of law rather than fact. Since this defense is in effect a collateral attack on what defendant contends was an erroneous quasi-judicial ruling by the Industrial Commission, we are unable to consider it on its merits. *See* 8 Strong's N.C. Index 3d, Judgments § 16.

> An erroneous judgment is one entered contrary to law. Such a judgment can be corrected only by appeal, and a party may not thereafter attack it for intrinsic errors or errors in the proceedings culminating in its entry.
>
> * * *
>
> An erroneous judgment binds the parties until corrected in the proper manner in the exercise of due diligence. It can-

not be collaterally attacked. 8 Strong's N.C. Index 3d, Judgments § 18, p. 45.

G.S. 97-86 provides:

> Award conclusive as to facts: appeal; certified questions of law.—The award of the Industrial Commission, as provided in G.S. 97-84, if not reviewed in due time, or an award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within 30 days from the date of such award or within 30 days after receipt of notice to be sent by registered mail or certified mail of such award, but not thereafter, appeal from the decision of said Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from superior court to the Court of Appeals in ordinary civil actions. . . .

Since defendant did not appeal from the modified order of 18 February 1975, which was issued pursuant to G.S. 97-17, and assert her legal defense in that manner, she cannot collaterally attack the validity of that award in the plaintiff's subsequent action to enforce the modified award.

Although we can find no case directly on point with the present situation, the case of *Robinson v. United States Casualty Co.*, 260 N.C. 284, 132 S.E. 2d 629 (1963), is analogous. In that case the plaintiff's driver's license was suspended by the North Carolina Department of Motor Vehicles because the defendant insurance company allegedly misinformed the department that plaintiff did not have automobile liability insurance in force on the date that he was involved in an accident. Plaintiff was given notice of the hearing and of the suspension but failed to challenge the truthfulness of the testimony by the defendant insurance company either at the hearing before the commissioner or by the statutory right of appeal to the superior court where the proceeding to suspend would have been heard *de novo*. Instead, plaintiff brought action against the insurance company for damages sustained because of the allegedly false testimony which was given in the quasi-judicial proceeding and which caused a finding and adjudication adverse to him. The court held that the suspension or revocation of a driver's license by the Department

of Motor Vehicles was a quasi-judicial act which could not be collaterally attacked.

Applying this principle to the present case, under G.S. 97-86 defendant was entitled to have a review of all legal questions and findings by the Court of Appeals, but she failed to assert this right. The action by the Industrial Commission like the action of the Department of Motor Vehicles was a quasi-judicial act which cannot be collaterally attacked in an independent action as defendant is attempting to do. In the absence of a direct appeal, the modified order of the Industrial Commission is conclusively presumed to be correct and cannot be collaterally attacked. A review of other cases which attack a modification order entered pursuant to G.S. 97-17 shows that each was appealed directly from the Industrial Commission ruling rather than attacked in an independent suit. *See Pruitt v. Publishing Co.*, 289 N.C. 254, 221 S.E. 2d 355 (1976); *Caudill v. Manufacturing Co.*, 258 N.C. 99, 128 S.E. 2d 128 (1962); *Hartsell v. Cotton Mills*, 4 N.C. App. 67, 165 S.E. 2d 792 (1969).

For the reasons stated, we conclude that plaintiff brought a timely action to have the modified order of the Industrial Commission enforced and that defendant cannot collaterally attack said order when she did not appeal as permitted by G.S. 97-86.

Affirmed.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. NEIL A. McDIARMID, JR.

No. 7712SC906

(Filed 2 May 1978)

Criminal Law § 91.4— insufficient time for counsel to prepare for trial—continuance properly denied

The trial court did not abuse its discretion in denying defendant's motion to continue, made on the day the case was called for trial, on the ground that his counsel was not prepared for trial, since the record did not reveal why defendant waited to employ counsel until the date of his trial, some nine months after his indictment; defendant failed to show why or how his case

could have been better prepared had the continuance been granted; defendant failed to show that he was prejudiced by denial of his motion; and the record indicated that the case was well tried.

APPEAL by the defendant from *Herring, Judge.* Judgment entered 26 May 1977 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 2 March 1978.

The defendant and others were indicted on 9 August 1976 for conspiracy to forge and utter checks. The defendant was tried alone, convicted and sentenced to serve a term of not less than three years nor more than four years with the Department of Correction. The defendant appealed.

Attorney General Edmisten, by Associate Attorney Thomas F. Moffitt, for the State.

Brown, Fox & Deaver, by Bobby G. Deaver, for the defendant appellant.

ERWIN, Judge.

We note that the record in this case was not timely filed as required by App. R. 12(a). We elect to treat this appeal as a Petition for Writ of Certiorari, which we allow, and proceed to dispose of the case on its merits. *See Boone v. Fuller*, 30 N.C. App. 107, 226 S.E. 2d 191 (1976).

The defendant presents one argument: he contends that the trial court committed error in denying defense counsel's motion for continuance because he was not adequately prepared, and thus defendant was denied effective assistance of counsel as guaranteed by the Constitutions of North Carolina and the United States.

The record reveals that the offense which led to trial of the defendant occurred on or about 26 January 1976. The record does not reveal when a warrant was issued for the defendant's arrest or when the defendant had his first appearance or preliminary hearing. Indictment was returned by the grand jury against the defendant 9 August 1976. The trial judge continued arraignment of the defendant until the next nonjury session of Superior Court; two similar continuances of arraignment were allowed on 25 August 1976 and on 21 September 1976. The defendant was

represented by counsel on these occasions. The arraignment was set for the 25 October 1976 Session of the Superior Court. On 22 November 1976, the following stipulation was filed:

> ". . . attorney for the defendant with the consent of Neil A. McDiarmid, Jr., the defendant, stipulate that as of this date and insofar as they now know, no further discovery is desired and there are no motions which can be made prior to trial that will be made. Further, it is stipulated that the defense and the State are ready for trial and anticipate making no further motions, and agree that the case may be set for trial. The defendant will plead not guilty."

This case was finally called for trial 24 May 1977. The record does not reveal any reason why the case was continued in Superior Court from 9 August 1976 until 24 May 1977. The record reveals the following from an affidavit of defendant's trial counsel:

> ". . . I did not accept employment or any monies at this time for the obvious reason that I was not prepared to defend him at that time. I did appear before the Honorable D. B. Herring, Jr., upon the opening of Court on the morning of May 24, 1977, and upon the call of the defendant's case informed the Court that the defendant had contacted me in regards to employment in the case and that although I had not been employed in the matter it was my understanding that he was in a position to do so at that time. I was instructed by the Court to talk to the defendant and report back to the Court. I talked with the defendant . . . I immediately informed the Court that I was in fact retained to represent him in this matter, and immediately forthwith moved the Court for a continuance of this case to give me time to prepare the defense. This was approximately 10:00 a.m. on the morning of May 24, 1977. The Court denied my motion to continue the case and the case was immediately thereafter called for trial. I thereafter approached the bench with the Assistant District Attorney, Michael DeSilva, and informed the Court that I would like to make a verbal or parole motion, in his discretion, concerning the bill of indictment and thought same should be heard in the absence of the jury. Thereupon, the Court took a short recess. During this recess I explained

to Judge D. B. Herring, Jr. that I was inadequately prepared to defend the case and that if the Court insisted upon proceeding with the trial of the case I felt obligated on behalf of myself and the defendant to enter my exception and grounds therefore in the record. . . ."

The trial court denied the defendant's motion to continue.

A motion for continuance is usually addressed to the discretion of the trial court, and its ruling on such motion is not subject to review absent an abuse of discretion. *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975); *State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970). If, however, the motion is based upon a right guaranteed by the United States or North Carolina Constitutions, the question is one of law, and the decision of the trial court is reviewable. *State v. Miller, supra; State v. Phillip*, 261 N.C. 263, 134 S.E. 2d 386 (1964), *cert. denied*, 377 U.S. 1003, 12 L.Ed. 2d 1052, 84 S.Ct. 1939 (1964). The denial of a motion to continue will not require a new trial absent a showing that there was both error in such denial and that defendant was prejudiced thereby. *State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325 (1976), *modified on other grounds*, 428 U.S. 904, 49 L.Ed. 2d 1211, 96 S.Ct. 3212 (1976); *State v. Robinson*, 283 N.C. 71, 194 S.E. 2d 811 (1973). If constitutional issues are raised by the motion's denial, whether defendant's rights have been abridged is to be determined based on the circumstances of each case. *State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742 (1977); *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976).

We hold that the trial court did not abuse its discretion in denying the defendant's motion to continue, and the defendant was not denied effective representation of counsel at the trial, and therefore, the defendant's constitutional rights as guaranteed by the Sixth Amendment of the Constitution of the United States and Article I, §§ 19 and 23 of the Constitution of North Carolina have not been violated. In *State v. Sneed*, 284 N.C. 606, 612, 201 S.E. 2d 867, 871 (1974), Justice Branch, speaking for our Supreme Court on this subject, stated:

"Neither the United States Supreme Court, nor this Court, has fashioned a rule to guide us in determining whether an accused was denied his Constitutional right to effective assistance of counsel due to counsel's negligence, incompeten-

cy, conflicting loyalties or other similar reasons. However, there are numerous decisions from other jurisdictions and other federal courts which bear upon decision of the question here presented. A review of these decisions indicates the general rule to be that the incompetency (or one of its many synonyms) of counsel for the defendant in a criminal prosecution is not a Constitutional denial of his right to effective counsel unless the attorney's representation is so lacking that the trial has become a farce and a mockery of justice. *Snead v. Smyth*, 273 F. 2d 838; *Doss v. State of North Carolina*, 252 F. Supp. 298; *Edgerton v. State of North Carolina*, 230 F. Supp. 264; *DuBoise v. State of North Carolina*, 225 F. Supp. 51; *Jones v. Balkcom*, 210 Ga. 262, 79 S.E. 2d 1, cert. den. 347 U.S. 956, 98 L.Ed. 1101; See Annot., 74 A.L.R. 2d 1390 (1960), Conviction—Incompetency of Counsel."

The record does not reveal why the defendant waited until the date of his trial to employ counsel, some nine months after his indictment. The State is not required to seek out a defendant in a criminal case and supervise his employment of counsel and the preparation of his case for trial. The defendant does not show why or how his case could have been better prepared had the continuance been granted, nor does the defendant show that he was prejudiced by the denial of his motion to continue. We note that five witnesses were called to testify on the defendant's behalf as well as the defendant himself, and the record indicates that the case was well tried. *State v. McFadden, supra*, is distinguishable from the case at bar. In *McFadden* the defendant had retained counsel, but an unprepared junior associate appeared at the trial and requested a continuance because the employed attorney was engaged in a trial elsewhere; the junior associate met the defendant for the first time 90 minutes before trial; the retained attorney had handled all proceedings up to that point; the junior associate was inexperienced; and the defendant did not want the junior associate to handle his case. Here the appellant wanted his trial attorney to represent him, an experienced, privately retained counsel. Further, G.S. 15A-952 provides the procedure for continuing cases which the defendant did not choose to follow.

The writing of Judge Widener in *United States v. Phifer*, 511 F. 2d 960, 962 (4th Cir. 1975), is very relevant here:

"The conduct of a defendant in failing either to retain counsel or to avail himself of his right to court appointed counsel, if he were indigent, may make him solely responsible for any lack of trial preparation on the part of his counsel. See *United States v. Grow*, 394 F. 2d 182, 210 (4th Cir. 1968)."

In the trial below, we find no prejudicial error.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIAM RUSSELL NELSON

No. 7725SC945

(Filed 2 May 1978)

1. **Criminal Law § 71— inferences from observations—shorthand statements of fact**

Testimony by various witnesses was competent as impressions or inferences from personal observations or as shorthand statements of fact.

2. **Assault and Battery § 13— wounds suffered by one victim—nonsuit as to such victim**

In a prosecution for felonious assaults on a male and a female, testimony as to wounds sustained by the female victim was relevant at the time it was admitted although the charge of assaulting the female victim was thereafter dismissed.

3. **Assault and Battery § 8— self-defense—assault by victim after assault in question**

In this felonious assault prosecution, defendant's testimony concerning an assault made upon him by the victim after the assault for which defendant was on trial had no bearing on defendant's claim of self-defense on the occasion in question and was properly excluded by the trial court.

APPEAL by defendant from *Snepp, Judge*. Judgment entered 22 June 1977, in Superior Court, BURKE County. Heard in the Court of Appeals 28 March 1978.

Defendant pled not guilty to two charges of assault with a deadly weapon with intent to kill inflicting serious injury, G.S.

14-32(a), upon (1) Jimmy Abee and (2) Debra Blackburn. At the close of the State's evidence the trial court granted defendant's motion for directed verdict on the charge of assault upon Debra Blackburn. Defendant was convicted as charged of the assault upon Jimmy Abee and appeals from judgment imposing a prison term of 12 years.

The State's evidence tended to show that Debra Blackburn, defendant's former girl friend and mother of his four-year-old son, was visiting in the trailer home of Wanda Gilbert on 21 January 1977. With them in the trailer home were Jimmy Abee, Debra's new boyfriend, and Steve Whisnant. Early in the evening defendant came to the trailer looking for Debra but she hid from him; defendant returned about midnight and asked to speak to Debra; she refused and told him to leave; as defendant turned to leave Abee shoved him out and closed the door; defendant immediately pulled a pistol and fired at Abee, striking him in the hip and arm; as Abee turned to run defendant shot him twice in the back, then came into the trailer and shot Abee in the head while he was lying on the floor. Whisnant grabbed the gun from defendant and ran. Then Wanda Gilbert, in the bathroom, heard Debra say, "No, Russ, no.", followed by more shots; Wanda opened the bathroom door and saw defendant run from the trailer with a gun in his hand, get into his car and drive away. Debra was shot five times.

Abee and Debra Blackburn were hospitalized for two months. Debra now walks with a limp. Abee has a bullet imbedded in his brain which has diminished his ability to think.

Defendant testified that as he attempted to leave the trailer Abee and Whisnant began beating him; he pulled his pistol to protect himself; he feared for his life because Abee had assaulted him on a prior occasion; the pistol discharged twice, one bullet striking Abee; Whisnant grabbed the pistol; defendant ran; he did not have a second gun.

Debra Blackburn corroborated defendant's version of the fight, and testified that she did not know who shot her.

On rebuttal Officer Buchanan testified that Debra Blackburn told him at the hospital that defendant shot her.

Attorney General Edmisten by Associate Attorney John R. Wallace for the State.

Hatcher, Sitton, Powell & Settlemeyer by Douglas F. Powell for defendant appellant.

CLARK, Judge.

Defendant's claim of error in the denial of his motion to quash the indictment is without merit. The language of the indictment follows substantially the language of the statute, which meets the requirements of the law. *State v. Jones*, 242 N.C. 563, 89 S.E. 2d 129 (1955); *State v. Randolph*, 228 N.C. 228, 45 S.E. 2d 132 (1947); *State v. Lane*, 1 N.C. App. 539, 162 S.E. 2d 149 (1968).

[1] Defendant made numerous exceptions to the admission of evidence over his objection: testimony of Whisnant that defendant did not see Debra Blackburn on his first visit to the trailer, that defendant must have had another gun because more shots were fired after he took the gun from defendant, that he heard defendant crank his car, testimony of Wanda Gilbert that Debra Blackburn had been going with defendant for five years, and testimony of Officer Buchanan that Debra Blackburn did not appear to be intoxicated when he saw her at the hospital. We concede that some of the testimony could qualify as "opinion" evidence. But the distinction between fact and opinion is one of degree only, and the opinion rule simply imposes limits on the witness's freedom to express himself in terms of inferences from facts observed by him or gathered from other sources. In the case *sub judice* the witnesses stated impressions or inferences based on personal observations, or made shorthand statements of the facts. 1 Stansbury, N.C. Evidence (Brandis Ed.) § 124. The facts observed by the witnesses had been related to the jury and were clearly comprehensible. If we concede error in the admission of any of the evidence questioned by defendant, clearly the exclusion of evidence would not have produced a different result, and the error is not sufficient grounds for a new trial. See *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978).

We have examined the record on appeal to determine if defendant was prejudiced by leading questions asked by the State, and we find the number of such questions were limited. This is a matter within the discretion of the trial judge, who is

reversed only for abuse of discretion. *State v. Clanton*, 278 N.C. 502, 180 S.E. 2d 5 (1971).

[2] Testimony as to the wounds sustained by Ms. Blackburn was allowed in the presentation of the State's case, before defendant's motion to dismiss on the charge of assaulting her. At that time it was relevant. Further, the State had evidence that Ms. Blackburn stated immediately after being wounded that defendant had shot her. We find no merit in defendant's hindsight assignment of error. At that time the seriousness of the injury was clearly an essential of the charged assault upon Ms. Blackburn. *State v. Ferguson*, 261 N.C. 558, 135 S.E. 2d 626 (1964).

[3] Defendant assigns as error the exclusion of his testimony that Jimmy Abee had assaulted defendant on another occasion. Since defendant offered evidence of self-defense, he could offer evidence of a prior assault upon him by Abee for the purpose of showing reasonable apprehension of death or bodily harm at the hands of Abee. *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967). But defendant attempted to introduce evidence of an assault made upon him by Abee after the time of the charged assault, which had no bearing upon defendant's apprehension on the occasion in question. Evidence of a post-charge assault by Abee upon defendant would be only remotely relevant and would be outweighed by confusing the critical issues in the minds of the jurors.

The trial judge gave to the jury written instructions, which required them to answer five questions on five elements of the felonious assault charged in the indictment. By their answers to these questions the trial judge could determine clearly whether the jury found defendant guilty of the crime charged, or only lesser offense thereof, or not guilty. The indictment charged a statutory offense with multiple elements, and with several lesser included offenses. See G.S. 15A-1237(a): "The verdict must be in writing, signed by the foreman, and made a part of the record of the case." This statute is effective 1 July 1978.

We find that defendant had a fair trial, free from prejudicial error.

No error.

Judges BRITT and ERWIN concur.

WILBUR RAY OLIVER, MINOR, BY HIS GUARDIAN AD LITEM, IDA MAE OLIVER v. WILLIE B. ROYALL AND VIOLA G. ROYALL

No. 778SC399

(Filed 2 May 1978)

Automobiles § 69— striking minor bicyclist—directed verdict for automobile driver proper

In an action to recover damages for personal injuries suffered by the minor plaintiff when he was struck, while riding a bicycle, by defendants' vehicle, the trial court properly allowed defendants' motion for a directed verdict where the evidence, which consisted only of the testimony by defendant driver, tended to show that defendant slowed his speed to 20 mph and sounded his horn before he reached the child; the child darted into the path of defendant's vehicle; and there was no showing that defendant, with the exercise of reasonable care under the circumstances, could have avoided the accident.

APPEAL by plaintiff from *Graham, Judge.* Judgment entered 3 March 1977 in Superior Court, WAYNE County. Heard in the Court of Appeals 28 February 1978.

The minor plaintiff, Wilbur Ray Oliver, filed this action against the defendants, Willie B. Royall and Viola G. Royall, by his guardian ad litem. He alleged that he was injured, while riding a bicycle, due to the negligent operation of a motor vehicle by the defendant, Willie B. Royall. The defendants' answer denied negligence and alleged contributory negligence. At the conclusion of the plaintiff's evidence, the trial court allowed the defendants' motion for a directed verdict in their favor on the ground of failure of proof, and the plaintiff appealed.

Other pertinent facts will be hereinafter set forth.

Cecil P. Merritt for plaintiff appellant.

Taylor, Warren, Kerr & Walker, by Robert D. Walker, Jr. and Gordon C. Woodruff, for defendant appellee.

MITCHELL, Judge.

The sole question for review is whether the trial court erred in directing a verdict for the defendants, at the conclusion of the plaintiff's evidence, pursuant to G.S. 1A-1, Rule 50. Motions pursuant to this rule are directed to the sufficiency of the evidence

to justify a verdict for the plaintiff when considered in the light most favorable to him. *Evans v. Carney*, 29 N.C. App. 611, 225 S.E. 2d 157 (1976). *Bray v. Dail*, 20 N.C. App. 442, 201 S.E. 2d 591 (1974). To determine the sufficiency of the evidence to go to the jury, all evidence supporting the plaintiff's claim must be taken as true and considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference which may be legitimately drawn therefrom, with contrasts, contradictions, conflicts and inconsistencies resolved in the plaintiff's favor. *Bray v. Dail*, 20 N.C. App. 442, 201 S.E. 2d 591 (1974); *Adams v. Curtis*, 11 N.C. App. 696, 182 S.E. 2d 223 (1971).

Given these rules as to the determination of sufficiency, the plaintiff's evidence would permit the jury to find the following facts:

The plaintiff minor child was moderately mentally retarded and fourteen years old at the time of the accident on 22 June 1974. He was not permitted to ride a bicycle in the streets and did not own a bicycle. He was hard of hearing, afraid of automobiles, and could not read.

On 22 June 1974, he was riding a bicycle on Hillsboro Street in Mount Olive, North Carolina. He was traveling east and on the north edge of the pavement.

The defendant, having "just taken off from a stop sign at Hillsboro and Church Streets," was driving east on Hillsboro Street on the south side of the pavement. The car driven by him belonged to his wife, Viola G. Royall, who was also made a party defendant in this action. The intersection of Hillsboro and Church Street is about two hundred fifty feet from the point where the accident occurred. The defendant was aware of a child on a bicycle riding on the left side of the road and slowed down. He saw the child approximately fifty to one hundred feet ahead. The child had his back to the defendant and did not look back. As he came upon the child, the defendant was moving at approximately twenty miles per hour. When the defendant came to within a car length of the bicycle, about twenty feet, he sounded his horn and slowed down. As soon as the horn sounded, the child suddenly swerved to his right into the path of the automobile.

The child's bicycle and body were struck by the left front of the car. The bicycle tires were partially under the front of the car, but the child was lying several feet in front of the car. The car, the bicycle, and the child were then on the right side of the street, but there was no center line. The car was on the paved portion of the street, and there was no evidence as to the existence of skid marks. The car was dented on its left front.

The minor plaintiff suffered a broken leg and a skull fracture. He was later placed in a body cast and some of his teeth had to be removed.

Hillsboro Street is paved with asphalt, is twenty-two feet wide and has a thirty-five mile per hour speed limit. It is flat and straight and runs through a residential neighborhood. There are houses on both sides and trees in the yards.

Traffic is permitted in both directions, but there were no other vehicles on the street when the collision occurred. The accident occurred during daylight hours at approximately 8:30 p.m.

The plaintiff contends that clear inferences of negligence arise from the evidence as to the defendant's conduct, and that the case should have gone to the jury. We do not agree.

The only direct evidence concerning the accident was the testimony of the defendant, Willie B. Royall, who was called by the plaintiff as an adverse witness. Therefore, all the evidence as to the details of the accident came from the defendant.

The plaintiff urges that the horn, if blown, should have been blown earlier and that, at the time it was sounded, it may have created a hazard by startling the child. Plaintiff further argues that passing to the right gives rise to an inference of negligence, as does passing from the rear without a timely warning. These arguments, if accepted as correct, lead us at best into sheer speculation and conjecture as to the causation of the child's actions, what his actions might have been had the facts been different, and what a timely warning would have been under the circumstances. The plaintiff's argument that passing to the right was negligence per se is clearly without merit since the statute, G.S. 20-150.1, and case cited, *Teachy v. Woolard*, 16 N.C. App. 249, 191 S.E. 2d 903, *cert. denied* 282 N.C. 430, 192 S.E. 2d 840 (1972),

deal with passing other vehicles proceeding in the same direction and in the same lane of traffic.

The facts here show only that an accident occurred. The mere fact that an accident occurred is not enough to infer negligence. *Winters v. Burch*, 284 N.C. 205, 200 S.E. 2d 55 (1973); *Burns v. Turner*, 21 N.C. App. 61, 203 S.E. 2d 328 (1974); *Adams v. Curtis*, 11 N.C. App. 696, 182 S.E. 2d 223 (1971).

We recognize the rule that a driver who sees children on the traveled portion of a highway has a duty to use due care to control the speed of his vehicle and to vigilantly seek to avoid their injury. *Winters v. Burch*, 284 N.C. 205, 200 S.E. 2d 55 (1973); *Brinson v. Mabry*, 251 N.C. 435, 111 S.E. 2d 540 (1959). However, a motorist is not required to come to a complete stop when there is nothing to give him notice that a child may dart into the path of his vehicle. *Brinson v. Mabry, supra. See Winters v. Burch*, 284 N.C. 205, 200 S.E. 2d 55 (1973); *see also Fox v. Barlow*, 206 N.C. 66, 173 S.E. 43 (1934); *and see Burns v. Turner*, 21 N.C. App. 61, 203 S.E. 2d 328 (1974).

There is no presumption of actionable negligence when a motorist strikes or injures a child who darts into the path of his vehicle. There must be evidence that, with the exercise of reasonable care under the circumstances, the motorist could have avoided the accident. *Winters v. Burch*, 284 N.C. 205, 200 S.E. 2d 55 (1973); *Daniels v. Johnson*, 25 N.C. App. 68, 212 S.E. 2d 245 (1975); *Burns v. Turner*, 21 N.C. App. 61, 203 S.E. 2d 328 (1974).

The plaintiff, to overcome a motion for a directed verdict, is required to offer evidence sufficient to establish, beyond mere speculation or conjecture, every essential element of negligence. Upon his failure to do so, a motion for a directed verdict is properly granted. *Mills v. Moore*, 219 N.C. 25, 12 S.E. 2d 661 (1941); *Ingold v. Carolina Power & Light Co.*, 11 N.C. App. 253, 181 S.E. 2d 173 (1971). *See Winters v. Burch*, 284 N.C. 205, 200 S.E. 2d 55 (1973); *see also Burns v. Turner*, 21 N.C. App. 61, 203 S.E. 2d 328 (1974). We hold that, under any reasonable construction of these facts, the plaintiff has not met his burden in this regard. The directed verdict for the defendants was proper and is

Affirmed.

Judges MORRIS and CLARK concur.

Jones v. Gooch

FLORENCE JONES; VIOLA J. WILLIFORD; COLLIE R. JONES AND WIFE ELSIE C. JONES; NORMAN S. JONES, JR. AND WIFE JEAN B. JONES; AND EDWIN H. JONES AND WIFE DOROTHY D. JONES, PETITIONERS v. NOLA J. GOOCH; MAMIE J. HICKS; ROBERT L. JONES AND WIFE LECTER C. JONES; BERTHA J. DAVIS AND HUSBAND JOHN W. DAVIS; DAVID MARK JONES; FRANCES J. HAVENS AND HUSBAND HARRY F. HAVENS; BOOTSIE DEAN AND WIFE JANIE P. DEAN; AUDREY D. DEAN AND HUSBAND ALTON DEAN; JOHN CLARK AND WIFE GRACE CLARK; HELEN C. HOBGOOD AND HUSBAND JIMMIE HOBGOOD; LUCILLE C. PERRY AND HUSBAND D. G. PERRY; PATSY C. WEBSTER AND HUSBAND CLYDE WEBSTER; JONES CLARK AND WIFE ALMA CLARK; J. C. CLARK AND WIFE DOROTHY CLARK; AND ROBERT L. CLARK, RESPONDENTS

No. 779SC283

(Filed 2 May 1978)

Wills § 34— devise to wife and single daughters—joint life tenancy in entire tract

Items of testator's will devising the family home and the 180 acre tract on which it stood to his wife and his two single daughters "as long as my daughters remain single," providing that "my two single daughters . . . are to be equal in proportion share and share alike with their mother . . . until their marriage at which time the property is to be the property of their mother," and further providing that "all of the property given to my belove wife and two daughters—at their marriage is to remain the property of my wife until her death" *are held* to have given an unmarried daughter a joint tenancy with her mother in the entire 180 acre tract, for life, with right of survivorship, subject to be defeated upon her marriage.

APPEAL by respondents from *Graham, Judge.* Judgment entered 8 March 1977 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 1 February 1978.

This action was instituted to obtain a judgment declaring what interest Florence Jones has in a 180 acre tract of land. Her interest in the land came to her by the will of her father, R. S. Jones, which was probated in 1933. The pertinent portions of that will are as follows.

> "Second—I give and devise to my belove wife Rosa A. Jones and my two single daughters Nola T. Jones & Florence Jones—as long as my daughters remain single the tract of land on which I now reside, (except one fourth acre which is to be used for burring ground) containing one hundred & eighty acre.

Third—I give and bequeath to my said belove wife and two single daughters Nola and Florence all of the personal property of every description together with all the household and kitchen furniture.

Fourth—That my two single daughters name above are to be equal in proportion share and share alike with their mother Rosa A. Jones untill their marriage at which time the property is to be the property of their mother.

Fifth—All of the property given to my said belove wife and two daughters—at their marriage is to remain the property of my wife untill her death, at which time is to be sold and equally divided among all of my children."

A residuary clause in the will directed that the balance of his estate should be reduced to cash and paid to all of his children in equal shares. Included in testator's residuary estate was a farm of approximately 100 acres.

Rosa A. Jones is now deceased. Nola T. Jones married prior to the deaths of the testator and Rosa A. Jones. Florence Jones has never married.

Appellees contend Florence Jones has a defeasible life estate in the entire tract. Appellants contend she has a defeasible life estate in only one-third of the tract. No controversy exists as to the remainder after Florence's life estate.

The court concluded that Florence is possessed of an estate for life, or for so long as she remains single, in the entire tract.

Zollicoffer & Zollicoffer, by Robert K. Catherwood, for petitioner appellees.

Royster & Royster, by John H. Pike, for respondent appellants.

VAUGHN, Judge.

The principles that are supposed to guide the courts in the interpretation of wills are frequently and easily recited. Their application to particular cases presents a more difficult test. We have no reason to disagree with the trial judge's conclusions as to what the testator intended, even though it appears that testator

was ambiguous in dealing with the contingency of having an unmarried daughter survive his widow.

In effect, the judge concluded that for as long as the daughter did not marry, the daughter and the mother held the land as joint tenants, for life, with right of survivorship. The remaindermen cannot take, therefore, until the death (or, in this case, death or marriage) of the last of the joint life tenants. *Burton v. Cahill*, 192 N.C. 505, 135 S.E. 332 (1926). In reaching this conclusion, it seems that the judge properly tried to find the intent of the testator by considering the entire will and the circumstances as they existed at the time the will was executed. *Cannon v. Cannon*, 225 N.C. 611, 36 S.E. 2d 17 (1945).

Testator's will shows clearly several concerns. First it appears that he wished to deal as even handedly as possible with his family. Thus the residuary estate was to be paid over to his children in equal proportion, share and share alike. Secondly, he felt a strong sense of responsibility to the women of his family who would be alone after his death. He, therefore, provided especially for his widow and his two unmarried daughters, disturbing the general equality to this end. To his wife he gave some cash. To the three of them he left the family home and the 180 acre tract on which it stood, plus all of the personal property. He provided that, among the three, each would be equal in proportion, share and share alike, until the time of marriage at which time each daughter's share would move to her mother. There is another concern throughout the will. Testator had eleven children and obviously recognized the problem of dividing the ownership of land among so many. He, therefore, directed that all of his estate, with the exception of the homeplace reserved for his wife and unmarried daughters, be sold and the cash distributed to his children. He further provided that all of the personal property and the home which was given to his wife and daughters remain intact until the event he considered likely to close the matter, the death of his wife. It seems reasonable to infer that the same considerations would have guided him, had he considered the question, to keep the homeplace unpartitioned until it was no longer needed by his unmarried daughter. At that time he ordered that the land be sold and cash again be distributed to his children.

For the reasons stated, the judgment is affirmed.

Affirmed.

Judges CLARK and ERWIN concur.

MRS. BESSIE C. ALEXIOU v. O.R.I.P., LTD.

No. 7718DC360

(Filed 2 May 1978)

Appearance § 1.1— notice of appeal given—jury trial demanded—general appearance

When a party gives notice of appeal and demands trial by jury prior to contesting the court's jurisdiction over his person, he has made a general appearance under G.S. 1-75.7, and the court therefore has jurisdiction over his person, even if service of process was defective.

APPEAL by defendant from *Yeattes, Judge*. Order denying motion to dismiss entered 21 March 1977, in District Court, GUILFORD County. Heard in the Court of Appeals 9 February 1978.

Defendant was the lessee of the plaintiff. Plaintiff commenced this action by the filing of a complaint on 26 May 1976, alleging that the lease terminated 30 April 1976, because of defendant's failure to pay rent. Summons was issued on 26 May 1977.

Deputy Berekins of the Guilford County Sheriff's Office travelled to the subject property to serve the summons but found the building vacant. He posted a copy of the summons and complaint on the building, noted on the return that he had done so, and stated on the return that the defendant "cannot be found in the county after due and diligent search." In fact, the deputy made no further efforts to serve any officer of the defendant and no effort to ascertain who was designated with the Secretary of State as agent to receive service of process.

A hearing before the magistrate was held 3 June 1976. Defendant had no notice of the hearing and was not present at the hearing. Judgment, granting possession of the property and $300 per month rent from 1 May 1976, was entered 4 June 1976.

Defendant gave written notice of appeal and demanded trial by jury 7 June 1976. Plaintiff, with the assistance of the sheriff, took possession of the premises 18 June 1976. On 12 January 1977, defendant filed a motion to dismiss alleging the insufficiency of service of process. By order of 21 March 1977, the trial court denied defendant's motion. Defendant appealed the denial of its motion to dismiss.

No counsel contra.

O. Max Gardner III for defendant appellant.

MORRIS, Judge.

The sole question presented by this appeal is whether the court has jurisdiction over the person of the defendant. Defendant argues that service of process was defective and, therefore, the motion to dismiss should have been allowed. We believe that it is not necessary for us to decide whether service of process was defective.

G.S. 1-75.7 provides that "[a] court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person: (1) Who makes a general appearance in an action. . . ." G.S. 7A-193 provides that "the civil procedure provided in chapters 1 and 1A of the General Statutes applies in the district court division of the General Court of Justice." Thus, if defendant made a "general appearance", the court has jurisdiction over his person even if service of process was defective. *In re Blalock*, 233 N.C. 493, 64 S.E. 2d 848 (1951).

In *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 203 S.E. 2d 769 (1974), the Supreme Court thoroughly discussed the application of G.S. 1-75.7 and the concept of "general appearance" in North Carolina law. The Court held that when the legislature used the term "general appearance" in enacting G.S. 1-75.7, it used the term in light of its settled meaning in North Carolina law. The Court clearly stated that if one "invoked the judgment of the court for any other purpose [than contesting service of process] he made a general appearance and by so doing submitted himself to the jurisdiction of the court whether he intended to do so or not." 285 N.C. at 151, 203 S.E. 2d at 773. Also, the Court

noted " 'that the making of any motion or the filing of answer *prior to the presentation of such objection* [to personal jurisdiction] *shall waive it.*' " 285 N.C. at 151, 203 S.E. 2d at 774. In that case, the Court held that moving the court for an extension of time amounted to a "general appearance". Although G.S. 1-75.7 was amended specifically to allow motions for extensions of time, we believe that otherwise the concept of a "general appearance" remains the same and that the concept should be given a liberal interpretation. In other cases, the Court has interpreted the concept liberally. Acts amounting to a general appearance include the following: (1) Challenging jurisdiction over the subject matter, *In Re Blalock*, supra; (2) Procuring the reduction of a civil arrest bond by consent order, *Reverie Lingerie, Inc. v. McCain*, 258 N.C. 353, 128 S.E. 2d 835 (1963); (3) Filing a motion for change of venue, *Waters v. McBee*, 244 N.C. 540, 94 S.E. 2d 640 (1956); (4) Filing a motion for a continuance, *Hardy & Newsome, Inc. v. Whedbee*, 244 N.C. 682, 94 S.E. 2d 837 (1956); and (5) Entering a stipulation agreeing to an extension of time, *Youngblood v. Bright*, 243 N.C. 599, 91 S.E. 2d 559 (1956). In short, " '[a]n appearance for any purpose other than to question the jurisdiction of the court is general.' " *Motor Co. v. Reaves*, 184 N.C. 260, 264, 114 S.E. 175, 177 (1922).

In the present case, judgment was entered by the magistrate 4 June 1976. On 7 June 1976 defendant, through counsel, gave written notice of appeal from the magistrate and also demanded trial by jury. We believe that those acts, taken together, are inconsistent with defendant's *subsequent* motion to dismiss for lack of jurisdiction over the person. We also note that the defendant gave notice of appeal and demanded trial by jury on 7 June 1976 but did not move to dismiss until 12 January 1977. We are of the opinion that, when a party gives notice of appeal and demands trial by jury prior to contesting the court's jurisdiction over his person, he has made a general appearance under G.S. 1-75.7. Thus, we conclude that the court has personal jurisdiction over the defendant. Furthermore, we note that defendant is entitled to a trial de novo and that he has actual notice of the proceedings and ample opportunity to prepare for trial.

For the foregoing reasons, the order of the trial court denying defendant's motion to dismiss is

Affirmed.

Judges CLARK and MITCHELL concur.

STATE OF NORTH CAROLINA v. ROZELL OXENDINE HUNT

No. 7720SC957

(Filed 2 May 1978)

Constitutional Law § 48— ineffective assistance of counsel

A defendant convicted of first degree murder was properly granted a new trial in a post-conviction hearing on the ground that she was denied her right to effective assistance of counsel where the court made findings supported by the evidence that defendant was tried on the date she was indicted and arraigned and 24 days after her arrest; defendant's court-appointed counsel talked with defendant three or four times prior to the trial; defendant's counsel made no investigation of the case, did not talk with or subpoena any potential defense witnesses, and presented no evidence for defendant; and defendant's counsel made no motion for continuance although he knew he was not prepared adequately to represent defendant at the trial.

ON certiorari to review the order of *Barbee, Judge.* Order entered 21 June 1977, in Superior Court, ANSON County. Heard in the Court of Appeals 29 March 1978.

Defendant was indicted on 10 June 1974 for first degree murder. Her trial began on that same day, and she was convicted by a jury. Through her court-appointed attorney, defendant appealed from a sentence of death, and the attorney appointed to represent defendant at trial was also appointed to perfect the appeal. In September, 1975, however, the attorney was removed and attorney Henry Drake was appointed to perfect defendant's appeal in *forma pauperis.*

In *State v. Hunt*, 289 N.C. 403, 222 S.E. 2d 234 (1976), the defendant's trial was held to be without error. In November 1976, the North Carolina Supreme Court vacated the sentence of death and substituted a sentence of life imprisonment.

Application for a post-conviction hearing was filed in January 1977, and a plenary hearing was held at the 12 April 1977 session of Superior Court. After hearing evidence by defendant and the

State, the trial judge made findings of fact and concluded, in pertinent part, as follows:

"1. This Court is of the opinion that under the evidence and circumstances of this particular case, it was fundamentally unfair and unjust to try the petitioner for a capital offense on the date she was indicted and arraigned and twenty-four days after she was arrested and eight months after the victim died.

"2. Under the evidence and circumstances of this particular case, the Court appointed counsel did not have a reasonable time to adequately prepare a defense for the petitioner in this capital offense.

"3. The Court-appointed counsel made no investigation or adequate preparation for a defense in this capital case. Counsel was not adequately prepared to represent the petitioner.

"4. The petitioner did not have effective assistance of counsel at the trial of this capital offense, and therefore, petitioner was denied her constitutional right of effective assistance of counsel as guaranteed by the sixth and fourteenth amendments to the United States Constitution."

The State petitioned this court for the issuance of a writ of certiorari, and on 27 August 1977, the petition was allowed.

Attorney General Edmisten, by Assistant Attorney General Charles J. Murray, for the State.

Henry T. Drake for defendant appellee.

ARNOLD, Judge.

Until 1 July 1978, the effective date of its repeal, Article 22 of Chapter 15 of the North Carolina General Statutes provided a judicial proceeding whereby an imprisoned person may assert, *inter alia*, that, in the proceedings resulting in his conviction, there was a substantial denial of his rights under the Constitution of the United States or under the Constitution of North Carolina. G.S. 15-217. In her application for a post-conviction hearing, defendant alleged that she was denied the effective assistance of counsel at trial, in violation of the Sixth Amendment to the

United States Constitution as made applicable to the states by the Fourteenth Amendment. At the hearing, there was competent evidence to support the following findings of fact by the court:

> "3. The petitioner's court-appointed lawyer talked with the petitioner three or four times prior to the trial. He made no investigation of the case. He at no time talked or discussed the case with any potential witnesses which the petitioner could use in her defense. Counsel for the petitioner did not subpoena any witnesses for the petitioner to the trial. Counsel did not investigate the scene of the alleged poisoning which allegedly caused Joseph Hunt's death. Trial counsel saw the autopsy report on Joseph Hunt on the date the trial began. Trial counsel was not prepared to represent the petitioner when the case was called for trial. The record of the trial reflects that trial counsel (knowing that he was not prepared to adequately represent the petitioner at the trial) did not make a motion to continue the trial of the case.
>
> "4. During the trial, counsel offered no evidence for the petitioner. The petitioner, after being advised of her rights to do so by the trial court, did not testify in her own behalf."

The State, in its brief, concedes that these findings were supported by the evidence presented at the hearing. It contends, however, that the conclusions of the court were not supported by the findings of facts or the evidence and, further, that the conclusions were not sufficient to support the order for a new trial. The State would have us remand this case to allow the trial court to make a finding that a different result would likely have resulted had defendant had effective assistance of counsel at her trial. We are unable to agree with the State's view.

Case law does support the argument of the State that, in a post-conviction hearing, "[t]he inquiry is whether there was a *substantial denial* of the constitutional rights of petitioners in the original criminal action in which they were convicted and whether a different result would likely have ensued had petitioners not been denied such rights." *State v. Graves*, 251 N.C. 550, 554, 112 S.E. 2d 85, 89 (1960). However, the purpose of the proceeding under the North Carolina Post-Conviction Hearing Act is not to determine the guilt or innocence of petitioner. "The purpose of post-conviction review is to determine whether in the proceedings

leading to the conviction there occurred any substantial denial of petitioner's constitutional rights." *Parker v. State*, 2 N.C. App. 27, 34, 162 S.E. 2d 526, 530 (1968), *aff'd* 397 U.S. 790, 25 L.Ed. 2d 785, 90 S.Ct. 1458 (1970).

From the record there appears competent evidence to support the findings of the able trial judge and those findings support his conclusions. We agree with his order granting a new trial. The order granting a new trial is

Affirmed.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. CATHY BUFF WHISNANT

No. 7725SC977

(Filed 2 May 1978)

1. **Criminal Law § 7— entrapment—government agent as entrapper**

North Carolina follows the majority rule that entrapment is a defense only when the entrapper is an officer or agent of the government.

2. **Criminal Law § 121— entrapment—failure to give instruction—error**

In a prosecution of defendant for sale and delivery of a controlled substance to an SBI agent, evidence presented by defendant was sufficient to require the trial court to instruct the jury that if a co-worker of defendant was acting as an agent for the SBI agent and she, as such agent, induced defendant to commit the crime charged, the SBI agent would be responsible for her actions and the defense of entrapment would be available to defendant.

APPEAL by defendant from *Lewis, Judge*. Judgment entered 25 May 1977, in Superior Court, CATAWBA County. Heard in the Court of Appeals 30 March 1978.

Defendant pled not guilty to the indictment charging sale and delivery on 28 January 1977 to S.B.I. Agent John G. Prilliman of Phenaphen Number 3 containing codeine, a Schedule III Controlled Substance.

The State's evidence tended to show that defendant for several years had worked as a technician at Catawba Memorial

Hospital. In December, 1976, she called co-worker Rebecca Reynolds and told her that if she (Ms. Reynolds) knew someone who wanted drugs, defendant knew where she could get some. On 26 January 1977 defendant called Ms. Reynolds and asked if she could find anyone who wanted drugs; Ms. Reynolds replied that she had visitors who knew people that wanted drugs. Agent Prilliman came to Ms. Reynolds' apartment two nights later and asked for drugs; Ms. Reynolds called defendant, and gave to her a list of drugs, including Talwin and Phenaphen Number 3, that he wanted. Defendant said she would get the drugs. Ms. Reynolds and Agent Prilliman went to defendant's apartment. Prilliman bought Talwin and Phenaphen Number 3 tablets. Phenaphen was not a Controlled Substance, but because of the codeine in the Phenaphen tablets, the Phenaphen was a Controlled Substance; the Talwin was a prescription drug, but not a Controlled Substance. Defendant gave part of the money to Ms. Reynolds. Ms. Reynolds and her husband subsequently sold Controlled Substances to Agent Prilliman; she agreed to testify for the State in this case when seven of eleven drug charges against her were dropped.

Defendant testified that on the night of 28 January 1977 Ms. Reynolds called, said a friend of her husband needed drugs for pain, and defendant replied that she had some Talwin and Phenaphen tablets that were her own. Ms. Reynolds and Prilliman (introduced as Mr. Williams) came to her apartment, and she agreed to sell the Phenaphen for fifty sents per capsule and the Talwin for a dollar per tablet. Subsequently Prilliman asked her several times for drugs but she refused to get them.

For defendant, a pharmacist testified that Phenaphen was not a Controlled Substance. Several witnesses testified that defendant had a good character.

Defendant was found guilty as charged and appeals from judgment imposing imprisonment of 44 months, but 41 months were suspended for three years' probation.

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

Sigmon & Sigmon by W. Gene Sigmon; Lefler, Gordon & Waddell by Lewis E. Waddell, Jr. for defendant appellant.

CLARK, Judge.

The defendant contends the trial court erred in charging the jury that the defense of entrapment is not available to one who has been induced by some person other than a law enforcement officer.

[1] North Carolina follows the majority rule that entrapment is a defense only when the entrapper is an officer or agent of the government. *State v. Jackson*, 243 N.C. 216, 90 S.E. 2d 507 (1955); *State v. Yost*, 9 N.C. App. 671, 177 S.E. 2d 320 (1970), *cert. den. Yost v. Ross*, 181 S.E. 2d 600 (1971); *Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed. 2d 848 (1958); *Smith v. State*, 258 Ind. 415, 281 N.E. 2d 803 (1972).

It appears from the decisions in this State that the main purpose of the entrapment defense is to regulate government activity in investigating crimes, crimes that often require no form of specific intent. *State v. Love*, 229 N.C. 99, 47 S.E. 2d 712 (1948).

[2] The State's evidence tended to show that defendant in December initiated the telephone call to Ms. Reynolds and sought buyers for drugs. But on 28 January 1977, Ms. Reynolds called defendant while Agent Prilliman was present, and Prilliman gave her a list of drugs he wanted her to ask defendant to get for him.

On the other hand, defendant's evidence tended to show that she did not call Ms. Reynolds in December, but on the day in question Ms. Reynolds called and said she had a friend who needed drugs for pain. Defendant told Ms. Reynolds she had Talwin and Phenaphen of her own. Then Ms. Reynolds and Agent Prilliman came to defendant's apartment. This evidence tends to show some inducement of defendant by Ms. Reynolds as the agent of Prilliman to commit the crime.

Under these circumstances it was the duty of the trial judge under G.S. 1-180 to apply the law to the evidence by instructing the jury in substance that if Ms. Reynolds was acting as an agent for S.B.I. Agent Prilliman and she as such agent induced the defendant to commit the crime charged, the S.B.I. Agent would be responsible for her actions and the defense of entrapment would be available to defendant. *Sherman v. United States, supra.* The failure to do so was prejudicial error.

We do not treat the other assignments of error since they may not occur on retrial.

The judgment is reversed and we order a

New trial.

Judges BRITT and ERWIN concur.

IN THE MATTER OF: WILTON S. ENOCH, CLAIMANT AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 7715SC318

(Filed 2 May 1978)

Master and Servant § 111.1— appeal from Employment Security Commission— authority of reviewing court

The function of the superior court in reviewing a decision of the Employment Security Commission is not to conduct an evidentiary hearing but is to determine whether there was evidence before the Commission to support its findings of fact and to decide whether the facts found sustain the conclusions of law and the resultant decision of the Commission; therefore, the trial court's conclusion that the "findings and conclusions of the Employment Security Commission are not supported by the evidence in this matter . . ." indicated that the court may have based its decision in part upon the testimony elicited at the improper evidentiary hearing it conducted, and the court in doing so exceeded its jurisdiction.

APPEAL by claimant from *Smith (David I.), Judge*. Judgment entered 25 February 1977 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 7 February 1978.

Claimant was separated from his employment in March 1975. On 6 October 1975 he filed a claim for unemployment insurance benefits. Because of questions as to "separation from employment" and "able and available for work", a hearing was held by a claims deputy 26 November 1975. The claims deputy determined that the claimant was ineligible. The claimant appealed. The decision was reviewed by an appeals deputy on 6 February 1976. The appeals deputy upheld the claims deputy's determination of ineligibility insofar as the period which is the subject of this appeal is concerned (5 October 1975 to 27

December 1975). Again, claimant appealed. The Employment Security Commission, by and through its chairman, held a hearing 18 May 1976 and rendered a decision affirming the appeals deputy.

Claimant appealed the decision of the Commission to the Superior Court. The appeal was heard in Alamance County Superior Court 29 November 1976. That court reviewed the record and heard further testimony. The Superior Court entered judgment 25 February 1977 holding the claimant eligible during the relevant period. From that decision the Commission appeals.

Chief Counsel Doyle, by Staff Attorney Thomas S. Whitaker, for the Employment Security Commission appellant.

Chambers, Stein, Ferguson and Becton, by J. LeVonne Chambers and Yvonne Mims, for the claimant appellee.

MORRIS, Judge.

The Commission raises one central question in this appeal: Does the fact that the Superior Court accepted additional evidence in hearing claimant's appeal from the decision of the Commission justify a reversal of its decision?

In reviewing decisions of the Employment Security Commission, the jurisdiction of the superior courts is based solely upon G.S. 96-15(i). The statute provides in pertinent part that:

> "The decision of the Commission shall be final, subject to appeal . . . to the superior court of the county of his residence. . . . In any judicial proceeding under this section the findings of the Commission as to the facts, if there is evidence to support it, and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law. . . ." G.S. 96-15(i).

The legislature, in granting this jurisdiction to the superior court, intended for the superior court to function as an appellate court. The function of the superior court in reviewing a decision of the Employment Security Commission is twofold: "(1) To determine whether there was evidence before the Commission to support its findings of fact; and (2) to decide whether the facts found sustain the conclusions of law and the resultant decision of the

Commission." *Employment Security Com. v. Jarrell*, 231 N.C. 381, 384, 57 S.E. 2d 403, 405 (1949). If the court properly confines its review to those two questions, there is no reason to conduct an evidentiary hearing.

We said in *Employment Security Comm. v. Paul's Young Men's Shop*, 32 N.C. App. 23, 231 S.E. 2d 157 (1977), *cert. denied* 292 N.C. 264, 233 S.E. 2d 396 (1977), the same principles governing the scope of judicial review on appeals from the Industrial Commission govern the scope of judicial review on appeal from the Employment Security Commission.

> ". . . [T]he reviewing court may determine upon proper exceptions whether the facts found by the Commission were supported by competent evidence and whether the findings so supported sustain the legal conclusions and the award made, but in no event may the reviewing court consider the evidence for the purpose of finding the facts for itself. (Citations omitted.) 'If the findings of fact of the Commission are insufficient to enable the Court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the end that the Commission make proper findings.' " *Id.* at 29, 160.

In this case the Superior Court heard and considered further evidence during the hearing of claimant's appeal and found facts. In its conclusions of law, the court held that the "findings and conclusions of the Employment Security Commission are not supported *by the evidence in this matter*. . . ." (Emphasis supplied.) It is possible that the court's determination that the Commission's findings were not supported was based solely upon a review of the record before it. It is also possible that the court based its decision, at least in part, upon the testimony elicited at the evidentiary hearing it conducted. From the record before us, we cannot determine what the basis was. The use of the phrase "not supported *by the evidence in this matter*" suggests that the Superior Court may have relied on evidence at the hearing it held. The judgment begins with the acknowledgment that the decision was reached "after . . . hearing further testimony. . . ." We, thus, conclude that the trial court relied upon evidence elicited at the improper evidentiary hearing which was outside the record brought before it on appeal. In so doing, the court exceeded its jurisdiction.

The superior court's jurisdiction in reviewing the Commission's decisions is severely limited. Clearly, any action of a court without jurisdiction is legally meaningless. We, therefore, vacate the judgment of the Superior Court and remand the case for a review on the record presented to it. It may be that the court will reach the same result in reconsidering the case. We take no position in that regard. The judgment of the Superior Court is vacated and the case is remanded for rehearing.

Vacated and remanded.

Judges CLARK and MITCHELL concur.

SANDRA HOLSTEIN, BY HER NEXT FRIEND, PAUL G. MALLONEE v. ETNA OIL COMPANY

No. 7712DC427

(Filed 2 May 1978)

Trial § 44— polling of jury—failure to show assent by one juror

The polling of the jury in a personal injury case did not establish that one juror unqualifiedly assented to a verdict in favor of defendant where the juror, when asked if her answer to the first issue was "no" and whether she *still* assented thereto, stated, "Well, it was not proven beyond a reasonable doubt. If you're saying that, then I would have to say no --," and when asked the same question again, the juror stated, "I would still say no."

APPEAL by plaintiff from *Brewer, Judge*. Judgment entered 16 May 1977 in District Court, CUMBERLAND County. Heard in the Court of Appeals 2 March 1978.

This action was instituted to recover damages for personal injury suffered by the minor plaintiff when she fell on defendant's premises and cut her right hand and wrist on a broken bottle. No issue arises as to the evidence or the charge of the court. The only question presented is whether plaintiff is entitled to a new trial by reason of the answers of one of the jurors given during the polling of the jury after a verdict in favor of defendant had been returned.

A. Maxwell Ruppe for plaintiff appellant.

Anderson, Broadfoot and Anderson, by Hal W. Broadfoot, for defendant appellee.

MORRIS, Judge.

After the verdict of the jury, plaintiff, in apt time, requested that the jury be polled. During the polling of the jury, the following occurred, with respect to Juror No. 2:

> "CLERK: . . . you have answered the first issue no. Is this your answer and do you still assent thereto?
>
> JUROR NO. 2: Well, it was not proven beyond a reasonable doubt. If you're saying that, then I would have to say no —
>
> COURT: Ma'am simply answer the question as it's asked of you.
>
> . . .
>
> COURT (after conference with attorneys at the bench): Madam Clerk, would you read the question, again?
>
> Now Ma'am, if you would, please listen carefully to the question as it is read to you and answer it.
>
> CLERK: . . . you have answered the first issue 'No'. Is this your answer and do you still assent thereto?
>
> JUROR NO. 2: I would still say no."

Plaintiff urges that it cannot be said that the polling of the jury in this case establishes that Juror No. 2 unqualifiedly assented to the verdict entered. We are constrained to agree.

The reason for polling the jury is discussed at length in *Lipscomb v. Cox*, 195 N.C. 502, 142 S.E. 779 (1928). There the Court said:

> "The predominant purpose of the poll is to ascertain if the verdict as tendered by the jury is the 'unanimous verdict of a jury of good and lawful men in open court,' . . . . 'If it is found by such poll that one juror does not assent to the verdict as tendered, such verdict cannot be accepted, for it is not as a matter of law the unanimous decision of the jury.' " *Id.* at 505.

The answers of Juror No. 2 are filled with ambiguity and susceptible of various interpretations. Is she saying that if the court's question is whether it was proved beyond a reasonable doubt she would answer "no", or that if it had to be proved beyond a reasonable doubt she would have to answer the first issue "no"? If this be what she meant, we have nothing to indicate what her answer would be if she understood the standard to be the greater weight of the evidence. Did she say "no" meaning the verdict was not her verdict and reiterate it in her second answer? We see no clarification whatever in the second answer. She still says "no", but "no" to what? This juror's assent—if, indeed, it be an assent—is certainly far from clear and unequivocal. Perhaps she would have clarified her first answer had she been allowed to continue without interruption from the court. However, upon the present state of the record, we cannot discern what she intended.

A verdict is a unanimous decision of the jury returned to the court and is a substantial right of which neither party can be deprived. *In re Sugg*, 194 N.C. 638, 140 S.E. 604 (1927). On the record before us, we cannot say that plaintiff has not been deprived of this substantial right. For that reason, she is entitled to a

New trial.

Judges CLARK and MITCHELL concur.

JOYCE McCURRY SHORT, BY HER GUARDIAN AD LITEM, RONNIE SHORT, PLAINTIFF v. RODNEY ERROL SHORT, DEFENDANT

WARREN McCURRY BY HIS GUARDIAN AD LITEM, HAZEL McCURRY, PLAINTIFF v. RODNEY ERROL SHORT, DEFENDANT

No. 7729SC475

(Filed 2 May 1978)

Automobiles § 46— officer's opinion as to speed—opinion not based on observation of vehicle—testimony inadmissible

In an action to recover damages for injuries sustained by plaintiff pedestrians when they were struck by defendant's vehicle, the trial court

erred in allowing the officer who investigated the accident to express his opinion as to the speed of defendant's vehicle, since the officer did not see the vehicle in operation but based his opinion on defendant's statement and his own observations of the scene of the accident.

APPEAL by plaintiffs from *Martin (Harry), Judge.* Judgment entered 17 January 1977 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 8 March 1978.

Plaintiffs instituted separate actions to recover for injuries sustained in a one-car, two-pedestrian accident. Defendant driver answered, denying negligence. At the trial, plaintiffs' evidence tended to show that: plaintiff Short began crossing a two-lane highway from west to east with plaintiff McCurry in her arms; defendant approached from the north in his car; there is a crest of a hill and curve in the roadway about 200 or 300 feet north of the accident scene; plaintiffs got to the center of the highway and then turned to cross back to the west side; and defendant's car struck plaintiffs near the western edge of the road.

One Ronnie Short observed the accident and testified that in his opinion, defendant's car was traveling 60 to 65 miles per hour, but that the speed "could have been 55 miles an hour." Defendant testified that: he was traveling 55 miles per hour; he saw someone in the road ahead and came off the accelerator; he did not brake because he assumed that the person could cross the road ahead of him; the person got two-thirds of the way across the road and then turned, coming back in front of him; and he braked and skidded, but could not avoid hitting plaintiffs. The investigating patrolman testified for defendant. The jury found no negligence on defendant's part. Plaintiffs appealed.

Hamrick & Hamrick, by J. Nat Hamrick, for plaintiff appellants.

Van Winkle, Buck, Wall, Starnes, Hyde & Davis, by Howard L. Gum, for defendant appellee.

ERWIN, Judge.

The dispositive assignment of error in this case is that the trial court erred in allowing the investigating officer, who arrived at the scene sometime after the accident occurred, to testify as follows:

"Q. Based on his (defendant's) statement to you and your own observations there at the scene, did you have any reason to believe he (defendant) was going over 55?

MR. HAMRICK: Objection.

THE COURT: Overruled.

MR. HAMRICK: Exception.

A. No sir.

Q. You accepted his statement as to his speed there?

A. It seemed reasonable to me.

MR. HAMRICK: Objection and move to strike.

THE COURT: Overruled and denied."

We hold the admission of this evidence to be prejudicial error.

The above-quoted testimony clearly amounted to an expression of opinion by the officer as to the speed of defendant's vehicle when he did not see the vehicle in operation. The applicable rule is well stated in 1 Stansbury, N.C. Evidence § 131 (Brandis Rev. 1973): "The opinion of a witness, whether lay or expert, will not be received when he did not observe the critical events, but bases his testimony on the appearances at the scene which he later observed and can adequately describe to the jury." Our Supreme Court stated in *Tyndall v. Hines Co.*, 226 N.C. 620, 623, 39 S.E. 2d 828, 830 (1946):

> ". . . one who did not see a vehicle in motion will not be permitted to give an opinion as to its speed. The 'opinion' must be a fact observed. The witness must speak of facts within his knowledge. He cannot, under the guise of an opinion, give his deductive conclusion from what he saw and knew . . ."

See also Johnson v. Yates, 31 N.C. App. 358, 229 S.E. 2d 309 (1976).

In finding this error to be prejudicial, we follow the reasoning of our Supreme Court in *Tyndall v. Hines Co., supra*, at 623, a case which also involved the testimony of a highway patrolman who did not observe the accident:

"On this record the admission of this evidence, in our opinion, was prejudicial to the defendants. The witness was a State employee whose duty it was to make a disinterested and impartial investigation of the accident. In so doing he was a representative of the State. His testimony should, and no doubt did, carry great weight with the jury."

Accordingly, plaintiffs are awarded a

New trial.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. KENNETH JONES

No. 7729SC978

(Filed 2 May 1978)

Gambling § 2— unlawful possession of gambling devices—insufficiency of warrant

A warrant was insufficient to charge defendant with the unlawful possession of gambling devices where it alleged only that defendant had in his possession illegal punchboards but failed to allege that defendant operated the gambling devices or that he kept the devices in his own possession or in the possession of other persons for the purpose of being operated. G.S. 14-302.

APPEAL by defendant from *Baley, Judge.* Judgment entered 10 August 1977 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 30 March 1978.

Defendant was arrested for unlawful possession of gambling devices and was tried and convicted of that offense. The State presented evidence which tended to show that on 11 December 1976, after receiving a complaint, the Sheriff of Rutherford County and two deputies entered a service station and store owned by defendant and found one Gary Bostic in charge of the business. The Sheriff asked for the punchboards, and Bostic opened a drawer and produced five of them. Two Timex watches, which one of the boards listed as the prize, were also found along with discarded boards and punches in the ditch behind the station. A warrant for the defendant was issued later that day after the punchboards had been secured. Defendant was given a six-month

term, suspended for three years, and was fined $350.00. Defendant appealed.

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

Robert W. Wolf and George R. Morrow, for defendant appellant.

ERWIN, Judge.

The defendant assigns the following as error:

> "The face of the record proper fails to present a charge upon which judgment could be rendered, in that the warrant fails to charge an offense."

Under App. R. 10(a), any party may present for review, by properly raising the issue in his brief, the questions of whether the Court had jurisdiction of the subject matter and whether a criminal charge is sufficient in law. This rule applies even when, as here, no motion was made to quash. *State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976).

Suffice it to say that here the requirements of App. R. 10(a) are satisfied. This assignment of error is properly before us, and it is sustained.

Defendant was charged under a criminal summons which reads in part as follows:

> "THE UNDERSIGNED FINDS THAT THERE IS PROBABLE CAUSE TO BELIEVE that on or about the 11th day of Dec., 1976, in the county named above, you did unlawfully, willfully, Have in his possession Illegal gambling devices to wit; punchboards.
>
> this being in violation of the following law: G.S. 14-294."

Defendant and State agree that the citation in the warrant should have been G.S. 14-302 which reads as follows:

> "It shall be unlawful for any person, firm or corporation to operate or keep in his possession, or the possession of any other person, firm or corporation, for the purpose of being operated, any punchboard, machine for vending merchandise,

or other gambling device, by whatsoever name known or called, that shall not produce for or give to the person operating, playing or patronizing same, whether personally or through another, by paying money or other thing of value for the privilege of operating, playing or patronizing same, whether through himself or another, the same return in market value, each and every time such punchboard, machine for vending merchandise, or other gambling device, by whatsoever name known or called, is operated, played or patronized by paying of money or other thing of value for the privilege thereof. . . ."

The warrant does not charge that the defendant operated the gambling devices or that he kept such devices in his own or the possession of other persons for the purpose of being operated. The omission of such charge is a fatal defect in the warrant, since an essential element of the offense as provided by statute is the operation of the gambling device or the keeping of the device in his possession for the purpose of being operated. Mere possession of a gambling device is not a criminal offense. *State v. Jones*, 218 N.C. 734, 12 S.E. 2d 292 (1940); *State v. Sheppard*, 4 N.C. App. 670, 167 S.E. 2d 535 (1969).

Where, as here, the warrant fails to charge an essential element of the offense, the defect is fatal. The judgment entered below is arrested.

Judges BRITT and CLARK concur.

JOHN H. CUTTER III, P.A. v. WALTER W. BROOKS AND SCOTT S. CARSWELL

No. 7726SC572

(Filed 2 May 1978)

Rules of Civil Procedure § 37— failure to appear for deposition—entry of default judgment

There was sufficient evidence before the trial court that defendant had failed to appear for a deposition to support the court's entry of a default judgment against defendant where plaintiff's motion for sanctions clearly alleged that defendant failed to appear for the deposition, and defendant was not pres-

ent for the scheduled hearing on plaintiff's motion and offered through his attorney no denial of plaintiff's allegations and no explanation for his failure to appear for the deposition; furthermore, the trial court could properly order the default judgment without finding that defendant "wilfully" failed to appear for his deposition. G.S. 1A-1, Rule 37(d).

APPEAL by defendant Brooks from *Griffin, Judge*. Order entered 24 February 1977, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 April 1978.

Plaintiff instituted this action on 27 July 1976 to recover the sum of $10,000, plus interest, on a note executed by defendants Brooks and Carswell and duly assigned to plaintiff. After defendant Brooks filed an answer to plaintiff's complaint, plaintiff served a Notice of Taking Deposition and a subpoena on defendant Brooks. By a letter dated 1 November 1976, defendant Brooks requested that the 30 November date for the deposition be postponed until a date during the week of 20 December 1976. On 24 November 1976, the parties stipulated that the oral depositions of both Brooks and Cutter were to be taken on 22 December 1976.

On 12 January 1977, plaintiff filed a motion, pursuant to G.S. 1A-1, Rule 37, alleging that defendant Brooks failed to appear for the deposition and praying, among other things, that the court order that defendant's answer be stricken, and that a judgment by default be rendered against defendant Brooks. On that same day, the court issued an order for defendant to appear before the Court on 4 February 1977, to show cause why plaintiff's relief should not be granted.

An order was entered on 24 February 1977 in which the trial court found as fact that "the defendant, Walter W. Brooks, has offered no sufficient reason to excuse his failure to appear for the deposition scheduled on December 22, 1976." The court also found that defendant had requested that the 4 February hearing be continued and that a continuance was, in fact, granted; that the hearing had been rescheduled for 18 February 1977; and that defendant, through his attorney, moved for a further continuance because defendant Brooks was involved in a trial in Florida. That motion was denied. As a matter of law the court then concluded that defendant Brooks had failed to appear for the scheduled depositions, and that defendant had failed to offer any "acceptable excuse" for his failure to appear. In its discretion the court

ordered, upon the facts found, that plaintiff's allegation of facts be taken as true for the purpose of this action, and that plaintiff be awarded judgment by default against defendant Brooks. Defendant Brooks appealed.

Michael P. Carr for plaintiff appellee.

Mraz, Casstevens and Davis, P.A., by Kenneth R. Jacobson and Gary A. Davis for defendant appellant Brooks.

ARNOLD, Judge.

G.S. 1A-1, Rule 37(d) reads in pertinent part:

> "If a party . . . fails . . . to appear before the person who is to take his deposition, after being served with a proper notice . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sub-section a, b, and c of sub-section (b)(2) of this rule."

We cannot accept defendant's view that the trial judge abused his discretion in ordering the entry of a default judgment against him because there was no evidence that defendant had failed to appear for his deposition. Plaintiff's Rule 37(d) motion, which was uncontroverted, clearly alleged that defendant had failed to appear for the pretrial discovery. Defendant, who had postponed the first hearing on the motion, was not present at the second scheduled hearing and, as far as the record reveals, offered, through his attorney, no denial of plaintiff's allegations, and no explanation for his failure to appear for the depositions.

Furthermore, the trial judge did not abuse his discretion by ordering the default judgment without finding that defendant Brooks had wilfully failed to appear at his deposition. The 1975 amendment to Rule 37(d) omitted the requirement that sanctions be leveled against a party who failed to respond to pretrial discovery "without good cause." The comment to Rule 37(d) states:

> "The resulting flexibility as to sanctions eliminates any need to retain the requirement that the failure to appear or respond be 'willful.' The concept of 'willful failure' is at best subtle and difficult, and the cases do not supply a bright line.

Many courts have imposed sanctions without referring to willfullness. In addition, in view of the possibility of light sanctions, even a negligent failure should come within Rule 37(d)."

Whether such extreme sanctions as are authorized by Rule 37(d) should be imposed obviously must be determined from the circumstances of each case. Based upon the record before us in this appeal we do not find abuse in the trial court's exercise of discretion. (*See also Wright & Miller*, Federal Practice and Procedure: Civil § 2291.)

The order granting default judgment is, therefore,

Affirmed.

Judges MORRIS and MARTIN concur.

RAYMOND C. GOODE v. TAIT, INC.

No. 7721SC582

(Filed 2 May 1978)

Carriers § 8.1; Rules of Civil Procedure § 56— summary judgment—when appropriate

G.S. 1A-1, Rule 56(c) requires that before summary judgment may be had, the materials filed must affirmatively show that not only would the moving party be entitled to judgment from the evidence contained within the materials, but they must also show that there can be no other evidence from which a jury could reach a different conclusion as to a material fact; therefore, summary judgment was inappropriate in an action to recover damages for injury sustained by plaintiff when water pumps and tanks which had been loaded onto a truck by defendant fell onto plaintiff, since the materials relied on by defendant showed that plaintiff did not know the cause of the accident, but they did not show that there was no other evidence that the pumps and tanks were negligently stacked.

APPEAL by plaintiff from *Albright, Judge*. Judgment entered 11 May 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 6 April 1978.

This is an appeal from a summary judgment entered against the plaintiff in an action seeking damages for personal injury. The

plaintiff alleged that he drove a tractor pulling a trailer from Fayetteville, North Carolina to Lumberton, North Carolina, which trailer had been loaded by the defendant in Dayton, Ohio. The trailer contained a load of water pumps and water tanks. The plaintiff further alleged that as he was helping another person unload the tanks and pumps in Lumberton, they fell against him and he was injured. The plaintiff's theory is that the pumps and tanks were negligently loaded by the defendant in Ohio which caused them to fall and injure him.

The plaintiff testified by deposition that each pump was in a box. The boxes were stacked in rows three boxes high with the tanks lying loose on top of the boxes. After plaintiff and his helper had unloaded several rows, the person working with him carried a load of pumps by handtruck into a warehouse. The plaintiff, while waiting for him to return, was standing on the back of the trailer with his back to the tanks and pumps that were still loaded on the trailer. While he was so standing, the pumps and tanks fell against him. The plaintiff testified he did not know what caused the stacks to fall unless the second layer "wasn't setting on top of each other right", and he could not say whether or not it was. On its motion for summary judgment, the defendant relied on the pleadings and the deposition taken from the plaintiff.

Eubanks and Walden, by Daniel S. Walden, for plaintiff appellant.

Womble, Carlyle, Sandridge and Rice, by Allan R. Gitter and William C. Raper, for defendant appellee.

WEBB, Judge.

The judgment must be reversed. Rule 56(c) of the Rules of Civil Procedure provides in part:

> "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."

The rule requires that before summary judgment may be had, the materials filed must affirmatively show that not only

would the moving party be entitled to judgment from the evidence contained within the materials, but they must also show that there can be no other evidence from which a jury could reach a different conclusion as to a material fact. The rule has been stated to be that the materials must show there is no triable issue. *Long v. Long*, 15 N.C. App. 525, 190 S.E. 2d 415 (1972). Applying the rule to this case, the deposition of the plaintiff can be read to mean he did not know the cause of the accident. For this reason, there is no evidence of negligence as to the loading. After considering the deposition and the pleadings, however, there still could be a triable issue because there could be other evidence that the pumps and tanks were negligently stacked. Thus, the materials relied on by the defendant do not show there is not a triable issue of negligence.

We presume the trial court relied on the rule as stated in *Haithcock v. Chimney Rock*, 10 N.C. App. 696, 179 S.E. 2d 865 (1971) as follows: "[t]he test is whether the moving party, by affidavit, or otherwise, presents materials which would require a directed verdict in his favor if presented at trial", and concluded that if the materials offered had been presented at a trial, a directed verdict would have been proper for defendant. In *Haithcock*, the plaintiff sued for injuries from a fall on the defendant's premises. She stated on adverse examination that she could not tell what caused her to fall. The facts in that case were such that she was the only one in a position to know what caused the fall. For that reason, summary judgment was appropriate. In this case, there were others who might be able to tell how the pumps and tanks were stacked and for that reason, summary judgment was not appropriate.

Reversed and remanded.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JEROME H. LOUCHHEIM III

No. 7710SC909

(Filed 16 May 1978)

1. **Searches and Seizures § 19— motion to suppress—affidavit for warrant—credibility of informant—accuracy of information**

Where a search warrant was valid on its face and an SBI agent's affidavit was sufficient to establish probable cause for issuance of the warrant, defendant could not attack the credibility of the confidential informant referred to in the affidavit or the accuracy of the information obtained by the SBI agent in the hearing on motion to suppress evidence seized pursuant to the warrant.

2. **Searches and Seizures § 24— probable cause for warrant—business records—elapse of 14 months since informant saw records**

An officer's affidavit to obtain a warrant to search for business records did not fail to show probable cause because some 14 months had elapsed since the officer's informant had seen the records in defendant's office since such records are usually kept for years, and the office in which the records were kept by defendant 14 months previously was still in the possession of defendant.

3. **Searches and Seizures § 31— search warrant—items to be seized—incorporation of application by reference**

A search warrant sufficiently specified the items to be seized where it referred to the property described in the application, and the application described the items as corporate minutes, bank statements, checks, sales invoices and journals, ledgers, correspondence, contracts, and the books and documents relating to a State advertising contract; furthermore, the circumstances required that officers executing the warrant inspect certain innocuous records and documents in order to locate the ones which tended to show the suspected criminal activity.

4. **Evidence § 28.1; Criminal Law § 15— motion to dismiss for improper venue—consideration of affidavit**

The trial court did not err in considering an affidavit on a motion to dismiss for improper venue on grounds the affidavit was hearsay and violated defendant's right of confrontation since the use of affidavits in determining preliminary and interlocutory motions is proper, and the right of confrontation applies only to the trial of the offense charged and not to a hearing incidental to the trial.

5. **Criminal Law § 15— proper venue—sufficiency of evidence**

In a prosecution for conspiracy to commit false pretense and false pretense in overbilling for State advertising work, the State carried its burden of proving that Wake County was the proper venue where it presented evidence that the State made payment under the advertising contract to defendant in his office in Raleigh; defendant prepared and submitted invoices to the State; defendant's place of business for purposes of the State contract

was in Raleigh; and defendant and another worked together in Raleigh on the State contract.

6. **Criminal Law §§ 77.1, 79; Conspiracy § 5.1— conversations heard by witness—admission by defendant—declarations of coconspirator**

In this prosecution for conspiracy to commit false pretense and false pretense in overbilling the State for advertising work, the trial court properly admitted a witness's testimony concerning a conversation in her presence and telephone conversations which she heard between defendant and the coconspirator in which defendant and the coconspirator discussed how they were going to mark up the amounts of the bills submitted to the State since (1) statements by defendant amounted to an admission which was admissible against him although not made in furtherance of the conspiracy, and (2) statements made by the coconspirator, even if descriptive of the conspiracy, were made while the conspiracy was in existence and in furtherance of it and thus were admissible against defendant and did not violate defendant's right of confrontation.

7. **Criminal Law § 56— expert in accounting—examination of seized books and records—comparison of cost figures**

In this prosecution for conspiracy to commit false pretense and false pretense in overbilling the State for advertising work, the evidence on voir dire supported the court's finding that an employee of the office of the State Auditor was an expert in accounting and auditing, and the court properly allowed the witness to compare actual advertising production costs and the inflated costs submitted in invoices to the State based on his examination of the books and records seized from defendant's office.

8. **Conspiracy § 6; False Pretense § 3.1— overbilling State for advertising—conspiracy and false pretense**

The State's evidence was sufficient for the jury in a prosecution for conspiracy to commit false pretense and false pretense in overbilling the State for advertising work.

9. **Corporations § 8; Criminal Law § 9; False Pretense § 1— overbilling of State by corporation's president—criminal liability of corporation and its president**

Where the president of a corporation in the course of the corporation's business overbilled the State for advertising work done by the corporation, both the corporation and the president could be convicted of false pretense.

APPEAL by defendant from *Braswell, Judge.* Judgments entered 10 June 1977, in Superior Court, WAKE County. Heard in the Court of Appeals 2 March 1978.

Defendant plead not guilty to indictments as follows: (1) 76CR29772, charging conspiracy with Harry Julian Eng and others during the period from 1 June 1973 to 28 June 1975 to commit felonious false pretense by submitting false billings to the

State; (2) 76CR29773, charging false pretense on 22 August 1973 by falsely representing to the State advertising production costs in the sum of $38,254.98, which was $374.78 more than actual costs; (3) 76CR29774, charging false pretense on 10 October 1973 by falsely representing to the State advertising production costs in the sum of $11,198.68, which was $628.12 more than actual costs; (4) 76CR29775, charging false pretense on 4 December 1973 by falsely representing to the State advertising production costs in the sum of $24,972.94, which was $239.00 more than actual costs; and (5) 76CR29776, charging false pretense on 11 January 1974 by falsely representing to the State advertising production costs in the sum of $23,410.45, which was $370.00 more than actual costs.

The evidence for the State tended to show that in 1970 defendant opened an advertising agency in Florida. In 1971 he came to North Carolina and worked as a consultant in the gubernatorial campaign of James E. Holshouser. After Holshouser's election, defendant, in 1972, formed Capital Communications, Inc. (hereafter C.C.I.) in anticipation of doing advertising business in this State. In May 1973 he was informed that he had the State advertising contract. Under the contract in general defendant received a commission of 15% on all advertising production work. He associated Julian Eng, a commercial artist with his own agency in Florida, to do production work on the North Carolina contract when needed. They had known each other for several years. Defendant agreed to pay Eng an "agency fee" of $1,500 per month.

Defendant signed three ad contracts with the State, each for one year, beginning 1 July 1973, the first two for C.C.I. In April 1975 defendant and Eng reorganized their agencies into Louchheim, Eng & People, Inc., and the third contract was awarded to this corporation. The contract was for State advertising costing about $400,000 to $500,000 annually. Defendant's agency was to be compensated for actual sums paid to others for production work or the prevailing rates for this type of work, whichever is lower, plus his commission.

A State audit in March 1975 revealed overbillings amounting to about $10,970 for the period from 1 July 1973 to 31 December 1974. This sum was paid by C.C.I. A second audit in February

1976 revealed overbilling of $2,916, which was paid by C.C.I. The State Auditor found the books and records of C.C.I. to be disorganized.

State's witness Toni Brennan, who worked for Mr. Eng in Florida, testified that in early 1974 defendant handed her some invoices in Eng's office and asked her to type up bills from Eng to match the C.C.I. bills to the State so that he would have them if the auditors came over. In October 1974 she left Eng and came to work for defendant in Raleigh, where she continued to type Eng's invoices as directed by defendant, who told her he was upping the bills so that he could make some money and make up for Mr. Eng's agency fee of $1,500 a month. She heard defendant and Eng state that any time you had a government contract you had to milk it for all it's worth. She heard them talk about marking up the bills. She placed the inflated invoices in a file folder in the front office; the original "true billings" from Eng to defendant she placed in a file folder entitled "Real" and gave it to defendant.

On 25 May 1976, a search warrant was issued for search of the offices of C.C.I. and Louchheim, Eng & People, Inc. for books, checks, and other records of these corporations relating to the State advertising contract. The search warrant was based on the application and affidavit of Curtis L. Ellis, S.B.I. Agent, averring that he was informed by a reliable confidential informant that defendant kept two different sets of invoices, one set with inflated and inaccurate production costs that were submitted to the State for payment; that after the false and inflated invoices were submitted to the State, defendant prepared a separate set of invoices prepared on Eng's letterheads reflecting the false and inflated production costs.

A search was made and records seized on 25 May 1976.

Defendant moved to quash the search warrant and suppress the evidence. The hearing on this motion was held on 15 July 1976. After hearing evidence offered by defendant and the State, the court found that the search warrant was validly issued, and that the search and seizure was reasonable in scope and did not violate the Fourth Amendment. The motion to suppress was denied.

Donnie W. Wheeler, a Supervisor in the office of the State Auditor, examined the books and records seized from defendant's office pursuant to the search warrant. He testified that he found records revealing that actual advertising production costs, evidenced by Eng agency bills to defendant paid by checks, had been increased by defendant in submitting invoices to the State for payment as alleged in the indictments.

Defendant offered the testimony of several employees, including his wife, who was a bookkeeper for C.C.I., which tended to show that defendant operated an efficient advertising agency, that he was honest and had a good reputation.

Defendant's testimony tended to show that in the early 1960's he began public relations and advertising work in Florida, subsequently joined the campaign staff of a gubernatorial candidate, was appointed Commissioner of Hotels and Restaurants of Florida in 1968, and opened his own advertising agency in 1970. In 1971 he spent three or four days in North Carolina working as a consultant in the Holshouser campaign. In 1972 he formed C.C.I. in this State in anticipation of doing advertising business here. He was awarded the State advertising contract in May, 1973. He had known Julian Eng for 12 years. Eng was a commercial artist and had the State of Florida advertising account. Defendant agreed to pay Eng 5% of the gross for production work. Eng was paid $1,500 monthly, and an adjustment was made at the end of the year.

Eng submitted a bill once a month for production work; defendant would then bill the State. Some of the invoices relied on by the State were "working copies" which were subsequently increased when he or Eng received new information from suppliers. He never told Toni Brennan he was going to "up" the bills to the State, and he never asked her to type up a whole set of invoices for the State auditors. He submitted no false invoices to the State, but there were some errors in billings.

The jury returned verdicts of guilty as charged. From judgment imposing an active prison term of four years and judgment of five years in prison suspended for five years upon good behavior and restitution payment of $1,611.90 to the State, defendant appeals.

Attorney General Edmisten by Assistant Attorney General Charles M. Hensey and Associate Attorneys Christopher Prather and Robert Newsom III for the State.

Akins, Harrell, Mann & Pike by Bernard A. Harrell; Ragsdale, Liggett & Cheshire by Joseph B. Cheshire V, and Peter M. Foley for defendant appellant.

CLARK, Judge.

The defendant brings forward in his brief, consisting of 76 pages, eight assignments of error in seven arguments. Their voluminosity demands that we treat each of them, albeit briefly.

First, defendant contends the trial court erred in denying his motion to suppress the evidence seized pursuant to an invalid search warrant because the supporting affidavit of Curtis Ellis (a) fails to show that the confidential informant was reliable as to the information, (b) fails to show probable cause in that the information of the informant was 14 months old, (c) is defective in that the information allegedly obtained from Judith Justice was inaccurate and false, and (d) is defective in that the search warrant did not specify the items to be seized.

In *State v. Harris*, 25 N.C. App. 404, 213 S.E. 2d 414, *app. dis.* 287 N.C. 666, 216 S.E. 2d 909 (1975), and *State v. Brannon*, 25 N.C. App. 635, 214 S.E. 2d 213, *cert. den.* 287 N.C. 665, 216 S.E. 2d 908 (1975), this Court imposed a limitation on the possible scope of challenging the search warrant's validity by attacking the affidavit upon which its issuance was based. In these cases the court decided that when the search warrant is valid on its face and the sworn allegations are sufficient to establish probable cause, a defendant may not attack the validity of the allegations or the credibility of the affiant or his informant in the *voir dire* hearing on the defendant's motion to suppress the evidence seized by law enforcement officers. The United States Supreme Court has never ruled directly on this issue, although it is arguable that such attack in the *voir dire* is consistent with the policy of *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961), which made the exclusionary rule a requirement of the Fourth Amendment. We note, however, that some members of the Supreme Court are backing off from the exclusionary rule as set out in *Mapp*. See Chief Justice Burger's dissent in *Bivins v. Six*

Unknown Named Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971), and Justice Harlan's dissent in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564, *reh. den.* 404 U.S. 874, 92 S.Ct. 26, 30 L.Ed. 2d 120 (1971). And the Burger court has refused to extend the rule to any situation. *See United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed. 2d 561 (1973), holding that the exclusionary rule does not apply to evidence introduced before grand juries; *Rugendorf v. United States*, 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed. 2d 887, *reh. den.* 377 U.S. 940, 84 S.Ct. 1330, 12 L.Ed. 2d 303 (1964), holding that errors did not invalidate the search warrant because they were not material to the finding of probable cause; *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed. 2d 1046 (1976), holding that evidence illegally seized by state officers may be used in a federal civil proceeding; *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed. 2d 1067 (1976), holding that a state prisoner may not be granted habeas corpus relief in federal courts upon the ground that evidence obtained in an unconstitutional search was introduced at his trial, if he had an opportunity for a full and fair litigation of the Fourth Amendment claim; and *United States v. Ceccolini*, --- U.S. ---, 98 S.Ct. ---, 55 L.Ed. 2d 268 (21 March 1978), which qualified the "fruit of the poisonous tree" doctrine of *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963), by holding admissible the voluntary testimony of an eyewitness (respondent's employee) concerning the ownership of certain policy slips, which testimony resulted from the discovery by a police officer of the betting slips during an illegal search of respondent's flower shop.

[1] We find that the search warrant is valid on its face, that the affidavit of Curtis Ellis, S.B.I. Agent, contained facts and circumstances within his knowledge, and of which he had reasonably trustworthy information, and presented sufficient justification for probable cause for issuance of the search warrant. *Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed. 2d 1040 (1967). We decline to consider the attack upon the credibility of the confidential informant referred to in the Ellis affidavit or the credibility of the information obtained by Judith G. Justice in view of the rule adopted in this court by the *Harris* and *Brannon* cases, *supra*.

[2] The defendant contends that a lapse of some 14 months since the informant had seen the business records of the defendant was such a lapse of time that there could be no probable cause to believe that the records sought were present in the place to be searched. The defendant relies on *State v. Campbell*, 14 N.C. App. 493, 188 S.E. 2d 560 (1972), cases collected in 100 A.L.R. 2d 525, and various decisions of the Federal Courts of Appeal. In *Campbell* the item sought in the search was a narcotic drug. In the other cases relied on, the items sought were likely to be consumed, sold or otherwise removed within a relatively short period. In the case *sub judice*, the items sought in the search warrant were business records, records that were required to be kept in compliance with the State advertising contract. Such records are usually kept for years, and the office in which they were kept by the defendant 14 months ago was still in the possession of the defendant. There were reasonable grounds to believe that he retained the records in his office. In *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed. 2d 627 (1976), the items sought were business records, and the court held that a lapse of three months was reasonable and supported the finding of probable cause.

[3] Nor do we find merit in defendant's claim that the search warrant did not specify in sufficient detail the items sought. The search warrant referred to the property described in the application. Such incorporation by reference was approved in *State v. Flowers*, 12 N.C. App. 487, 183 S.E. 2d 820, *cert. den.* 279 N.C. 728, 184 S.E. 2d 885 (1971). The items described in the application were "corporate minutes, bank state. . . .s [statements] and checks, sales invoices and journals, ledgers, correspondence, contracts, . . .ices, [invoices] and other books and documents kept in the course of business by Louchheim, . . ." The State was seeking evidence of fraudulent overcharges by defendant in invoices to the State under the advertising contract. The investigation involved a complex *modus operandi* involving business records other than the invoices submitted by defendant to the State. The list of documents in the search warrant included only the records relating to the State advertising contract. We find the items to be seized were sufficiently designated in the warrant. And we find, further, that the circumstances required that the officers executing the search warrant inspect certain innocuous records and documents in order to locate and seize the ones which tended to

show the suspected criminal activity. In *Andresen v. Maryland, supra*, the court recognized that investigators conducting the search will exercise some judgment and "discretion" in separating the innocuous from the incriminating. The scope of the search and seizure was reasonably limited in the search warrant and did not violate G.S. 15A-253.

We conclude that the trial court properly denied the defendant's motion to quash the evidence seized under the search warrant.

[4] In the hearing on defendant's motion to dismiss for improper venue, the trial court, over defendant's objection, received in evidence and considered the affidavit of Charles R. Lassiter III. The defendant contends that the court erred because the affidavit (1) was hearsay and (2) violated his right of confrontation.

Upon a motion to dismiss for improper venue the State has the burden to go forward and produce evidence to show venue properly lies in the county of indictment. *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975).

The use of affidavits in determining preliminary and interlocutory motions are considered proper, irrespective of the vital influence the decision on the motion may have upon the outcome of the action. *In re Custody of Griffin*, 6 N.C. App. 375, 170 S.E. 2d 84 (1969); 3 Am. Jur. 2d, Affidavits, § 28, pp. 403-404. We note that defendant did not request the right to subpoena the affiant and confront him by cross-examination.

The right of confrontation under the Sixth Amendment is applicable only to the trial for an offense charged and not for hearing or inquiries incidental to the trial. 21 Am. Jur. 2d Criminal Law, § 337, pp. 364-365.

We find no merit in this assignment of error.

[5] Nor do we find merit in defendant's contention that the State failed in its burden of proving that Wake County was the proper venue. The State had the burden of showing that the offenses charged, or any act or omission constituting part of the offense, occurred in Wake County. *State v. Miller, supra; State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974). Where conspiracy is charged, the proper venue is the county where the conspiracy

was entered into or in which any overt act was committed by any of the conspirators in furtherance of the common design. *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334 (1964); *State v. Hicks*, 233 N.C. 511, 64 S.E. 2d 871 (1951).

The evidence at the venue hearing established that the State made payment under the advertising contract to defendant at his office in Raleigh, that defendant prepared and submitted invoices to the State, that defendant admitted that his place of business for purposes of the State contract was in Raleigh, and that defendant and Eng worked together in Raleigh on the State contract.

The question of venue is not an issue after the jury has been empaneled. *State v. Dozier*, 277 N.C. 615, 178 S.E. 2d 412 (1971); *State v. Puryear*, 30 N.C. App. 719, 228 S.E. 2d 536, *app. dis.* 291 N.C. 325, 230 S.E. 2d 678 (1976). But it was not incumbent upon the State at the venue hearing to produce evidence of the crime itself; it had the burden of showing that *if* a crime was committed, venue properly lay in Wake County. We find that the State carried its burden and the evidence fully supported the denial of defendant's venue motion.

[6] Defendant assigns as error the admission of the testimony of Toni Brennan, a witness for the State, about a discussion in her presence between defendant and Eng in which it was said "that any time you had a government account you have to milk it for all it's worth and that's when you make all the money you can while you've got it. . . . I heard them discuss on more than one occasion how much more they were going to mark it up when they sent it to the State." Too, Ms. Brennan testified that while working for Eng in Miami she would get on a telephone during conversation between defendant and Eng about "how they were going to mark up the bill after Mr. Eng had already made his bill."

The record on appeal reveals that before the foregoing testimony was admitted a *voir dire* examination of the witness was conducted, and the witness was cross-examined by defendant. The record does not include any part of the examination or findings and conclusions of the trial court. However, it does appear elsewhere in the record that Ms. Brennan began working for Eng in Miami in June 1973, that defendant came to the Eng office there in the summer of 1974 and had her type some "inflated"

bills from Eng to C.C.I. to match the bills the defendant had actually billed the State. These bills were more than the "true billings" previously submitted by Eng to defendant. She testified also that some of Eng's bills to defendant also had inflated costs. The record on appeal does not disclose the time of the challenged conference or telephone conversations.

It is an established rule of law in North Carolina, in a majority of the other states, and in the Federal Courts, that the declarations and acts of any one of the co-conspirators made or done while the conspiracy is in existence, and in furtherance of the common design, are admissible against the other conspirators. *U.S. v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed. 2d 1039 (1974); *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed. 2d 213 (1970); *State v. Conrad*, 275 N.C. 342, 168 S.E. 2d 39 (1969); *State v. Sanders*, 276 N.C. 598, 174 S.E. 2d 487 (1970); *State v. Puryear*, *supra*.

But defendant contends that at the time the statements were made a conspiracy was not in existence, and that the statements were not in furtherance of any conspiracy but merely descriptive of a conspiracy.

The defendant relies on *Dutton v. Evans*, *supra*, to support his Sixth Amendment right of confrontation argument. In *Dutton*, the defendant Evans was tried in a Georgia state court for the murder of three police officers. A cell mate of one of his codefendants testified that when the codefendant returned from his arraignment, he stated, ". . . if it hadn't been for that dirty son-of-a-bitch, Alex Evans, we wouldn't be in this now." The statement was admitted under the Georgia co-conspirator exception to the hearsay rule. The United States Supreme Court in substance stated that the right to confrontation was violated by the introduction of a co-conspirator's hearsay statements, but found the statement was neither "crucial" to the prosecution nor "devastating" to defendant. The court did not find reversible error because there were many witnesses for the prosecution, including an eyewitness to the crime, who were subjected to full and effective cross-examination, and the questioned statement was "of peripheral significance at most."

The defendant refers to several federal cases for support of his claim that defendant was denied the right to confront Eng, and that Eng's availability as a defense witness was not sufficient to meet his constitutional right of confrontation.

Neither *Dutton* nor the other federal cases relied on by defendant support his position in the case *sub judice* for several reasons. First, it appears that the challenged statements were made subsequent to the conspiracy agreement. There is no direct evidence of this agreement, but the only reasonable inference from the circumstantial evidence is that the agreement was made by the time of the effective date of the State advertising contract on 1 July 1973. The statements were, as defendant argues, descriptive of a conspiracy, but they were descriptive of an existing conspiracy. Too, it does not appear from Ms. Brennan's testimony about the conference and telephone conversation who said what, but it is clear that each agreed with the other, which constituted an admission by the defendant. Any declaration by the defendant amounting to an admission on his part is admissible against him, although not made in furtherance of the conspiracy. *State v. Turner*, 119 N.C. 841, 25 S.E. 810 (1896), 39 N.C.L.R. 422 (1961).

Further, if it is conceded that some part of the challenged statements was made by Eng and was descriptive of the conspiracy, it was made also in furtherance of it, and therefore within the established rule of law which recognizes the admissibility of the declaration of a co-conspirator made while the conspiracy is in existence and in furtherance of the common design.

[7] The defendant assigns as error (1) the finding by the court that the witness Donnie Wheeler, employee of the Office of the State Auditor, was an expert in the field of accounting and auditing, (2) allowing him to compare figures on various exhibits, and (3) permitting him to use and explain State's Exhibit 45, a comparison of the amounts billed by Eng to defendant with the amounts defendant billed to and paid by the State.

The trial court found that in light of the complex nature of the case, with many records, figures and dates, the assistance of an expert would be valuable to the jury in understanding the evidence. After *voir dire*, the court found Wheeler to be an expert in the field of accounting. The finding was fully supported by the evidence. When material to the inquiry, an expert witness in the field of accounting may testify as to entries made in the books of a business and their meaning. *Bank v. Crowder*, 194 N.C. 331,

139 S.E. 604 (1927); *State v. Hightower*, 187 N.C. 300, 121 S.E. 616 (1924).

As an expert accountant, Wheeler's testimony in comparing figures on various exhibits and in showing and explaining the comparison figures was admissible. An expert accountant may give an opinion or conclusion if it is properly based on his personal examination of the records. *State v. Hightower, supra.* In *Teer Co. v. Dickerson, Inc.*, 257 N.C. 522, 126 S.E. 2d 500 (1962), Justice Sharp (now Chief Justice), for the Court wrote:

> "Entries in the books of the defendant were clearly admissible against it as admissions. Stansbury on Evidence, Section 156. It was permissible for the auditor, an expert accountant, to interpret the books and testify what the books showed; he did not purport to say what amount was, in fact, due. Whether the books were correct or not, in the absence of a stipulation, was, of course, for the jury. In *LaVecchia v. Land Bank*, 218 N.C. 35, 41, 9 S.E. 2d 489, an expert accountant, after examining the books of a corporation, testified that they did not indicate that the corporation was indebted to its president in any amount. The court said: 'The witness being an expert accountant, his testimony, based upon personal examination of the books and records of the corporation, is clearly competent.'" 257 N.C. at 529, 126 S.E. 2d at 505.

The trial court did not err in finding Wheeler to be an expert in the field of accounting or in admitting his opinion testimony. These assignments of error are without merit.

[8, 9] Finally, defendant's motions for nonsuit were properly overruled. The State offered evidence that there was a conspiracy between Eng and defendant to submit false billings to the State, and that the bills submitted by defendant to the State were inflated and false as charged. The evidence supports the charges and was sufficient to overcome the nonsuit motion. Nor is it a defense that the false representations were made by Capital Communications, Inc., and not the defendant. He was president of the corporation and its agent. 3 Strong's, N.C. Index 3d, Corporations, § 8, pp. 485-486. Where the agent of a corporation in the course of his and his employer's business obtains anything of value for the corporation by false pretense both the corporation and the agent

may be convicted. *State v. Ice Co.*, 166 N.C. 366, 81 S.E. 737 (1914).

We conclude that the defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and ARNOLD concur.

CHICAGO TITLE INSURANCE COMPANY, PLAINTIFF v. HILARY H. HOLT, DEFENDANT AND THIRD-PARTY PLAINTIFF v. DAVID B. BLANCO AND HOUSE & BLANCO, P.A., THIRD-PARTY DEFENDANTS

No. 7721SC371

(Filed 16 May 1978)

1. **Attorneys at Law § 5.1— errors in certifying title to real property—who may sue**

   It is generally held that attorneys may be held liable for errors in certifying title to real property only to those to whom the certification is made and who enjoy privity of contract with such attorneys.

2. **Attorneys at Law § 5.1— malpractice action—parties who may sue—contract action**

   Claims for relief for attorney malpractice are actions sounding in contract and may properly be brought only by those who are in privity of contract with such attorneys by virtue of a contract providing for their employment.

3. **Contracts § 25.1; Attorneys § 5.1— attorneys' contract with corporation—individual not in privity with attorneys—malpractice action—complaint insufficient**

   Complaint of the third party plaintiff was insufficient to state a claim upon which relief could be granted where the complaint alleged that, because the third party plaintiff served as either vice-president or consultant to the firm which was represented by the third party defendant law firm, the attorneys were therefore the third party plaintiff's attorneys also and were liable to him if they failed properly to perform their duties as attorneys under their contract of employment, since one who is not a party to a contract may not maintain a claim for relief for its breach, and third party plaintiff did not allege facts establishing privity of contract with third party defendant attorneys.

APPEAL by defendant third-party plaintiff from *Albright, Judge*. Judgment entered 7 March 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 9 February 1978.

This appeal involves an action brought against attorneys by one other than their immediate client for alleged negligence in carrying out legal duties on behalf of the immediate client, a corporation. The defendant third-party plaintiff filed complaint against the third-party defendants under alternative theories of tort or contract.

Chicago Title Insurance Company [hereinafter "Chicago Title"] initiated an action against the defendant third-party plaintiff, Hilary H. Holt, on 20 August 1976, alleging that Chicago Title issued twelve title insurance policies covering condominium units which were built and sold to various grantees by Land Limited of America, Inc. [hereinafter "LLA"]. The policies were issued to Winston-Salem Savings and Loan [hereinafter "the Bank"] which had made purchase money loans to the various grantees. Pursuant to the policies, Chicago Title insured that the deeds of trust on the twelve units, which the Bank took as security for the loans, constituted first liens upon those units.

As the units were newly constructed, Chicago Title required both the owner of the condominium project and the general contractor for that project to submit certain form "lien waivers" as a condition precedent to issuing the policies. By these lien waivers the owner and the general contractor warranted that there were no unpaid materialmen or subcontractors who had furnished goods or services to the properties. The lien waivers contained an agreement by the owner and the general contractor to indemnify Chicago Title should it incur any liability as a result of the existence of any unpaid subcontractors who might assert mechanics liens which had priority over the deeds of trust held by the Bank. Twelve of these lien waivers were signed by one Doug Twiddy on behalf of LLA as the owner of the project. In addition, Holt signed each of the lien waivers as President of H. H. Holt Construction Company, the general contractor for the project.

In reliance upon the lien waivers, Chicago Title issued the policies of title insurance. Warren Brothers Company, which had provided goods and services to the project, subsequently filed a claim of lien and obtained a judgment against LLA in a separate action. As this lien had priority over the insured deeds of trust, Chicago Title satisfied the judgment and instituted this case against Holt based upon the indemnity agreements contained in the lien waivers.

Holt filed an answer on 20 October 1976 and denied that he was the general contractor for LLA. He further alleged *inter alia* that he served either as a consultant to LLA or as its vice-president and that his signature on the lien waivers was obtained by fraud, misrepresentation, or mistake. Holt additionally alleged in the answer that the third-party defendants, David Blanco [hereinafter "Blanco"] and House & Blanco, P.A. [hereinafter the "Professional Association"], the attorneys who closed the loans on the condominium units and certified title to Chicago Title, had failed to use reasonable care to determine the existence of the unpaid lien creditors. Based upon these allegations, Holt contended that he was not liable to Chicago Title or, alternatively, that he was only jointly liable with LLA, the Professional Association, Blanco and others.

Holt filed a third-party complaint against Blanco and the Professional Association on 25 October 1976. By this complaint he alleges that the Professional Association and Blanco are liable to him for losses he has or may sustain. He alleges this liability arises from the undertaking of Blanco and the Professional Association to represent the seller (LLA), the buyers, and the lender (the Bank) in the real estate closings. Holt further alleges he relied upon the advice of the attorneys, Blanco and the Professional Association, in signing the indemnity agreements, and that they were obligated to determine the existence of any unpaid materialmen since Blanco certified title to Chicago Title. Holt additionally alleges that Blanco and the Professional Association had an affirmative duty to determine whether there were unpaid materialmen or subcontractors, which duty they failed to perform.

On 12 November 1976, Blanco and the Professional Association, pursuant to G.S. 1A-1, Rule 12(b)(6), moved to dismiss the third-party complaint on the ground that it failed to state a claim upon which relief could be granted. The trial court granted this motion on 7 March 1977, and from the order granting the motion, Holt appealed.

A. Carl Penney for defendant and third-party plaintiff appellant.

Larry B. Sitton and E. Garrett Walker for third-party defendant appellees.

MITCHELL, Judge.

The appellant, Hilary H. Holt, assigns as error the trial court's dismissal of his third-party complaint against the appellees, Blanco and the Professional Association, and contends that his third-party complaint sets forth a valid claim for relief alleging attorney malpractice on the part of the appellees. He contends his complaint states a claim upon which relief could be granted under either a theory of breach of contract or a theory of tort liability for negligence and that his complaint properly alleged each theory in the alternative.

We point out at the outset that throughout this opinion reference is made to a cause of action for "attorney malpractice" rather than "legal malpractice" or some other designation of the claim for relief alleged. Our use of this terminology is prompted by our concern that the use of the term "legal malpractice" might well lead to confusion by its connection in some minds with "legal" or "lawful" conduct.

There is disagreement among the various jurisdictions of the United States as to whether claims for attorney malpractice are grounded in contract or in tort. Many of the cases appear to blur distinctions between torts and breaches of contract. *See*, Annot., 45 A.L.R. 3d 1181 (1972). Perhaps the nearest approximation of a general rule as to the nature of claims for attorney malpractice is set forth in 7 C.J.S., Attorney and Client, § 140, p. 978, which states:

> Although the liability of an attorney on the ground of negligence is ordinarily enforced by an action on the case for negligence in the discharge of his professional duties, the liability in reality rests on the attorney's employment by the client and *is contractual in its nature*. Hence, before the attorney can be made liable, it must appear the loss for which he is sought to be held arose from his failure or neglect to discharge some duty which was fairly within the purview of his employment. Moreover, *an attorney is liable* for negligence in the conduct of his professional duties *to his client alone*, that is, to the one between whom and the attorney the *contract* of employment and service existed, and not to third parties. (Emphasis added.)

[1] The requirement of an attorney-client relationship or privity of contract as a basis for a claim against an attorney has been recognized by the majority of jurisdictions. It is generally held that attorneys, such as the appellees, may be held liable for errors in certifying title to real property only to those to whom the certification is made and who enjoy privity of contract with such attorneys. *National Savings Bank v. Ward*, 100 U.S. 195, 25 L.Ed. 621 (1880); Annot., 59 A.L.R. 3d 1176 (1974); Annot., 34 A.L.R. 3d 1122 (1970); Whitman, *Transferring North Carolina Real Estate Part I: How the Present System Functions*, 49 N.C. L. Rev. 413, 442-43 (1971). The same principle has been applied by a majority of jurisdictions to cases involving allegations of attorney malpractice with regard to matters other than title to real property. Annot., 45 A.L.R. 3d 1181 (1972). Thus, the majority of jurisdictions have relied more heavily upon the law of contracts than the law of torts in establishing the requirements for a valid claim for relief for attorney malpractice.

Our research has revealed no North Carolina case determining whether claims for attorney malpractice are claims sounding in contract or in tort. We find some support for the view of the majority of jurisdictions, that such claims are based upon the law of contracts, in the fact that the decided cases of this jurisdiction involve claims by immediate clients who sought to hold their attorneys liable. Although not determinative in itself of the issue, it is relevant to note that the Supreme Court of North Carolina has given no indication in the decided cases that claims for attorney malpractice may be brought on behalf of individuals not in privity of contract with the attorneys upon the contracts of employment. 1 Strong, N.C. Index 3d, Attorneys at Law, § 5.1, pp. 581-2, and cases cited.

[2] We concur in the view applied by, although not always specifically stated by, the majority of jurisdictions and hold that claims for relief for attorney malpractice are actions sounding in contract and may properly be brought only by those who are in privity of contract with such attorneys by virtue of a contract providing for their employment. Having so held, we find the appellant did not allege facts establishing such privity and was not entitled to proceed further on his complaint against the appellees.

[3] Subject to certain exceptions not relevant here, one who is not a party to a contract may not maintain a claim for relief for

its breach. *Matternes v. City of Winston-Salem*, 286 N.C. 1, 209 S.E. 2d 481 (1974); *Jones v. Elevator Co.*, 231 N.C. 285, 56 S.E. 2d 684 (1949). Here, the appellant alleged in his complaint that he served as either vice-president of LLA or as its consultant, and that the appellees as attorneys for LLA were, therefore, also his attorneys and liable to him if they failed properly to perform their duties as attorneys under their contract of employment. We do not agree.

Duties of the magnitude and seriousness involved when an attorney at law undertakes to represent a client should arise only from his contract of employment with his client as governed by the law of contracts. *See*, 7 Am. Jur. 2d, Attorneys at Law, § 167, p. 146. To hold otherwise would encourage a party to contractual negotiations or other business matters to forego retaining counsel and later sue counsel representing the other contracting parties for attorney malpractice if the result of the negotiations should prove disfavorable in some way. Accordingly, we hold that the appellees owed no duty to the appellant by virtue of their contract of employment with their client LLA, regardless of whether the appellant is viewed as vice-president of or a consultant to LLA. *See, Chalpin v. Brennan*, 114 Ariz. 124, 559 P. 2d 680 (1977); *Harding v. Bell*, 265 Or. 202, 508 P. 2d 216 (1973); *Ronnigen v. Hertogs*, 294 Minn. 7, 199 N.W. 2d 420 (1972); *Bresette v. Knapp*, 121 Vt. 376, 159 A. 2d 329 (1960); *Delta Equipment and Construction Co., Inc. v. Royal Indemnity Co.*, 186 So. 2d 454 (La. Ct. of App. 1966). This holding applies to and is determinative of the allegations of negligence by the appellees, the allegations concerning their representation of multiple parties, and all other allegations.

The appellant contends that, even though he may not be a party to the contract of employment between LLA as client and the appellees as attorneys, he should, nevertheless, be permitted to maintain this action as a third-party beneficiary of that contract of employment. This contention is without merit.

In *Vogel v. Supply Co.* and *Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E. 2d 273 (1970), the Supreme Court of North Carolina expressly approved the categories of third-party beneficiaries discussed in the Restatement of Contracts and stated:

> The American Law Institute's Restatement of Contracts provides a convenient framework for analysis. Third party beneficiaries are divided into three groups: *donee* beneficiaries where it appears that the "purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary"; *creditor* beneficiaries where "no purpose to make a gift appears" and "performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary"; and *incidental* beneficiaries where the facts do not appear to support inclusion in either of the above categories. Restatement of Contracts § 133 (1932). While duties owed to donee beneficiaries and creditor beneficiaries are enforceable by them, Restatement of Contracts §§ 135, 136, a promise of incidental benefit does not have the same effect. "An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee." Restatement of Contracts § 147.

277 N.C. at 127, 177 S.E. 2d at 278.

The appellant was clearly not a donee beneficiary or creditor beneficiary of the contract by which LLA retained the appellees as counsel. At most, he was merely an incidental beneficiary who acquired no rights by virtue of the contract. *Matternes v. City of Winston-Salem*, 286 N.C. 1, 209 S.E. 2d 481 (1974); *Vogel v. Supply Co.* and *Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E. 2d 273 (1970).

The complaint contained no allegation that LLA, which is alleged to have employed the appellees to certify title to Chicago Title, had any intent to benefit the appellant or owed him any duty which would be fulfilled by such certification. Neither are there any allegations in the complaint that the appellees promised to, or did in fact, certify the title to the appellant. The intention of the parties to the contract of employment determines whether the plaintiff is a mere incidental beneficiary thereof. Here, the allegations of the complaint do not indicate the parties intended the appellant to be anything more than a mere incidental beneficiary, and as such he cannot maintain a claim for relief upon a breach of contract merely because he would receive a benefit from its performance or because he is injured by the breach thereof. *Mat-*

ternes v. City of Winston-Salem, 286 N.C. 1, 209 S.E. 2d 481 (1974). Thus, the trial court properly allowed the appellees' motion to dismiss.

A distinct minority of jurisdictions have found that actions for attorney malpractice are actions in tort. Although we expressly reject this view, its application in the present case would be of no assistance to the appellant. Those jurisdictions grounding claims for attorney malpractice in tort have held attorneys liable only to those whose injuries could have been reasonably foreseen by the attorneys. *Williams v. Polgar*, 391 Mich. 6, 215 N.W. 2d 149 (1974); Annot., 45 A.L.R. 3d 1181 (1972).

Here, the reliance, if any, by the appellant was neither reasonable nor foreseeable. The appellant does not allege in his complaint that the appellees' certificates of title purported to certify that no unrecorded liens existed. As a general rule, attorneys in North Carolina, in their certifications of title, purport to discover and list only such title defects as may be discovered by an examination of the public records. Whitman, *Transferring North Carolina Real Estate Part I: How the Present System Functions*, 49 N.C. L. Rev. 413, 443-46 (1971). Defects not discoverable by examination of public records are, therefore, either expressly or impliedly excluded from such certifications. Thus, absent a specific allegation that the appellees' certificate of title purported to certify that no unrecorded liens existed, the appellees had no affirmative duty to discover such unrecorded liens and could not reasonably have foreseen that their failure to do so might cause injury to the appellant.

It is difficult to determine from the complaint, upon what theory the appellant bases his contention that the appellees had the duty to determine whether unrecorded liens existed. Had they searched for such unrecorded liens and indicated in their certificate of title that none existed, there would have been no necessity for Chicago Title to procure the lien waivers from LLA and the appellant. Chicago Title then would not have needed the waivers, as it could have gone against the appellees as certifying attorneys if such liens were later discovered to exist.

The appellant's contention that the complaint properly stated a claim for relief against the appellees for their undertaking to represent multiple parties would also be without merit if pursued

under a theory of tort. Whether actions for attorney malpractice are actions in contract as we have held, or actions in tort as we have held they are not, the appellant failed to state a claim for improper representation of multiple parties upon which relief could be granted. Disciplinary Rule 5-105 of the North Carolina Code of Professional Responsibility permits an attorney to represent multiple clients if he can adequately represent the interests of each and if each consents to the representation after full disclosure. The appellant does not allege in his complaint that the appellees failed to make such disclosure or that the alleged clients were otherwise less than fully aware of the situation. He does not, in fact, even allege that he was unaware of this situation. The allegations of the complaint concerning representation of multiple clients were, therefore, insufficient to present a valid claim against the appellees. Annot., 28 A.L.R. 3d 389 (1969).

The appellant has advanced other contentions to the effect that the complaint stated a claim upon which relief could be granted. Although our holding makes it unnecessary, we have reviewed each of these contentions carefully and find that they do not present any claim upon which relief could be granted for violation of the contractual duty owed by an attorney to his client.

The judgment of the trial court dismissing the appellant's third-party complaint against the appellees on the ground that it failed to state a claim upon which relief could be granted was proper and is

Affirmed.

Judges MORRIS and CLARK concur.

KENNETH DOCKERY v. LAMPART TABLE COMPANY AND U. S. FURNITURE INDUSTRIES

No. 7718SC500

(Filed 16 May 1978)

1. **Master and Servant § 10.2— pursuit of workmen's compensation remedies—retaliatory discharge—failure to state claim for relief**

Plaintiff's allegation that his employer fired him in retaliation for his pursuit of remedies under the N. C. Workmen's Compensation Act failed to state a claim upon which relief could be granted since the allowance of such a claim would violate the long-standing rule that employment contracts of indefinite duration may be terminated with or without cause at the will of either party and would constitute judicial legislation.

2. **Master and Servant §§ 10.2, 47— pursuit of workmen's compensation remedies—retaliatory discharge—no "device" relieving employer of compensation obligations**

Alleged discharge of an employee in retaliation for his pursuit of remedies under the N. C. Workmen's Compensation Act would not constitute a "device" to relieve the employer of obligations under the Act within the meaning of G.S. 97-6.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 18 May 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 March 1978.

The plaintiff filed a complaint alleging that he was formerly employed by defendant Lampart Table Co., a wholly owned subsidiary of defendant U. S. Furniture Industries, and that he was fired from his job in retaliation for his pursuit of remedies made available to him by the North Carolina Workmen's Compensation Act after receiving injuries on the job. Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. From the order of the trial court granting the defendants' motion to dismiss, the plaintiff appeals.

Other pertinent facts are hereinafter set forth.

Morgan, Byerly, Post, Herring & Keziah, by Charles L. Cromer, for plaintiff appellant.

Schoch, Schoch and Schoch, by Arch Schoch, Jr., for defendant appellees.

MITCHELL, Judge.

[1] The sole question before us is whether the plaintiff's complaint sets forth a claim upon which relief can be granted and was, therefore, improperly dismissed. As the defendant made the motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted, the allegations of the complaint must be taken as true for purposes of this appeal. *Smith v. Ford Motor Co.*, 289 N.C. 71, 80, 221 S.E. 2d 282, 288, 79 A.L.R. 3d 651, 662 (1976); *Mazzucco v. Board of Medical Examiners*, 31 N.C. App. 47, 50, 228 S.E. 2d 529, 532, *appeal dismissed*, 291 N.C. 323, 230 S.E. 2d 676 (1976). This is the proper method of testing the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). We point out, however, that we express no opinion as to whether the allegations could be supported in fact.

The plaintiff's complaint made the following allegations:

The plaintiff was employed by Lampart Table Company [hereinafter "Lampart"] during February 1976. On 18 September 1976 a load of tables fell on him, while he was engaged in his work, injuring his neck and back. He was treated for his injury at High Point Memorial Hospital and, at defendants' insistence, by Dr. H. Bryan Noah.

Pursuant to the North Carolina Workmen's Compensation Act, G.S., Chapter 97, plaintiff notified defendant Lampart of the injury and his claim was processed through Lampart's workmen's compensation insurance carrier who paid the plaintiff $621.60 temporary total disability benefits and $164.75 for medical expenses for the calendar period 18 September 1976 to 29 November 1976.

On or about 23 November 1976, Dr. H. Bryan Noah certified that the plaintiff could return to work by 27 November 1976. Plaintiff returned to work then, although still suffering severe pain. He was fired by defendant Lampart on 6 December 1976 without a reason being given, and has been unable to find other employment since that time. Throughout the period of plaintiff's injury he was hesitant to file a claim for workmen's compensation benefits and hesitant to have an attorney represent him in the matter, for fear of losing his job. For the same reason, he was forced to put himself in the care of a physician of defendant's choice.

The plaintiff was fired from his job in retaliation for pursuit of his remedies under the North Carolina Workmen's Compensation Act, G.S., Chapter 97. This action was an attempt by the defendants to create a deleterious effect on the plaintiff's exercise of his statutory rights. Further it was an attempt by the defendants to create a device to relieve them from their obligations under the Act. These actions were wrongful, willful, and have injured the plaintiff's reputation and earning capacity.

The plaintiff's complaint alleges a tort theory heretofore unrecognized in this State, that of "retaliatory discharge." In his brief he has referred us to decisions by courts of other jurisdictions which recognize this tort. *See generally*, Annot., 63 A.L.R. 3d 979 (1975).

In *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E. 2d 425, 63 A.L.R. 3d 973 (1973), the Supreme Court of Indiana reversed the dismissal of a similar claim. There it was held that the plaintiff's allegation, that his employer fired him in retaliation for pursuit of his Indiana workmen's compensation rights, stated a claim upon which relief could be granted. The Indiana court held "retaliatory discharge" to be an exception to the contract rule allowing termination, without cause, of employment contracts for an indefinite duration, by either party thereto. Although no authority was cited to support this novel proposition, the Indiana court observed that there was a parallel development in landlord-tenant law. Some states have recognized "retaliatory eviction" as an affirmative defense in actions by landlords for possession of the rented premises. *Edwards v. Habib*, 130 U.S. App. D.C. 126, 397 F. 2d 687 (1968); *Schweiger v. Superior Court*, 3 Cal. 3d 507, 90 Cal. Rptr. 729, 476 P. 2d 97 (1970); *Portnoy v. Hill*, 57 Misc. 2d 1097, 294 N.Y.S. 2d 278 (1968); *Dickhut v. Norton*, 45 Wis. 2d 389, 173 N.W. 2d 297 (1970); *Wilkins v. Tebbetts*, 216 So. 2d 477 (Fla. App. 1968). The court in *Frampton* further observed that one state had held a landlord's "retaliatory eviction" to be a sufficient basis for an affirmative cause of action. *Aweeka v. Bonds*, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971). For these reasons the Indiana court held "retaliatory discharge" to be a "device" within the meaning of the Indiana Workmen's Compensation Act and actionable.

The section of the Indiana Workmen's Compensation Act proscribing the use of "devices" to defeat the purpose of the Act is

similar to our own G.S. 97-6 which prohibits the use of a "device" to relieve an employer of any of the obligations of Article 1 of our Act. G.S., Chapter 97. However our courts have expressly rejected the use of "retaliatory eviction" by a tenant as an affirmative defense in an action by a landlord for possession. *Evans v. Rose*, 12 N.C. App. 165, 182 S.E. 2d 591, *cert. denied*, 279 N.C. 511, 183 S.E. 2d 686; 8 Strong, N.C. Index 3d, Landord and Tenant, § 17.1, p. 262. Therefore, the reasoning of the Indiana court in *Frampton* is not applicable in this State. We deem this claim based upon "retaliatory discharge" not a claim upon which relief can be granted.

The Texas Court of Civil Appeals recently affirmed the judgment on a verdict in favor of the plaintiff who was allegedly fired in retaliation for instituting a proceeding under the Texas Workmen's Compensation Act. *Texas Steel Co. v. Douglas*, 533 S.W. 2d 111 (1976). The Texas Workmen's Compensation Act, however, contains provisions that specifically create a cause of action in tort based upon this theory, and upon which the claim was grounded. North Carolina has no similar statutory provision in its Workmen's Compensation Act. G.S., Chapter 97. Additionally, our courts have rejected the landlord-tenant rule from which the Indiana court drew its analogy in *Frampton*.

Other states have considered complaints alleging "retaliatory discharge" and have found them not to present claims upon which relief could be granted. The Supreme Court of South Carolina in *Raley v. Darling Shop of Greenville, Inc.*, 216 S.C. 536, 59 S.E. 2d 148 (1950), held that the actions of an employer who threatened to discharge, and in fact discharged, an employee who refused to withdraw her South Carolina workmen's compensation claim were reprehensible but not actionable. In *Raley* the court found that the employee proceeded with the claim, was compensated and, therefore, was not denied her statutory rights. Similarly, the plaintiff in the case *sub judice* received his benefits pursuant to the statute and was not denied his workmen's compensation rights.

In *Christy v. Petrus*, 365 Mo. 1187, 295 S.W. 2d 122 (1956), the Supreme Court of Missouri denied a claim in tort under similar facts. The court observed that it could "hardly conceive of the legislature making such careful provision for the rights and

compensation of injured employees covered by the Act and yet omitting a specific provision for recovery of damages for wrongful discharge if there had been any intent to create such a right." 365 Mo. at 1193, 295 S.W. 2d at 126.

We think the reasoning of the Missouri court in *Christy* concerning the intent of the legislature is applicable here. If the General Assembly of North Carolina had intended a cause of action be created, surely, in a workmen's compensation statute as comprehensive as ours, it would have specifically addressed the problem.

In *Stephens v. Justiss-Mears Oil Company*, 300 So. 2d 510 (La. Ct. of App. 1974), the court upheld a lower court's dismissal of a suit based upon the "retaliatory discharge" theory. There an employer allegedly discharged the plaintiff for filing a workmen's compensation claim. In affirming the dismissal, the court cited and applied the contract rule recognized in *Frampton* that, under ordinary circumstances, an employer may hire and fire his employees at will.

We think that to allow recovery in tort upon a theory of "retaliatory discharge" on the facts of this case would be ill-advised for several reasons. First, it would do injury to the well-established common-law rule of contract allowing employers and employees to terminate their relationship at the will of either party when the employment is for an indefinite duration.

The plaintiff concedes that the general rule in this and other jurisdictions is that, where a contract of employment does not fix a definite term, the employment is terminable with or without cause at the will of either party. *Bishop v. Wood*, 426 U.S. 341, 48 L.Ed. 2d 684, 96 S.Ct. 2074 (1976); *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282, 79 A.L.R. 3d 651 (1975); *Tuttle v. Kernersville Lumber Co.*, 263 N.C. 216, 139 S.E. 2d 249 (1964); *Howell v. Commercial Credit Corp.*, 238 N.C. 442, 78 S.E. 2d 146 (1953); *Malever v. Kay Jewelry Co.*, 223 N.C. 148, 25 S.E. 2d 436 (1943). However, the plaintiff here has attempted to allege a tort. He argues that a holding that he has stated a claim for which relief can be granted in tort would not violate the established contract rule. We do not agree.

An employment contract for an indefinite period would not be terminable at the will of either party thereto with or without cause if an employer could be held liable in tort for a termination of the contract. The plaintiff in this case, as in *Raley v. Darling Shop of Greenville, Inc.*, 216 S.C. 536, 59 S.E. 2d 148 (1950), alleged no breach of contract, had no right to continued employment and has no claim upon which relief can be granted due to termination for whatever reason, unless such right exists by statute. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1975); *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971); *Willard v. Huffman*, 247 N.C. 523, 101 S.E. 2d 373 (1958); 8 Strong, N.C. Index 3d, Master and Servant, § 10, p. 490. We further point out that the plaintiff in the case at bar, as was the case with the plaintiff in *Raley*, received benefits under the statute and therefore has had compensation for injuries received on the job.

Additionally, the plaintiff suggests that we infer by innuendo from the language in *Still v. Lance*, 279 N.C. at 264, 182 S.E. 2d at 409, an exception to the rule allowing free termination of employment. He contends that the same reasoning applies, where one is fired in retaliation for pursuit of a statutory or constitutional right, as applies when a statute specifically protects an employee from discharge for engaging in certain activities. We reject this multifaceted contention. The plaintiff pursued his rights under the statute and was compensated thereby. As violations of constitutional rights were not alleged and argued below, we are not required to consider them upon appeal. *Grissom v. Dept. of Revenue*, 34 N.C. App. 381 S.E. 2d (1977). *See generally*, 1 Strong, N.C. Index 3d, Appeal and Error, § 3, p. 182. Therefore, we express no opinion as to whether the plaintiff could have sought and obtained relief under any theory other than that he sought to raise by the complaint.

[2] We think complex problems such as "devices" to defeat provisions of an act of the legislature, are best left to the expertise and resources of that body. The plaintiff contends that denying him relief will have a chilling effect upon employees who attempt to pursue their rights under the North Carolina Workmen's Compensation Act. He argues that this would create a "device" relieving employers from the obligation established by the Act and that such "device" is prohibited by public policy as expressed in G.S. 97-6.

A pattern of activity by employers which discourages or discriminates against employees who claim benefits pursuant to the Workmen's Compensation Act of this State might be found to have a chilling effect on employees' pursuit of those rights. However, we are not here confronted with allegations of fact tending to establish a pattern of such activity.

Remedies for claims resulting from alleged violations of the spirit of the act are best left to the legislature. This was recognized in *Bushwick-Decatur Motors v. Ford Motor Co.*, 116 F. 2d 675, 677 (2d Cir. 1940), in which the court was faced with an allegedly unjustifiable termination of a dealership contract by Ford Motor Company. On an appeal from a decision granting summary judgment in favor of the defendant, Ford Motor Company, the court recognized the imbalance in the bargaining power between Ford Motor Company and the dealer. Confronted with a dealership agreement drafted by Ford that was without stated duration, except for the provision making it terminable at the will of either party, the court stated:

> To attempt to redress this balance by judicial action without legislative authority appears to us a doubtful policy. We have not proper facilities to weigh economic factors, nor have we before us a showing of the supposed needs which may lead the manufacturers to require these seemingly harsh bargains.

116 F. 2d at 677.

Left to their own devices in the wake of opinions such as those in *Bushwick-Decatur Motors*, the General Assembly of North Carolina addressed the social and economic issues presented by the relationships between automobile manufacturers and dealers and enacted legislation providing a comprehensive set of rights and remedies for both parties. We believe the General Assembly is equally well equipped to weigh the various social and economic factors presented by the plaintiff's allegations in this case and to take appropriate action promoting the public welfare.

Another example of the willingness of our General Assembly to deal with such complex social and economic problems is to be found in G.S. 95-83 providing for recovery of damages in tort by an employee who is terminated for union activities or for failing

to engage in union activities. G.S. 95-83; *Willard v. Huffman*, 247 N.C. 523, 101 S.E. 2d 373 (1958). Our General Assembly having made such affirmative showings of its ability to deal with problems similar to those sought to be raised by the plaintiff, we are entirely unwilling to preempt the legislative function in this case. We are, therefore, forced to conclude that the failure of the General Assembly to specifically provide the claim for relief alleged by the plaintiff was an indication of its intent that no such claim be created.

For the reasons previously set forth, we feel the claim for relief alleged by the plaintiff, if allowed, would do violence to the long-standing rule governing employment contracts for an indefinite period and would constitute judicial legislation. We deem both such consequences undesirable.

We hold that the facts alleged by the plaintiff, although they pose valid public policy questions for the legislature, do not state a claim upon which relief can be granted. The judgment of the trial court appealed from is

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

KATIE B. SAWYER, ADMINISTRATRIX OF THE ESTATE OF TOMMIE SAWYER, DECEASED SUBSTITUTED PARTY PLAINTIFF v. JOHN H. COX, M.D. DEFENDANT

No. 7721SC366

(Filed 16 May 1978)

1. **Rules of Civil Procedure § 55— entry of default—written motion not mandatory**

A written motion for entry of default is not mandatory since G.S. 1A-1, Rule 55 (a) provides for the use of affidavit or motion or some other method.

2. **Rules of Civil Procedure § 55— motion for entry of default—affidavit—allegation that defendant was not incompetent**

An affidavit filed in support of plaintiff's motion for entry of default which stated that defendant was not an infant nor incompetent was not legally

insufficient because it failed to state that defendant was not incompetent at the time of service of process upon him.

3. Rules of Civil Procedure § 55— motion for entry of default—affidavit—allegation that defendant was natural person domiciled in N. C.

Defendant's contention that an affidavit filed in support of plaintiff's motion for entry of default failed to state that defendant was a natural person domiciled in the State of N. C. is without merit, since defendant was referred to in the affidavit and complaint as "John H. Cox, M.D.," "a licensed physician," "not an infant," and a "citizen," and defendant was further described as a citizen and resident of Forsyth County, N. C., a physician licensed to practice medicine in N. C., and a physician "engaged in the specialty of Dermatology in his office and place of occupation at 3000 Maplewood Avenue, Winston-Salem, North Carolina."

4. Rules of Civil Procedure § 55— entry of default—oral motion sufficient

Plaintiff's oral motion for entry of judgment by default made during a hearing was sufficient to satisfy the requirements of G.S. 1A-1, Rules 55(b)(2) and 7(b)(1).

5. Rules of Civil Procedure § 60.1— setting aside default judgment—sufficiency of notice questioned

Defendant's contention that judgment by default should be set aside because he was not served with written notice of the application for judgment at least three days prior to the hearing as required by Rule 55(b)(2) is without merit, since a "Request to Calendar Clerk" and a copy of the calendar were mailed to defendant at least ten days before the hearing; moreover, defendant had actual notice and appeared in person at the calendar call on 18 October, and the hearing was held three days later on 21 October as scheduled.

6. Rules of Civil Procedure § 60.2— setting aside default judgment—insufficient grounds

Defendant's contention that default judgment entered against him should be set aside because there was insufficient evidence of the causal connection between plaintiff's injury and defendant's negligence, because the trial court considered defendant's criminal record, and because defendant's problem with alcohol amounted to excusable neglect under Rule 60(b)(1) is without merit, since, in failing to deny plaintiff's allegation that defendant's negligence was the sole and proximate cause of plaintiff's injury, defendant admitted the averment; the trial court was unaware of defendant's criminal record until the case was over and the decision was made; and defendant's own witness termed him "an excellent physician" and defendant testified that he had not "had any alcohol for the last 5½ months."

APPEAL by defendant from *Collier, Judge*. Order entered 16 December 1976. Heard in the Court of Appeals 9 February 1978.

Plaintiff's intestate commenced this action by verified complaint filed in Forsyth County Superior Court 30 June 1976. The

complaint alleged *inter alia*: that defendant, a medical doctor, was negligent in rendering medical services to Tommie Sawyer in that he prescribed for Sawyer's use a drug which caused renal (kidney) failure and other problems and continued the medication after notice of the complications; that defendant's negligence was the sole cause of his injuries; and, that defendant was a citizen and resident of North Carolina maintaining an office in Winston-Salem, North Carolina. Summons was issued on 30 June 1976, and was returned showing service upon the defendant 6 July 1976. By affidavit of James A. Beaty, Jr. filed 11 August 1976, the plaintiff showed to the court: that defendant was personally served with summons 30 June 1976; that defendant was not an infant and was not incompetent; and that defendant had failed to answer. Based upon the foregoing, the clerk entered default 11 August 1976.

Counsel for plaintiff requested the clerk on 7 October 1976 to calendar for hearing on Tuesday or Thursday of the week of 18 October 1976 its motion for default judgment. Defendant received a letter dated 28 September which stated "that your case which was scheduled for October 11th, 1976, has been rescheduled for October 18th, 1976, at nine thirty o'clock in the morning." Defendant also received a copy of the calendar request and, as a result thereof, was personally present at the calendar call on 18 October. The trial judge set the hearing for 21 October 1976, and on 18 October the clerk personally informed defendant that he should be in court for the hearing at 9:30 a.m. on Thursday, 21 October 1976. The clerk called the defendant's office on Wednesday afternoon and told the receptionist that the hearing would be held on Thursday morning at 9:30.

A hearing was held 21 October 1976 as scheduled. Defendant did not appear. Judgment by default was entered, and, after a hearing on the issue of damages, $354,318.75 was awarded as compensatory damages. Judgment was signed and filed 26 October 1976. At the end of the hearing on 21 October, the court directed that a copy of the judgment and a copy of defendant's criminal record be sent to the Board of Medical Examiners. On 22 October, defendant called the offices of Judge Collier and the Clerk of Superior Court to tell them that he had been suffering from abdominal pain and diarrhea (self-diagnosed) on 21 October. On 26 October, defendant was served with a copy of the judgment.

On 29 November 1976, defendant moved the trial court to stay execution of the judgment pursuant to Rule 62 and to set aside the judgment pursuant to Rule 55(d) (later the motion was amended so that it was pursuant to Rule 60(b)). Defendant alleged that entry of judgment by default was improper and that his failure to plead had been the result of excusable neglect.

A hearing on defendant's motion to set aside the judgment was held on 9 December 1976. Defendant presented evidence showing that he was a 64-year-old licensed physician. He admitted that he had previously suffered from his use of alcohol, but he testified that he had not "had a drink of any sort of alcoholic beverage now in roughly 5½ months." He defended his treatment of Tommie Sawyer. Defendant admitted receiving the summons and a copy of the complaint, and he testified that he read the complaint. He understood that he was to answer within 30 days. His self-diagnosed illness was his only reason for not appearing at the 21 October hearing. When asked why he did not answer the complaint within 30 days, defendant testified, "I assumed that I would be notified when to appear."

By order of 16 December 1976, the trial court denied defendant's motion to set aside the verdict. From that order, defendant appealed.

Erwin and Beaty, by James A. Beaty, Jr., for the plaintiff appellee.

Robert B. Wilson, Jr., for the defendant appellant.

MORRIS, Judge.

Defendant raises two primary questions for this Court: (1) Was judgment by default properly entered? (2) If so, should that judgment be set aside under Rule 60(b)?

Defendant advances four arguments to support his contention that judgment by default was erroneously entered. We will address each argument separately.

[1] First, defendant asserts that the clerk's entry of default was improper in that no written application for entry of default was made. Rule 55(a) of the Rules of Civil Procedure provides that "[w]hen a party against whom a judgment . . . is sought has failed

to plead . . . and that fact is made to appear by affidavit, motion . . . or otherwise, the clerk shall enter his default." Rule 55(a) provides for the use of affidavit *or* motion *or* some other method. The use of the disjunctive rather than the conjunctive suggests that the use of a written motion is not mandatory. While it may be better practice to file a written motion, we do not believe that the use of a written motion is mandatory.

[2, 3] Second, defendant asserts that there was no jurisdictional basis for the judgment by default because of failure to comply with G.S. 1-75.11. For the purposes of this discussion we will assume that defendant did not appear. Defendant points to two defects. (1) He asserts that the 11 August 1976 affidavit supporting the judgment, as required by G.S. 1-75.11, was defective in stating that "defendant . . . is not an infant, and neither is he incompetent nor suffering under any known legal disability." He argues that Rule 4(j) requires that the person so served be competent at the time of service (in this case 6 July 1976). In short, defendant urges this Court to hold that the affidavit is legally insufficient because it did not state that defendant *was not* incompetent on 6 July 1976. Defendant offers no evidence at all to show that he was in fact incompetent. He merely relies upon the technical defect. In developing the philosophy of the new Rules of Civil Procedure in this State, we have generally adopted the philosophy of interpretation of the Federal Rules of Civil Procedure in interpreting the Rules liberally and disregarding technicalities. *Johnson v. Johnson*, 14 N.C. App. 40, 187 S.E. 2d 420 (1972). In the absence of some evidence of incompetence, we are not willing to apply the Rules as technically as defendant would have us. (2) Defendant argues that G.S. 1-75.11 was violated in that the supporting affidavit failed to state that defendant was a natural person domiciled in the State of North Carolina. We consider both the affidavit and verified complaint. *See Bimac Corporation v. Henry*, 18 N.C. App. 539, 197 S.E. 2d 262 (1973). Defendant is referred to as "John H. Cox, M.D.", "a licensed physician", "not an infant", and a "citizen". We believe these terms show that he is a natural person. He was further described as a citizen and resident of Forsyth County, North Carolina, a physician licensed to practice medicine in the State of North Carolina, and a physician "engaged in the specialty of Dermatology in his office and place of occupation at 3000 Maplewood

Avenue, Winston-Salem, North Carolina." We believe these uncontradicted facts are sufficient to show "domicile" in North Carolina. Therefore, we hold that the jurisdictional requirements of G.S. 1-75.11 are satisfied.

[4] Third, defendant argues that Rule 55(b)(2) requires a written motion for entry of judgment by default. We disagree. Rule 55(b)(2) states that "the party entitled to a judgment by default shall apply to the judge therefor;" the rule does not specifically require a written motion. Rule 7(b)(1) requires that an application be made by written motion "unless made during a hearing". Since a hearing was conducted 21 October 1976, plaintiff's oral application for judgment during that hearing would be sufficient.

[5] Fourth, defendant argues that judgment by default should be set aside because he was not served with "written notice of the application for judgment at least three days prior to the hearing" as required by Rule 55(b)(2). Although there is some question as to whether defendant's physical presence at the calendar call on 18 October amounted to an appearance, we will, for the purpose of addressing this argument, assume that defendant "appeared". Rule 55(b)(2) requires that the non-moving party "shall be served with written notice of the application for judgment at least three days prior to the hearing on such application". Rule 5(b) provides that service may be accomplished "by mailing it [the notice] to him at his last known address . . . ." The record shows that defendant received a copy of the "Request to Calendar Clerk" requesting a "trial on the merits Motion D & J" for Tuesday or Thursday of the week of 18 October 1976. Defendant also was mailed a copy of the actual calendar at least ten days before the hearing. We believe that the mailing of these two documents is sufficient "written notice of the application for judgment". Furthermore, we note that defendant had actual notice and appeared in person at the calendar call on 18 October and that the hearing was held three days later on 21 October as scheduled. We believe that the "Request to Calendar Clerk" and the calendar which were mailed to defendant were sufficient notice to satisfy the requirements of Rule 55(b)(2). We do not discuss whether the actual notice would constitute a sufficient reason to deny defendant's Rule 60(b) motion.

[6] Defendant further contends that the judgment by default should be set aside under Rule 60(b) even if it was properly

entered. First, defendant argues that there was insufficient evidence of the causal connection to support the judgment. Plaintiff alleged in the complaint that "defendant's negligence was the sole and proximate cause" of Sawyer's injury. In failing to deny the allegation, defendant admitted the averment. Rule 8(d), North Carolina Rules of Civil Procedure. Thus, there is an admission of the causal connection. Defendant also argues that the judgment should be set aside because the trial court considered defendant's criminal record. The evidence simply does not support this allegation. The record reveals that the court was unaware of defendant's criminal record until the "case was over and the decision was made." Defendant further argues that defendant's problem with alcohol amounted to "excusable neglect" under Rule 60(b)(1). Defendant's argument is without factual basis. Defendant's own witness termed him "an excellent physician", and defendant testified on 9 December 1976 that he had not "had any alcohol for the last 5½ months."

Finally, defendant argues that the trial court abused its discretion in not setting aside the judgment under Rule 60(b)(6) because allowing defendant to answer would have been appropriate to accomplish justice. Defendant points out that he was present at the calendar call. He also notes that he finally took some action 30 days after default. In this case, defendant actually received service of process, read the complaint, realized he was to answer within 30 days, actually knew of the hearing on motion for judgment by default, but took no action at all. The record before us reveals no circumstance which would indicate abuse of discretion. Defendant, a well educated professional man, simply failed to take care of his business.

Affirmed.

Judges CLARK and MITCHELL concur.

C. CAPERS SMITH v. STATE OF NORTH CAROLINA, JAMES HOLSHOUSER, GOVERNOR; JOE K. BYRD, CHAIRMAN, STATE BOARD OF MENTAL HEALTH; RALPH SCOTT, CHAIRMAN, ADVISORY BUDGET COMMISSION; DAVID T. FLAHERTY, INDIVIDUALLY AND AS SECTRETARY OF HUMAN RESOURCES; N. P. ZARZAR, INDIVIDUALLY AND AS COMMISSIONER, DEPARTMENT OF MENTAL HEALTH; TREVOR G. WILLIAMS, INDIVIDUALLY AND AS SUPERINTENDENT OF BROUGHTON HOSPITAL

No. 7725SC523

(Filed 16 May 1978)

Master and Servant § 10.2; State § 4.4— employee of Department of Mental Health—necessity for discharge by State Board

The authority given by G.S. 122-1.1 to the State Board of Mental Health, with the concurrence of the Governor, to discharge for cause employees of the State Department of Mental Health who were appointed for a specific length of time was not removed by G.S. 143A-6(b) when the State Department of Mental Health and the State Board of Mental Health were transferred to the Department of Human Resources. Therefore, the trial court erred in failing to grant partial summary judgment for plaintiff on the issue of the State's liability for his wrongful discharge as superintendent of Broughton Hospital where all the evidence showed that plaintiff was not discharged by the State Board of Mental Health but was relieved of his duties by letters from two of his superiors and by a telegram from the Secretary of Human Resources.

Judge VAUGHN dissenting.

APPEAL by plaintiff from *Snepp, Judge*. Judgment entered 16 February 1977 in Superior Court, BURKE County. Heard in the Court of Appeals 29 March 1978.

This is an appeal by the plaintiff from a directed verdict against him pursuant to Rule 50(a) of the Rules of Civil Procedure and from the court's refusal to grant the plaintiff's motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure. The plaintiff did not appeal from the court's granting a motion for judgment on the pleadings pursuant to Rule 12(c) of the Rules of Civil Procedure in favor of the defendants James E. Holshouser, Jr. and Ralph Scott. Plaintiff took a voluntary dismissal without prejudice as to defendant, Joe K. Byrd, prior to trial. This case has previously been in this Court and the Supreme Court of North Carolina. *See Smith v. State*, 23 N.C. App. 423, 209 S.E. 2d 336 (1974) and at 289 N.C. 303, 222 S.E. 2d 412 (1976).

The plaintiff, a medical doctor, was appointed on 1 October 1970, pursuant to G.S. 122-25 (now repealed) to a six year term as Superintendent of Broughton Hospital. In April 1973, a dispute arose between the plaintiff and defendants Trevor G. Williams, then Western Regional Commissioner of Mental Health for the State of North Carolina, N. P. Zarzar, Director of the Division of Mental Health Services, and David T. Flaherty, then Secretary of Human Resources. Williams and Zarzar are both medical doctors and they were the plaintiff's superiors within the Department of Mental Health, which was an agency within the Department of Human Resources. As the result of the plaintiff's refusal to release to his superiors certain cassette tape recordings of a staff conference at the Broughton Hospital, he was discharged from his office as Superintendent on 30 April 1973. He was relieved of his duties first by letter of Dr. Williams, followed by letter from Dr. Zarzar, and finally by telegram from Mr. Flaherty. At no time was the plaintiff discharged by the State Board of Mental Health.

After his dismissal, the plaintiff, pursuant to G.S. 122-1.1 (repealed 1 July 1973 by N.C. Sess. Laws, Chap. 476, § 133 (1973)), served upon the Governor and the Chairman of the Advisory Budget Commission a claim for severance pay. When no action was taken on this claim, plaintiff filed this action. It was stipulated that had the plaintiff served the remainder of his six year term, he would have received total compensation of $169,455.59.

Hall, Booker, Scales and Cleland, by James J. Booker and Hatcher, Sitton, Powell and Settlemyer, by Claude S. Sitton, for plaintiff appellant.

Attorney General Edmisten, by Special Deputy Attorney General William F. O'Connell, for the State.

WEBB, Judge.

We note first that the plaintiff amended his complaint after the decision of the Supreme Court, *Smith v. State, supra,* to allege that the actions of David T. Flaherty were motivated by malicious and corrupt intent. The plaintiff excepted to the directed verdict in favor of the individual defendants and assigned this as error in his brief. In support of this assignment of error, no reason or argument is stated and no authority is cited.

The assignment of error as to the allowance of a directed verdict in favor of David T. Flaherty, N. P. Zarzar, and Trevor G. Williams in their official capacities and as individuals is taken as abandoned. Rule 28, North Carolina Rules of Appellate Procedure. The judgment as to these defendants is affirmed.

As to the claim against the State of North Carolina, we hold that the superior court committed error by not allowing partial summary judgment for the plaintiff. The facts as set forth in this opinion are established either by the pleadings or by stipulation. There being no genuine issue as to these facts, if they establish a claim for relief, the plaintiff is entitled to summary judgment as to the claim to which they entitle him. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). The plaintiff bases his claim on the theory that being an employee of the Department of Mental Health, appointed for a specific length of time, he can only be discharged by a certain procedure and this procedure was not followed. In passing on this claim, we must examine some of the General Statutes in effect in April 1973.

The State Department of Mental Health was created by the General Assembly in 1963. N.C. Sess. Laws 1963, Chap. 1166 (codified as Chap. 122 of the General Statutes). At that time, a policy-making body for the Department was created which was denominated the State Board of Mental Health. G.S. 122-1.1 (now repealed) provided in part:

> "The Board shall determine policies and adopt necessary rules and regulations governing the operation of the State Department of Mental Health and the employment of professional and staff personnel. The State Board of Mental Health, by and with the approval of the Governor, may terminate for cause the services of any employee appointed for a specific length of time. In the event of any such termination, severance pay shall be adjusted by the Governor and the Advisory Budget Commission."

Nothing else appearing, it seems clear that the plaintiff, having been appointed for a specific length of time could only be discharged for cause and then only by the State Board of Mental Health, with the concurrence of the Governor. The defendants contend that this power to discharge was removed from the State

Board of Mental Health and placed in the Secretary of Human Resources by the Executive Organization Act of 1971.

Under the Executive Organization Act of 1971, N.C. Sess. Laws 1971, Chap. 864, codified as Chap. 143A of the General Statutes, the State Department of Mental Health and the State Board of Mental Health were transferred by type II transfers to the Department of Human Resources, G.S. 143A-138 and 143A-139. (Both the sections were repealed by N.C. Sess. Laws 1973, Chap. 476 s. 183). G.S. 143A-6 said:

> "(b) Under this Chapter, a type II transfer means the transferring intact of an existing agency, or part thereof, to a principal department established by this Chapter. When any agency, or part thereof, is transferred to a principal department under a type II transfer, that agency, or part thereof, shall be administered under the direction and supervision of that principal department, but shall exercise all its prescribed statutory powers independently of the head of the principal department, except that under a type II transfer the management functions of any transferred agency, or part thereof, shall be performed under the direction and supervision of the head of the principal department.
>
> (c) Whenever the term 'management functions' is used it shall mean planning, organizing, staffing, directing, coordinating, reporting and budgeting."

The defendants' position is that when the State Board of Mental Health was transferred to the Department of Human Resources the power to discharge employees was given to the Secretary of the Department. The defendants say this is so because G.S. 143A-6(b) says "the management functions (which includes 'staffing') . . . shall be performed under the direction and supervision of the head of the principal department." The defendants argue that "staffing" includes the right to hire and fire, that this provision of G.S. 143A-6(b) is inconsistent with the power to discharge given the State Board of Mental Health by G.S. 122-1.1 and being inconsistent, the later statute must prevail. We believe the two statutes can be reconciled. As we read G.S. 143A-6(b), it leaves in the State Board of Mental Health all its statutory powers, but provides management functions including hiring and

discharging personnel shall be done under the supervision of the Secretary of the Department. Because the Secretary supervises the Board in the performance of its duties does not mean the Secretary assumes those duties. Since we conclude that the two statutes can be reconciled and G.S. 143A-6(b) does not overrule G.S. 122-1.1, we hold that the power to discharge for cause, with the concurrence of the Governor, given to the State Board of Mental Health was not removed by G.S. 143A-6(b).

We hold the superior court committed error in not granting the plaintiff's motion for summary judgment against the State as to the liability of the State for the wrongful discharge of plaintiff from his job as Superintendent of Broughton Hospital. We order that the case be remanded to the Superior Court of Burke County for trial on the issue of damages.

Affirmed as to defendants David T. Flaherty, individually and as Secretary of Human Resources, N. P. Zarzar, individually and as Commissioner, Department of Mental Health, and Trevor Williams, individually and as Regional Commissioner of Mental Health, for the State of North Carolina.

Reversed and remanded as to the State of North Carolina.

Judge PARKER concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

In my opinion, the entry of a directed verdict against the plaintiff was proper and should be affirmed because, among other reasons, the Secretary of the Department of Human Resources had authority to terminate plaintiff's services and plaintiff's evidence fails to show the absence of just cause for that termination.

McPhaul v. Sewell

ODESSA MCPHAUL, WIDOW AND GUARDIAN AD LITEM OF OLAS MCPHAUL, JR., WILLIE DELORES MCPHAUL AND WELDON D. MCPHAUL, MINOR CHILDREN OF OLAS MCPHAUL, DECEASED, EMPLOYEE v. HAROLD SEWELL (SEWELL LOGGING COMPANY), EMPLOYER; AMERICAN MUTUAL LIABILITY INSURANCE CO., CARRIER.

No. 7710IC561

(Filed 16 May 1978)

1. **Master and Servant § 93.3— expert testimony—rescheduling hearing to permit —no abuse of discretion**

A deputy commissioner of the Industrial Commission did not abuse his discretion in granting defendants' motion, made at the close of plaintiff's evidence, to reschedule the case for the purpose of allowing defendants to obtain a medical expert of their choosing.

2. **Master and Servant § 93.2— admissibility of evidence—failure to object—right to object waived**

In a hearing before the Industrial Commission plaintiffs waived their right to object to the admissibility of defendants' expert medical testimony by failing to object to the admission of the evidence at the time of its introduction.

3. **Master and Servant § 96.5— finding of fact—sufficiency of evidence to support**

Plaintiffs' contention that a deputy commissioner's finding of fact that treatment of deceased for his fractured neck did not cause, accelerate or aggravate pneumonia was not supported by competent evidence because testimony by defendants' witness was not competent and, therefore, the only evidence on which the Commission could base its opinion was that of plaintiffs is without merit, since plaintiffs had the burden of proving that the pneumonia was related to the neck injury, and, even if defendants' evidence was incompetent, the Commission was not required to take plaintiffs' evidence as true.

APPEAL by plaintiffs from an order of the North Carolina Industrial Commission entered 8 April 1977. Heard in the Court of Appeals 4 April 1978.

The plaintiffs, deceased's widow and minor children, filed a claim for death benefits under the Workmen's Compensation Act alleging that the death of Olas McPhaul from Klebsiella pneumonia was a proximate and direct result of a logging injury he suffered while in the employ of Sewell Logging Company. The plaintiffs and defendants stipulated that the defendant was injured by an accident arising out of and in the course of employment.

On 20 September 1974, Olas McPhaul, an employee of Sewell Logging Company, was struck in the back of the head by a falling

tree or branch and sustained an injury which was diagnosed as a fractured dislocation of the cervical spine at C6-C7, the lower part of the neck. Dr. Victor Keranen inserted Crutchfield tongs in an effort to reduce the fracture by putting traction on the fracture site. This method of treatment consisted of drilling holes in the skull, placing tongs in the holes, and then putting weights on the tongs.

Shortly after the application of the Crutchfield tongs, it became apparent that Mr. McPhaul was having difficulty with this method of treatment. He began to remove the weights from the tongs, get out of bed and walk about. Finally, on 23 October 1974, he disconnected the tongs. At this point, Dr. Keranen consulted Dr. James Askins, an orthopedic surgeon, about alternative methods of immobilizing the patient's neck. On 22 November 1974, Dr. Askins applied a Minerva cast. A Minerva cast is a plaster cast which begins below the chin and extends around the ear to the back of the head and then down to the pelvis.

Olas McPhaul was discharged from the hospital on 29 November 1974, but he remained in the Minerva cast. On 9 January 1975, he was taken to the emergency room of Cape Fear Valley Hospital where the Minerva cast was ordered removed by Dr. Askins. Dr. Askins' examination of Mr. McPhaul revealed that he was in severe respiratory distress with little or no ability to cough. Dr. Harry Garison, a cardiologist, was called in by Dr. Askins for consultation and assistance in the treatment of Mr. McPhaul. Tests revealed that Mr. McPhaul was suffering from Klebsiella pneumonia. Olas McPhaul died on 6 February 1975 and Dr. Garison, the treating physician, listed Klebsiella pneumonia as the cause of death on the death certificate.

The case was brought on for a hearing before Deputy Commissioner Ben E. Roney, Jr., and plaintiffs offered evidence from Doctors Keranen, Askins, and Garison which tended to show that the Minerva cast rendered the deceased more susceptible to pneumonia and, if pneumonia was contracted, would aggravate the patient's condition. At the close of the plaintiffs' evidence, defendants' attorney asked if he could transcribe the medical expert opinion testimony relating to the cause of death in order to present such evidence to a physician of defendants' choice for an independent opinion as to whether the neck injury was related to

the cause of death. Over plaintiffs' objection, the request was granted, and the case was reset for the offering of expert testimony on behalf of the defendants. Defendants obtained Dr. Arthur Davis, an anatomical pathologist, as an expert witness, and he testified that, in his opinion, there was no relationship between the death of Olas McPhaul and the application of the Minerva cast.

Deputy Commissioner Roney, in an order dated 3 May 1976, found that the treatment received by deceased after his injury "was not the probable cause of his untimely demise either as a direct causative factor of Klebsiella pneumonia or as an indirect causative factor, by way of material aggravation or acceleration of Klebsiella pneumonia." He concluded the plaintiffs' claim was not compensable.

Plaintiffs appealed the ruling of the Deputy Commissioner to the full Commission and it affirmed Deputy Commissioner Roney's ruling on 8 April 1977. Plaintiffs appealed to this Court.

McLeod and Senter, by Joe McLeod, for plaintiff appellants.

Teague, Johnson, Patterson, Dilthey and Clay, by Dan M. Hartzog, for defendant appellees.

WEBB, Judge.

[1] Plaintiffs first assign as error Deputy Commissioner Roney's rescheduling of the case at the close of the plaintiffs' evidence. Plaintiffs argue that they were greatly prejudiced by staking out their case and then having Deputy Commissioner Roney keep the suit open for defendants to obtain a medical expert of their choosing. We do not believe the rescheduling of the case constitutes error. The Legislature empowered the Industrial Commission to make rules in so far as they are not inconsistent with the Workmen's Compensation Act, G.S. 97-80. Rule XVI of the Rules of the Industrial Commission, applicable at the time of the hearing, provided in part that the "postponement or continuance of a duly scheduled hearing will rest entirely in the discretion of the Commission." We find no abuse of discretion in Deputy Commissioner Roney's actions. *See also Green v. Eastern Constr. Co.*, 1 N.C. App. 300, 161 S.E. 2d 200 (1968); *Mason v. North Carolina Highway Comm.*, 273 N.C. 36, 159 S.E. 2d 574 (1968).

[2] Plaintiffs next contend that the expert testimony by defendants' witness, Dr. Arthur Davis, was improper, incompetent and inadmissible. Specifically, plaintiffs object to Dr. Davis' testimony on the grounds that his opinions were not based on his personal knowledge or observation of deceased as a patient or on proper hypothetical questions addressed to him. *See State v. David*, 222 N.C. 242, 22 S.E. 2d 633 (1942); *State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974). Without deciding whether the testimony of Dr. Davis was elicited by proper hypothetical questions, we hold that plaintiffs have waived their right to object to the admissibility of defendants' evidence by failing to object to the admission of the evidence at the time of its introduction. *Maley v. Thomasville Furniture Co.*, 214 N.C. 589, 200 S.E. 438 (1938); *Steelman v. Benfield*, 228 N.C. 651, 46 S.E. 2d 829 (1948). During direct examination of Dr. Davis by defendants' attorney, the hypothetical question asked Dr. Garison by plaintiffs' attorney at the initial hearing was read to Dr. Davis along with a series of other questions designed to attack the plaintiffs' expert testimony and offer an alternative conclusion as to the relation between the Minerva cast and Klebsiella pneumonia. Plaintiffs' attorney did not object to any specific questions or line of questions. Even if the testimony of Dr. Davis should have been excluded upon timely objection, the plaintiffs' failure to object entitles the evidence to be considered for whatever probative value it may have. *Reeves v. Hill*, 272 N.C. 352, 158 S.E. 2d 529 (1968).

[3] Finally, plaintiffs contend that the Deputy Commissioner's finding of fact No. 16, that the treatment of deceased for his fractured neck did not cause, accelerate or aggravate Klebsiella pneumonia and the conclusion that the claim was not compensable, is not supported by competent evidence. It is settled in this State that if findings of fact are supported by competent evidence in the record, the courts upon appeal are bound by those findings. *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952). However, it is plaintiffs' argument that the testimony of Dr. Davis was not competent and, therefore, the only evidence from which the Commission could base its opinion was that of plaintiffs. Assuming, *arguendo*, that Dr. Davis' testimony was improper and should not have been considered, it does not necessarily follow that plaintiffs' claim is compensable. The plaintiffs had the burden of proof to show that the Klebsiella pneumonia was related to the

neck injury. *Matthews v. Carolina Standard Corp.*, 232 N.C. 229, 60 S.E. 2d 93 (1950). If the Deputy Commissioner did not believe the plaintiffs' evidence he should have held against them. The Commission sits as the trier of fact in workmen's compensation proceedings and it is the sole judge of the credibility of witnesses. *Blalock v. Roberts Co.*, 12 N.C. App. 499, 183 S.E. 2d 827 (1971). Uncontroverted testimony of a witness does not have to be accepted as true. *Shook v. Construction Co.*, 25 N.C. App. 231, 212 S.E. 2d 413 (1975). Even though the record may contain evidence which would support a contrary finding, "[u]pon appeal this Court does not have the right to weigh the evidence and decide the issue on the weight given the evidence by this Court." *Shook v. Construction Co., supra.* It may be that Deputy Commissioner Roney found the evidence of plaintiffs untruthful or unpersuasive and thus denied plaintiffs' claim. Yet, whatever Deputy Commissioner Roney's and the full Commission's reasons were for denying the claim, we cannot, from the record in this case, hold that it was error to deny plaintiffs' claim without usurping the Commission's province as fact finder.

Due to the decision we have reached in this opinion, we will not address the cross-assignments of error raised by defendants.

Affirmed.

Judges PARKER and VAUGHN concur.

WAKE COUNTY CHILD SUPPORT ENFORCEMENT EX REL REBECCA BAILEY v. ART McGUINNESS MATTHEWS

No. 7710DC449

(Filed 16 May 1978)

1. Parent and Child § 1.2— action to establish paternity—mother's testimony as to husband's access

In an action to establish paternity, the trial court erred in failing to exclude testimony by the mother of the child that she did not have sexual intercourse with her husband during the period of possible conception, since the mother's testimony violated the confidential relation existing between a husband and wife and public policy prohibiting a parent from bastardizing her own issue.

2. Parent and Child § 1.1— action to establish paternity—married mother—presumption of legitimacy

When a husband has actual access to his wife during the period of conception, the law conclusively presumes he has exercised that access and establishes the child as his absent proof that the wife was living in open and notorious adultery.

3. Parent and Child § 1.1— action to establish paternity—husband's access to child's mother

In an action to establish paternity, the trial court's finding that the husband of the child's mother had actual access to the mother during the period of conception was supported by evidence that the mother and her husband both lived in the same county during such period, and although the evidence did not support the court's finding that the husband exercised this access to the wife during the period of conception, such finding was harmless surplusage since it is conclusively presumed the child was lawfully begotten in wedlock where there was actual access.

4. Parent and Child § 1.2— action to establish paternity—open and notorious adultery

In this action to establish paternity, testimony by the child's mother that she had illicit sexual relations with defendant during the period of possible conception and that she shared a room with defendant on several nights while both within and without the community in which she resided did not show that the mother lived in "open and notorious adultery" so as to show nonaccess by her husband during the period of conception, since the "open and notorious adultery" necessary to show nonaccess by the husband means that the parties resided together publicly as if a marital relationship existed between them.

APPEAL by plaintiff from *Barnette, Judge*. Judgment entered 11 January 1977 in District Court, WAKE County. Heard in the Court of Appeals 6 March 1978.

This action was brought by the plaintiff, Wake County Child Support Enforcement, upon relation of the relatrix, Rebecca Bailey, to establish paternity of her minor child, Gregory Scott Bailey, in the defendant Art McGuinness Matthews. The plaintiff introduced the testimony of Rececca Bailey tending to show that she became pregnant in late October or early November of 1974 and gave birth to the child in question on 29 July 1975. She testified that she had sexual relations with the defendant on a regular basis from early July through early November of 1974. She was lawfully married to James Brooks Bailey from 11 December 1972 until 19 May 1976. During the entire time of this marriage, both she and her husband resided in Wake County.

Rebecca Bailey further testified that she did not have her ordinary menstrual period for November, which should have occurred on approximately 12 November 1974. She had sexual relations with no one other than the defendant from early August through mid November of 1974. Sometime after missing her ordinary menstrual period, however, she began having regular sexual relations with one Richard Butch Bragg.

The relatrix's mother, Gertha Mae Dickson, testified that James and Rebecca Bailey were separated in late January of 1973. She testified that the relatrix lived with her from 29 January 1973 through 24 October 1975. Gertha Mae Dickson further testified that she did not see James Bailey at her home from April of 1974 until May of 1976. She testified that the relatrix did not leave her home in the presence of any man other than the defendant from August through December of 1974, but that the relatrix had a car and was not in her presence at all times during this period.

At the close of the plaintiff's evidence, the defendant moved for an involuntary dismissal pursuant to G.S. 1-1A, Rule 41 (b). After making findings of fact and conclusions of law, the trial court issued an order granting the involuntary dismissal. From this order, the plaintiff appealed.

E. Gregory Stott for plaintiff appellant.

A. R. Edmonson for defendant appellee.

MITCHELL, Judge.

The plaintiff assigns as error the trial court's order granting the involuntary dismissal. The plaintiff contends that its evidence, if believed, was sufficient to show a right to relief upon the facts and the law. We do not agree.

The trial court properly found from uncontested evidence that the minor child in question was born during the existence of the marriage between James and Rebecca Bailey. When a child is so born during wedlock, it is presumed to be legitimate. *State v. McDowell*, 101 N.C. 734, 7 S.E. 785 (1888). The presumption can be rebutted only by proof that the husband could not have been the father. Such proof may be by a showing that he was impotent, could not have had access to the mother during the period when

conception must have occurred, or that the results of blood-grouping tests show impossibility of the husband's paternity. *Wright v. Wright*, 281 N.C. 159, 188 S.E. 2d 317 (1972) (blood-grouping tests); *State v. Rogers*, 260 N.C. 406, 133 S.E. 2d 1 (1963); *State v. Pettaway*, 10 N.C. 623 (1825).

[1] In the case *sub judice*, the plaintiff, in attempting to prove the paternity of the defendant, relied solely upon lack of access by the husband during the period of conception. The plaintiff first offered as evidence of lack of access the testimony of Rebecca Bailey that, during the period of possible conception, she did not have sexual intercourse with her husband. In *State v. Green*, 210 N.C. 162, 163, 185 S.E. 670, 671 (1936), the Supreme Court of North Carolina indicated by way of dictum that such testimony is "proffered evidence of nonaccess." If testimony by a wife is testimony of lack of access or other testimony tending to bastardize her child, it is incompetent. It was error for the trial court to fail to exclude this testimony by the wife as violative of the confidential relations existing between husband and wife and pursuant to sound public policy prohibiting a parent from bastardizing her own issue. *Ray v. Ray*, 219 N.C. 217, 220, 13 S.E. 2d 224, 226 (1941). *See also, State v. Hickman*, 8 N.C. App. 583, 174 S.E. 2d 609, *cert. denied*, 277 N.C. 115 (1970).

[2] Evidence from any source tending to show that the relatrix, Rebecca Bailey, did not have sexual intercourse with her husband during a period in which he had actual access to her would have been, at best, irrelevant. When a husband has actual access to his wife during the period of conception, the law conclusively presumes he has exercised that access and establishes the child as his absent proof that the wife was living in open and notorious adultery. *Ray v. Ray*, 219 N.C. 217, 13 S.E. 2d 224 (1941); *State v. Green*, 210 N.C. 162, 185 S.E. 670 (1936); *Rhyne v. Hoffman*, 59 N.C. 335 (1862).

Although this evidence should have been excluded, its admission was clearly favorable to the plaintiff. The plaintiff may not, therefore, properly complain of its admission. The plaintiff was not, however, entitled to have evidence drawn from an incompetent witness considered relative to its contention of lack of access by the husband. The trial court's apparent refusal to treat the testimony of Rebecca Bailey, as to lack of sexual intercourse with

her husband, as sufficient to overcome the motion for dismissal was not error. The trial court was required to ignore this incompetent evidence.

Where, as here, the trial court admits both competent and incompetent evidence, it is presumed that the findings of fact of the court were in no way influenced by hearing the incompetent evidence. *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668, *cert. denied*, 358 U.S. 888, 3 L.Ed. 2d 115, 79 S.Ct. 129 (1958). Here, the presumption is borne out by the fact that the trial court seems to have ignored the incompetent evidence.

[3] The testimony of Gertha Mae Dickson showed, at most, that the husband and wife were not together in her presence during the period of conception. This evidence was totally insufficient to prove lack of access by the husband. It was uncontested that, during the period of conception, both the husband and wife resided in Wake County. The trial court properly concluded that all of the evidence revealed access in fact by the husband during the crucial period.

The plaintiff contends, however, that the trial court erred in finding as a fact that the husband exercised this access to the wife during the period of possible conception. This contention is correct, as there was no evidence tending to support the finding. This error was clearly harmless. If access in fact is proven, whether proven to have been exercised or not, "there is a conclusive presumption that the child was lawfully begotten in wedlock." *Ray v. Ray*, 219 N.C. 217, 219, 13 S.E. 2d 224, 226 (1941). The finding by the trial court that there was access in fact was supported by the evidence, and its erroneous finding that the access was exercised was, at worst, harmless surplusage restating a presumption of law arising from the facts.

[4] The plaintiff next contends that evidence was admitted tending to show that Rebecca Bailey was living in open adultery during the period of possible conception. The plaintiff asserts that such evidence tended to show nonaccess and made dismissal by the trial court erroneous. We do not agree.

In a proper case a wife may be permitted to testify involving her illicit relations with a man other than her husband during the period of possible conception, as proof of such relations would fre-

quently be impossible except through the testimony of the woman involved. *State v. Rogers*, 260 N.C. 406, 408, 133 S.E. 2d 1, 2 (1963). This was not, however, evidence of "open and notorious adultery." That term has generally been held to encompass only cases in which the parties engaging in adultery reside together publicly as if a marital relationship existed between them, and this as well as the fact that they are not husband and wife are both known in the community of their residence. Black's Law Dictionary 72 (4th ed. rev. 1968). Although we have found no North Carolina case precisely defining the term, we think this definition is consistent with the decided cases involving "open and notorious adultery" in North Carolina.

The testimony of Rebecca Bailey tended to show that she had illicit sexual relations with another man during the period of possible conception. That testimony also tended to show that she shared a room with this man on several nights while both within and without the community in which she resided. No evidence that she lived with him on a regular basis or as if a marital relationship existed was introduced. This evidence, if believed, was insufficient to tend to show that type of "open and notorious adultery" which has been held to constitute "a potent circumstance tending to show nonaccess." *Eubanks v. Eubanks*, 273 N.C. 189, 197, 159 S.E. 2d 562, 568 (1968). Further, had this testimony by the wife, Rebecca Bailey, tended to show such nonaccess, the trial court would have been required to exclude it as the incompetent testimony of a wife tending to prove nonaccess of her husband during the period of conception. A wife is not a competent witness to prove such nonaccess by her husband. *State v. Rogers*, 260 N.C. 406, 408, 133 S.E. 2d 1, 2 (1963).

None of the competent evidence introduced by the plaintiff, including the testimony of the relatrix as to her illicit sexual acts, tended to show lack of access by the husband during the period in which the child in question could have been conceived. Rather, all of the plaintiff's evidence itself tended to show access. Thus, it is conclusively presumed that the child was lawfully begotten in wedlock.

The trial court committed no error prejudicial to the plaintiff in its findings of fact and conclusions of law as set forth in the

order from which this appeal is taken. We find that order was proper, and it is

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

BALCON, INC. v. ALLEN A. SADLER, D/B/A SADLER CONSTRUCTION COMPANY

No. 771SC397

(Filed 16 May 1978)

1. **Courts § 2— action on account—superior court's jurisdiction over subject matter**

The trial court had jurisdiction over the subject matter since the Superior Court of Chowan County was a court of general jurisdiction; the subject matter of the case was an account, which was a transitory action; and a court of general jurisdiction has jurisdiction over actions transitory in nature.

2. **Courts § 2.2— property within the State—standards of fairness, reasonableness, substantial justice and minimum contacts applicable**

According to *Shaffer v. Heitner*, 433 US 186, the standards of fairness, reasonableness, substantial justice and minimum contacts should govern actions *in rem* as well as *in personam*, and jurisdiction cannot be based on the mere presence of property within the State; therefore, the trial court was without jurisdiction in this action to recover a money judgment and for attachment of defendant's real property, since plaintiff and defendant were both residents of Maryland; the cause of action arose in Maryland; and the controversy had no relation whatever to the defendant's realty located in N. C.

3. **Courts § 2— property within the State—jurisdiction in rem—statute unconstitutional**

G.S. 1-75.8(4) which provides that jurisdiction *in rem* or *quasi in rem* may be invoked "when the defendant has property within this State which has been attached or has a debtor within the State who has been garnished . . ." does not meet the due process standards of *Shaffer v. Heitner*, 433 US 186, and is unconstitutional, but G.S. 1-75.8(5) which extends *in rem* and *quasi in rem* jurisdiction to any action "in which in rem or quasi in rem jurisdiction may be constitutionally exercised" supports such jurisdiction over the property within the state of a nonresident if due process standards are met.

APPEAL by plaintiff from *Tillery, Judge*. Judgment filed 15 March 1977 in Superior Court, CHOWAN County. Heard in the Court of Appeals 28 February 1978.

Plaintiff, a corporation incorporated and doing business in Maryland and neither domesticated nor doing business in North Carolina, instituted this action to recover a money judgment from defendant, an individual resident of Maryland. Plaintiff alleged that defendant owed it $5,360.94 on an account. Defendant owned real property in North Carolina and plaintiff, concurrently with the filing of the complaint, began ancillary proceeding for the attachment of defendant's real property pursuant to G.S. 1-440.1(b). Defendant moved to dismiss plaintiff's action pursuant to G.S. 1A-1, Rule 12, for lack of jurisdiction over the person or over the subject matter.

At the hearing on the motion the court found as fact that plaintiff and defendant were both residents of Maryland and:

> "that the account sued on in the pleading arose by reason of a business transaction in the State of Maryland and the subject matter in controversy, which is the account, arose entirely in the State of Maryland; that there is no suit pending in the State of Maryland for the collection of this account; that the cause of the plaintiff, if any, arose in the State of Maryland; that while the defendant owned property in North Carolina at the date of the filing of this action, that the proceeding in attachment is ancillary in nature and does not give this court jurisdiction of the subject matter of any action that arose in Maryland between citizens of Maryland."

The court then ordered the plaintiff's action dismissed. From this judgment, plaintiff appeals.

LeRoy, Wells, Shaw, Hornthal, Riley & Shearin by Terrence W. Boyle for plaintiff appellant.

Pritchett, Cooke & Burch by W. W. Pritchett, Jr. for defendant appellee.

CLARK, Judge.

The defendant moved to dismiss on the grounds that the Superior Court of Chowan County lacked jurisdiction over both the subject matter and the person. Though the findings in the judgment relate primarily to the issue of jurisdiction over the person, the trial court concluded that it had no jurisdiction over the subject matter.

A court has jurisdiction over the subject matter if it has the power to hear and determine cases of the general class to which the action in question belongs. A court has jurisdiction over the person if it has the power to bring the person to be affected by the judgment before the court so as to give him an opportunity to be heard. 21 C.J.S., Courts, § 23, pp. 36-37.

[1] The Superior Court of Chowan County is a court of general jurisdiction. N.C. Const., Art. IV, §§ 1, 2, 12. The subject matter of the case *sub judice* is an account, which is a transitory action, as are contract actions in general. A court of general jurisdiction has jurisdiction over actions transitory in nature. Clearly, the trial court had jurisdiction over the subject matter. *Gibbs v. Heavlin*, 22 N.C. App. 482, 206 S.E. 2d 814 (1974).

But the trial court could not exercise its subject matter jurisdiction to adjudicate the case if it did not have jurisdiction over the person of the defendant, and without such jurisdiction the action should have been dismissed.

The plaintiff and defendant were nonresidents of this State, and the action arose in Maryland. Defendant owned real estate in Chowan County; his ownership of this realty did not give the court jurisdiction over the defendant's person. The basis of the court's jurisdiction must rest on plaintiff's proceeding to attach defendant's realty under G.S. 1-440.1. The realty had no relation to the account which is the subject matter of the action. The attachment is a *quasi in rem* proceeding, instituted by plaintiff for the purpose of bringing the realty of the nonresident defendant under the jurisdiction of, and subject to the judgment of, the court. The attachment proceeding is ancillary and does not give the court *in personam* jurisdiction over the defendant. But G.S. 1-75.8(4) gives the court jurisdiction *quasi in rem* when "the defendant has property within this State which has been attached or has a debtor within the State who has been garnished."

The opening sentence of G.S. 1-75.8 is as follows: "A court of this State having jurisdiction of the subject matter *may* exercise jurisdiction in rem or quasi in rem on the grounds stated in this section. . . ." (Emphasis added.) Thus, it appears that the exercise of such jurisdiction is a matter for the discretion of the court. See Anno. 90 A.L.R. 2d 1109; 20 Am. Jur. 2d, Courts, §§ 93, 172; 21 C.J.S., Courts, § 77(b), pp. 116-118. It is clear, however, in the case

before us that the trial court found that it did not have jurisdiction, and not that it in its discretion refused to exercise it.

The foregoing statute and the case law relating to *in rem* jurisdiction has been based on the decisions in *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878), which for a hundred years has provided the conceptual framework for jurisdictional matters in the United States. *Pennoyer* asserted that jurisdiction was defined by two principles: (1) that every state possesses exclusive jurisdiction and sovereignty over persons and property *within* its territory, and (2) that a state cannot exercise direct jurisdiction over persons or property *without* its territory. The decision recognized that the states must comply with the standards of due process but perceived the requirements for jurisdiction over property as conceptually distinct from those applicable to personal jurisdiction. The mere presence of property was sufficient for *in rem* jurisdiction, whereas the presence of the defendant's person within the state was essential for *in personam* jurisdiction. These bifurcated jurisdictional standards have been maintained over the years, with the state courts exercising jurisdiction based on the presence of property in actions *in rem* and *quasi in rem* and exercising personal jurisdiction based on the presence of the person.

The concept of *in personam* jurisdiction has been adjusted by the courts during the past century to meet the needs of a mobile society by judicially circumventing the presence of the person as the basis for jurisdiction with the fictions of implied consent and constructive presence, based on activities in the state, i.e., operating a motor vehicle or doing business.

But the fiction-eroded standards for *in personam* jurisdiction were supported two decades ago by *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057 (1945), which held that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he is not present within the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

[2] Recently, in *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed. 2d 683 (June 1977), the Supreme Court held for the first time that the standards of fairness, reasonableness and substantial justice and the minimum contacts required by *International Shoe* should govern actions *in rem* as well as *in personam*. The

court suggested that all of the circumstances relating to the controversy should be considered in determining reasonableness.

In *Shaffer*, the asserted basis of jurisdiction was the statutory presence of defendants' property in Delaware, by statute the situs for ownership of stock in a Delaware corporation. The action was a stockholder's derivative suit by a nonresident against nonresident officers and directors of a Delaware corporation for breach of corporate duties. In the case *sub judice* the basis of jurisdiction was real property. Where real property has some relation to the controversy, the interest of the State in realty within its borders, and the defendant's substantial relationship with the forum should support jurisdiction. But in the case before us the controversy had no relation to the realty, and *Shaffer* clearly held that jurisdiction could not be based on the mere presence of property. We interpret *Shaffer* as controlling the case *sub judice* if *Shaffer* has retroactive effect.

We find nothing in *Shaffer* relative to retroactive effect of the decision. There is a traditional presumption that an overruling decision is intended to receive general retroactive effect. *Mason v. Cotton Co.*, 148 N.C. 492, 62 S.E. 625 (1908). But the more modern view is that, unless the overruling court expressly indicates retroactivity, the lower courts are entitled to reach their own conclusions on the issue until the overruling court clarifies how much retroactive effect its overruling decision is to receive. Anno., 10 A.L.R. 3d 1371.

Mason v. Cotton Co., supra, recognized an exception to the traditional rule, that neither contracts nor vested rights acquired under the former decisions may be impaired by a change of construction made by a subsequent decision. Obviously, *Shaffer*, if retroactive, would remove the plaintiff's right to sue in North Carolina. But this loss of jurisdiction is a procedural matter, and we do not find that it reaches the level of vested rights. We are aware of decisions which have raised procedural rights to the level of "vested rights" where the relying party is denied access to the courts completely. *McSparran v. Weist*, 402 F. 2d 867 (Ca. 3) (1968), *cert. den. sub nom. Fritzinger v. Weist*, 395 U.S. 903, 89 S.Ct. 1739, 23 L.Ed. 2d 217 (1969). And see *England v. Louisiana Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed. 2d 440 (1964). However, we have no such precedent in this State, and in

the case *sub judice* there is nothing in the record on appeal to establish, or even to indicate, that plaintiff would be out of court completely if *Shaffer* be applied retroactively. One of the stated reasons in *Shaffer* for changing the century old rule of law followed since *Pennoyer v. Neff, supra,* is that the old rule offended "traditional notions of fair play and substantial justice." We decline to continue the adherence to that offensive old rule of law and elect to apply *Shaffer* retroactively to the case *sub judice.*

[3] G.S. 1-75.8(4) provides that jurisdiction *in rem* or *quasi in rem* may be invoked "When the defendant has property within this State which has been attached or has a debtor within the State who has been garnished. Jurisdiction under this subdivision may be independent of or supplementary to jurisdiction acquired under subdivisions (1), (2) and (3) of this section." Clearly this statute does not meet the due process standards required by the *Shaffer* decision and is unconstitutional. But G.S. 1-75.8(5) extends *in rem* and *quasi in rem* jurisdiction to any action "in which in rem or quasi in rem jurisdiction may be constitutionally exercised." This statute supports such jurisdiction over the property within the state of a nonresident if due process standards are met.

The judgment of the trial court dismissing the action is

Affirmed.

Judges MORRIS and MITCHELL concur.

ROBERT LOUIS JONES AND BRENDA A. PORTER, PLAINTIFFS v. RICHARD D. CLARK, T/A RICHARD D. CLARK ASSOCIATES, AND WIFE, TONI B. CLARK, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. LESCO HOMES, INCORPORATED OF NORTH CAROLINA AND PITTSBURGH TESTING LABORATORY THIRD-PARTY DEFENDANTS

No. 7721DC453

(Filed 16 May 1978)

1. Appeal and Error § 6.8— right of appeal from summary judgment

There is a right of appeal under G.S. 1-277 from an order granting summary judgment, notwithstanding the failure to meet the requirements for a Rule 54(b) appeal where a substantial right is affected.

2. **Uniform Commercial Code § 15— seal on modular home—no implied warranty**

Where third party plaintiffs alleged that one of the third party defendants had placed upon a modular home its seal certifying that the home was "approved for use and occupancy," but third party plaintiffs dealt exclusively with the other third party defendant in purchasing the home, third party plaintiffs had no cause of action against third party defendant who inspected the home for breach of an implied warranty, since (1) an implied warranty of workmanlike construction cannot properly be imputed to one who simply allows its seal of inspection to be placed on a product manufactured by someone else; (2) G.S. 25-2-314 and G.S. 25-2-315 are inapplicable because they apply only to transactions in goods, but any implied warranty of third party defendant would concern the quality of its inspection services rather than the quality of goods; and (3) if the doctrine of implied warranty were applicable to inspection services, third party plaintiffs would have to prove that they were in privity of contract with third party defendant in order to recover, and third party plaintiffs made no such showing.

3. **Uniform Commercial Code § 15— seal on modular home—no express warranty**

Where third party plaintiffs bought from one third party defendant a modular home on which the other third party defendant had placed its seal certifying that the home was "approved for use and occupancy," there was no express warranty running from third party defendant which affixed the seal to the unit, since the reason for placing the seal on the house was to avoid certain state and local building inspections and to qualify the completed unit for FHA mortgage insurance and Low Rent Public Housing projects; the parties did not intend to induce the reliance of the consuming public by placing the seal on the unit, as indicated by its placement on a living room closet door rather than in a conspicuous place; third party plaintiffs were builders and should have known the underlying reasons for the presence of the seal; no written warranty was given by the third party plaintiffs to the ultimate purchasers; and third party plaintiffs could not have relied upon representations in the seal, since, at the time they entered into the contract for the building of the house, there was no seal present and no representation by third party defendant upon which third party plaintiff could rely.

APPEAL by defendants/third-party plaintiffs from *Tash, Judge*. Judgment entered 14 January 1977 in District Court, FORSYTH County. Heard in the Court of Appeals 7 March 1978.

Plaintiffs commenced this action 6 February 1975, by the filing of a complaint alleging breach of warranty by defendants in the sale of a personal residence. Defendants answered 19 April 1975 denying liability. Additionally, defendants' answer included a third-party complaint and a counterclaim.

In their third-party complaint, defendants allege that Lesco Homes, Incorporated of North Carolina (Lesco), manufactured the modular home which is the subject of this suit and transported it

to the construction site, where the foundation had been laid. The third-party complaint further alleges that Pittsburgh Testing Laboratory (PTL) inspected the modular homes built by Lesco and had given this particular home its seal of approval.

By allowing to be placed upon the modular home the seal of PTL certifying that the home was "approved for use and occupancy", defendants/third-party plaintiffs allege that PTL is liable upon the warranties, both express and implied, to them for any damages they may incur in the present unit.

After a period of discovery and on 21 October 1976, PTL moved the court for summary judgment under Rule 56. A hearing on the motion was held 10 January 1977. By order of 14 January 1977, the trial court granted summary judgment in favor of the third-party defendant PTL. From that judgment defendants/third-party plaintiffs appeal.

Westmoreland and Sawyer, by Barbara C. Westmoreland and Gregory W. Schiro, for defendant/third-party plaintiff appellants.

Deal, Hutchins, and Minor, by William Kearns Davis, for third-party defendant appellee.

MORRIS, Judge.

[1] In this case, the first question presented is whether the appeal should be dismissed as is urged by the appellee (third-party defendant). PTL asserts that the appeal does not meet the requirements of Rule 54(b) for an interlocutory appeal where final judgment is entered "as to one or more but fewer than all of the claims or parties" because the trial judge did not determine that "there is no just reason for delay". Our Supreme Court has addressed the same issue on two occasions and has held that there is a right of appeal under G.S. 1-277 from an order granting summary judgment, notwithstanding the failure to meet the requirements for a Rule 54(b) appeal where a substantial right is affected. *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976); *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976). Here the summary judgment determined the claim of defendants Clark against PTL. The possibility of PTL's having to indemnify defendants Clark is remote. Should the summary judg-

ment be upheld, Lesco is still a party and is obligated to indemnify PTL. We, nevertheless, choose to discuss and decide the matter on its merits.

Defendants/third-party plaintiffs have alleged a breach of both express and implied warranties by PTL. The cause of action is based upon a warranty claim growing out of a contract and not upon a tort. We will examine separately the alleged breach of express and implied warranty.

[2] As to the allegations of breach, the complaint does not reveal the nature of the alleged implied warranties, nor does the record suggest their nature. We do not believe that an implied warranty of workmanlike construction such as the one the Court discussed in *Hartley v. Ballou*, 286 N.C. 51, 209 S.E. 2d 776 (1974), can properly be imputed to one who simply allows its seal of inspection to be placed on a product manufactured by someone else. Additionally, we do not believe that the provisions of the Uniform Commercial Code, specifically G.S. 25-2-314 and G.S. 25-2-315, are properly applicable. Article 2 of the Uniform Commercial Code applies to transactions in *goods*. G.S. 25-2-102. In this case, any implied warranty of PTL would concern the quality of its inspection *services* rather than the quality of *goods*. Thus, Article 2 does not apply.

If some other type of implied warranty were arguably applicable, we believe that such an implied warranty could not meet the privity requirements. Our courts, as a general rule, have continued to require that one seeking to recover on an implied warranty prove privity of contract. *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21 (1960). This privity requirement has been relaxed in cases involving the sale of goods. *See* G.S. 25-2-318. However, this relaxation of the privity requirement has not yet been extended to services. Thus, assuming that the doctrine of implied warranty were applicable to inspection services, third-party plaintiffs would have to prove that they were in privity of contract with PTL in order to recover. The record before us does not suggest in any manner that PTL and the Clarks had direct dealings sufficient to establish privity of contract. The Clarks purchased the unit from Lesco. Only Lesco dealt directly with PTL. Thus, we find no cause of action for breach of an implied warranty.

[3] Next, we must determine whether there is any express warranty running from PTL to the Clarks. With respect to express warranties, the privity requirement does not present the same problem as is present with respect to implied warranties. Indeed, in some cases our Courts have held that an express warranty existed while simultaneously holding that the plaintiff had not established privity of contract to base his recovery on an implied warranty. *See Corprew v. Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98 (1967). Therefore, if the defendants/third-party plaintiffs can establish that there was an express warranty running from PTL to them and that the warranty has been breached, they are entitled to recover on that warranty.

The only evidence of the existence of an express warranty is the fact that the seal of PTL was affixed to the unit in the living room closet. There is no evidence of the precise wording of the seal or the exact appearance of the seal. The third-party complaint, verified by both Richard D. Clark and Toni B. Clark, says that the seal certified that the unit was "approved for use and occupancy". The record presents no other evidence of any other possible contact between the Clarks and PTL. The whole claim must, therefore, rest upon the presence of the seal. There is evidence that the reason Lesco used PTL's services and the reason for placing the seal on the unit was to avoid the necessity of certain state and local building inspections and to qualify the completed unit for Federal Housing Administration mortgage insurance and Low Rent Public Housing projects. Indeed, the seal was placed on the unit on a living room closet door rather than in a conspicuous place on the exterior or on a large wall. This evidence strongly suggests that the parties did not intend, by the placing of the seal on the unit, to induce the reliance of the consuming public. Additionally, the Clarks were builders and would know the underlying reasons for the presence of the PTL seal. Even more revealing is the fact that no written warranty was given by the Clarks to the ultimate purchasers. This fact casts grave doubt upon the Clarks' contention that they relied upon the representations of the seal. We do not believe that these facts are sufficient to establish the existence of a warranty.

The ultimate flaw in the Clarks' complaint, however, is revealed by an examination of the sequence of events. The third-party complaint alleges that "the defendants/third-party plaintiffs

entered into a contract *for the construction of a modular home* by . . . Lesco. . . ." (Emphasis added.) The Clarks base their allegation of an express warranty on the presence of the seal. The seal, of necessity, was placed on the unit only *after construction.* Therefore, at the time of entering into the contract, there was no seal present and no representation of PTL upon which the Clarks could rely. The record is devoid of any evidence whatsoever that PTL made any representation to the Clarks other than the representations found in the seal itself. Thus, the Clarks could not have detrimentally relied on the representations in the PTL seal. Without reliance on the warranty by the Clarks, PTL cannot be bound by an express warranty. *See Hollenbeck v. Fasteners Co.*, 267 N.C. 401, 148 S.E. 2d 287 (1966). The third-party complaint plainly establishes the lack of reliance.

The action of the trial court in granting summary judgment in favor of third-party defendant PTL is

Affirmed.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. RALPH LEE BURDEN

No. 778SC1057

(Filed 16 May 1978)

1. **Homicide § 27.1— estranged wife riding with another man—no adequate provocation for shooting in heat of passion**

Evidence that defendant shot his estranged wife when he found her riding in a car with another man was not sufficient to show adequate provocation for passion which would negate the malice of murder and reduce the crime to manslaughter.

2. **Homicide § 28.3— self-defense—no excessive force to require submission of manslaughter**

A defendant on trial for murder was not entitled to an instruction submitting the issue of voluntary manslaughter on the theory of excessive force where the sole basis for the defense of self-defense was defendant's testimony that he heard shots and returned the fire in the direction from which the shots came, since defendant's testimony disclosed that he used only such force as was necessary to defend himself under the circumstances which he recounted.

State v. Burden

APPEAL by defendant from *Cowper, Judge.* Judgment entered 11 August 1977 in Superior Court, WAYNE County. Heard in the Court of Appeals 25 April 1978.

Defendant was charged in proper bills of indictment with the murder of Edna Faye Burden and with assault with intent to kill inflicting serious injury to David Ward. The defendant plead not guilty to both charges, whereupon, the State presented evidence tending to show the following:

The defendant and his wife, Edna Faye Burden, separated in September of 1976. Soon thereafter, Edna Faye began dating David Ward who lived in Washington, D.C. On 27 May 1977 Ward traveled to Goldsboro, North Carolina, to attend a dance with Edna Faye. That night they went to the dance and an early morning breakfast at a friend's house. At approximately 5:00 a.m., they were driving north on Slocumb Street en route to Edna Faye's apartment when Ward noticed an International tractor detached from its trailer parked in a parking lot some distance ahead. As Ward's car proceeded north, the truck driven by the defendant pulled onto Slocumb Street headed south. As the two vehicles approached each other, the defendant pulled into the northbound lane and came to a stop directly in front of Ward's car. Ward came to an abrupt stop to avoid collision. Almost immediately, the defendant carrying his .22 rifle descended from his truck and began shooting at Ward's car. Ward and Edna Faye got out of the car and were both hit by bullets from the defendant's rifle. Edna Faye fell to the street with wounds in her thigh, back and head. Ward attempted to flee but the defendant followed and overtook him a short distance away. The two men struggled over the rifle until the defendant finally withdrew and returned to his truck where he waited until the police arrived. Edna Faye died as a result of her wounds. Ward was treated in the hospital for wounds in his groin and back, and later released. Neither Ward nor Edna Faye was carrying a weapon at the time of the incident.

The defendant offered evidence tending to show the following: The defendant was driving south on Slocumb Street when he noticed a blue car headed towards him and saw someone leaning out of the left side window with something in his hand. He slammed on his brakes and pulled his truck in front of the car. As he opened the door of his truck he heard a shot. Grabbing his

rifle from beneath the seat, he jumped towards an embankment on the left side of the road. When defendant heard a second shot he began shooting his rifle, aiming at the driver's side of the car. He did not see Edna Faye until she got out of the car. After chasing Ward, the defendant returned and called the police.

The jury found the defendant guilty of second degree murder of Edna Faye Burden and assault with a deadly weapon of David Ward, inflicting serious injury. From judgments imposing 5 years imprisonment for the assault, to run concurrently with 25 years imprisonment for the murder, the defendant appealed.

Attorney General Edmisten, by Associate Attorney T. Michael Todd, for the State.

Barnes, Braswell & Haithcock, by Michael A. Ellis, for defendant appellant.

HEDRICK, Judge.

No assignments of error appear in the record with respect to the felonious assault charge. Thus, no question is presented for review in the case wherein the defendant was convicted of assault of David Ward with a deadly weapon inflicting serious injury. In case number 77CR6955 we find no error.

With respect to his conviction for second-degree murder of Edna Faye Burden, the defendant assigns as error the failure of the trial court to submit to the jury the lesser included offense of voluntary manslaughter. The principle by which we are guided in the determination of when to submit a lesser included offense to the jury was succinctly stated in *State v. Hicks*, 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954):

> The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor.

[1] The defendant first argues that the evidence raises an inference that the defendant killed Edna Faye Burden in the heat of passion with provocation. In order to reduce second degree murder to voluntary manslaughter, there must be some evidence

that the defendant killed his victim "in the heat of passion engendered by provocation which the law deems adequate to depose reason." *State v. Freeman*, 275 N.C. 662, 668, 170 S.E. 2d 461, 465 (1969). Our examination of the record has revealed no evidence upon which the jury could find such provocation. Specifically, evidence that the defendant found his estranged wife riding in a car with another man is not sufficient to show adequate cause for passion which would negate the malice of murder and reduce it to manslaughter. *State v. Ward*, 286 N.C. 304, 210 S.E. 2d 407 (1974).

[2] Under the same assignment, the defendant contends that since the trial judge instructed the jury on self-defense it was incumbent upon him to instruct the jury that if it should find that in defending himself the defendant used excessive force, it could return a verdict of voluntary manslaughter. According to well-settled principles of law, if the defendant in killing the deceased was acting in self-defense but used more force than was necessary or reasonably appeared necessary under the circumstances, he is guilty of voluntary manslaughter. *State v. Woods*, 278 N.C. 210, 179 S.E. 2d 358 (1971).

In the present case the defendant testified that as he approached the automobile driven by Ward "it had stopped and on the left-hand side someone was leaning out" with something in his hand and that he pulled into the northbound lane and stopped in front of Ward's car. His account of the shooting appears in the record as follows:

> I opened the door and started to get out and I heard a shot. That is when I went back in the truck and got my rifle.
> . . .
>
> I jumped out of the truck, and when I jumped out, I heard another shot. I jumped and from the jump I had gone toward the bank on the left side of Slocumb, and when I got on the bank, I heard the second shot. It was just like I was back in Viet Nam and I was shooting at wherever the shot came from.

Assuming that the defendant's testimony raises the defense of self-defense, it does not necessarily follow that the defendant was entitled to an instruction submitting the offense of voluntary

manslaughter on the theory of excessive force. In *State v. Harrington*, 286 N.C. 327, 210 S.E. 2d 424 (1974), the defendant who had been found guilty of second degree murder assigned as error the failure of the trial court to submit to the jury the lesser included offense of involuntary manslaughter. The Supreme Court, citing *State v. Hicks*, *supra*, pointed out that in view of his defense of accident "defendant would be guilty of involuntary manslaughter only if there were evidence tending to show that such unintentional killing was caused by defendant's unjustified and wanton or reckless use of the rifle in such manner as to jeopardize . . . [the victim's] safety." 286 N.C. at 330-1, 210 S.E. 2d at 427. The Court concluded that there was no evidence from which the jury could infer culpable negligence, and thus, the trial court was not required to submit involuntary manslaughter to the jury. *See also State v. Bright*, 237 N.C. 475, 75 S.E. 2d 407 (1953).

Similarly, in the present case the trial judge was not required to submit the offense of voluntary manslaughter to the jury unless there was evidence from which the jury could find that in defending himself the defendant used excessive force. We think that the defendant's testimony, which provided the sole basis for his defense of self-defense, discloses that he used only such force as was necessary to defend himself under the circumstances which he recounted. If the jury found that the defendant reasonably believed that he was in danger of death or great bodily harm from the shots which he heard, then it follows that his only reasonable defense was to shoot back. Thus, since there was no evidence of excessive force, the trial judge was not required to submit the offense of voluntary manslaughter to the jury. *State v. Hicks*, *supra*.

We hold that the defendant received a fair trial in Case No. 77CR6911 and Case No. 77CR6955 free from prejudicial error.

No error.

Chief Judge BROCK and Judge MITCHELL concur.

STATE OF NORTH CAROLINA v. WILLIAM GASTON MONK

No. 775SC1004

(Filed 16 May 1978)

1. **Larceny § 7— larceny of clothes from employer—sufficiency of evidence**

In a prosecution for larceny of clothing valued at $500 from defendant's employer, evidence was sufficient for the jury where it tended to show that some of the women's clothing found after closing hours in a box at the rear of the employer's place of business was seen on the rack in the women's section of the store at the beginning of the evening; none of the clothes found in the box had been sold that night; defendant, who in the normal performance of his duties as shift manager would remain in the front of the store, was seen walking around the men's and women's sections of the store near the same racks where some of the clothes had been seen earlier; defendant possessed the only key to the back door; defendant made a trip to the dumpster purportedly to empty trash at a time when the back door was never supposed to be opened according to company policy; and after closing hours a car which looked like one owned by defendant pulled into the store parking lot, stopped beside the dumpster where the box of clothes had been found, but sped away when the store owner turned his automobile lights on the car and driver.

2. **Larceny § 6— larceny of women's clothes—size of defendant's wife—testimony admissible**

In a prosecution of defendant for larceny of clothing from his employer, the trial court did not err in admitting testimony by the manager of the store regarding the clothes size of defendant's wife since the testimony objected to tended to prove that defendant's wife wore size 13-14 blouses while other evidence established that the blouses stolen were of the same size, and the testimony objected to was clearly relevant to show the defendant's motive in taking the women's clothes.

3. **Larceny § 4.1— indictment—description of property taken**

An indictment which charged defendant with stealing "assorted items of clothing, having a value of $504.99 the property of Payne's, Inc." was sufficiently particular in describing the stolen property.

4. **Larceny § 8.3— value of property stolen—jury instructions not required**

The trial court was not required to charge the jury that it must find that the value of the stolen property exceeded $200, since G.S. 14-74 under which defendant was indicted does not by its terms require that the property stolen reflect a minimum value in order for a violation thereof to constitute a felony.

APPEAL by defendant from *Wood, Judge*. Judgment entered 27 May 1977 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 4 April 1978.

Defendant was charged in a bill of indictment with larceny of clothing valued at $504.99 from his employer, Payne's, Incorporated. Upon his plea of not guilty, the State offered evidence tending to show the following:

In the early part of 1977 the defendant, William Gaston Monk, was employed as a shift manager for Payne's, Inc., a clothing store in Wilmington, North Carolina. He had recently announced his intention to resign and discussed it with the owner of the store, but it had not yet been determined when his resignation would become effective. In his capacity as shift manager, the defendant was primarily responsible for the management of the store from 6 to 9 p.m. At such times, he maintained the only keys to the front and back doors.

On 25 March 1977 the defendant assumed his managing duties at 6 p.m. Three employees were working with him. It was the normal practice for the shift manager to stay at the front of the store where he could best conduct his duties and oversee the operation of the store. However, on this night, the defendant reported to several of his co-workers that he was feeling sick and stayed at the back of the store near the bathroom. At one point in the evening, the defendant was seen moving around the women's clothing section of the store near a rack of blouses. At another time, he was seen in the men's clothing section.

According to company policy, the back door was to be kept locked at all times when not in use and was never to be used after 6 p.m. at night. Thus, the trash was normally placed beside the back door at night and taken out the following day. In violation of this policy, the defendant, at approximately 8:45 p.m., told one of the employees that he was going to take the trash to the dumpster located behind the store. Shortly thereafter, he was seen returning to the store from the dumpster. The defendant was the only employee to leave by the back door on the night in question. As closing time drew near, the defendant's mood seemed to be improving, and he told one of his fellow employees that he was feeling better. At 9 p.m., the defendant closed and locked the store and left with his wife who had come in his automobile to pick him up.

At approximately 9:15 p.m. on the same night, an employee of a neighboring store was emptying the trash when he noticed a

Payne's box beside the dumpster. He reached down to pick up the box intending to throw it in the trash and realized that there were clothes inside. He immediately told his manager who notified Harry Payne, the owner of Payne's, Inc. Payne drove his automobile to a spot near the dumpster, parked and turned off his lights. After a short wait, a car turned into the driveway and stopped beside the dumpster. As the driver of the car opened his door, Payne turned on his headlights which were directed at the other car. The driver quickly shut the door of the car and sped from the parking lot. Payne testified that the car resembled one owned by the defendant.

When Payne examined the contents of the box, he found two size 40 men's suits and a size 43 men's suit as well as several women's blouses and a women's pantsuit, all size 13-14. The value of the clothes was $504.99. The defendant wears a size 40 regular suit and his wife wears a size 13-14 blouse. There was at least one other employee who wore size 40 suits. During the previous week, the defendant had been seen trying on one of the suits found. None of the clothes found in the box had been sold on the night they were found. However, one of the employees testified that she had seen some of the women's clothing found in the box on a rack in the store earlier in the evening.

The defendant offered no evidence.

The jury returned a verdict of guilty. From a judgment imposing a prison sentence of five years, the defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Robert G. Webb, for the State.

Peter Grear for the defendant appellant.

HEDRICK, Judge.

By his sixth assignment of error, the defendant contends that the trial court erred in its denial of the defendant's motion to dismiss at the close of the State's evidence. It is well-established that in reviewing the trial court's denial of a motion for judgment as of non-suit, we must view the evidence in the light most favorable to the State and determine whether it is sufficient to find that the crime charged in the indictment has been committed

and that the defendant committed it. *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971).

[1] Viewed in this light, we think that there was sufficient evidence to submit the case to the jury and to support the verdict. We particularly note evidence that some of the women's clothing found in the box was seen on the rack in the women's section of the store at the beginning of the evening; that none of the clothes found were sold during the night; that defendant, who in the normal performance of his duties would remain in the front of the store, was seen walking around the men's and women's sections of the store near the same racks where some of the clothes had been seen earlier; that the defendant possessed the only key to the back door; and that he made a trip to the dumpster purportedly to empty trash at a time when the back door was never supposed to be opened according to company policy. We think this evidence provided a sufficient basis from which the jury could infer that defendant took the box of clothes to a place where he could later return to pick them up.

[2] The defendant next contends that the trial court erred in its admission of the testimony of Doris Little, the manager of the store, regarding the clothes size of defendant's wife. The testimony objected to tended to prove that the defendant's wife wore size 13-14 blouses while other evidence established that the blouses stolen were of the same size. We think the testimony was clearly relevant to show the defendant's motive in taking the women's clothes. 1 Stansbury's N.C. Evidence § 83 (Brandis Rev. 1973).

[3] The defendant also assigns as error the trial court's denial of his motion to quash the bill of indictment. He argues that the indictment which charges the defendant with stealing "assorted items of clothing, having a value of $504.99 the property of Payne's, Inc." is defective in that it is not sufficiently particular in describing the stolen property. The defendant cites *State v. Ingram*, 271 N.C. 538, 157 S.E. 2d 119 (1967), as support for his position. In *Ingram* the indictment described the stolen property as "the merchandise, chattels, money, valuable securities and other personal property, located therein, of the value of $878.25 of the goods, chattels and money of the said Henry J. Thomas." The evidence tended to show that the specific property stolen was

eleven rings. The indictment in the present case is clearly more particular in describing the property than that in *Ingram*. On the other hand, this Court in *State v. Foster*, 10 N.C. App. 141, 177 S.E. 2d 756 (1970), held that an indictment charging the defendant with larceny of "automobile parts of the value of $300.00 . . . of one Furches Motor Company" was sufficiently descriptive to fulfill the purposes of an indictment. In our opinion, the indictment in the present case satisfies the standards set forth in *Foster*.

[4] The defendant finally argues that the trial court was required to charge the jury that it must find that the value of the stolen property exceeded $200. The defendant cites *State v. Cooper*, 256 N.C. 372, 124 S.E. 2d 91 (1962), a case construing G.S. 14-72 which sets out the offense of larceny of property and receiving stolen goods "not exceeding two hundred dollars in value." However, G.S. 14-74 under which the defendant was indicted does not by its terms require that the property stolen reflect a minimum value in order for a violation thereof to constitute a felony.

We hold that the defendant received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge MITCHELL concur.

STATE OF NORTH CAROLINA v. LARRY K. SNEED

No. 7728SC1018

(Filed 16 May 1978)

1. Searches and Seizures § 10— warrantless search of motel room—exigent circumstances

Exigent circumstances justified and rendered lawful a search of defendant's motel room without a warrant where an officer received information from a confidential informant that defendant and others, who were staying at a certain motel, had some checks from a Tennessee company which were being passed in the Asheville area; officers verified that checks had been stolen from the Tennessee company; officers observed known gamblers going to and from

the motel rooms occupied by defendant and his companions; an officer obtained a search warrant for the room occupied by defendant but, upon arriving at the motel, learned that defendant and his companions had left during the night; another confidential informant told the officer that defendant had gone to another motel because he learned the police were checking car tags in the parking lot of the first motel; officers recognized several cars in the parking lot of another motel and saw a known gambler, whom they had seen at the first motel, enter a room of the second motel; an officer thought the gambler recognized him and proceeded to search without a warrant the motel room which the gambler entered and which was occupied by defendant and others; and the stolen checks and a checkwriting machine were found during the search.

2. **Constitutional Law § 67— hearing on motion to suppress—identity of informants**

The trial court did not err in refusing to require the disclosure of the identity of two confidential informants pursuant to G.S. 15A-978 during a hearing on a motion to suppress where defendant did not seek to contest the truthfulness of the information presented to establish probable cause. G.S. 15A-978(b).

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 15 July 1977, in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 5 April 1978.

Defendant was indicted for forging and uttering a forged check. Prior to trial defendant moved to suppress evidence seized by police in a search of his motel room. A *voir dire* hearing was held, and the State's evidence tended to show that on 27 March 1977, Officer Fred W. Hensley of the Asheville Police Department received information from a reliable confidential informant that a man named "Wootsie," two females, and three other males, located at a Quality Inn Motel, had some checks of Public Supply Company out of Tennessee, and that these checks were being passed in the Asheville area. The police had received several complaints about forged checks and had called Tennessee to learn that the Public Supply Company had been broken into on 6 March 1977, and that three checkbooks had been stolen. The informant also told Officer Hensley that defendant and the two women had guns and would not hesitate to use them.

Officer Hensley and Sgt. W. L. Dillingham went to the motel and observed rooms 52 and 53. They checked the traffic in and out of the rooms and determined that the informant had been correct in identifying the people in these rooms. Some of the people

were known gamblers, including Gene Black whom Hensley knew. On 29 March, Officer Hensley obtained a search warrant for the room registered in defendant's name. Upon arriving at the motel, however, the officers were told that defendant and the other occupants had left during the night. Officer Hensley then went to another confidential informant who told him that defendant had learned that police were checking car tags at Quality Inn and had moved to another motel. Hensley and the other officers drove to various motels until they recognized several of the cars at the Rodeway Inn, and they saw Gene Black enter room 152. Thinking that Black had seen him, Hensley did not attempt to procure a new search warrant. Instead, he went directly to room 152, announced his identity, and told everyone "to freeze." In an adjoining room were found a suitcase containing the stolen checkbooks, a checkwriting machine and two guns. No one claimed ownership of these items, and no inventory sheet of the seized items was ever given to defendant. Defendant was arrested, along with Thelma Bradley and another person who was subsequently released.

The court made findings of fact and conclusions of law and denied defendant's motion to suppress. The State then presented this, as well as additional evidence, to the jury. Defendant presented no evidence. He was convicted of both counts and was sentenced to two consecutive ten year terms of imprisonment. Defendant appeals.

Attorney General Edmisten, by Associate Attorney Christopher P. Brewer, for the State.

J. Lawrence Smith for defendant appellant.

ARNOLD, Judge.

[1] Defendant assigns as error the trial court's refusal to allow his motion to suppress evidence seized in the Rodeway Inn motel. He argues that his Fourth Amendment rights were violated when police officers conducted a warrantless search of his motel room and that, under G.S. 15A-974, evidence obtained as a result of the search should have been excluded. Since we do not believe the search of defendant's motel room violated his Fourth Amendment rights, we reject his argument.

The Fourth Amendment does not prohibit all searches and seizures but only those which are unreasonable. *Elkins v. United States*, 364 U.S. 206, 4 L.Ed. 2d 1669, 80 S.Ct. 1437 (1960). Whether a search or seizure is unreasonable is determined upon the facts of each individual case. *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970), *cert. denied sub nom. Reams v. North Carolina*, 404 U.S. 840, 30 L.Ed. 2d 74, 92 S.Ct. 133 (1971). In the instant case defendant argues the general rule that because the search was warrantless it was *per se* unreasonable. To that rule, however, there are exceptions. One exception to the rule is a search conducted under exigent circumstances. *See e.g. State v. Johnson*, 29 N.C. App. 698, 225 S.E. 2d 650 (1976).

From the record, it is clear that exigent circumstances were present on 29 March 1977, when Officer Hensley proceeded to search the motel room without a search warrant. He stated on *voir dire* that on 29 March 1977, he obtained a warrant to search defendant's Quality Inn motel room, but when he arrived at Quality Inn defendant had left. Hensley checked with a second informant whose past reliability in supplying correct information had been shown. Based on the information obtained from this informant Officer Hensley and the other officers checked motels until they came to the Rodeway Motel where they spotted several of the cars previously observed at the Quality Inn motel. Fearing that Gene Black, whom they had observed go into a motel room, had seen them, Hensley opted for an immediate warrantless search. We believe that the trial court's findings of fact clearly show the circumstances which made necessary the immediate search:

> "[T]hat at this point Officer Hensley was of the opinion that Black had seen and recognized him and would so advise the persons in the room of his presence; that he also knew at that time that the occupants of Rooms 52 and 53 at the Quality Inn had been advised that he and other officers had been seen in the vicinity of those rooms checking license plates from vehicles; that Officer Hensley, knowing of the type of person that he had observed going and coming from the Quality Court rooms and having knowledge that the parties had moved the previous night, having been told that the persons involved were professional criminals, and fearing that he had been recognized, was of the personal opinion that he

did not have time to obtain another search warrant, and was of the positive opinion that the person or persons being sought by him would flee . . . ."

We agree with the trial court's conclusion that defendant's constitutional and statutory rights were not violated by the search.

[2] Defendant's second argument is that the trial court erred in refusing to permit the witnesses for the State to divulge the names of the confidential informants. G.S. 15A-978 on which defendant relies reads in part:

> "*Motion to suppress evidence in superior court or district court; challenge of probable cause supporting search on grounds of truthfulness; when identity of informant must be disclosed.*—(a) A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance. The defendant may contest the truthfulness of the testimony by cross-examination or by offering evidence. For the purposes of this section, truthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.
>
> (b) In any proceeding on a motion to suppress evidence pursuant to this section in which the truthfulness of the testimony presented to establish probable cause is contested and the testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, the defendant is entitled to be informed of the informant's identity unless:
>
> (1) The evidence sought to be suppressed was seized by authority of a search warrant or incident to an arrest with warrant; or
>
> (2) There is corroboration of the informant's existence independent of the testimony in question."

Nowhere in the record of this case has defendant sought to contest the information on which the first warrant was obtained or the information which led police officers to search other motels.

Furthermore, defendant has failed to show in the record, or to argue in his brief, any prejudicial error to him.

In defendant's trial, therefore, we find

No error.

Judges MORRIS and MARTIN concur.

TEXAS WESTERN FINANCIAL CORPORATION v. IRVING MANN, D/B/A MANN'S DEPARTMENT STORE

No. 7713DC629

(Filed 16 May 1978)

1. **Rules of Civil Procedure § 52— excusable neglect—findings not required**

Though the trial court was not required, in the absence of a request, to make findings of fact on which it based its legal conclusion that there had been excusable neglect on defendant's part in failing to file answer, it would have been the better practice to do so.

2. **Rules of Civil Procedure § 60.2— excusable neglect—insufficient evidence—default judgment improperly set aside**

Evidence was insufficient to support the trial court's finding of excusable neglect on defendant's part and the trial court erred in setting aside default judgment against defendant where the only matter presented in support of defendant's motion was his unverified memorandum which alleged that "the attorney for plaintiff misrepresented to the undersigned [defendant] that he would give him an opportunity to inspect the defendant's dead files for 1973 and 1974"; defendant did not claim that plaintiff's attorney promised to delay the litigation for any specific period; defendant presented nothing to show that he did not have a sufficient opportunity to inspect his own files, which were presumably in his custody and control; in addition to the thirty day period allowed by law, plaintiff's attorney gave defendant approximately an extra month to file his answer before obtaining the default judgment; and nothing in defendant's memorandum supported his characterization of the conduct of plaintiff's attorney as misrepresentation.

APPEAL by plaintiff from *Hunt, Judge*. Judgment entered 8 June 1977 in District Court, BLADEN County. Heard in the Court of Appeals 27 April 1978.

Plaintiff commenced this civil action on 28 September 1976 by filing verified complaint in which it alleged that defendant was

indebted to it in the sum of $958.85 for merchandise sold and delivered. An itemized statement of the account was attached as an exhibit to the complaint. Plaintiff prayed for judgment that it recover from defendant $958.85 with interest. Summons was issued on 28 September 1976 and was duly served on defendant on 5 October 1976. Defendant did not file answer, request an extension of time in which to answer, or otherwise plead in response to the complaint.

Defendant's default being made to appear by affidavit of plaintiff's attorney, on 3 December 1976 the Clerk of Superior Court made entry of default against defendant and on the same date entered judgment by default against him for $958.85 with interest. Execution on the judgment was issued on 2 February 1977.

On 31 May 1977 defendant, acting *pro se*, filed a motion to set aside the default judgment, supporting his motion by an unverified memorandum in which he stated:

> The judgment in this case should be set aside because the attorney for plaintiff misrepresented to the undersigned that he would give him an opportunity to inspect the defendant's dead files for 1973 and 1974 to locate all bills submitted by plaintiff, and to show what dates each was paid. However, without knowledge of defendant, plaintiff's attorney obtained a default judgment before the investigation was completed.
>
> The defendant has reviewed all the bills and confirmed that the said bills were paid in full. Upon giving such information to plaintiff's attorney, the said attorney refused to consider the facts, stating that he already had a judgment.
>
> It is submitted that the Court should set aside the judgment because of the actions of the plaintiff's attorney and, more importantly, that nothing is owed to the plaintiff.

Plaintiff responded to defendant's motion by filing a statement signed by plaintiff's attorney in which he denied that any misrepresentation was made to the defendant. Plaintiff's attorney attached to his statement a copy of a letter dated 29 October 1976 which he had written to the defendant. The letter is as follows:

October 29, 1976

Mr. Irving Mann
Mann's Department Store
Broad Street
Elizabethtown, N.C. 28337

Re: Texas Western Financial Corporation vs. Mann's

Dear Irving:

I would appreciate your immediately giving me a copy of the cancelled check where you have paid the above named debtor, as you contended in our recent telephone conversation. Unless satisfactory proof of this can be produced for our client, we shall have no alternative but to follow through with the pending legal action in this case.

Yours very truly,

James R. Melvin

After considering defendant's motion and his memorandum in support thereof, and hearing oral argument from plaintiff's attorney and from the defendant, who was not represented by counsel, the District Court entered an order in which it found "as a fact that in this case there has been excusable neglect and meritorious defense." On these findings, the Court ordered that the default judgment be set aside. From this order, plaintiff appeals.

Moore and Melvin by James R. Melvin for plaintiff appellant.

No counsel contra.

PARKER, Judge.

Plaintiff contends that the trial judge erred in setting aside the default judgment because there was insufficient evidence from which the court could find excusable neglect on defendant's part. We agree and accordingly reverse.

"Parties who have been duly served with summons are required to give their defense that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable." 8 Strong's N.C. Index 3d, Judgments

§ 25, p. 57; *Whitaker v. Raines*, 226 N.C. 526, 39 S.E. 2d 266 (1946); *Johnson v. Sidbury*, 225 N.C. 208, 34 S.E. 2d 67 (1945); *Meir v. Walton*, 2 N.C. App. 578, 163 S.E. 2d 403 (1968). Although the cases just cited were decided under former G.S. 1-220 which has now been replaced by G.S. 1A-1, Rule 60(b)(1), the procedure under Rule 60(b) is "analogous to the former practice under G.S. 1-220," *Brady v. Town of Chapel Hill*, 277 N.C. 720, 724, 178 S.E. 2d 446, 448 (1971), and the principles announced in the case decided under former G.S. 1-220 still apply. *Doxol Gas v. Barefoot*, 10 N.C. App. 703, 179 S.E. 2d 890 (1971). Upon hearing a motion to set aside a judgment on the ground of excusable neglect, the trial court should make findings of fact from which it can determine, as a matter of law, whether excusable neglect has been shown. "Whether excusable neglect has been shown is a question of law, not a question of fact." *Equipment, Inc. v. Lipscomb*, 15 N.C. App. 120, 122, 189 S.E. 2d 498, 499 (1972). The trial court's findings of fact are final, unless exception is made that there was no evidence to support the findings of fact or that there was a failure to find sufficient material facts. *Norton v. McLaurin*, 125 N.C. 185, 34 S.E. 269 (1899). The trial court's conclusion of law, that excusable neglect has or has not been shown, is reviewable on appeal. *Ellison v. White*, 3 N.C. App. 235, 164 S.E. 2d 511 (1968).

[1] In the present case the trial court did not make any findings of fact on which it based its legal conclusion that there had been excusable neglect. Had it been requested to do so, it would have been error for the court not to have found the facts. *Sprinkle v. Sprinkle*, 241 N.C. 713, 86 S.E. 2d 422 (1955). However, absent a request it was not required to do so, G.S. 1A-1, Rule 52(a)(2), although it would have been better practice to have done so. The record in the present case does not disclose any request that the court make findings of fact.

[2] The question presented by this appeal thus becomes whether, on the evidence before it, the court could have made findings of fact sufficient to support its legal conclusion that excusable neglect had been shown. So far as the record discloses, the only matter presented in support of defendant's motion was his unverified memorandum. Even if this be accepted as competent and even if all statements therein be accepted as true, we find it insufficient as a matter of law to show excusable neglect.

The crucial allegation in defendant's memorandum, though somewhat ambiguous, is that "the attorney for plaintiff misrepresented to the undersigned [defendant] that he would give him an opportunity to inspect the defendant's dead files for 1973 and 1974." Defendant did not claim that plaintiff's attorney promised to delay the litigation for any specific period, and he presented nothing to show that he did not have a sufficient opportunity to inspect his own files, which were presumably in his custody and control. The record shows that in addition to the thirty-day period allowed by law, G.S. 1A-1, Rule 12(a)(1), plaintiff's attorney gave defendant approximately an extra month to file his answer before obtaining the default judgment. Nothing in defendant's memorandum supports his characterization of the conduct of plaintiff's attorney as misrepresentation. On his own statement, defendant simply did not give to his defense the attention which a man of ordinary prudence usually gives his important business.

In the absence of sufficient showing of excusable neglect, the question of whether defendant had a meritorious defense becomes immaterial. *Stephens v. Childers*, 236 N.C. 348, 72 S.E. 2d 849 (1952); *Whitaker v. Raines*, *supra*; *Johnson v. Sidbury*, *supra*. Because defendant presented insufficient evidence to support the trial court's conclusion of excusable neglect, the order setting aside the judgment is

Reversed.

Judges VAUGHN and WEBB concur.

FLOYD MOORE v. FIELDCREST MILLS, INC., AND MONSANTO COMPANY

No. 777SC478

(Filed 16 May 1978)

Carriers § 8.1— alleged negligence in loading of goods—summary judgment

The trial court properly entered summary judgment for defendants in an action to recover for personal injuries received by plaintiff when several large bales of acrylic fiber loaded on a trailer by defendant shipper fell on plaintiff while he was marking the bales inside the trailer at defendant consignee's unloading dock where defendants presented materials tending to show that

defendant shipper was not negligent in stacking the bales and defendant consignee did not know the bales would fall as stacked, and plaintiff relied on the mere allegations of his complaint.

Judge MARTIN dissents.

APPEAL by plaintiff from *Gaines, Judge*. Judgment entered 17 January 1977 in Superior Court, WILSON County. Heard in the Court of Appeals 9 March 1978.

Plaintiff commenced this action 23 March 1976 by the filing of a verified complaint. Plaintiff alleged *inter alia* the following: He was injured when several large bales of acrylic fiber fell while he was marking the bales inside a trailer which was parked at an unloading bay in the warehouse of the defendant, Fieldcrest Mills, Inc. A Fieldcrest employee, responsible for unloading and storing the cargo, "invited" plaintiff to mark these bales and did not warn him of any danger. The bales of fiber had been loaded on the trailer by Monsanto Company, and the trailer was sealed at that time. The employee of Fieldcrest knew that when these bales were stacked so that the length of the bales was perpendicular to the length of the trailer "the stacks of bales were unstable and would tumble over". The defendant Monsanto was negligent in stacking the bales in that manner, and defendant Fieldcrest was negligent in receiving the materials so loaded and in failing to warn plaintiff of the dangerous condition.

Depositions of plaintiff and the Fieldcrest employee who was present at the time of the injury were taken. Plaintiff picked up the trailer in Wilson, carried it to Greenville, backed it up to the dock, and opened the door in the presence of the Fieldcrest employee. Some of the bales were stacked "lengthwise", while others were stacked "crosswise". After returning from attending to a personal matter, plaintiff noted that the employee, a Mr. Boyd, had to disembark from his forklift to mark each of the bales. Plaintiff testified that he saw nothing unusual in the manner in which the trailer was loaded. While Boyd was unloading it with his forklift, plaintiff entered the trailer to mark the bales for Boyd. While Boyd was in the warehouse, several of the bales fell on plaintiff. Plaintiff said that he did not know whether the bales stacked "crosswise" or the bales stacked "lengthwise" fell on him; nor did Boyd know. Boyd testified that most shippers stacked bales of acrylic fiber "lengthwise" although Fieldcrest had re-

quested that woolen fiber be stacked "crosswise". He also testified that he had never personally known of another load of bales falling as this load had.

Defendants moved for summary judgment under Rule 56. The trial court granted summary judgment. From that judgment plaintiff appealed.

Narron, Holdford, Babb, Harrison & Rhodes, by William H. Holdford, for plaintiff appellant.

Young, Moore, Henderson & Alvis, by R. Michael Strickland, for defendant appellee Fieldcrest Mills, Inc.

Connor, Lee, Connor, Reece & Bunn, by John M. Reece, for defendant appellee Monsanto Company.

MORRIS, Judge.

Plaintiff's cause of action is grounded upon negligence. Paragraphs VII and VIII of his complaint specifically allege the negligence of the defendants. In his brief, plaintiff relies heavily upon *Honeycutt v. Bryan*, 240 N.C. 238, 81 S.E. 2d 653 (1954), which deals with a shipper's duty to load cargo in a safe manner. It is clear, however, that this duty is nothing more than the normal duty of due care. Also, plaintiff's brief characterizes his status as that of an "invitee". Again, the landowner's duty is nothing more than the duty of due care. Thus, plaintiff's complaint states only a cause of action for negligence.

Upon defendants' motion for summary judgment, they must show that there is no genuine issue as to any material fact and that they, as movants, are entitled to judgment as a matter of law. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972).

In the present case there is no genuine issue as to any material fact. The only potential conflict in the present case is whether Fieldcrest's employee Mr. Boyd "knew . . . that where the length of the bales ran with the width of the trailer as the defendant, Monsanto Company, had loaded these bales the stacks of bales were unstable and would tumble over". Plaintiff examined Boyd, and Boyd testified that the occasion of plaintiff's injury "was the only time they [a stack of bales] had fell [sic]". Boyd did testify that "bales of acrylic fiber with the plastic exterior

coating are a little slippery". Otherwise, the record is devoid of any suggestion that Boyd knew the stacks were "unstable and would tumble over".

This Court, as well as our Supreme Court, has frequently warned parties that "when the moving party presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment." *Frank H. Connor Co. v. Spanish Inns Charlotte, Limited et al*, 294 N.C. 661, 675, 242 S.E. 2d 785, 793 (1978). In this case, plaintiff only has mere allegations to support his claim. He offers no facts whatsoever to establish negligence. Where the moving party offers facts and the opposing party only offers mere allegations, there is no *genuine* issue as to a material fact.

Save for the general unsupported *allegations* in the complaint, nowhere is there even a suggestion as to how that method of stacking bales amounts to negligence. Plaintiff cannot rely upon mere allegations. He must offer facts which support his claim for relief. *Frank H. Connor Co. v. Spanish Inns Charlotte, Limited et al, supra.*

Plaintiff argues strongly that summary judgment is inappropriate in negligence cases. However, in this instance, his argument is groundless. True, in some cases, the case should go to the jury so that the jury can apply the reasonable man standard to the facts even if the facts are not disputed. *See Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E. 2d 147 (1971), *cert. den.* 279 N.C. 395 (1971). In this case, application of the reasonable man standard by the jury is unnecessary, because we find no facts even suggesting negligence. Here, there simply are no facts upon which to base the allegations of negligence. Summary judgment was properly entered against plaintiff.

Affirmed.

Judge ARNOLD concurs.

Judge MARTIN dissents.

STATE OF NORTH CAROLINA v. CHARLES SIMMONS

No. 7713SC926

(Filed 16 May 1978)

1. **Animals § 7— killing dog—criminal offense**

The killing of a dog, the property of another, without justification has long been a criminal offense in this State. G.S. 14-360.

2. **Animals § 7— killing of dog—no evidence of self-defense—failure to instruct—no error**

In a prosecution of defendant for killing a dog, the property of another, the trial court did not err in failing to instruct the jury with respect to self-defense where there was no evidence that the dogs were attacking defendant or even threatening to attack or doing anything which would make a reasonable person think they were about to attack; there was no evidence that the dogs were ferocious or vicious or that either of them had ever caused any trouble whatever; and there was no evidence that defendant thought the dog was vicious.

APPEAL by defendant from *Smith, Donald L., Judge.* Judgment entered 24 August 1977, Superior Court, COLUMBUS County. Heard in the Court of Appeals 7 March 1978.

Defendant was tried in District Court under a warrant charging that he "unlawfully, willfully, and wantonly did cruelly overdrive, mutilate and kill a dog, the property of Tylon V. Mills". He was convicted in District Court and appealed to Superior Court. There he was convicted by the jury and appeals from the judgment entered on the verdict.

His only argument on appeal is that the court failed to instruct the jury with respect to self-defense. Such facts as are necessary for decision are set out in the opinion.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders, for the State.

Ray H. Walton for defendant appellant.

MORRIS, Judge.

[1] The statute under which defendant was charged is G.S. 14-360 which provides, in pertinent part:

> "If any person shall willfully . . . kill . . . , any useful beast, fowl or animal, every such offender shall for every such offense be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. . . ."

The killing of a dog, the property of another, without justification, has long been a criminal offense in this State. *See State v. Latham*, 35 N.C. 33 (1851). In *State v. Smith*, 156 N.C. 628, 72 S.E. 321 (1911), the Court had before it on appeal a conviction for willfully killing a dog, the property of the prosecutor. The statute was substantially the same. The Court said: "It would be vain and unprofitable to discuss, for the purpose of deciding, that a dog is a living creature within the meaning of Revisal, sec. 3299 (now G.S. 14-360) under which the indictment was drawn and presented to the grand jury." *Id.* at 629. The Court discussed cases decided prior to the statute which had recognized that a dog is property and said:

> "The right to slay him cannot be justified merely by the baseness of his nature, but it is founded upon the natural right to protect person or property. He has the good-will of mankind because of his friendship and loyalty, which are such marked traits of his character that they have been touchingly portrayed both in song and story. Why, then, should he be declared an outlaw and a nuisance, and forfeit his life without any sufficient cause? This was never the law. Neither at the common law nor since the passage of our present statute prohibiting cruelty to animals can a dog be killed for the commission of any slight or trival [sic] offense (*S. v. Neal*, 120 N.C., 614); nor to redress past grievances (*Morse v. Nixon, supra* [51 N.C., 293]). As said by *Chief Justice Pearson* in the last cited case: 'It may be the killing will be justified by proving that the danger was imminent—making it necessary "then and there" to kill the hog in order to save the life of the chicken, or prevent great bodily harm.' " *Id.* at 631.

And the Court concluded:

> "It is not the dog's predatory habits, nor his past transgressions, nor his reputation, however bad, but the doctrine of

self-defense, whether of person or property, that gives the right to kill." *Id.* at 635.

[2] When these principles are applied to the case before us, it becomes necessary to determine from the evidence whether the issue of self-defense should have been presented to the jury.

There is no dispute about the fact that the prosecuting witness and defendant's brother were having a dispute over some land and, on the day in question, the two were fighting at a point on the land in dispute. Defendant, according to his testimony, was asked to go "down there" by his sister-in-law, wife of the person who was fighting with the prosecuting witness at the time of the shooting. The State's evidence was that when he saw defendant, he, the prosecuting witness was on the ground, and defendant's brother was beating and kicking him. Defendant exited from a vehicle carrying a "long-type" firearm and was running in the direction of the fight. Defendant stopped and pointed the firearm in the direction of prosecuting witness. His brother then stopped the beating and hollered to defendant to "kill them dogs". Defendant was then "some 50 yards plus" from where prosecuting witness was. Defendant called the dogs, and they started toward him. When they got some distance from him, they turned and started circling away from him, and as they turned, defendant shot and killed the dog named Silver. The dog got no closer to defendant than 40 yards.

Defendant testified that when he got to the point where he could see around the hedgerow, he saw two men in the northeast corner of the field. One was on his knees and appeared to have his hands on the ground. The other one "seemed to have his hand up on his head and his right arm holding it up in the air." He never, on that day, got any closer to that corner of the field than approximately 150 yards. He did not shoot the dog. "There is a difference in shooting and shooting at. I shot to turn the dogs off of me. I said I shot to turn the dogs off of me." At that time he was from 200 to 250 yards from the two men. The dogs were coming up beside the hedgerow from down in the southeast corner of the field. There were two "big old" dogs. He had never seen them before and did not know whose they were. He shot four times. "As to whether those dogs got anywhere near me, they were just about like from here to that deputy sheriff standing over there

and were coming right at me. That was as close as they got to me because I shot at them. I did not shoot right at them. I shot in front of them in the ground."

The court had placed in the record the following statement:

> "In the instructions to the jury the court is not going to charge on the defendant's right to kill a dog in protecting himself, there being no evidence that the defendant was under attack, but rather, the only evidence is that the dogs were proceeding in his direction."

We agree with the court. There is no evidence in the record that the dogs, or either of them, were attacking defendant or even threatening to attack, or doing anything which would make a reasonable person think they were about to attack. Nor does defendant testify that he thought they were going to attack. There is absolutely no evidence that the dogs were ferocious or vicious or that either of them had ever caused any trouble whatever. The only evidence with respect to the nature of the dog which was killed was that he was gentle and had never bitten anyone. There is no evidence that the defendant thought the dog was vicious. He said he had never seen the dogs before and did not know to whom they belonged.

The court instructed the jury that the State would have to prove, beyond a reasonable doubt, that the defendant shot a dog belonging to the prosecuting witness; that, in so doing, the defendant acted willfully and needlessly; that "the shot, if any, proximately caused the dog's death"; and the jury would have to find all these elements before they could find the defendant guilty. Under the evidence in this case, defendant was not entitled to more.

No error.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOHN LESLIE HEISER, SR.

No. 7714SC1030

(Filed 16 May 1978)

1. **Criminal Law § 80.1— medical records—doctor deceased—admission as business record—right of confrontation**

In a prosecution for child abuse, a medical record prepared during an examination of defendant's son by a physician at a child care center who was deceased at the time of the trial was admissible under the business records exception to the hearsay rule where another physician at the child care center testified that entries in such records are made by the physician as the child is examined and that he recognized the handwriting of the physician who prepared the record. Furthermore, the admission of the medical record did not constitute a violation of defendant's right of confrontation because of the death of the physician who prepared it since business records are deemed reliable and trustworthy even though the person who prepared the record is not subject to cross-examination.

2. **Criminal Law § 99.8— court's questioning of witness—no expression of opinion**

In this prosecution for child abuse, the trial judge's questioning of the child's mother was for the purpose of clarifying some confusing and contradictory testimony as to the date the child sustained a tooth injury prior to the time he was struck by defendant and did not constitute an expression of opinion in violation of G.S. 1-180.

3. **Parent and Child § 2.2— child abuse—dates alleged in civil action—proof of dates**

In this prosecution for child abuse, the trial court properly excluded cross-examination of the child's mother as to her ability to recall the dates of child abuse alleged in an earlier action for child custody and support, and the court properly instructed the jury that it was not essential that the State prove the exact date charged but must prove a date so near to the date in question that the defendant would have adequate notice of that with which he is charged.

APPEAL by defendant from *McKinnon, Judge*. Judgment entered 24 June 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 6 April 1978.

The defendant was charged in two separate warrants with child abuse, G.S. 14-318.2. The defendant pled not guilty.

Only that evidence which is necessary to dispose of the defendant's assignments of error will be set out in the opinion. Further elaboration thereon would serve no useful purpose.

The jury found the defendant guilty. Judgment was entered imposing a prison sentence of 1 year, suspended for 3 years on condition that the defendant accept certain terms of probation. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Charles J. Murray, for the State.

William A. Graham III for the defendant appellant.

HEDRICK, Judge.

[1] The defendant's first assignment of error concerns the trial court's admission of a medical record. At trial Dr. Sam Yancey was permitted over the defendant's objection to read into evidence a medical record prepared during an examination of the defendant's son at the Durham Child Care Center by Dr. Arthur London, who was deceased at the time of trial. The record challenged by this exception reads as follows:

> "Mother states child's father pulled out his hair. There is an area of baldness the size of fifty cent piece at the left vertex. No other evidence of entry. The mother was advised to talk with the father concerning child abuse law, and if there is recurrence to report it."

The defendant contends that the quoted record constitutes hearsay and does not fall within any recognized exception.

Our Supreme Court held in *Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E. 2d 326 (1962), that upon a proper foundation hospital and medical records are admissible under the business records exception to the hearsay rule. A proper foundation consists of the testimony by a witness familiar with such records and the system under which they are made that the record is authentic and that it was prepared at or near to the time of the event recorded by a person having personal knowledge of such event. *Sims v. Insurance Co., supra*; 1 Stansbury's N.C. Evidence, § 155 (Brandis Rev. 1973). This rule has recently been re-affirmed by the Court of Appeals. *Spillman v. Forsyth Memorial Hospital*, 30 N.C. App. 406, 227 S.E. 2d 292 (1976); *State v. Wright*, 29 N.C. App. 752, 225 S.E. 2d 645 (1976).

In the present case the medical record in question was offered following the testimony of Dr. Yancey, who as a physician at the Child Care Center, was familiar with such records. Dr. Yancey testified that the entries in such records are made by the physician as the child is examined. He further testified that he recognized the handwriting of Dr. London who prepared the record. This evidence clearly constituted a sufficient basis for the admission of the record. While a portion of the entry was perhaps objectionable as hearsay on hearsay, *Sims v. Insurance Co.*, *supra*, the defendant's failure to move to strike that portion renders the whole admissible. *State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354 (1963).

The defendant advances no persuasive reasoning for his contention that the record in this case does not fall within the business records exception but simply asserts that because of the death of Dr. London the admission of the record would constitute a denial of his right to confrontation. Obviously, the right to confrontation which is guaranteed by the Constitution and represented by the hearsay rule admits to many exceptions when evidence is deemed reliable and trustworthy. 1 Stansbury, *supra* § 139. Business records constitute one such exception. A former prerequisite to the application of that exception was that the person making the entries must have been dead at the time of trial. 1 Stansbury, *supra* § 155. That this rule has been relaxed is an indication of the reliability which the courts impute to such records. Accordingly, the defendant's argument is without merit.

[2] The defendant also contends that the trial judge expressed an opinion in violation of G.S. 1-180 in his questioning of a State witness. It is established that a trial judge has the right and duty to control the examination of witnesses and to ask questions tending to clarify the witness' testimony for the jury. *State v. Tinsley*, 283 N.C. 564, 196 S.E. 2d 746 (1973). In doing so, the judge must refrain from impeaching or discrediting a witness or demonstrating any hostility toward the witness thereby indirectly expressing an opinion in violation of G.S. 1-180. 1 Stansbury's N.C. Evidence, § 37 (Brandis Rev. 1973).

In the present case the defendant's wife, testifying for the State, stated on cross-examination that the child had fallen from his bed and sustained a slight tooth injury some time prior to the

date on which the defendant allegedly struck the child. This evidence was elicited to determine whether the child's tooth was loosened as a result of the defendant's striking him or as a result of the previous incident. The record reflects some inconsistency in the witness' testimony as to the approximate date of the previous incident. Thus, the trial judge intervened in the defendant's cross-examination of the witness and asked her if the child fell from the bed a few weeks or three and a half months prior to the alleged child abuse incident or whether there was more than one such incident. The witness finally responded that the incident to which she had referred occurred three and a half months prior to the defendant's striking the child and that no similar incident had occurred thereafter. It is obvious that the trial judge's questioning of the witness was solely for the purpose of clarifying some confusing and contradictory testimony. Moreover, he displayed the utmost objectivity in the performance of his duty. This assignment is overruled.

[3] Finally, the defendant excepts to the exclusion of certain evidence. On cross-examination of the defendant's wife the defendant's counsel asked the following question: "Did you put any specific dates in that complaint?" The State's objection to the question was sustained by the trial court. The defendant contends that the question was "designed to test her memory with respect to specific dates of alleged child abuse occurrences originally given to her lawyer . . . when she instituted a civil action" for custody and support of their minor children. Accepting the defendant's statement as to his purpose in asking the question, we think it was actually addressed to his wife's ability to recall the substance of a complaint in an earlier lawsuit. As such, it was clearly irrelevant to the issues of the present case.

Under this same assignment of error the defendant cites the following instruction by the trial court:

> MEMBERS OF THE JURY, I HAVE REFERRED IN EACH OF THE CASES AS TO A DATE BEING A FINDING THAT THE EVENTS MUST HAVE OCCURRED ON OR ABOUT A CERTAIN DATE. IT IS NOT ESSENTIAL THAT THE STATE PROVE THE EXACT DATE CHARGED IN A CASE OF THIS NATURE, BUT MUST PROVE A DATE SO NEAR TO THE DATE IN QUESTION THAT THE DEFENDANT WOULD HAVE ADEQUATE NOTICE OF THAT WITH WHICH HE IS CHARGED.

The defendant then submits the following argument:

> When this instruction is taken in conjunction with . . . the sustaining of an objection with respect to dates in an earlier complaint, the Court has put itself in the position of not allowing the Defendant to cross-examine the main prosecuting witness with respect to the date of alleged child abuse occurrences, thereby eliminating the Defendant's ability to provide alibi testimony, and yet at the same time is instructing the jury that it is not essential that dates be proven exactly.

We see no relation between the question asked by the defendant on cross-examination and the quoted instruction. The defendant was free to question the witness as to specific dates of child abuse incidents by questions properly addressed to that end, and the record discloses that he did so. In the quoted instruction the trial judge merely explained the law of this State. *See State v. Baxley*, 223 N.C. 210, 25 S.E. 2d 621 (1943); *State v. Lemmond*, 12 N.C. App. 128, 182 S.E. 2d 636 (1971).

We hold that the defendant received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge MITCHELL concur.

IN THE MATTER OF GLORIA SHERRY WILLIAMSON

No. 774DC579

(Filed 16 May 1978)

1. Appeal and Error § 9; Insane Persons § 1— commitment to mental hospital

Discharge of respondent from a mental hospital does not render questions challenging the involuntary commitment proceeding moot in view of the adverse consequences which could arise therefrom, including the possibility that the commitment in this case could form the basis of a future commitment.

2. Insane Persons § 1.2— threats by allegedly insane person—criminal standards inapplicable

The standards applicable to criminal threats proscribed by G.S. 14-277.1 are inapplicable to evidence of threats which might support a finding of imminent danger in an involuntary commitment proceeding.

3. Insane Persons § 1.2— finding of imminent danger to others—sufficiency of evidence

Evidence that respondent destroyed various articles of furniture coupled with evidence that she threatened physical injury and death to various members of her family was sufficient to support the court's finding that respondent was imminently dangerous to others.

APPEAL by respondent from *Barnette, Judge*. Order entered 12 May 1977 in District Court, WAKE County. Heard in the Court of Appeals 6 April 1978.

This is a special proceeding instituted by petitioner, Vicki W. Huehner, for the involuntary commitment of the respondent, Gloria Sherry Williamson. On 3 May 1977, petitioner appeared before a magistrate and signed a petition for involuntary commitment stating that the respondent was a mentally ill or inebriate person who was imminently dangerous to herself or others. The petitioner alleged in her petition as facts supporting her opinion that the respondent "has a hammer in the house and breaks everything she can find," that "[s]he told her husband that if he went to sleep she would bash his brains out," and that "[s]he has threaten [sic] to kill her Daughter, Grand Daughter and Sister." Based on this petition, the magistrate issued an order directing a law enforcement officer to take the respondent into custody for a preliminary examination by a qualified physician in accordance with the provisions of G.S. 122-58.4(a). The custody order was executed, and the respondent was examined by a physician who determined that the respondent should be detained pending a hearing in the District Court. The respondent was then transported to the Dorothea Dix Hospital where she was admitted on the involuntary commitment petition.

On 12 May 1977 a hearing was conducted pursuant to G.S. 122-58.7 before a District Court Judge at the Dorothea Dix Hospital. At the hearing, the State introduced into evidence the evaluation of a physician from the Dorothea Dix Hospital which included the following:

> Indications for Mental Illness or Inebriacy: Impulsive, restless, very dysphoric, irritable, Presents pressured speech, circumstancial [sic] thoughts, labile emotions. Socially appropriate, conventional, yet unable to admit to her emotional unrest. Very antagonistic about involuntary admission, refuses treatment in the hospital.

The State then presented the testimony of Teresa Williamson, a daughter of the respondent, who testified as follows:

> I went to Clinton the next morning after my exam and found mother on her knees on the kitchen floor cleaning up glass. The television tube in the living room was busted, the telephone was laying on the floor, having been cut away from the wall, and glass was all over the living room, (glass from the television was around the area of the TV, some hurricane lamps were busted, along with an ashtray and a stool from the kitchen.) The iron was in the middle of it.
>
> I asked mother what happened. At first she did not answer, but then said that my father was next door. My father came in and mother continued cleaning up. I again asked what happened and mother responded that she had broken the TV. When asked about the telephone, mother became excited, stopped cleaning for a minute, said she cut the phone and had broken some of the glass. . . .
>
> On the phone the night before, mother had threatened to kill my father and aunt.

The petitioner, another daughter of the respondent, testified that during a telephone conversation the respondent had threatened to kill her and her son.

The respondent offered her own testimony in which she denied making any of the alleged threats and stated that her husband had broken the various items of furniture.

At the conclusion of the hearing, the trial judge entered a finding incorporating the physician's report by reference and further found "that the respondent did break the television set, lamps, various and sundry cords that caused the house to be in disarray," and "did threaten her husband, daughter and an aunt." The court then found that "[r]espondent is suffering from manic-

depressive psychosis, manic phase and is imminently dangerous to others by reason thereof." Based on these findings, the court ordered that the "respondent be committed to Dorothea Dix Hospital for a period not to exceed 30 days." Respondent appealed.

Attorney General Edmisten, by Assistant Attorney General Isaac T. Avery III, for the State.

Judith L. Kornegay for the respondent appellant.

HEDRICK, Judge.

[1] We note at the outset that it appears in the respondent's brief that she has been officially discharged from the mental health facility by order of her psychiatrist. However, it is established that her discharge does not render questions challenging the involuntary commitment proceeding moot in view of the adverse consequences which could arise therefrom, including the possibility that the commitment in this case could form the basis of a future commitment. *In re Hatley*, 291 N.C. 693, 231 S.E. 2d 633 (1977).

The controlling statute with respect to involuntary commitment proceedings, G.S. 122-58.7(i), requires the trial court to find "by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others." The two distinct ultimate facts of (1) mental illness or inebriacy and (2) imminent danger must be supported by facts which are found from the evidence and recorded by the District Court. *In re Hogan*, 32 N.C. App. 429, 232 S.E. 2d 492 (1977).

The respondent in this case does not challenge the court's finding of mental illness based on the physician's examination. In her sole assignment of error brought forward and argued in her brief, she contends that the ultimate finding that the respondent is "imminently dangerous to others" is not supported by the facts recorded in the order.

[2] Pursuant to this assignment, the respondent apparently contests the admissibility of her threats as evidence that she was dangerous. She seeks to impose the standards applicable to criminal threats proscribed by G.S. 14-277.1 to evidence of threats which might support a finding of imminent danger in an involun-

tary commitment proceeding. Suffice it to say that the fundamental differences between a criminal charge based entirely on threats and an involuntary commitment in which threats merely serve as some evidence of the imminent dangerousness of the person weigh against the use of such strict standards in the latter case.

[3] In our opinion, evidence that the respondent destroyed various articles of furniture coupled with evidence that she threatened physical injury and death to various members of her family provides clear, cogent and convincing proof that her mental condition posed an imminent danger to others. Thus, we hold that the facts found by the trial court support the ultimate finding that the respondent "is imminently dangerous to others."

Affirmed.

Chief Judge BROCK and Judge MITCHELL concur.

RONALD STEPHEN CARDWELL v. SARA LINEBERGER WARE AND ROBERT H. WARE, JR.

No. 7721SC571

(Filed 16 May 1978)

1. **Witnesses § 5— prior out-of-court statement—competency for corroboration**

The trial court erred in excluding a witness's testimony on redirect examination that he told a private investigator one month after the accident in question that he was almost positive that he saw plaintiff's turn signal operating, since the testimony was competent to corroborate his testimony on direct examination concerning his observation of the turn signal.

2. **Automobiles § 80.2— making left turn—failure to see movement could be made safely—contributory negligence**

In an action to recover for personal injuries sustained in a collision between plaintiff's motorcycle and defendants' automobile, plaintiff's evidence disclosed that he was contributorily negligent as a matter of law in making a left turn where it showed that, even though plaintiff may have given a turn signal, plaintiff failed to see defendants' automobile approaching from the rear, defendants' automobile was practically alongside plaintiff as he started his turn, and plaintiff thus failed to make sure that his movement could be made in safety.

APPEAL by plaintiff from *Lupton, Judge*. Judgment entered 24 February 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 5 April 1978.

Plaintiff instituted this civil action to recover damages for personal injuries sustained in a collision between his motorcycle and defendants' automobile, allegedly caused by the actionable negligence of defendants.

Defendants filed answer, denying any negligence on their part and pleading in bar of plaintiff's action the contributory negligence of plaintiff.

Plaintiff introduced evidence tending to show that at approximately 10:30 a.m. on 27 July 1975, he was operating his motorcycle in the southbound lane of Main Street in Winston-Salem. Main Street, a two-lane road with a broken line down the middle, runs north-south and is intersected by Arnold Avenue which runs east-west. As plaintiff approached Arnold Avenue, he turned on his left turn signal, checked his rear view mirrors and began turning left. Plaintiff's front tire was in Arnold Avenue when he was struck by defendants' automobile being driven by defendant Sara Ware who was attempting to pass plaintiff. Injuries to plaintiff's person were severe and resulted in the amputation of his left leg below the knee.

Defendants' evidence tended to show that on the day in question, defendant Sara Ware was proceeding south on Main Street in the family automobile when she came up behind plaintiff's motorcycle. She followed the motorcycle for an undetermined distance at 20 m.p.h. until she came upon a straight stretch of road and decided to pass. Without blowing her horn, defendant pulled into the northbound lane and accelerated to approximately 35 m.p.h. As she drew almost even with plaintiff's motorcycle, it began, without signal or other warning, to turn left toward defendants' car. Mrs. Ware slammed on brakes and veered to her left, but was unable to avoid colliding with plaintiff. The collision caused a dent in the right front fender of defendants' car.

The jury found both plaintiff and defendant negligent, thereby denying recovery to plaintiff. Judgment was entered in accordance therewith. Plaintiff appealed to this Court.

Morrow, Fraser and Reavis, by John F. Morrow and Bruce C. Fraser, for the plaintiff.

Womble, Carlyle, Sandridge & Rice, by Grady Barnhill, Jr. and Keith W. Vaughan, for the defendants.

MARTIN, Judge.

[1] Plaintiff assigns as error the trial court's refusal to allow one of plaintiff's witnesses to testify regarding his out-of-court statement to a private investigator one month after the collision.

Upon vigorous cross-examination, and contrary to his testimony on direct examination, plaintiff's witness Gary Myers expressed uncertainty as to whether he had actually seen plaintiff's turn signal operating just prior to the time of the collision. In an effort to bolster Myers' earlier testimony, plaintiff's counsel sought on redirect to elicit the substance of an earlier statement by witness Myers relative to his observation of the turn signals. This testimony, if allowed, would have revealed that Myers told a private investigator one month after the accident that he was "almost positive" he saw plaintiff's turn signal operating. The trial court sustained defendants' general objection to this series of questions. While we do not concur with plaintiff's contention that this evidence was admissible under the rules pertaining to refreshing the memory of a witness, we feel the challenged evidence was competent to corroborate Myers' testimony on direct examination relative to the turn signal as it tended to show that Myers made a prior statement to the same effect.

The admissibility of a witness's prior consistent statements to corroborate his testimony at trial is well established in the law of this State. *State v. McLawhorn*, 270 N.C. 622, 155 S.E. 2d 198 (1967); 1 Stansbury's N.C. Evidence, §§ 49-52 (Brandis Rev. 1973). Indeed, the witness himself is competent to testify to his prior consistent statements. *Burnett v. R.R.*, 120 N.C. 517, 26 S.E. 819 (1897). Accordingly, the trial judge's exclusion of the subject testimony was error. However, for the reasons set forth below, this error does not present grounds for reversal.

[2] In a cross-assignment of error, defendants contend that the trial court erred in denying defendants' motion for directed verdict at the close of plaintiff's evidence and at the end of all the

evidence in that the evidence, taken in the light most favorable to plaintiff, established plaintiff's contributory negligence as a matter of law. We must agree.

Our courts have consistently held that a driver of any vehicle upon a highway, intending to make a left turn, has a duty to exercise reasonable care to avoid causing injury to a following vehicle by keeping a proper lookout, by giving proper signals of his intention, and by keeping his vehicle under control. *Clarke v. Holman*, 274 N.C. 425, 163 S.E. 2d 783 (1968); *Gasperson v. Rice*, 240 N.C. 660, 83 S.E. 2d 665 (1954); *Ervin v. Mills Co.*, 233 N.C. 415, 64 S.E. 2d 431 (1951). Moreover, the giving of appropriate signals does not necessarily relieve the driver of the duty also to make proper observation of the movement of the vehicles approaching from the rear. *Ervin v. Mills Co., supra.* To the same effect is G.S. 20-154, a safety statute which prescribes in pertinent part that the driver of any vehicle upon a highway "before starting, stopping or turning from a direct line shall first see that such movement can be made in safety. . . ."

In the instant case, evidence adduced at trial showed that plaintiff's motorcycle was equipped with two rear view mirrors through which he had an unobstructed view of the road behind him for a distance of approximately seven hundred (700) feet. Plaintiff stated that he checked both mirrors and did not see any cars behind him as he traveled down Main Street or at anytime before the collision. Yet the undisputed evidence disclosed that the point of impact was the right front fender of the automobile between the headlight and right front wheel. This indicates that defendants' automobile was practically alongside plaintiff as he started his turn. Plaintiff's failure to see defendants' automobile and to make sure that his movement could be made in safety, under the circumstances of this case, amounts to contributory negligence as a matter of law for which the jury verdict must be vacated and a verdict directed as a matter of law in defendants' favor.

The cause is remanded with directions that judgment be entered as a matter of law in accordance with this opinion.

Judges MORRIS and ARNOLD concur.

ROBERT M. McBRIDE v. APACHE CAMPING CENTER, INC., AND BOBBY DEWAYNE TALBERT

No. 7721SC198

(Filed 16 May 1978)

1. **Damages § 3.5— breach of contract—lost profits recoverable**

N. C. courts have often held that lost profits are a proper subject of recovery for breach of contract where it is reasonably certain that such profits would have been realized except for the breach, the amount of such profits can be ascertained and measured with reasonable certainty from the evidence presented, and such profits may be reasonably supposed to have been within the contemplation of the parties at the inception of the contract.

2. **Damages § 16.3— lost profits—evidence insufficient—consideration by jury improper**

In an action to recover damages for breach of contract to repair plaintiff's motor home which he used in his business of raising, breeding and showing dogs, the trial court erred in allowing the jury to consider possible lost profits as an element of damages, since the evidence of lost profits consisted of testimony by an expert in small business cost accounting concerning the probable success of plaintiff's dogs at shows, the increased hiring out of plaintiff's dogs for stud services as a result of these successes, and the ability of plaintiff's female dogs to bear litters of puppies to be sold in a general market susceptible to fluctuations, and any estimate of plaintiff's expected profits based on such evidence would be based solely on speculation.

APPEAL by defendant Apache Camping Center, Inc. from *Collier, Judge*. Judgment entered 29 October 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 13 January 1978.

Plaintiff instituted this civil action to recover damages for the alleged failure of defendants properly to perform their contract to repair plaintiff's 1973 Dodge Pace-Arrow Motor Home [hereinafter "motor home"].

The evidence adduced at trial tended to show that plaintiff and his wife Dr. Alyce McBride, a veterinarian by profession, owned and operated a business which consisted of raising, breeding and showing miniature schnauzers. As an integral part of the business, plaintiff owned a motor home specially outfitted for transporting his dogs to American Kennel Club sanctioned dog shows up and down the east coast.

In November 1973 the motor home was extensively damaged in an automobile collision. In early December plaintiff entered

into a contract with defendant Apache Camping Center for repair of the damaged motor home wherein defendant was to pick up the motor home once the necessary parts became available and to repair and return it to plaintiff within two weeks thereafter.

Defendant Apache took possession of the motor home before the necessary parts arrived and retained possession from early December 1973 until July 1974, except for a brief period in March 1974 when plaintiff's wife used the motor home to honor a previous commitment. During this period, plaintiff contacted defendant Apache through its agents on a weekly basis and was repeatedly assured that the necessary parts were expected any day and repairs would be completed within the week.

In July 1974 plaintiff demanded return of the motor home and used it for a year thereafter, although it was in an incomplete state of repair.

A jury trial was had on plaintiff's action before Judge Collier. At the end of plaintiff's evidence, the individual defendant Bobby Talbert was dismissed from the action pursuant to a directed verdict entered in his favor. The jury returned a verdict in favor of plaintiff awarding him $4,000.00 for damages arising out of the breach of contract. Defendant appealed.

David B. Hough, for the plaintiff.

Hatfield and Allman, by J. W. Armentrout, for the defendant.

MARTIN, Judge.

This appeal deals solely with the determination of damages in the instant case and, through the several assignments of error brought forward by defendant, raises the question of the propriety, upon the evidence presented, of submitting to the jury the issue of damages without restriction as to the alternative methods to be considered in computing the same.

In the instant case, plaintiff sought to place before the jury three alternative methods for computing the measure of damages —loss of profits, loss of use of the motor home and diminution in value of the motor home. Defendant, through its motions for directed verdict, attempted to limit the jury's consideration of

these various methods of computation to diminution in value only. These motions were denied and the issue of damages was submitted to the jury with a general instruction encompassing each of the three alternative methods of computing damages.

Defendant now contends that the trial court erred in denying its motion for a directed verdict and allowing the jury to consider possible lost profits as an element of damages. It argues that plaintiff's evidence provides an insufficient basis from which lost profits can be reasonably determined. We are constrained to agree.

[1] Our courts have often held that lost profits are a proper subject of recovery for breach of contract where it is reasonably certain that such profits would have been realized except for the breach, the amount of such profits can be ascertained and measured with reasonable certainty from the evidence presented, and such profits may be reasonably supposed to have been within the contemplation of the parties at the inception of the contract. *Perkins v. Langdon*, 237 N.C. 159, 74 S.E. 2d 634 (1953); *Gouger & Veno, Inc. v. Diamondhead Corp.*, 29 N.C. App. 366, 224 S.E. 2d 278 (1976). Evidence of these essential factors must be sufficiently specific so as to provide a factual basis from which damages can be reasonably determined; evidence permitting no more than speculation or conjecture is insufficient. *Weyerhaeuser Co. v. Supply Co.*, 292 N.C. 557, 234 S.E. 2d 605 (1977). *Tillis v. Cotton Mills*, 251 N.C. 359, 111 S.E. 2d 606 (1959).

[2] In the instant case, plaintiff's evidence of lost profits consisted of the testimony of Jack Ferner, an expert in small business cost accounting. His projections as to probable lost profits sustained by plaintiff as a result of the unavailability of the motor home were based upon such factors as the probable success of plaintiff's dogs at shows, the increased hiring out of plaintiff's dogs for stud services as a result of these successes, and the ability of plaintiff's female dogs to bear litters of puppies to be sold in a general market susceptible to fluctuations. We are of the opinion that this evidence provides no basis for an award of damages for lost profits, since any estimate of plaintiff's expected profits must on the evidence presented, be based solely upon speculation. Thus, it was error to allow the jury to consider possible lost profits as an element of damages and the verdict returned must be vacated.

In reaching this decision, we are not inadvertent to the competent evidence of other pecuniary losses sustained by plaintiff as a natural and probable result of defendant's breach, including the expense of hiring professional dog handlers and the diminution in fair market value of the motor home as a result of defendant's failure properly to repair it. However, because an improper element of damages was placed before the jury and the jury's verdict provides no basis for ascertaining which of the several methods of computing damages it relied upon, a partial new trial as to the issue of damages must be awarded. In this respect, we note that an appellate or trial court has discretionary authority to award such a partial new trial when it is clear that the error in assessing damages did not affect the determination of the issue of liability. *See Robertson v. Stanley*, 285 N.C. 561, 206 S.E. 2d 190 (1974); *Crawford v. Manufacturing Co.*, 88 N.C. 554 (1883).

For the reasons indicated, the judgment is vacated and the cause is remanded for a new trial on the issue of damages.

Remanded for partial new trial.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. HERBERT RICHARDSON

No. 778SC920

(Filed 16 May 1978)

1. **Criminal Law § 34.7— narcotics offenses—prior sale—competency to show intent, modus operandi**

In a prosecution for possession of marijuana with intent to sell and sale of marijuana, testimony by the officer who purchased the marijuana from defendant that he purchased marijuana from defendant ten days before the occasion in question and defendant told him he could come back for more marijuana at any time was relevant to show the relationship between the witness and defendant, the modus operandi, and guilty knowledge.

2. **Criminal Law § 117.3— purchase of marijuana—undercover officer—no interested witness as matter of law**

In a prosecution for possession of marijuana with intent to sell and sale of marijuana, the trial court was not required to instruct that the undercover officer who purchased marijuana from defendant was an interested witness as a

matter of law, and the court properly instructed the jury that the interested witness rule would apply if the jury determined that the officer was an interested witness.

APPEAL by defendant from *Cowper, Judge.* Judgments entered 27 July 1977, in Superior Court, WAYNE County. Heard in the Court of Appeals 7 March 1978.

Defendant pled not guilty to charges of (1) possession of marijuana with intent to sell and deliver, and (2) sale and delivery of marijuana in excess of five grams to Police Officer E. L. Burton on 27 February 1977. Defendant was found guilty as charged and appeals from judgments imposing concurrent sentence of two to three years in prison.

The State's evidence tended to show that Officer Burton, employed as an undercover agent, went to defendant's residence in Goldsboro and paid defendant $10.00 for marijuana. He was accompanied by Air Force Sergeant Glen Hockaday, who did not observe the transaction, but Burton showed the marijuana to him when they returned to Hockaday's home. The marijuana weighed five grams.

Defendant offered no evidence.

Attorney General Edmisten by Associate Attorney Sarah Lee Fuerst for the State.

Hulse and Hulse by Herbert B. Hulse for defendant appellant.

CLARK, Judge.

[1] Officer Burton, over defendant's objection, testified that he had purchased marijuana from defendant on 17 February 1977 for $20.00, and that defendant told him he could come back for more marijuana at any time. Defendant contends that this evidence was not relevant to the alleged drug violations ten days thereafter in the case *sub judice.*

It is an established rule that evidence of other offenses at other times, even though they are of the same nature as the one charged, is inadmissible for the purpose of showing the commission of the particular crime charged. *State v. McClain,* 240 N.C.

171, 81 S.E. 2d 364 (1954). But evidence of other offenses is admissible if it tends to prove any other relevant fact even though it shows defendant to be guilty of an independent crime. *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969).

In drug cases, evidence of other drug violations is relevant and admissible if it tends to show plan or scheme, disposition to deal in illicit drugs, knowledge of the presence and character of the drug, or presence at and possession of the premises where the drugs are found. *State v. Sink*, 31 N.C. App. 726, 230 S.E. 2d 435 (1976); *State v. Barfield*, 23 N.C. App. 619, 209 S.E. 2d 809 (1974); *State v. Logan*, 22 N.C. App. 55, 205 S.E. 2d 558 (1974); Anno., 93 A.L.R. 2d 1097 (1964).

If requested by defense counsel, the trial judge should instruct the jury as to the limited purpose for which the evidence of other crimes is admitted, and warn the jury not to consider it for any other purpose. There was no such request in the case *sub judice*. We find the evidence of the prior marijuana sale to the undercover officer, including the invitation to return, relevant in that it tends to show the relationship between them, the modus operandi, and guilty knowledge.

[2] The defendant challenges the following instruction to the jury: ". . . with regard to the testimony of the witness, Burton, if you find that he is interested in this case as an interested witness in the case, I instruct you . . . ." Defendant argues that the trial judge should have instructed that Burton, an undercover officer, was an interested witness as a matter of law, relying on *State v. Love*, 229 N.C. 99, 47 S.E. 2d 712 (1948); *State v. Boynton*, 155 N.C. 456, 71 S.E. 341 (1911). We do not find support for defendant's position in these cases. In *Boynton*, the trial court rejected defendant's requested instruction that "the testimony of a detective must be scrutinized with unusual caution," and, instead, instructed that the jury should scrutinize the evidence to determine if a private detective or a public officer is a biased witness. In *Love*, the *Boynton* case is cited and quoted. For a collection of cases and discussion of the interested witness rule, see 1 Stansbury, N.C. Evidence (Brandis Ed.) § 45, p. 124, fn. 28.

We find little support in case law for the proposition that the trial court is required to charge that a police officer or any other witness is an interested witness as a matter of law. Any expres-

sion of opinion of the court as to the credibility of a witness or any testimony violates G.S. 1-180. The trial court is required to charge on the interested witness rule when requested to do so if justified by the evidence; the court *may* do so without request but the charge must be justified. In *State v. Morgan*, 263 N.C. 400, 139 S.E. 2d 708 (1965), it was held that, where defendant was a customer of his witnesses, the question of whether the court should have charged on the interested witness rule was found to be a close one, but it was held that defendant was not prejudiced by such instruction since bias need not prevail over the obligation of a solemn oath.

There is no hard and fast rule requiring the trial court to charge the defendant is an interested witness, but the court may do so. *State v. Holland*, 216 N.C. 610, 6 S.E. 2d 217 (1939). However, the court, though it charges that defendant is an interested witness, is not required to find that any other witness is *per se* an interested witness. In *State v. Turner*, 253 N.C. 37, 116 S.E. 2d 194 (1960), the court found reversible error by the trial court in charging that the testimony of defendant's brother-in-law was to be carefully scrutinized in light of his interest. And in *State v. Williams*, 6 N.C. App. 611, 170 S.E. 2d 640 (1969), the court held it was not error for the trial court to charge that defendant was an interested witness but fail to charge that the prosecuting witness was interested.

We conclude that the trial court did not err in failing to find that the undercover officer was an interested witness *per se*, and that the jury was properly instructed that the interested witness rule would apply if the jury determined that he was an interested witness.

We have carefully examined the defendant's other assignments of error and find them to be without merit, and discussion of them would serve no useful purpose.

No error.

Judges BRITT and ERWIN concur.

STATE OF NORTH CAROLINA v. REX CARSWELL

No. 7725SC876

(Filed 16 May 1978)

1. **Constitutional Law § 48— effective assistance of counsel**

The record does not disclose that defendant was denied the effective assistance of counsel in his trial for breaking and entering and larceny.

2. **Larceny § 7.13— moving air conditioner four to six inches—insufficient evidence of larceny**

Evidence that defendant moved a heavy window air conditioner approximately four to six inches just off the base on which it was sitting was insufficient evidence of a taking and asportation to support a conviction of larceny.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 16 November 1976 in Superior Court, BURKE County. Heard in the Court of Appeals 27 February 1978.

Defendant was indicted for breaking or entering and larceny, convicted by a jury on both charges, and sentenced to consecutive terms of ten years and five years respectively. State's case rested primarily upon the testimony of Donald Morgan who testified that on the night of 18 April 1976 while working as a security guard at a motel under construction, he found certain motel room doors pried open and an air conditioning unit in one room "pried up." Later at approximately 10:30 p.m. while on the second level, he observed the defendant and another man come out of the woods and open the door to a motel room on the first level. The witness was 50 to 75 feet away from the room. This room had an air conditioner which could be seen from the outside in the bottom part of the window. The witness, Morgan, saw the men "scooting the conditioner from its position"; the unit was moved "approximately four inches just off the base it was sitting on." The unit was moved towards the door but was not removed from the room before the men put it down and started to another room. The witness, Morgan, stopped the men as they were entering the second room and called the sheriff. Defendant's trial counsel stated that he had "a motion," which must have been a motion for judgment as of nonsuit, but the judge promptly denied it. Defendant's evidence tended to show that he and the other man had been drinking, and they went to the motel to sleep but did not touch

the air conditioning unit. The room smelled bad, and they left. At that point, Morgan stopped them. Defendant appealed both cases.

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

Richard W. Beyer, for defendant appellant.

ERWIN, Judge.

[1] We first consider defendant's contention that he was denied the effective assistance of counsel at his trial. Justice Branch, speaking for our Supreme Court in *State v. Sneed*, 284 N.C. 606, 612, 201 S.E. 2d 867, 871 (1974), stated the test to be applied: ". . . the incompetency (or one of its many synonyms) of counsel for the defendant in a criminal prosecution is not a Constitutional denial of his right to effective counsel unless the attorney's representation is so lacking that the trial has become a farce and a mockery of justice." (Citations omitted.) With the benefit of hindsight, a review of virtually any record in a criminal case will suggest that different tactics might have been employed or that errors of judgment might have been committed by trial counsel. Suffice it to say that the record before us does not disclose a denial of defendant's right to the effective assistance of counsel.

[2] Defendant's remaining contention presents an intriguing question: Was the State's evidence as to larceny sufficient for submission to the jury and sufficient to support a verdict thereon? "Common-law larceny is the felonious taking by trespass and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use." 8 N.C. Index 3rd, Larceny § 1, p. 271.

The contention of defendant pertains to the elements of taking and carrying away, or asportation, of larceny. Even the slightest change of position of the object, if it is moved from its original position, is sufficient asportation; it need not have been removed from the premises in which it was kept. *State v. Green*, 81 N.C. 560 (1879); *State v. Walker*, 6 N.C. App. 740, 171 S.E. 2d 91 (1969). But the object must be moved from its original position for there to be sufficient asportation. *State v. Alexander*, 74 N.C. 232 (1876); *State v. Jones*, 65 N.C. 395 (1871).

This Court stated in *State v. Walker*, *supra*, at p. 743, that:

"The fact that the property may have been in defendant's possession and under his control for only an instant is immaterial if his removal of the rings from their original status was such as would constitute *a complete severance from the possession of the owner*." (Emphasis added.)

See also State v. Jackson, 65 N.C. 305, 308 (1871), where our Court held that a sufficient showing of asportation is made ". . . if the goods are removed from the place where they were, and the felon has for an instant *the entire and absolute possession of them*." (Emphasis added.)

We do not believe that moving a heavy air conditioner approximately four to six inches was a sufficient taking and asportation to take this case to the jury on the charge of larceny. Our reading of the cases leads us to the conclusion that, even if only for an instant, there must be a complete severance of the object from the owner's possession, to such an extent that the defendant has absolute possession of it. The cases appear to have, in effect, merged the elements of taking and asportation, but here the problem with the State's case is that the evidence of asportation does not also constitute sufficient evidence of taking. Further, we note that the *Jackson*, *Green*, and *Walker* cases, *supra*, involved the slight movement of small objects, and in those cases, convictions were upheld. *Jones*, *supra*, on the other hand, dealt with the turning of a barrel of turpentine from a standing position to its side; this was held to be an insufficient asportation, and clearly, we think, an insufficient taking. We do not believe that the result would have been different if the barrel had been moved a few inches while upright.

As to the felonious breaking or entering conviction, we find

No error.

For the reasons stated, the larceny conviction is

Reversed.

Chief Judge BROCK and Judge VAUGHN concur.

JANIE LEE WYATT v. DEZER PRUITT IMES

No. 7723SC593

(Filed 16 May 1978)

Torts § 7.2— release of insurer—no mutual mistake

In an action to recover for personal injury and property damages suffered by plaintiff in an automobile accident with defendant where defendant pled in bar of plaintiff's recovery a release signed by plaintiff, the trial court properly entered summary judgment for defendant, since plaintiff's contention that her signing of the release was induced by a mistake of fact as to the extent of her injuries was unsupported by the evidence which did not show that the mistake was mutual but which did show that plaintiff signed the release after discussing estimates of her damages with an insurance adjuster and that plaintiff, on several occasions subsequent to the signing of the release, indicated her desire to settle for the amount offered by the insurance company.

APPEAL by plaintiff from *Crissman, Judge.* Order entered 31 May 1977, in Superior Court, WILKES County. Heard in the Court of Appeals 7 April 1978.

Plaintiff filed complaint seeking to recover for personal injuries and property damage received in an automobile accident with defendant. Defendant answered, denying negligence, asserting that plaintiff and defendant's representative reached an agreement on 18 December 1975, that Six Hundred Fifty Dollars ($650) was sufficient to settle plaintiff's claim and pleading, in bar of plaintiff's recovery, a release signed by the plaintiff. Plaintiff, pursuant to G.S. 1A-1, Rule 12(f), moved to strike from defendant's answer the plea in bar and, in support of her motion, alleged that she returned the check for $650 made to her by defendant's insurer, and, therefore, that she had not completed the release. Her motion to strike was denied.

Plaintiff's reply alleged that, while hospitalized between 23 December 1975 and 2 January 1976, she had received the draft from the insurance company. Under advice of her attorneys, plaintiff returned the check to the insurance company.

Pursuant to G.S. 1A-1, Rule 56, defendant moved for summary judgment and submitted an affidavit by J. M. Wise, an insurance adjuster, who stated that he negotiated a settlement with plaintiff on 18 December 1975; that he and plaintiff discussed all personal injuries and property damages arising out of the acci-

dent on 8 December 1975; that plaintiff executed a release in full and complete settlement; and that after the execution of the release, but prior to the receipt of the draft, plaintiff contacted Wise on several occasions to indicate her desire to accept the draft as quickly as possible. Plaintiff's response to defendant's motion for summary judgment stated that, at the time the release was signed, plaintiff was mistaken as to the full extent of her injuries. Defendant's motion for summary judgment was granted and plaintiff appeals.

McElwee, Hall & McElwee, by John E. Hall and William C. Warden, Jr., for plaintiff appellant.

Pope, McMillan & Bender, by Constantine H. Kutteh II, for defendant appellee.

ARNOLD, Judge.

Plaintiff's contention in this appeal is that it was error to grant summary judgment for defendant. Her position may evoke sympathy from the Court, but it is without basis in logic or law. Plaintiff admitted signing the release with the insurance company, but she contends that her signing was induced by a mistake of fact as to the extent of her injuries. While our courts have held that a release from liability for personal injury may be set aside for mutual mistake of fact, *Cheek v. R.R.*, 214 N.C. 152, 198 S.E. 626 (1938), there is nothing in the instant case to suggest that the mistake was mutual. The North Carolina Supreme Court has broadly outlined factors to be considered in determining whether a release was executed under a mutual mistake of fact:

> ". . . [A]ll of the circumstances relating to the signing must be taken into consideration, including the sum paid for the release. A factor to be considered in cases of this kind is whether the question of liability was in dispute at the time of the settlement. The source or author of the mistake is of no consequence if the parties in good faith relied on it, or were misled by it, and the releasor was thereby induced to release a liability, which he would not otherwise have done."

Caudill v. Manufacturing Co., 258 N.C. 99, 103, 128 S.E. 2d 128, 131 (1962), quoting 76 C.J.S., Release, s. 25a, pp. 645-47.

In the case *sub judice*, the plaintiff offered no evidence that indicates any mistake or misrepresentation by defendant, through J. M. Wise. Both the deposition of plaintiff and the affidavit of Wise indicate that plaintiff and Wise discussed the estimates of damage to plaintiff's automobile and the medical bills plaintiff had received. The release plaintiff signed stated that plaintiff did "release, acquit and discharge the said Dezer D. Imes from all claims and demands, actions and causes of action, damages, cost, loss of service, expenses and compensation on account of, or in any way growing out of bodily injuries and property damage resulting *or to result* from . . . [the] accident . . . ." [Emphasis added.]

Furthermore, according to the undisputed affidavit of J. M. Wise, plaintiff on several occasions indicated her desire to settle for $650. While there is evidence tending to support the fact that plaintiff's damages ultimately came to $3000, we cannot say that the sum of $650 was an unreasonable amount to pay for the release at the time the release was signed. Finally, plaintiff at no time has alleged that she was unable to read, that she was misled by defendant, or that the release failed to express the intention of the parties at the time of the settlement. *See Beeson v. Moore*, 31 N.C. App. 507, 229 S.E. 2d 703 (1976), *cert. denied*, 291 N.C. 710, 232 S.E. 2d 203 (1977), a case in which summary judgment for defendant was affirmed even though plaintiff argued that he mistakenly believed that the release he signed was solely for automobile damage and not personal injury.

We find that the trial court properly granted defendant's motion for summary judgment.

Affirmed.

Judges MORRIS and MARTIN concur.

HAZEL MARTIN REDMAN v. HOWARD GRAYSON NANCE

No. 7723SC468

(Filed 16 May 1978)

Automobiles § 76.1— striking car from rear at stop sign—absence of contributory negligence

In this action to recover for injuries sustained in a rear-end collision, defendant's testimony that plaintiff, after having stopped before entering a highway, then proceeded forward a few feet and stopped again, and that he was not looking at plaintiff's car after it moved forward and struck it from the rear was insufficient to support the court's submission of an issue of contributory negligence to the jury.

APPEAL by plaintiff from *Crissman, Judge.* Judgment entered 16 March 1977 in Superior Court, WILKES County. Heard in the Court of Appeals 8 March 1978.

Plaintiff brings this action to recover for injuries sustained in a rear-end collision. Defendant denied negligence in striking the rear of plaintiff's vehicle and pled contributory negligence.

At trial, plaintiff's evidence tended to show that about midnight on 5 June 1976 plaintiff left the parking lot of Chatham Manufacturing Company and stopped at a stop sign with her headlights and brake lights on at the entrance to Highway 268, where she waited for traffic to clear. She intended to enter the highway and turn right. Plaintiff testified that the stop sign was about four or five feet from the highway, that she stopped there and did not go forward, that she was hit from behind, and her car was knocked two or three feet into the highway. Officer Simmons investigated and testified that plaintiff's vehicle was only about two feet into the highway, that defendant told him that plaintiff had appeared to him to start out into the highway but had stopped before getting to the highway. Plaintiff sustained injury to her neck and back.

Defendant testified that plaintiff stopped, then moved into the highway and stopped again, suddenly and for no reason, causing him to hit her. He admitted that he was not looking ahead at plaintiff's car after he saw her move. ". . . I looked up to my left to see there wasn't anything else coming, I didn't see anything, so I started easing on before I looked back around. That is where I

made my mistake. . . . That is when I bumped into her." Defendant testified that plaintiff's car was "two-thirds of the way turned off down the street" when he hit her, and that the officer's diagram misrepresented where the cars were after the accident.

After all the evidence was presented the trial judge announced to the lawyers for both sides that he would submit the issue of contributory negligence to the jury out of an "abundance of precaution," although he stated that "there is mighty little evidence of contributory negligence . . . I don't think you can get along with it very much." The record does not show that plaintiff made any objection to the submission of the issue of contributory negligence. The judge charged on contributory negligence. The jury found negligence by defendant and contributory negligence by plaintiff. From judgment on the verdict the plaintiff appeals.

Franklin Smith for plaintiff appellant.

Moore & Willardson by Larry S. Moore and John S. Willardson for defendant appellee.

CLARK, Judge.

The sole question presented by this appeal is whether the trial court erred in submitting the issue of contributory negligence to the jury.

The failure of plaintiff to except to the statement of the trial judge, when made, that out of "an abundance of precaution" he was submitting the contributory negligence issue to the jury, did not constitute a waiver. *Carruthers v. R.R.*, 215 N.C. 675, 2 S.E. 2d 878 (1939). Exceptions to the charge may be noted after trial and included in the appellant's record on appeal. *Corns v. Nickelston*, 257 N.C. 277, 125 S.E. 2d 588 (1962); *Bank v. Barry*, 14 N.C. App. 169, 187 S.E. 2d 478 (1972). The court has the duty to charge the law on the substantial features of the case arising on the evidence and the failure to do so is prejudicial error. *Payne v. Lowe*, 2 N.C. App. 369, 163 S.E. 2d 74 (1968).

The only evidence from which there could be a possible inference of contributory negligence on the part of the plaintiff is the testimony of the defendant that plaintiff, having stopped before entering the highway, then proceeded forward a few feet and stopped again. But defendant added that he was not looking

at plaintiff's car after it moved forward. Under these circumstances defendant's testimony relative to the second stop had no probative value as evidence of contributory negligence. Considering the evidence in the light most favorable to defendant, it does not provide evidential support for the defense of contributory negligence, and the trial court erred in submitting this issue to the jury.

The judgment is reversed and the cause remanded for a

New trial.

Judges BRITT and ERWIN concur.

JOSEPH KOLENDO v. MICHAEL KOLENDO AND MADELINE KOLENDO

No. 7728SC507

(Filed 16 May 1978)

Rules of Civil Procedure § 52— no request for findings of fact—presumption on appeal

If no request is made by the parties to a hearing on a motion, the trial judge is not required to find the facts upon which he bases his ruling, and in such case it will be presumed that the judge, upon proper evidence, found facts sufficient to support his judgment. G.S. 1A-1, Rule 52(a).

APPEAL by movants Michael and Madeline Kolendo from *Ervin, Judge*. Order entered 10 December 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 30 March 1978.

This is an appeal from an order denying defendants' motion made pursuant to G.S. 1A-1, Rule 60(b)(3) to be relieved from a judgment entered on 8 September 1975 in Superior Court in Buncombe County, North Carolina. Defendants alleged as grounds for their motion that Joseph Kolendo, plaintiff in the original action, had testified falsely at trial and that his testimony "constitute[s] fraud upon this court." At the hearing on the motion, the defendants introduced into evidence transcripts of the trial of the original action in Buncombe County and a previous trial between the same parties held on 31 August 1976 in the Circuit Court of Palm Beach, Florida, which allegedly reflect significant discrepan-

cies in the plaintiff's testimony as to the terms of an agreement between the parties.

After the hearing, the trial court in the exercise of its discretion denied the defendants' motion. Defendants appealed.

Adams, Hendon & Carson, by George Ward Hendon, for the plaintiff appellee.

Whalen and Hay, by Edward C. Hay, Jr., for defendant appellants.

HEDRICK, Judge.

A motion made pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure, G.S. 1A-1, is addressed to the discretion of the trial court. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). The decision of the trial court is not reviewable on appeal absent a showing of abuse of discretion. *Sink v. Easter, supra.*

In the present case neither party requested the judge to make findings of fact, and consequently, none were made. According to G.S. 1A-1, Rule 52(a), if no request is made by the parties to a hearing on a motion, then the trial judge is not required to find the facts upon which he bases his ruling. And "[i]n such case, it will be presumed that the judge, upon proper evidence, found facts sufficient to support his judgment." *Haiduven v. Cooper*, 23 N.C. App. 67, 69, 208 S.E. 2d 223, 225 (1974). Thus, when no findings are made there is nothing for the appellate court to review. *Holcomb v. Holcomb*, 192 N.C. 504, 135 S.E. 287 (1926).

Affirmed.

Chief Judge BROCK and Judge MITCHELL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 MAY 1978

BELL v. CHRISCO No. 7720SC516	Stanly (76CVS238)	Affirmed
CITY OF WILSON v. PARKER No. 777SC473	Wilson (74CVS2955)	No Error
IN RE ARD No. 7720DC573	Union (76J86)	Reversed and Remanded
JOHNSON v. JOHNSON No. 7711DC430	Johnston (76CVD721)	No Error
McLEAN v. CITY OF RAEFORD No. 7712SC450	Hoke (76CVS238)	Affirmed
MURPHY v. POWELL No. 7715SC576	Alamance (77CVS19)	Affirmed
SEVERT v. SEVERT No. 7723DC396	Wilkes (71CVD701)	Appeal Dismissed
STATE v. BULLMAN No. 7728SC1035	Buncombe (72CRS15548)	Affirmed
STATE v. CHRISP No. 779SC938	Granville (77CRS531) (77CRS572)	No Error
STATE v. DONLEY No. 7730SC979	Cherokee (77CR889)	No Error
STATE v. JACOBS No. 7716SC829	Robeson (76CR12212)	No Error
STATE v. LUCKEY No. 7726SC907	Mecklenburg (76CR72760)	No Error
STATE v. McCALL No. 7721SC860	Forsyth (77CR4869)	No Error
STATE v. McNATT No. 7712SC889	Cumberland (76CRS34361)	No Error
STATE v. SESSOMS No. 776SC1006	Hertford (77CR2260)	No Error
WILLIS v. BOND No. 773DC262	Carteret (76CVD552)	Affirmed

FILED 16 MAY 1978

CROCKER v. CROCKER No. 7726DC488	Mecklenburg (73CVD10790)	Affirmed

LUCAS v. TRAILER SALES No. 7719SC403	Randolph (76CVS311)	Reversed
STATE v. CARTER No. 7715SC894	Alamance (76CRS15873) (76CRS15874)	No Error
STATE v. FORNEY No. 7726SC951	Mecklenburg (77CRS4236) (77CRS4238)	No Error
STATE v. GEORGE No. 773SC956	Craven (76CRS9292) (76CRS9293) (76CRS9294) (76CRS9295)	No Error
STATE v. GUTIERREZ No. 7715SC918	Alamance (77CR0169)	No Error
STATE v. ISOM No. 7726SC1020	Mecklenburg (74CR63736)	Affirmed
STATE v. MOORE No. 7725SC984	Caldwell (77CRS2043)	No Error
STATE v. MORRISON No. 7718SC997	Guilford (77CRS16837)	No Error
STATE v. TOWNSEND No. 7825SC1	Catawba (77CRS7322)	No Error
STATE v. TURMAN No. 783SC6	Craven (77CR6820) (77CR6822)	No Error
STATE v. WHISNANT No. 7725SC995	Burke (77CRS6737)	No Error
STATE v. WILLIS No. 773SC941	Carteret (77CRS2419)	No Error
TURNER v. QUALIFIED PERSONNEL No. 775SC630	New Hanover (75CVS2570)	New Trial

P. H. CRAIG v. JONAS KESSING AND WIFE, ALICE KESSING, AND GORDON BLACKWELL AND JACK CARLISLE

No. 7715SC521

(Filed 6 June 1978)

1. **Vendor and Purchaser § 1— option to purchase—definiteness as to price, time of payment**

An option to purchase was sufficiently definite as to the purchase price and the time for payment to satisfy the statute of frauds, G.S. 22-2, where it stated the duration of the option, stated that the purchase price for the property was $14,000, and listed how the various elements of the purchase price should be paid and applied.

2. **Principal and Agent § 1; Vendor and Purchaser § 1— power of attorney—signing wife's name on option**

The trial court erred in finding that the male defendant forged his wife's signature to an option agreement where the evidence showed that his wife had executed a valid power of attorney granting the male defendant the authority to deal with the property on her behalf.

3. **Seals § 1— equity—necessity for consideration**

Where equitable relief is sought, the court will go back of the seal on an instrument and will refuse to act unless the seal is supported by consideration.

4. **Vendor and Purchaser § 1— option contract—consideration—seeking buyer**

Although plaintiff did not pay any money for an option to purchase land, the option was supported by valuable consideration where plaintiff was obligated, in good faith, to seek a buyer for the land.

5. **Evidence § 32.2— parol evidence—agreement not completed when executed**

Parol evidence was incompetent to show that a written option agreement was not completed when executed.

6. **Vendor and Purchaser § 1— option agreement—completeness**

Specific performance of an option agreement will not be denied because the "Other Conditions" section of the agreement was uncompleted but contained the unexplained notation "1.T."

7. **Duress § 1; Vendor and Purchaser § 1— option agreement—fairness of price—economic duress**

The evidence did not support the court's conclusions that the purchase price in an option agreement was unfair or that the seller executed the option under economic duress.

8. **Vendor and Purchaser § 5— option to purchase—specific performance**

Plaintiff was entitled to specific performance of an option to purchase land where the vendor had previously conveyed the land to another for $5,000 but had been given an option to repurchase for $5,200; the option to purchase obligated the vendor to use $5,200 of the purchase price to exercise the option

to repurchase; the vendor subsequently conveyed his option to repurchase to another; and all parties had actual knowledge of the option given by the vendor to the plaintiff.

9. Rules of Civil Procedure § 26— deposition—party not in lawsuit when taken

Although the deposition of one defendant was not admissible against a second defendant who was not a party to the lawsuit and was not present or represented by counsel when the deposition was taken, it was admissible against the defendant who made it. G.S. 1A-1, Rule 26(d).

Judge MARTIN concurs in the result.

APPEAL by plaintiff from *Walker (Ralph A.), Judge*. Judgment entered 1 April 1977, in Superior Court, ORANGE County. Heard in the Court of Appeals 29 March 1978.

In September 1966, plaintiff and defendant Jonas Kessing jointly purchased a 63.54 acre tract of land near Chapel Hill from Jerry Leggett and wife. Toward the $55,000 purchase price, plaintiff and Kessing each paid one-half of the $15,000 down payment, and they executed a purchase money deed of trust and promissory note to Leggett and wife for $40,000, the remaining balance. The deed of trust called for quarterly payments of approximately $1,440.

In the spring of 1968, Kessing was in extreme financial difficulty. On 31 May 1968, Kessing and wife executed a document which is purportedly a deed for one-half interest in the 63.54 acre tract of land to defendant Gordon Blackwell. In exchange for this document, Kessing received $5,000 from Blackwell. On the same day Kessing also received from Blackwell a document entitled "Option to Purchase," the terms of which allowed Kessing and wife to re-purchase, at any time on or before 31 July 1968, the one-half interest in the 63.54 acre tract for $5,200.

During the week of 18 June 1968, Kessing sought plaintiff's aid in alleviating some of his financial problems. On or about 26 June 1968, Kessing and plaintiff executed an option to purchase agreement, the document around which this case revolves. After the execution of the option agreement, plaintiff made efforts to locate a buyer for Kessing's interest in the property. He located a woman who lived in Fairmont, North Carolina, and on or about 28 June 1968, plaintiff and Mrs. Martha H. Beech entered into a contract of sale whereby Mrs. Beech agreed to purchase from Craig a

one-third interest in 48.54 acres, a smaller portion of the larger tract which he and Kessing owned.

By 3 July 1968, plaintiff had received approximately $14,000 from Mrs. Beech. Craig notified Kessing that he was ready to close on the option contract, and a closing time was initially set for 3 July, but defendant Kessing postponed the closing on several occasions. On 8 July, Craig went to Raleigh to meet with defendants Kessing, Blackwell and Carlisle and with an attorney. Plaintiff tendered the $14,000 called for in the option agreement, but the money was rejected. On 10 July, plaintiff again met with the four men in Raleigh and again his tender was rejected. Craig was given a letter by which the Kessings rescinded, for lack of consideration, the Craig option to purchase.

On 11 July, the Kessings executed a document entitled "Contract" which purportedly assigned to Blackwell the 31 May 1968 option agreement in which the Kessings had been given an option to re-purchase the one-half interest in the 63.54 acre tract.

On 26 July, plaintiff again met with Kessing and tendered to him a certified check for $14,000. Kessing refused to accept the check. The next day plaintiff wrote and hand-delivered a letter to the Kessings giving notice that he accepted the option agreement. On 30 July, plaintiff mailed a certified copy of the same letter to the Kessings. Plaintiff also notified defendant Blackwell by letter and by telegram that he was exercising his option.

On 2 August 1968, plaintiff instituted litigation in this matter by filing Notice of Lis Pendens. On 3 April 1969, Blackwell conveyed his interest in the land to defendant Carlisle who, at the time of the trial of this case, claimed ownership of one-half interest in the Orange County land. On 21 April 1970, plaintiff filed complaint seeking specific performance of the option contract. The trial judge made findings of fact and conclusions of law and denied relief to plaintiff. Plaintiff appeals.

Powe, Porter, Alphin & Whichard, by Charles R. Holton, for plaintiff appellant.

Hatch, Little, Bunn, Jones, Few & Berry, by David H. Permar, for defendant appellee Jack Carlisle.

ARNOLD, Judge.

I.

[1] This appeal first presents the issue of whether the trial court correctly concluded that the disputed option agreement was void for failure to comply with the statute of frauds. None of the defendants pleaded the statute as required by G.S. 1A-1, Rule 8(c), but the trial court, nonetheless, addressed this affirmative defense. Since plaintiff has claimed no surprise by the trial court's action, the issue will be considered as though properly raised. *See* Wright & Miller, Federal Practice and Procedure: Civil § 1278.

The statute of frauds, G.S. 22-2, is applicable to option contracts for the purchase of property, *Carr v. Good Shepherd Home*, 269 N.C. 241, 152 S.E. 2d 85 (1967). Is, therefore, the option agreement in this record, which is "in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized," G.S. 22-2, a sufficient contract or memorandum to comply with the statute? It is.

In essence, a memorandum or note is an informal and imperfect instrument. *Lane v. Coe*, 262 N.C. 8, 136 S.E. 2d 269 (1964). It must contain expressly or by necessary implication the essential features of an agreement to sell. *Id.* The option agreement in question named the parties to the agreement, contained a description of the land, and a statement of the period of time for exercising the option. Also, the names of the parties were signed on the agreement. The trial court specifically concluded that the agreement was not sufficiently definite as to the purchase price and the time for payment. That conclusion is erroneous. The contract stated that

> "THE TERMS AND CONDITIONS OF THIS OPTION are as follows:
>
> "1. This option shall begin on the 26 day of June, 1968, and shall continue and exist through 12:00 noon the 31 day of July, 1968.
>
> "2. The purchase price for said property shall be Fourteen Thousand + (Illegible) Dollars ($14,000), less the sum

paid for this option and any extension(s) or renewal(s) thereof, and shall be paid as follows:

"$700.00 for reimbursing the June (1/2) payment

"5200.00 to purchase option from Blackwell to Kessing

"5600.00 cash at time of closing; 2500.00 upon sale of 15 acres of the zoned apartment land."

This is clearly sufficient to withstand the application of the statute of frauds.

[2] The trial court also found:

"10. Jonas Kessing forged his wife's signature to the disputed option agreement without prior consultation with her and without her express permission."

However, the record contains a copy of a valid and uncontested power of attorney granted by Alice H. Kessing to Jonas W. Kessing and recorded on 12 August 1963, prior to the June 1968 option agreement. The power of attorney recites in part that Jonas W. Kessing had the authority to

"[S]ell or mortgage any real estate now or hereafter belonging to me; and execute such deeds, contracts, mortgages, deeds of trust, notes or bonds as may be necessary, convenient or incident to the exercise of any authority hereinbefore given to my said Attorney."

A copy of this document establishing power of attorney in Jonas Kessing was identified by Kessing and was introduced into evidence as Plaintiff's Exhibit 12. Further, defendant Kessing stated on cross-examination:

"I did testify under oath at my deposition that every decision concerning this land which has been made has been made by me acting for myself and my wife. I did testify that I agreed that she was bound by whatever actions I took. In my deposition I did stipulate that I had authority to deal with this property."

It thus appears that the trial court erred in finding that Jonas Kessing forged the signature of his wife. The document was, in law, signed by the parties to be charged and in that respect complied with the statute of frauds.

II.

[3] Plaintiff further assigns as error the following finding by the trial court:

> "While the disputed option agreement recites 'that the seller, for and in consideration of the sum of Fourteen Thousand Dollars ($14,000.00) to him in hand paid by the buyer, receipt of which is hereby acknowledged . . .' Craig did not in fact give any consideration for the option nor was it the intent of either of the parties that any consideration would be given."

Plaintiff contends that the option agreement was supported by valuable consideration under North Carolina law. It is true, as plaintiff argues, that, under common law, a seal, which was present on the option agreement, imports consideration, *Cruthis v. Steele*, 259 N.C. 701, 131 S.E. 2d 344 (1963). However, where equitable relief is sought, the court will go back of the seal and will refuse to act unless the seal is supported by consideration. *Id.* The question presented, therefore, is whether there was actual consideration.

The agreement between plaintiff and defendants Kessing reads in pertinent part:

> "That the Seller, for and in consideration of the sum of Fourteen Thousand Dollars ($14,000) to him in hand paid by the Buyer, receipt of which is hereby acknowledged, does hereby give and grant unto the Buyer, his heirs, assigns, or representatives, the exclusive option and right to purchase all that certain plot, piece, or parcel of land and all improvements thereon located in the City of Chapel Hill . . . ."

[4] It is undisputed that plaintiff never paid the Kessings any money for the disputed option. Plaintiff's argument, though, is that his extensive efforts to obtain a buyer for the property constituted valuable consideration. There is, indeed, sufficient evidence in this record, from plaintiff's evidence as well as defendant Kessing's, to support the position that plaintiff's extensive efforts to obtain a buyer for the land constituted valuable consideration. For example, defendant Kessing testified on direct examination:

> "As a result of my negotiations with Mr. Craig, Mr. Craig asked me to sign the document identified as Plaintiff's Exhibit 4. It is an Option to Purchase. I told Craig I needed

some money and I needed to do what I could to get it, and I had my interest in the property which was about the only unencumbered thing I had at that point. I asked him if he could do anything with some of his money contacts, and he said possibly he could and he mentioned a person—I thought he said lived in Sanford or somewhere. A woman that lived in Sanford that possibly could put up some money, however, she would have to have some kind of document. Something to show her that there was something to back this up and possibly he would have to cut her in on the situation. I would have to relinquish my part of the property in order for him to be able to show her there was something concrete she was getting for her money."

Furthermore, on cross-examination he stated:

"When Mr. Craig and I met together, I testified that my need was for immediate cash. Mr. Craig agreed that he would make his best efforts to go out and find some cash through a buyer or someone who would invest in the property."

This Court in the case of *Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E. 2d 410 (1973), *cert. denied*, 284 N.C. 616, 201 S.E. 2d 689 (1974), held valid a contract for the sale of land which was "contingent upon . . . [plaintiffs'] being able to secure a second mortgage . . . on such terms and conditions as are satisfactory to [plaintiffs] . . . ." *Id.* at 13, 200 S.E. 2d at 412. The Court noted that the contract implied that plaintiffs would in good faith seek proper financing from North Carolina National Bank, and that plaintiffs could not, on personal whim, reject financing which was in keeping with reasonable business standards. In the case *sub judice* plaintiff was clearly obligated, in good faith, to seek a buyer for the property, and the trial court was in error in its holding that plaintiff did not give any consideration for the option.

III.

Plaintiff also argues that the trial court erred in concluding:

"3. In addition to the lack of consideration and the failure to comply with the statute of frauds, the court con-

cludes that plaintiff's prayer for specific performance cannot be granted for the following reasons:

"(a) The instrument was not completed at the time of execution by Jonas Kessing.

"(b) Kessing's forgery of his wife's signature on the disputed option agreement.

"(c) The uncompleted 'other conditions' in the disputed option agreement.

"(d) The unfairness of the purchase price as revealed by the gross disparity between the purchase price stated in the option agreement and the sales contract which Craig obtained on the very next day.

"(e) Kessing was operating under extreme economic duress at the time of execution of the disputed option agreement."

None of the above conclusions is supported by sufficient findings of fact, or by the evidence contained in the record.

[5] Conclusion (a), presumably, was prompted by the testimony of defendant Kessing that he was "sure that parts of this document were not filled in at the time I signed it. I can't be too specific except for recalling, the first thing is the 31 July, 1968. This sticks in my craw. That's a month after I had to have the money." However, a review of the written contract indicates that it represents at least a partial integration of the agreement. "[I]t is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing." *Neal v. Marrone*, 239 N.C. 73, 77, 79 S.E. 2d 239, 242 (1953). *See also* 2 Stansbury § 253 (Brandis Rev. 1973). Parol evidence, therefore, was incompetent and will not support the trial court's conclusion that the instrument was not completed when executed.

[6] Since we have previously discussed conclusion (b), we now consider conclusion (c). At the end of the form of the disputed option agreement is contained the section "OTHER CONDITIONS." The notation "1.T" appears at this point on the form. There is absent from this record any allegation or showing of fraud. Specific per-

formance will not be denied on the basis of this unexplained notation appearing on the instrument.

[7] Nor can conclusions (d) and (e) be sustained based on the evidence presented. Certainly the conclusion that the purchase price was unfair cannot be based, as apparently it was, on the finding that plaintiff was profiting from his efforts. Moreover, our courts normally do not consider the question of adequacy of the consideration. Furthermore, there is no showing of economic duress, and no findings to support such a conclusion. (*See: Bakeries v. Insurance Co.*, 245 N.C. 408, 96 S.E. 2d 408 (1957); *also see, United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 86 L.Ed. 855, 62 S.Ct. 581 (1942), for a discussion of economic duress.)

IV.

Finally, plaintiff argues that the trial court erred in denying specific performance of the option agreement. He urges this Court to reverse judgment, direct specific performance of the option agreement and nullify the deeds and instruments of all defendants subsequent to the option. In brief, for reasons hereafter appearing, plaintiff is entitled to specific performance.

The record discloses, as the trial court found as fact, that, prior to the option agreement with plaintiff, defendants Kessing conveyed their interest by warranty deed to defendant Blackwell. According to the evidence, that warranty deed was recorded. If this were the extent of the transaction between the Kessings and Blackwell, the denial of specific performance would have been proper since, at the time of plaintiff's option, defendant Kessing would have had no interest for which to grant an option.

There was, however, more to the transaction. As stated elsewhere, defendant Blackwell, on the same day he received the warranty deed from Kessing for $5,000, granted Kessing an option to repurchase for $5,200. Plaintiff argues that the total transaction rendered the warranty deed a security instrument and that defendant Kessing still owned the land at the time of plaintiff's option. There is strong evidence in the record to support this argument. Plaintff himself testified that prior to his option agreement with Kessing, he checked the record and found that the warranty deed from Kessing to Blackwell had been recorded. Plaintiff testified:

". . . Jonas was a little bit surprised that it was recorded. He said it was only a stopgap measure—it was only a loan. And he pointed out the fact that it was nowhere near the value that he had put into it or the value of the land so I felt a little bit better then. Plaintiff's Exhibit 2 is a Deed from Jonas and Alice Kessing to Gordon Blackwell purporting to convey Kessing's half interest in the property which we had previously jointly owned. He said it was for purposes of securing a loan.

* * *

"The paper writing marked as Plaintiff's Exhibit 3 is the instrument that Jonas showed me to prove that it was a loan and that it was not intended to be a conveyance outright. This was an Option dated the same date as the previous instrument, 31 May, and recorded."

Furthermore, Kessing stated in a deposition that:

"The deed which my wife and I gave to Gordon Blackwell, dated May 31, 1968, was for purposes of security for a $5,000.00 loan which Mr. Blackwell made to us. The Deed was used as a security instrument. There was no intent on our part at that time to sell our property for the purchase price paid for the Deed. Our interest in the property was worth considerably more than the amount of money paid to us by Mr. Blackwell as a loan. The amount of the loan was $5,000.00. There was no intent at that time to convey a fee simple title."

Finally, during oral argument for this case, defense counsel conceded that the 31 May 1968 transaction "had all the indicia" of a security instrument.

On the other hand, all of the defendants denied plaintiff's allegation that the warranty deed was a security instrument. Kessing testified on direct examination that by executing the warranty deed he intended to sell Blackwell his interest in the property.

Whether a deed and contemporaneous agreement giving the grantor option to re-purchase together constitute a security instrument depends upon the intent of the parties. *Hardy v. Neville*, 261 N.C. 454, 135 S.E. 2d 48 (1964). In the case at bar, the

trial court concluded as a matter of law that the 31 May 1968 warranty deed was a valid instrument conveying all of the Kessings' interest in the 63.54 acres to Blackwell. However, it appears from the record that the trial court never made findings of fact to support this conclusion. No findings were made with regard to the parties' intent or with regard to other factors which are material to the question of whether the deed was in substance a deed or a security instrument. See *Hardy v. Neville*, *supra*, for other factors to be considered in such a determination.

[8] Despite the fact that the trial court should have made more detailed findings of fact with regard to the 31 May 1968 transaction between the Kessings and Blackwell, a proper determination of whether that transaction constituted a security transaction is not necessary to reach a decision in this case. Since we have found the option between plaintiff and defendant Kessing to be valid, Kessing, at the time plaintiff tendered $14,000, was bound by the terms of the option agreement, *i.e.*, to use $5,200 of the $14,000 to exercise his 31 May 1968 option to re-purchase from Blackwell. On both the 8th and 10th of July 1968, plaintiff tendered the $14,000 to defendants. It was on 11 July 1968 that defendant Kessing assigned his option to re-purchase to Blackwell. (According to Kessing's testimony he made this assignment based upon the advice of both Blackwell and Carlisle who "were in business together; one is the same as the other, it didn't make any difference.")

Where a party contracts to convey his right, title and interest to land he is only required to convey such title as he might have, not necessarily good title. *Talman v. Dixon*, 253 N.C. 193, 116 S.E. 2d 338 (1960). In the case at bar, Kessing, by the very terms of the option agreement with plaintiff, conveyed to plaintiff his right to re-purchase from Blackwell. The record is undisputed and replete with evidence that all of defendants had actual knowledge of the option given by Kessing to plaintiff. Where it appears that a third party purchaser has actual notice of an optionee's adverse claim, specific performance will not be denied the optionee. *Lawing v. Jaynes* and *Lawing v. McLean*, 285 N.C. 418, 206 S.E. 2d 162 (1974). Plaintiff is therefore entitled to specific performance in accordance with the terms of the 26 June 1968 option.

V.

[9] Defendant Carlisle makes two cross-assignments of error, only one of which, involving Kessing's deposition, merits the attention of this Court. Defendant Carlisle argues that the trial judge erred in admitting into evidence the deposition of Jonas Kessing taken at a time when Carlisle was not a party to the lawsuit and was not present or represented by counsel, and when defendant Blackwell was a party to the lawsuit but was not present or represented by counsel. We do not agree. G.S. 1A-1, Rule 26(d), which was applicable at the time of the trial of this case, states:

> "Any part or all of a deposition, so far as admissible under the rules of evidence, may be used at the trial or upon the hearing of a motion or an interlocutory proceeding or upon a hearing before a referee, against any party who was present or represented at the taking of the deposition or who had due notice thereof, as follows: . . . ."

While the deposition of Kessing, taken in the absence of Carlisle or counsel for Carlisle, would not be admissible against Carlisle, it is clearly admissible against Kessing. In a trial before a jury, limiting instructions would be necessary. They, of course, are not necessary where, as here, a judge is the factfinder.

Judgment is reversed. Upon remand to the Superior Court of Orange County an order is to be entered directing specific performance of the 26 June 1968 option contract.

Reversed and remanded.

Judge MORRIS concurs.

Judge MARTIN concurs in the result.

PROVIDENT FINANCE COMPANY v. BENEFICIAL FINANCE COMPANY

No. 778DC481

(Filed 6 June 1978)

1. **Uniform Commercial Code § 75— filing of financing statement—priority of interests**

Loans from plaintiff and defendant to borrowers were governed by former G.S. 25-9-312(5) and plaintiff's security interest in the borrowers' property had priority over defendant's interest where borrowers executed a promissory note and security agreement in favor of plaintiff on 1 December 1973; plaintiff filed a financing statement on 20 December 1973; the debt was paid in full on 8 November 1974; no termination statement was filed; defendant made a loan to borrowers on 31 December 1974 without requiring borrowers to obtain a termination statement; defendant filed a financing statement on 3 January 1975; plaintiff made new loans to borrowers on 11 July and 1 December 1975 and on 3 July 1976; and plaintiff relied on the financing statement filed 20 December 1973.

2. **Uniform Commercial Code §§ 4, 73— financing statement—typed name not a signature**

Where there is nothing whatsoever on the face of a financing statement to suggest that the debtor "adopted" his typed name as his signature, the debtor has not signed the financing statement as required by G.S. 25-9-402, and that financing statement is ineffective; therefore, plaintiff had priority interest only as to the property interest of the borrower wife in those items listed in a financing statement and not as to the property interest of the borrower husband, since the husband's name was typed on the financing statement but he did not sign the statement, and there was no indication that the wife signed the statement as his agent.

3. **Bankruptcy § 2; Uniform Commercial Code § 73— interests in secured property—bankruptcy of debtor—jurisdiction to determine interests**

In an action between lenders to determine their interests in secured property where the evidence shows that borrowers have filed a petition in bankruptcy, the action should be dismissed for lack of jurisdiction, unless the parties can offer facts to show abandonment of the property by the trustee in bankruptcy, since the bankruptcy court is the only court having jurisdiction to adjudicate the rights of the parties, absent an abandonment by the trustee.

APPEAL by defendant from *Exum, Judge*. Judgment entered 14 April 1977 in District Court, LENOIR County. Heard in the Court of Appeals 9 March 1978.

The essential facts are these: On 1 December 1973 Norman Carlyle and Janette Carlyle (Norman Carlyle's wife) executed a promissory note and security agreement in favor of plaintiff, Provident Finance Company. The security agreement pledged

certain items of houshold furnishings as collateral. The agreement did not provide for future advances. A financing statement was prepared and was signed by plaintiff, the creditor, through its agent and by Janette Carlyle and was properly filed 20 December 1973. After having been refinanced at least once, the debt was paid in full on 8 November 1974. No termination statement was filed.

On 31 December 1974, defendant, Beneficial Finance Company, made a loan to the Carlyles. The parties executed a security agreement, again pledging as collateral some of the very same property pledged as collateral in the security agreement with plaintiff. Again, a financing statement was prepared and was signed by defendant, the creditor, through its agent and by both Norman Carlyle and Janette Carlyle and was properly filed 3 January 1975.

On 11 July 1975, 1 December 1975, and 2 July 1976, plaintiff made new loans to the Carlyles. New notes and security agreements covering the same collateral first pledged in 1973, were executed, but plaintiff relied upon the 20 December 1973 financing statement.

The Carlyles filed a petition in bankruptcy 23 September 1976. At that time, the Carlyles owed the plaintiff approximately $940 and the defendant approximately $1500. On 30 September 1976, defendant seized the property covered by its security agreements and financing statements. Plaintiff commenced this action by the filing of a verified complaint on 11 October 1976, seeking possession of the collateral. Both parties submitted motions for summary judgment supported by affidavits. By order of 14 April 1977, the trial court entered summary judgment in favor of plaintiff. From that order, defendant appeals alleging error in the court's failure to grant its motion for summary judgment as well as in the court's granting plaintiffs' motion.

Walter Ray Vernon, Jr., for plaintiff appellee.

Gerrans & Spence, by William D. Spence, for defendant appellant.

MORRIS, Judge.

We will first discuss the rights of the parties to the property. Our analysis will entail answering two questions: (1) Which creditor has priority? (2) What property, if any, is covered in the financing statements?

[1] Defendant, Beneficial Finance Company, argues that it has priority. Defendant argues first that the financing statement given to plaintiff became ineffectual as soon as the original indebtedness was paid, but, even if we reject that position, defendant still should prevail because plaintiff's employees represented that the original debt had been paid. Defendant basically ignores Article 9 of the Uniform Commercial Code which governs this case. (There have been amendments to Article 9, some of which apply in this case and some of which do not apply.)

The security interest of both parties in this case must be perfected, if perfected at all, by the filing of a financing statement. G.S. 25-9-302. It appears that both parties have an "attached" security interest under G.S. 25-9-203. It also appears that, pursuant to G.S. 25-9-302, both parties have perfected these security interests by filing financing statements in proper form and in the proper offices. Thus, we determine the priority of their interests under G.S. 25-9-312. More precisely, all loans, except the 2 July 1976 loan, are governed by "old" G.S. 25-9-312(5) which provides in pertinent part that "priority between conflicting security interests in the same collateral shall be determined . . . in the order of filing if both are perfected by filing, *regardless of which security interest attached first under § 25-9-204(1) and whether it attached before or after filing. . . .*" (Emphasis added.) It would be difficult to conceive language which would more expressly reject defendant's argument.

The official comment to section 25-9-312 offers the following example:

> "Example 1. A files against X (debtor) on February 1. B files against X on March 1. B makes a non-purchase money advance against certain collateral on April 1. A makes an advance against the same collateral on May 1. A has priority even though B's advance was made earlier and was perfected when made. . . ."

In this case, plaintiff filed on 20 December 1973. Defendant filed on 3 January 1975. Defendant made a loan to the Carlyles on 31 December 1974 which was perfected on 3 January 1975 by the filing. Plaintiff made loans on 11 July 1975 and 1 December 1975, which were perfected at the time the loans were made. Plaintiff clearly has priority, however, because plaintiff was the first to file.

Defendant argues that the 20 December 1973 financing statement was terminated by the payoff of the original loan since the original security agreement did not provide for future advances. The termination provisions in effect at the times relevant to this case provide that a financing statement specifying no maturity date "is effective for a period of five years from the date of filing." G.S. 25-9-403(2). One could terminate prior to that time by filing a termination statement which would "remain in the file for such period of time as the financing statement . . . would be effective under the five year life provided in § G.S. 25-9-403 . . . ." G.S. 25-9-404 (now amended). The debtor was protected by the requirement that

> "[w]henver there is no outstanding secured obligation and no commitment to make advances . . . the secured party must *on written demand by the debtor* send the debtor a statement that he no longer claims a security under the financing statement . . . ." (Emphasis added.) G.S. 25-9-404 (now amended).

Defendant urges this Court to engraft upon the statute by judicial decision additional termination provisions. Defendant relies upon *In re Hagler*, 10 UCC Rep. Serv. 1285 (U.S.D.C. E.D. Tenn. 1972), and *Coin-O-Matic Service Co. v. Rhode Island Hospital Trust Co.*, 3 UCC Rep. Serv. 1112 (R.I. Super. Ct. 1966), to support his argument. These two cases, however, are clearly in a minority. The minority position was discussed and was expressly rejected by the Review Committee for Article 9 of the Permanent Editorial Board for the Uniform Commercial Code on page 115 of its 25 April 1971 Final Report. This position has also been criticized by major commentators. Bender's Uniform Commercial Code Service discusses Coin-O-Matic by name and rejects the case. P. Coogan, W. Hogan, and D. Vagts, Bender's Uniform Commercial Code Service. Vol. 1, § 3A.03[1][b]. We believe that it is unnecessary for this Court to involve itself in a detailed analysis

of this problem. We align ourselves with the majority for two reasons. First, we believe the majority position is the correct one. There are adequate safeguards for the debtor: (1) He must sign the financing statement. (2) He has the five-year automatic cutoff. (3) He can demand and file a termination statement. The majority position is not unlike the position our courts have taken to strengthen our real estate recording statute. Second, the legislature rewrote G.S. 25-9-404 in 1975. The legislature placed upon the creditor the duty of *filing* the termination statements. A $100 penality plus liability for all losses is now imposed on creditors who fail to file the termination statements. *However*, the legislature specifically chose to retain the requirement that the *debtor must first request in writing* the termination statement. G.S. 25-9-404(1). We believe that this legislative action is an implicit rejection of defendant's argument.

Also, we note that the legislature has amended G.S. 25-9-312 in such a manner that the present results might be different under the new statute. However, the legislature specifically provided that priorities fixed under "old" Article 9 prior to 1 July 1976 would not be altered by the new statute. G.S. 25-11-107.

Defendant also argues that plaintiff no longer has priority because plaintiff's employee informed defendant that the Carlyles had paid off the 1973 debt. This representation was obviously true. The real problem is that defendant either misunderstood or ignored the law. It would have been a simple matter for defendant to have required the Carlyles to obtain a termination statement prior to making the loan. Plaintiff would have been required by law to furnish the Carlyles such a termination statement. Defendant had more than ample opportunity to protect itself at little or no cost. Defendant failed to do so. We will not undermine the integrity of the notice filing system established under the U.C.C. to aid lenders who disregard the law and fail to help themselves. Thus, we conclude that plaintiff has a perfected security interest and that plaintiff's security interest has priority over defendant's security interest.

The remaining loan by plaintiff, made on 2 July 1976, is governed by "new" Article 9. Specifically, it is governed by "new" G.S. 25-9-312(7) which provides that "[i]f future advances are made while a security interest is perfected by filing . . . , the security

interest has the same priority for the purposes of subsection (5) with respect to the future advances as it does with respect to the first advance. . . ." The record reveals that the 2 July 1976 loan was made while plaintiff's security interest in the property, by virtue of the 1 December 1975 loan, was perfected. Thus, under "new" G.S. 25-9-312(7), the 2 July 1976 advance would take the same priority as the 1 December 1975 advance. As we have stated previously, the 1 December 1975 loan has priority [under G.S. 25-11-107 and "old" G.S. 25-9-312(5)], over defendant's loan. Therefore, the 2 July 1976 loan will also have priority over defendant's loan.

[2] Next, we must determine in which property plaintiff has a perfected security interest. The focal point of this issue is the 20 December 1973 financing statement. That financing statement covers:

> "1 living room suite—4 pc. red black
> 2 tables maple end
> 1 table brn.
> 1 Television Motorola—25 inch F21870621
> 1 coffee table
> 1 washing machine Auto Kenmore 6504807
> 2 lamps blk. gold
> 1 dryer Whirlpool 03717M939
> 1 gas stove heater
> 1 bed room suite 4 pc. Queen Cherry
> 4 chairs beige
> 1 bed room suite 4 pc. mah.
> 1 refrigerator Coldspot 81220951
> 1 sewing machine Enedas
> 1 air conditioner 3,2000(sic)
> 1 gas stove Kenmore."

The financing statement listed as debtor "Norman Carlyle" and was signed by "Janette Carlyle" as debtor. G.S. 25-9-402, as it stood at the times relevant to this case, provided that

> "[a] financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the securi-

> ty interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. . . ."

Plaintiff's financing statement lists the items of collateral, gives addresses for both the debtor and the secured party. There are problems, however. At the top Norman Carlyle is listed as debtor. At the bottom Janette Carlyle signed as debtor. The question presented is whether Norman Carlyle "signed" the financing statement. Plaintiff argues that Janette Carlyle signed as agent of Norman Carlyle. Because financing statements only perform a notice function, we believe that any agency status should be obvious on the face of the financing statement. In this case, there is no indication of any agency relationship between Janette Carlyle and Norman Carlyle. We note that the secured party's signature does suggest an agency status: "Provident Finance Co. By/s/ Brenda Sutton". This signature is clearly adequate. No such suggestion of agency can be found in Janette Carlyle's signature. Nor does the mere fact of the marital relation establish agency. *Hayes v. Griffin*, 13 N.C. App. 606, 186 S.E. 2d 649 (1972). We cannot, therefore, say that Janette Carlyle signed as the agent of Norman Carlyle.

G.S. 25-1-201(39) provides that " '[s]igned' includes any symbol executed or adopted by a party with present intention to authenticate a writing." We must determine whether Norman Carlyle "adopted" the typed name at the top of the financing statement as his signature. We realize that the U.C.C. does have a liberal definition for "signed". Because of the importance placed upon financing statements, we believe that, in cases dealing with the *debtor's* signature on financing statements, the courts should apply this liberal definition with caution. Some other courts have applied these provisions somewhat liberally when dealing with a *creditor's* signature. *See, e.g. Benedict v. Lebowitz*, 346 F. 2d 120 (2d Cir. 1965). However, absence of the *debtor's* signature is a different matter. J. White and R. Summers, Uniform Commercial Code (1972) noted the distinction:

> "We have found no case construing the official version of 9-402 in which a court found a financing statement to be ef-

> fective despite the absence of the signature of the debtor. If the debtor's signature is omitted the financing statement is ineffective. . . ." White and Summers at 835.

They later note that, on the other hand, the courts are divided on the question of whether a creditor will be deemed to have adopted the typed name. The creditor ought always to be aware of the importance of the signature on the financing statement. Furthermore, because of the notice function of the financing statement, we believe that the financing statement can function adequately only when it meets the necessary requirements on its face. This position is supported by R. Anderson, Uniform Commercial Code (1971), where the author argues for an "objective" interpretation of financing statements. *See* Anderson, Vol. 4 at § 9-402:23. In this case, there is nothing at all on the face of the financing statement which suggests that Norman Carlyle "adopted" the typed name as his signature. Where, as in this case, there is nothing whatsoever on the face of the financing statement to suggest that the debtor "adopted" the typed name as his signature, the debtor has not signed the financing statement as required by G.S. 25-9-402, and that financing statement is ineffective.

Thus, we conclude that plaintiff has a perfected security interest in the property interests of Janette Carlyle in those items of personalty listed in the financing statement. It may be that she owns that property completely; on the other hand, she may own only an one-half interest in that property. We cannot determine from the record precisely what she does own. Plaintiff's security interest in the property of Janette Carlyle has priority over defendant's security interest. Conversely, as between the parties, defendant's security interest in the property of Norman Carlyle and in the property of Janette Carlyle not listed in the 30 December 1973 financing statement has priority under G.S. 25-9-301 and G.S. 25-9-312. Insofar as those items listed in plaintiff's financing statement are concerned, the trial court must determine how the property is owned and, upon proper petition, how to divide that property. In summary, plaintiff has priority only as to the property interest of Janette Carlyle in those items listed in the 20 December 1973 financing statement.

[3] In both motions for summary judgment there is a fatal defect. Neither motion has shown adequate jurisdictional grounds.

The record shows that the Carlyles filed a petition in bankruptcy on 23 September 1976, and "[t]hat, pursuant to the Carlyles' request, your Affiant [Gene West, a Beneficial employee] on September 30, 1976 did pick up the said furniture."

It is axiomatic that

> "[B]ankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy. . . ." *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481, 60 S.Ct. 628, 630, 84 L.Ed. 876, 879-80 (1940).

Unless the parties can establish that the trustee has abandoned the property, the bankruptcy court is the only court having jurisdiction to adjudicate the rights of the parties in this property. We recognize that no set formalities are required for abandonment, but the evidence must establish a clear and unambiguous manifestation of an intent of the trustee in bankruptcy to abandon the property. *In the Matter of Newkirk Mining Co.*, 238 F. Supp. 1 (E.D.Pa. 1964), *aff'd per curiam* 351 F. 2d 954 (3d Cir. 1964). Also, the burden of proving abandonment is on the party seeking to show abandonment. *Hanover Insurance Co. v. Tyco Industries, Inc.*, 500 F. 2d 654 (3d Cir. 1974). Thus, unless the parties can offer facts to show abandonment, this case must be dismissed for lack of jurisdiction.

For the preceding reasons, the judgment of the trial court must be vacated and the case remanded. The trial court must first determine whether it can properly exercise jurisdiction over the property. If not, the case must be dismissed. If the trial court, however, determines that it has jurisdiction, the court shall then inquire into the property interests of Norman Carlyle and Janette Carlyle in the personalty listed in the 20 December 1973 financing statement and enter a judgment consistent with this opinion. The judgment of the trial court is vacated, and the case is remanded.

Vacated and remanded.

Judges MARTIN and ARNOLD concur.

H. L. MILLS AND WIFE, CATHERINE C. MILLS; ALICE W. FRAIN; L. D. USSERY AND WIFE, WILLIE MAE USSERY; STAN OLSEN AND WIFE, NANCY OLSEN; W. A. RHYNE; STEVE SANDERS AND WIFE, EMILY L. SANDERS; ANN PRESSGRAVES; SHIRLEY M. McGILL; E. L. GRANTHAM AND WIFE, GERTRUDE D. GRANTHAM; M. L. SMITH AND WIFE, MARGARET H. SMITH; ADRIAN E. AMAN; ELLIE G. FUNDERBURKE; ROBERTA WRIGHT; T. R. TODD AND WIFE, ELIZABETH TODD; S. M. VILLAS AND WIFE, ELIZABETH VILLAS; E. R. HOLLAND AND WIFE, NITA G. HOLLAND; THELMA H. DUNN; L. G. McNEIL AND WIFE, LEXIE E. McNEIL; T. W. RIDDLE AND WIFE, SUSAN RIDDLE v. HTL ENTERPRISES, INC., A CORPORATION

No. 7726SC343

(Filed 6 June 1978)

1. **Deeds § 20.7— residential restrictions—use of lot for parking—no waiver or estoppel**

The use of a subdivision lot for parking by a plumbing company and, subsequently, a candle shop did not render invalid covenants restricting use of the lot to residential purposes or constitute a waiver or estoppel of the right of owners of other subdivision lots to enforce the restrictive covenants.

2. **Deeds § 20.1— residential restrictions—use of lot for parking for fried chicken outlet**

The use of a subdivision lot as a parking area for a retail fried chicken outlet serving between 2,000 and 2,500 customers per week would constitute a violation of a covenant restricting use of the lot to residential purposes.

3. **Deeds § 20.8— residential restrictions—changes outside restricted area**

The trial court erred in declaring subdivision residential restrictions null and void as to one subdivision lot because the neighborhood in which the lot is located has undergone such a radical, substantial and fundamental change from residential to business purposes as to render the property no longer suitable or valuable for residential purposes where the changes which have taken place in the area in question have occurred outside the restricted area.

4. **Deeds § 20.1— restrictive covenants—effect of zoning**

A zoning ordinance will neither nullify nor supercede a valid restriction on the use of real property.

APPEAL by plaintiffs from *Walker (Ralph A.), Judge*. Judgment entered 17 March 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 February 1978.

Plaintiffs, property owners and residents of Morningside Drive subdivision in the City of Charlotte, filed a complaint seeking to enjoin defendant from violating certain restrictive covenants by constructing a parking lot for a retail fried chicken

outlet on a lot which fronts on Central Avenue with sideline down the margin of Morningside Drive.

The cause came on for a hearing in Superior Court. The parties waived the jury trial and stipulated to the facts with one witness testifying for defendant. The Court entered the following judgment:

> "THIS CAUSE coming on for trial before the undersigned Judge of Superior Court at the March 7, 1977, Non-Jury Schedule of Superior Court for Mecklenburg County, and having been heard by the undersigned Superior Court Judge as the trier of facts sitting as Judge and Jury, and, having heard the evidence and considered the Stipulations of Fact and other evidence offered by the attorneys for the Plaintiffs and Defendant, the Court finds the following facts:
>
> 1. The Plaintiffs are all owners and grantees by mesne conveyances of lots fronting on Morningside Drive as shown on that certain map recorded in Map Book 4 at Page 403 in the Mecklenburg Public Registry; and Morningside Drive, as an area or subdivision, was originally platted by John Crosland Company with the map being recorded as referred to above on or about March 7, 1940.
>
> 2. The Defendant is a North Carolina corporation, and is the owner of Lots 1 and 2 in Block 5 of Morningside Drive as shown on map recorded in Map Book 4 at Page 403, having purchased said lots in April, 1975.
>
> 3. In April, 1940, John Crosland Company as the owner of all the lots appearing on map recorded in Map Book 4 at Page 403 of said Registry imposed restrictions on certain of said lots, as such restrictions are found in Book 1008 at Page 397 of the Mecklenburg Public Registry, which restrictions read in pertinent parts as follows:
>
> (a) All lots in the tract (as described above) shall be known and described as residential lots, and no structures shall be erected, altered, placed or permitted to remain on any residential building plot other than one detached single family dwelling not to exceed two and one-half stories in height and a private garage for not more than two car and servants quarters.

. . .

(i) These covenants are to run with the land and shall be binding on all the parties and all persons claiming under them until January 1, 1965, at which time said covenants shall be automatically extended for successive periods of ten years unless by a vote of the majority of the then owners of the Lots it is agreed to change the said covenants, in whole or in part.

(j) If the parties hereto, or any of them, or their heirs or assigns, shall violate or attempt to violate any of the covenants herein it shall be lawful for any other person or persons owning any real property situated in said development or subdivision to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any such covenant and either to prevent him or them from so doing or to recover damages or other dues for such violation.

. . .

Such lots generally affected are those owned by the Plaintiffs and facing on Morningside Drive as well as two other lots being Lot 1, Block 5 (owned by the Defendant) and Lot 6, Block 2 (owned by individuals not parties to this proceeding), both of which front on Central Avenue and are located on the west and east side of Morningside Drive respectively. Said restriction agreement was placed of record by John Crosland Company before it conveyed any of the lots that it owned appearing on the map in Map Book 4 at Page 403 in the Mecklenburg Public Registry.

4. In conveying lots covered by said restriction agreement and appearing on map in Map Book 4 at Page 403, John Crosland Company made specific reference to the Book and Page of the restriction agreement in question or another of supposed similar content.

5. The Defendant, acquired Lots 1 and 2 in Block 5 and commenced construction of a restaurant facility on Lot 2. As an integral part of the restaurant operation, the Defendant intends to use Lot 1 as a paved parking area and to erect a sign for advertising purposes on Lot 1. Shortly after com-

mencing construction of the restaurant facility, the Defendant ceased construction when the Plaintiffs instituted this action, and, when construction stopped, the Defendant had completed the foundation on Lot 2.

6. Throughout the history of the real property in question, there have been no instruments filed for record in the Mecklenburg Registry containing conditions or restrictions affecting or limiting the use of the property until the filing of that certain restriction agreement recorded in Book 1008 at Page 397 by John Crosland Company which restricts for residential purposes the lots with checkmarks indicated thereon on Defendant's Exhibit 1. Specifically, Lots 2 and 3 in Block 4, Lot 1 in Block 11, Lot 5 in Block 2, and Lot 1 in Block 8 were not subjected to any of the aforementioned residential restrictions.

7. The residential convenants appearing in the restriction agreement in Book 1008 at Page 397 in the Mecklenburg Public Registry were placed on the property in question, including the lot owned by the Defendant which is in question (being Lot 1 in Block 5) over thirty-five (35) years ago at a time when the property was just inside the Charlotte City Limits.

8. Other than Lot 1 in Block 5 and Lot 6 in Block 2 (on the same side of the street on Central, but on the opposite or east side of Morningside Drive), all of the other lots subjected to the residential restrictions are facing or fronting on Morningside Drive which is a pleasant, well-kept and attractive residential area of one-story houses. Both lots mentioned herein, being Lot 1 in Block 5 and Lot 6 in Block 2, are presently vacant and front on Central Avenue with a side lot line on each lot being contiguous to Morningside Drive.

9. Central Avenue is a main four-lane thoroughfare in Charlotte, and the growth of the city over the past thirty (30) years or so has caused Central Avenue to develop commercially for general business uses so that few residential dwellings remain on Central Avenue which are used for such purposes at this time. Central Avenue is not considered to be a residential street.

10. Central Avenue runs in front of the property in question (being Lot 1 in Block 5 as one of the lots owned by the Defendant), and is a major artery for vehicular traffic in a generally east-west direction; that the significant growth of the City of Charlotte has caused Central Avenue to become a traffic thoroughfare between the uptown commercial area and a suburban shopping center or commercial area.

11. The Charlotte City Limits are now several miles beyond the property in question to the east and various commercial expansion has taken place in the immediate area of the property in question since such covenants were imposed on the Morningside Drive property, even though several business establishments were located in the neighborhood of the property in the year 1940 when the covenants were placed on the property. In the area immediately surrounding the property in question to the north, east and west, and within a radius of approximately 750 feet on Central Avenue, there are located two residential dwellings, an upholstery and furniture company, four retail stores in a small shopping center, a chiropractor's office, a parking area and a Pizza Hut across the street from the property to the north, an auto parts business approximately five small retail stores, and an office location used by a music company, insurance company and construction company.

12. That while the neighborhood or general area in which the Defendant's property is situated was many years ago a residential area, because of the influx of business, the said neighborhood adjacent to the Defendant's lot in question has undergone a radical, substantial and fundamental change in character from residential to a business character.

13. That the lots owned by the Defendant (being Lots 1 and 2 in Block 5) are exceedingly more valuable for business or commercial purposes than for residential purposes with their value for commercial purposes being approximately $38,000.00 and their value for residential purposes being approximately $4,000.00, and the property is no longer suitable, useful or valuable for residential purposes but is more suitably employed and is more valuable for business purposes.

14. The property in question is zoned by the City of Charlotte for business use which would allow retail activity outdoors as well as indoors and has been so zoned by the City since the zoning ordinance was first put into effect as to this property, a period of at least fifteen (15) years.

15. For a number of years, up through April, 1975, the lot in question owned by the Defendant was used for parking purposes for customers of Phillip's Plumbing Company and later a retail candle shop which were located (with the candle shop being the successor to the plumbing company) on the adjacent lot, being Lot 2, Block 5 (not one of the lots subject to the restriction agreement). These Plaintiffs did not, however, formally and legally object to the use of the lot in question for such parking.

16. The lot owned by the Defendant which is in question in this proceeding (Lot 1 in Block 5) fronts on Central Avenue in a business zoned and commercially developed area separate from essentially all other lots subjected to the restriction agreement, except one, and should be considered separate and apart from such lots which face on Morningside Drive and which are used for residential purposes in determining reasonableness of the use of the property in question.

17. That the Court, upon motion of one of the parties to the proceeding, visited the area in question and physically viewed the lots and surrounding areas which are the subject of this proceeding in order to gain a better appreciation for the physical characteristics of the area.

Upon the foregoing findings of fact, the Court makes the following conclusions of law:

1. That the neighborhood and vicinity within which the Defendant's property in question (being Lot 1 in Block 5) is situated his (sic) undergone a fundamental, radical and substantial change since the recording of the restriction agreement in question so as to render said property wholly unfit and unsuitable for residential purposes.

2. That to continue said restrictions in full force and effect as to the lot in question would work a great hardship

upon the Defendant, would be contrary to the basic rights incidental to land ownership and would be of little or no benefit to adjoining property owners located on Central Avenue.

3. That the restrictions placed on Defendant's lot almost thirty-seven years ago no longer serve the purpose for which they were imposed, but are detrimental and injurious to the property and if permitted to remain thereon would render the property virtually useless and worthless inasmuch as it would have to be used for residential purposes when essentially all surrounding lots are used for office and business purposes.

4. That to allow continued enforcement of the residential restrictions as to the Defendant's lot would be to deny the Defendant the proper use and benefit of said property.

5. That in viewing the total physical layout and scheme of planning, the Defendant's property must be considered separate and apart from the residential lots fronting on Morningside Drive inasmuch as the Defendant's lot fronts on commercially developed Central Avenue.

6. That the lots presently being used for residential purposes and fronting on Morningside Drive are not intended to be, nor shall they be considered to be, affected by the determinations made in these conclusions of law.

NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED as follows:

1. That the residential restrictions appearing of record affecting the Defendant's lot (Lot 1 in Block 5) be, and the same restrictions are hereby, declared null and void and no longer enforceable, as to the lot in question regarding the content of the restrictions, by the Plaintiffs or any other owner of a lot restricted for residential purposes appearing on the map in Map Book 4 at Page 403 in the Mecklenburg Public Registry.

2. That the Defendant be permitted to use the lot in question for any lawful purpose and specifically for purposes

of landscaping and paving it as a parking area incidental to the operation of a restaurant on Lot 2 in Block 5."

From the judgment entered, the plaintiffs appealed assigning error.

Martin, Howerton, Williams & Richards, by Philip F. Howerton, Jr., for plaintiff appellants.

Boyle, Alexander & Hord, by Robert C. Hord, Jr., for defendant appellee.

ERWIN, Judge.

The plaintiffs objected and excepted to conclusions of law Numbers 1, 2, 3, 4, 5, and 6, and to the entry of the judgment based thereon, contending that the facts, as found by the Court, do not support the conclusions of law that the restrictions should not be enforced against the defendant. We agree with the plaintiffs, that the restrictive covenants found in plaintiffs' and defendant's chains of title are enforceable *inter se* by plaintiffs to prohibit the non-residential use proposed by defendant.

Our Supreme Court held in *Elrod v. Phillips*, 214 N.C. 472, 477, 199 S.E. 722, 724-725 (1938):

". . . We have two lines of decisions in this jurisdiction involving the circumstances under which restrictive covenants in deeds for property originally devoted to residential purposes are rendered unenforceable or are enforced. The leading cases where such restrictions were held unenforceable are *Starkey v. Gardner*, 194 N.C., 74, and *Snyder v. Caldwell*, 207 N.C., 626, and the leading cases wherein such restrictions are held enforceable are *Johnston v. Garrett*, 190 N.C., 835, and *McLeskey v. Heinlein*, 200 N.C., 290."

Although there are two lines of decisions on the subject before us, we are not at liberty to select one over the other unless the facts of the case before us justify the line we are to follow.

[1] The above finding of fact Number 15 reveals that the lot in question was used for parking by a plumbing company and, subsequently, a candle shop. We do not consider such parking within the restricted area to be significant enough to undo the force and

validity of the restrictions before us or to constitute a waiver or an estoppel of plaintiffs' right to enforce the covenants. *See Tull v. Doctors Building, Inc.*, 255 N.C. 23, 120 S.E. 2d 817 (1961); *Van Poole v. Messer*, 25 N.C. App. 203, 212 S.E. 2d 548 (1975); *Cotton Mills v. Vaughan*, 24 N.C. App. 696, 212 S.E. 2d 199 (1975).

[2] The evidence for defendant reveals the following:

> "Holly Farms outlets normally operate between the hours of Ten a.m. and Nine p.m. We could change the hours as we saw fit. Based on my experience a Holly Farms outlet in this area averages $5,700.00 per week and an average sale of $2.63. This is roughly 2,500 or 2,000 customers per week. The majority of these customers drive on the premises."

To us this would constitute a significant commercial use of the property, in violation of the restrictive covenants.

Long v. Branham, 271 N.C. 264, 156 S.E. 2d 235 (1967), involved a situation in which the defendant desired to construct a roadway across his lot in a subdivision subject to restrictive covenants. In concluding that such construction would violate the restrictions, Justice Sharp (now Chief Justice) observed, referring to the intent of the developer and those purchasing lots in the subdivision: "Their objective was a quiet residential area in which the noise and hazards of vehicular traffic would be kept at a minimum. . . ." 271 N.C. at 275, 156 S.E. 2d at 243. *See also Starmount Co. v. Memorial Park*, 233 N.C. 613, 65 S.E. 2d 134 (1951).

We find a factual distinction between the case at bar and *Muilenburg v. Blevins*, 242 N.C. 271, 87 S.E. 2d 493 (1955), where our Supreme Court approved the nullification of certain restrictions. *Muilenburg, supra*, at 275-276, 87 S.E. 2d at 496, reveals:

> ". . . An apartment house is located on the lot adjacent to the plaintiffs' property to the east on Circle Avenue. In this same block at the corner of Circle Avenue and Willoughby Street, according to the record, is a plumbing and heating establishment. Adjacent to the property of the plaintiffs on the south is an apartment house, while on the west side of Providence Road opposite plaintiffs' property the entire block is occupied by an apartment house, an office building and a filling station."

Defendant urges, in its brief, that we consider seriously the following:

> "At the outset, the Defendant desires to again enforce the idea before this Court that the lot which it proposes to use for a parking area fronts on a different street entirely from all of the other residentially restricted lots and is a part of an area which is zoned for business and generally used for business and office purposes."

We do not make a distinction between Lot 1, Block 5, and the other lots in the subdivision. Lot 1 appears to be one side of the gate which protects the subdivision. If Lot 1 is released, the gate is opened to release all the remaining lots in the subdivision.

As our Supreme Court pointed out in *Tull v. Doctors Buiding, Inc.*, *supra*, at 40, 120 S.E. 2d at 829:

> "Business uses not permissible in this residential subdivision have gradually approached it on land outside this subdivision and not a part of it. . . . If equity should permit these border lots to deviate from the residential restriction, the problem arises anew with respect to the lots next inside those relieved from conforming. Thus, in time, the restrictions thoughout the tract will become nugatory through a gradual infiltration of the spreading change."

The defendant contends that the factual situation in the case at bar is more closely akin to that presented in *Elrod v. Phillips*, *supra*, and that we should follow its holding and affirm the case before us. However, our Supreme Court has distinguished *Elrod*, *supra*, in *Sheets v. Dillon*, 221 N.C. 426, 20 S.E. 2d 344 (1942), and *Brenizer v. Stephens*, 220 N.C. 395, 17 S.E. 2d 471 (1941). We conclude that *Elrod*, *supra*, is not controlling here, and we instead believe that the line of cases represented by *Brenizer*, *supra*, is controlling.

[3] It appears from the record that the changes which have taken place in the area in question have occurred outside the restricted area. Citing considerable authority, our Supreme Court stated in *Brenizer v. Stephens*, *supra*, at 399, 17 S.E. 2d at 473: "It is generally held that the encroachment of business and changes due thereto, in order to undo the force and vitality of the

restrictions, must take place *within* the covenanted area." (Emphasis added.) *See also Lamica v. Gerdes*, 270 N.C. 85, 153 S.E. 2d 814 (1967); *Tull v. Doctors Building, Inc., supra.* Clearly one important rationale for the imposition of restrictive covenants is to protect the character of the area subject thereto from encroachment by changing conditions occurring in surrounding areas. We conclude that the trial court should not have considered the changes occurring outside the restricted area.

Our Supreme Court, in *Lamica v. Gerdes, supra*, dealt with restrictive covenants containing very similar language to those we find here. In *Lamica, supra*, at 90, 153 S.E. 2d at 818, Justice Branch wrote for the Court as follows:

> "Here, there is no need to search for the grantor's intent. The developer clearly and distinctly expressed an intention to impose the restrictions on the land, and to allow any person or persons owning any real property situate in said development or subdivision to enforce the restrictions *inter se*. If there were any ambiguity in the language of the grantor as to whether the developer intended to impose restrictions for his personal benefit, it is dispelled by his outright grant to his grantees of the right to enforce the restrictions.
>
> > '*Sometimes restrictive covenants expressly provide that they may be enforceable by any owner of property in the tract. Where such is the case, the right of an owner to enforce the same is, of course, clear.* Similarly, where the agreement declares that the covenant runs with the land for the benefit of other lots or other owners, it may be so enforced.' 20 Am. Jur., 2d, § 292, p. 857. (Emphasis ours)."

[4] The record reveals that the property in question is now zoned for business. A zoning ordinance will neither nullify nor supercede a valid restriction on the use of real property. *Tull v. Doctors Building, Inc., supra.*

The record clearly shows that defendant was aware of the restrictions when it purchased the lot in question. In any event, the restrictions were duly recorded, and lots were conveyed by deeds specifically referencing the same.

Based on the foregoing, we conclude that the trial court erred in finding that the restrictions were no longer enforceable as to the lot in question. Accordingly, the judgment of the trial court is

Reversed.

Judges VAUGHN and MITCHELL concur.

GEORGE KLOSTER v. REGION D COUNCIL OF GOVERNMENTS

No. 7724SC810

(Filed 6 June 1978)

1. **Injunctions § 11.1— regional council of governments—illegal activity—standing of taxpayer to challenge**

A taxpayer and resident of an area encompassed by a regional council of governments does have standing to contest allegedly illegal activities of the council where such activities are funded by tax monies or property derived from local or federal sources, or where such activities may later require support by tax monies.

2. **Municipal Corporations § 4— regional council of governments—no authority to own land or construct buildings**

Defendant council of governments was without authority to own land or construct a building for any purpose, since G.S. 160A-475, § (1) through § (7), the statutes spelling out powers of councils of governments, did not name land ownership as one of those powers, and since the member governments of defendant council did not authorize defendant to own land or construct a building.

APPEAL by plaintiff from *Howell, Judge*. Judgments entered 13 May 1977, and 28 May 1977, in Superior Court, WATAUGA County. Heard in the Court of Appeals 29 March 1978.

This action was instituted by plaintiff, as citizen, resident, and taxpayer of the town of Boone, Watauga County, North Carolina, for a declaratory judgment that defendant Council of Governments does not have legal authority to hold title to real estate in its own name, to construct an office building for its own use and for rental purposes, or to lease office space in competition with free enterprise. Plaintiff also sought a temporary restraining

order to restrain defendant from commencing or continuing construction of the office complex.

Region D Council of Governments was established pursuant to G.S. 160A-470, *et seq.* and covers Watauga County and six other counties and the town of Boone as well as fourteen other towns. On or about 29 October 1976, the defendant, through its Executive Director James E. Brannigan, applied to the Economic Development Administration (EDA) of the United States Department of Commerce for a grant of $1,230,651 for the construction of a general use office complex in Boone. On 21 January 1977, representatives of EDA and of defendant signed the offer of grant from EDA to defendant for the amount requested. By deed dated 12 March 1977, defendant received a 1.674 acre tract of land in Boone from Joe Williams and wife, and, on 16 March 1977, defendant obtained from the Boone Board of Adjustment a variance in the "M-1 district" zoning which prohibits the construction of an office building on the property deeded by Williams and wife.

According to plaintiff's complaint, the minutes of the 15 November 1976 meeting of the Executive Board of defendant stated, in part, that "an employees' corporation would be formed. This corporation would be non-profit and would be formed to manage and maintain the facilities. Any profit to this corporation would be in the form of fringe benefits in a retirement fund for the employees." Plaintiff alleged upon information and belief that approximately 28,000 square feet of the 40,000 square foot building would be rented to outside individuals for profit "in competition with other office buildings" in Boone. Plaintiff contested defendant's legal authority to hold title to and own real estate and to construct on such property a general use office building for its own use and for profit and alleged that such activities violated Article VII of the Constitution of North Carolina and G.S. 160A-475.

After plaintiff's prayer for a temporary restraining order was denied, defendant answered plaintiff's complaint, alleging, among other things, that plaintiff had failed to state facts sufficient to give him legal right to file this action and that the complaint failed to state a claim on which relief could be granted. Defendant also moved for summary judgment. In response, plaintiff moved to amend his complaint and to delay hearing on the

summary judgment motion until after discovery had been conducted. The motion to amend was denied, and a hearing was held on the summary judgment motion. On 28 May 1977, the trial court, finding no genuine issue of material fact, ruled that the defendant was entitled to judgment as a matter of law. Plaintiff appeals.

Charles E. Clement and Paul E. Miller, Jr., for plaintiff appellant.

James E. Holshouser, Jr., for defendant appellee.

ARNOLD, Judge.

Plaintiff's sole question on this appeal is whether the defendant, Region D Council of Governments, has the power to hold title to real estate and to construct on real estate an office building for its own use and for rental purposes in competition with private enterprise. Before addressing that question, it must first be determined whether plaintiff, as citizen, resident and taxpayer, has the standing to contest the actions of the regional council of governments.

In *Shaw v. Asheville*, 269 N.C. 90, 152 S.E. 2d 139 (1967), a taxpayer suit to enjoin the performance of a cablevision contract, the court found standing. The court quoted from *Wishart v. Lumberton*, 254 N.C. 94, 96, 118 S.E. 2d 35, 36 (1961), that " '[i]f the governing authorities were preparing to put public property to an unauthorized use, citizens and taxpayers had the right to seek equitable relief.' " 269 N.C. at 95, 152 S.E. 2d at 143. The *Shaw* court also quoted from *Merrimon v. Paving Company*, 142 N.C. 539, 545, 55 S.E. 366, 367 (1906):

> " 'That a citizen, in his own behalf and that of all other taxpayers, may maintain a suit in the nature of a bill in equity to enjoin the governing body of a municipal corporation from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers—such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, *etc.*,—is well settled.' " 269 N.C. at 95, 152 S.E. 2d at 143.

See also Kornegay v. Raleigh, 269 N.C. 155, 152 S.E. 2d 186 (1967), where the Supreme Court allowed a suit by citizens and taxpayers to enjoin defendants from performing obligations under a cablevision license granted by the city to Southeastern Cablevision Company. The Court noted that the construction which the grant purported to authorize

> "May bring about extensive damage to and disturbance of pavements and other street and sidewalk surfaces. Such damage, if it occurs, will have to be repaired at substantial expense. The grant also contemplates that the operation of the proposed business may subject the city to liability to third persons. Part or all of these expenses and liabilities may fall upon the taxpayers of the city, notwithstanding provisions in the ordinance requiring Southeastern to hear them and the agreement by Southeastern to indemnify the city against such losses." *Id.* at 160, 152 S.E. 2d at 189-90.

On the other hand, courts must be cognizant of the "gist of the question of standing." In *Stanley, Edwards, Henderson v. Dept. of Conservation and Development*, 284 N.C. 15, 199 S.E. 2d 641 (1973), taxpayers were found to have standing to challenge the constitutionality of the North Carolina Pollution Abatement and Industrial Facilities Financing Act, G.S. 159A-1, *et seq.* In analyzing the question of standing, Justice Sharp, now Chief Justice, stated:

> "Under our decisions '[o]nly those persons may call into question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights.' [Citations omitted.] The rationale of this rule is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue. 'The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions." ' *Flast v. Cohen*, 392 U.S. 83, 99, 20 L.Ed. 2d 947, 961, 88 S.Ct. 1942, 1952 (1968)." 284 N.C. at 28, 199 S.E. 2d at 650.

In *Stanley*, taxpayers of Northampton, Halifax and Jones counties sought judicial review of resolutions of the North Carolina Board

of Conservation and Development (1) determining that the creation of the Pollution Abatement and Industrial Facilities Financing Authority of each of three counties was for a public purpose and (2) approving bond issues by the Halifax and Northampton Authorities for pollution abatement facilities and by the Jones Authority for an industrial facility project. The authorities had not spent, and had not contemplated spending, any funds derived from taxation. At the time of the lawsuit they had issued no bonds. However, the authorities were created solely for the purpose of issuing tax exempt revenue bonds to finance projects specified by the Act and were prepared to issue them immediately upon "successful resolution" of the constitutional questions concerning their power to issue such bonds. The Court noted the general rule regarding standing:

> " 'A taxpayer injuriously affected by a statute may generally attack its validity. Thus, he may attack a statute which . . . exempts persons or property from taxation, or imposes on him in its enforcement an additional financial burden, however slight.' " 284 N.C. at 29, 199 S.E. 2d at 651, quoting 16 C.J.S. *Constitutional Law* § 80, at 247-48 (1956).

In the case *sub judice*, there are two problems which complicate analysis of the question of plaintiff's standing. First, as averred by defendant, the money by which the office complex is to be built, is money received as a grant from the federal government, and not revenues from local tax coffers. Defendant argues and cites cases to the effect that taxpayers may not sue to enjoin activities which are wholly financed by non-tax or donative monies. *See, e.g. Andrews v. City of South Haven*, 187 Mich. 294, 153 N.W. 827 (1915). The theory underlying such decisions is that a taxpayer, such as plaintiff, can show no injury by projects requiring no expenditures of tax money. There have, however, been decisions to the contrary. In *Shipley v. Smith*, 45 N.M. 23, 107 P. 2d 1050 (1940), the New Mexico court held that a taxpayer had sufficient interest to allow him to sue to restrain a payment of public monies although such monies were received as a donation rather than as taxation. in *Shipley* the court agreed with the appellant's argument that the right of the taxpayer is analogous to a stockholder of a private corporation, and the directors of the private corporation have no more right to waste money which originated by gift to the corporation than to waste money which

the stockholders have paid in by way of subscription for shares of stock. See 131 ALR 1230. We are persuaded that the *Shipley* court expressed the more logical view, and more especially since the "donative funds" in the case at bar are a grant originating from the U.S. Department of Commerce, Economic Development Administration, which we perceive to be derived from the taxpaying public.

The second problem which makes this analysis more complicated is that defendant council of governments is not a taxing authority and, thus, defendant argues, should not be treated as the municipalities in the *Kornegay* and *Shaw* cases, *supra*. We do not agree with defendant's argument. Regional councils of governments are created by act of two or more units of local government which adopt identical concurrent resolutions referred to as charters. G.S. 160A-470. While the purpose of regional councils of governments is not clearly stated by the enabling legislation, G.S. 160A-470 *et seq.*, the purpose may be gleaned from a reading of the specific powers which may be conferred upon a council of governments by its charter:

> "The charter may confer on the regional council any of the following powers:
>
> (1) To apply for, accept, receive, and dispense funds and grants made available to it by the State of North Carolina or any agency thereof, the United States of America or any agency thereof, any unit of local government (whether or not a member of the council), and any private or civic agency;
>
> (2) To employ personnel;
>
> (3) To contract with consultants;
>
> (4) To contract with the State of North Carolina, any other state, the United States of America, or any agency thereof, for services;
>
> (5) To study regional governmental problems, including matters affecting health, safety, welfare, education, recreation, economic conditions, regional planning, and regional development;
>
> (6) To promote cooperative arrangements and coordinated action among its member governments;

(7) To make recommendations for review and action to its member governments and other public agencies which perform functions within the region in which its member governments are located;

(8) Any other powers that are exercised or capable of exercise by its member governments and desirable for dealing with problems of mutual concern to the extent such powers are specifically delegated to it from time to time by resolution of the governing board of each of its member governments which are affected thereby." G.S. 160A-475.

[1] Briefly stated, therefore, the purpose of councils of governments is to coordinate governmental functions best undertaken on a regional level. We do not believe that the General Assembly, in establishing the framework for such councils, intended that it would be a means by which local governmental functions would be isolated from local taxpayer suits designed to contest the legality of council action. Therefore, we hold that a taxpayer and resident of an area encompassed by a regional council of governments does have standing to contest allegedly illegal activities of the council where such activities are funded by tax monies or property derived from local or federal sources, or where such activities may later require support by tax monies. We think this holding is consistent with the *Shaw* and *Kornegay* cases, *supra*, as well as with *Stanley, supra*. Our fact situation is distinguishable from that in *Carringer v. Alverson*, 254 N.C. 204, 118 S.E. 2d 408 (1961), where the court nonsuited a taxpayer's action to have declared unconstitutional an act of the General Assembly and to have defendants adjudged as unlawfully holding public office. In that case, the plaintiff did not allege that public money had been or was to be expended, that taxes had been or were to be levied, that his rights had been or were to be invaded. In the present case, and with the liberality of pleadings under *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970), plaintiff has alleged that he is a taxpayer, that federal monies are to be used for the construction of an office complex, and that that office complex is to be built on land already held by the council of governments. Furthermore, it can be inferred from plaintiff's complaint that local taxpayers' monies will be necessary for future upkeep

of the building. Plaintiff, therefore, has standing to contest the legality of defendant's activities.

[2] It is defendant's position that a regional council of governments has the implied power to own property and to construct a building. G.S. 160A-476 authorizes member governments to provide office space for a council. Thus, defendant reasons, if a council may occupy space provided by a member government, at local government expense, it has the right to own and occupy a building constructed by funds from a federal grant. This position cannot be sustained.

Regional councils of government are created when units of local government, *i.e.*, cities and counties, adopt concurrent resolutions. G.S. 160A-470. Once created, however, the council does not become a municipality, or a political or governmental subdivision of the state in the same sense as a city, town or county. A council may take on some of the attributes and functions of a political subdivision, but it does not possess the powers which municipalities are said to possess. [See, *Greene v. City of Winston-Salem*, 287 N.C. 66, 72, 213 S.E. 2d 231, 235 (1975), for a definition of those powers.]

By the terms of its charter a council may possess certain powers which are expressly spelled out in G.S. 160A-475, sections (1) through (7). In addition, councils are expressly given "[a]ny other powers that are exercised or capable of exercise by its member governments . . . ." These "other powers" expressly given apply only "to the extent such powers are specifically delegated from time to time by resolution of the governing boards of each of its member governments which are affected thereby." G.S. 160A-475(8). Therefore, except for the powers conferred by its charter, a council may neither possess nor exercise any powers which are not specifically delegated by each of its member governments.

The legislature has fixed the powers of regional councils of government, and a council may not exercise powers which have not been conferred upon it. The intention of the legislature, by the adoption of G.S. 160A-475(8), is that any powers not conferred on a council by its charter be possessed and exercised only upon the express authorization of each of the member governments. In the instant case defendant is without authority to own land or

construct a building for any purpose unless specifically authorized to do so by its member governments. Those rights might belong to the member governments, but, by statute, they may only belong to defendant when its member governments specifically delegate them.

The record contains the following stipulation:

> "[F]rom the time of the amendment to G.S. 160A-475(8) to the time of the filing of the Complaint no governing board of the individual governments of Region D Council of Governments have adopted a specific resolution authorizing Region D Council of Governments to hold title to and own real estate, nor to construct on real estate an office building for its own use or for rental purposes."

Plaintiff's only contention in this appeal is that judgment be reversed because the defendant is without authority to own real estate or to construct an office building for its own use or for rental purposes since each of the member governments involved has not specifically authorized these powers. Application for the grant from the Economic Development Administration was made on or about 29 October 1976. In 1975 G.S. 160A-475(8) was amended and the language "to the extent such powers are specifically delegated" was added. Thus, in view of the parties' stipulation, plaintiff's position is correct.

The Superior Court of Watauga County is directed to enter judgment in accordance with this opinion. The judgment appealed from is

Reversed.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. FRANKLIN E. MUSSELWHITE AND GREGORY B. ARTIS

No. 7712SC1013

(Filed 6 June 1978)

1. **Searches and Seizures § 11— warrantless search of vehicle—probable cause**

Police officers had probable cause to conduct a warrantless search of a van in which defendants were riding, and items seized during the search were admissible in defendants' trial for armed robbery, where a grain company had been robbed; the robber had been described as five feet eight inches tall, weighing 170 to 180 pounds, and wearing black boots; a man fitting that description was seen leaving the crime scene wearing a faded blue sweat shirt, faded blue jeans, and black boots; he entered on the passenger's side a yellow van with a spare tire on the back bearing a license number beginning with AY9 and ending with either 86 or 66; a short while before the robbery, one defendant was seen driving the van; the police later spotted a yellow van with spare tire on the back bearing license number AY9 666; the van was occupied by defendants, one of whom was stocky, weighed 185 to 190 pounds, and was wearing a faded blue sweat shirt, faded blue jeans, and black boots.

2. **Robbery § 5.6— aider and abettor—driver of getaway car—instructions—insufficient evidence—possession of recently stolen items**

The trial court erred in instructing that defendant could be found guilty of aiding and abetting the actual perpetrator of an armed robbery if defendant drove the getaway car where there was no evidence before the jury that defendant was near the scene of the crime, that a getaway car was used, or that the getaway car was driven by defendant, the defendant's possession of items recently stolen in the robbery being insufficient to support such instruction.

APPEAL by defendants from *Godwin, Judge*. Judgment entered 18 May 1977 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 5 April 1978.

Defendants Franklin E. Musselwhite and Gregory B. Artis were charged by bills of indictment with robbery with a firearm. The bills of indictment allege that, with the use of a pistol, the defendants did rob Southern Gin and Grain Company and did steal monies and various distinctive items of property. Both defendants moved to suppress evidence seized by the police during the search of a certain 1974 Dodge van. The trial court held a hearing on the motions to suppress.

The essential facts elicited at the voir dire hearing on the motion to suppress are as follows: Around 9:00 a.m. on 10

September 1976, a white male with a stocking over his face and using a pistol, entered and robbed Southern Gin and Grain. The robber was described as approximately five feet eight inches tall, weighing 170 to 180 pounds, appearing to be 30 to 35 years old. The robber took two cigar boxes containing, among other things, a pistol, $1130 in normal currency, a silver Mother's Day medallion, and a coin collection, including some unusual two dollar bills. After the robber left, one of the three occupants of the office called the police.

Officers responded to the call and interviewed the three witnesses who revealed the foregoing facts. After attending to another matter, the officers began, about two hours later, to question persons in the area. Three women employed by a factory adjacent to Southern Gin and Grain told the police that they had seen a white male leaving the office of Southern Gin and Grain. The man was wearing a bluish sweat shirt, faded blue jeans, and black boots. He was carrying something under his shirt. He entered, on the passenger side, a yellow van with a spare tire on the rear door.

Shortly after interviewing these witnesses, a confidential informant, known by the officers and known to be reliable, whose information had previously led to arrests, told them that he had seen a person running from the office of Southern Gin and Grain around 9:00 that morning. The man was described as a white male, 30 years old, stocky, weighing 170 to 180 pounds with blondish looking hair. He was wearing a bluish white looking faded sweat shirt, faded blue jeans, and black boots. The man entered a yellow van with the spare tire on the back. The license number of the van began with A-Y-9 and ended with either an 8-6 or a 6-6. The informant had also seen this same van driving around the area shortly before the robbery. At that time, it was being operated by one Frank Musselwhite, whom the informant knew. The informant also gave them an accurate description of Musselwhite's residence.

The officers went to Musselwhite's residence and found it as described. At the mobile home, they observed a yellow van with a spare tire on the back bearing license number AY9 666. They returned to the station to check the license and obtain a warrant.

The van was registered to a Richard Nabinger. They returned to the mobile home with the warrant, but the van was gone.

Two other officers stopped the van pursuant to a radio alert for a yellow van license number AY9 666. The van was occupied by two white males—Musselwhite and Artis. Musselwhite was driving. Artis was wearing a faded blue sweat shirt, well worn blue jeans, and black boots. He appeared to be 20 to 25 years old and 185 to 190 pounds.

The two men were detained while the officers awaited assistance. The officers noticed a bulge in Artis's pocket which Artis said was money. It was removed, and it contained several old two dollar bills. One of the officers looked in the door of the van and observed a bag of green vegetable material. Artis and Musselwhite were then arrested and taken to the police station. The van was also taken to the station.

At the station, a thorough search of Artis revealed a silver Mother's Day medallion like the one taken in the robbery. A search of the van revealed numerous items, including several new items of clothing purchased that day and two loaded pistols. One of these pistols was like the gun which had been stolen. The other pistol was like the one used in the robbery.

The trial court denied both defendants' motions to suppress. Subsequent to the denial of his motion to suppress, defendant Artis entered a plea of guilty. Defendant Musselwhite was tried before a jury. The evidence before the jury revealed the following essential facts. A white male about five feet eight inches tall weighing 170 to 180 pounds robbed Southern Gin and Grain around 9:00 in the morning 10 September 1976. He used a pistol. He stole, among other things, $1130 in currency, a silver Mother's Day medallion, a pistol, and a coin collection including some distinctive two dollar bills. Around 4:30 that afternoon, pursuant to a radio alert, police stopped a yellow van belonging to Richard Nabinger. Defendant Musselwhite was driving. Artis was on the passenger's side and was wearing a faded blue sweat shirt, faded blue jeans, and black boots. Nabinger lent his van to Musselwhite around 7:00 that morning and saw him with it around 1:00 that afternoon.

Artis had $319 in his pocket. This money included 15 old type two dollar bills and 24 new two dollar bills—the exact number of each type which had been stolen. Artis also had a medallion like the one stolen. A search of the van revealed numerous new items of clothing purchased that same day, a pistol like the one used in the robbery, and the pistol which had been stolen.

The jury found defendant Musselwhite guilty of armed robbery. The trial court sentenced both defendants to 40 years imprisonment. Defendant Artis appeals from the denial of his motion to suppress. Defendant Musselwhite appeals from the judgment entered on the verdict.

Other facts necessary to the decision in this case are set out in the body of the opinion.

Attorney General Edmisten, by Assistant Attorney General Isaac T. Avery III and Associate Attorney David Roy Blackwell, for the State.

Smith, Geimer & Glusman, by W. S. Geimer, for the defendant appellant Musselwhite.

Public Defender James R. Parish for the defendant appellant Artis.

MORRIS, Judge.

[1] We shall first discuss the issue common to both defendants. Both Musselwhite and Artis moved to suppress the evidence seized by the police during the search of a certain 1974 Dodge van. The search was ostensibly conducted pursuant to a search warrant. The trial court ruled the search warrant invalid. At trial, subsequent to a hearing on the pretrial motions, the court ruled that the evidence seized during the search of the van was admissible even though, after invalidating the warrant, the search was warrantless. Defendants contend that these searches were constitutionally unreasonable and that evidence seized during the search must, therefore, be excluded.

Evidence obtained by unreasonable search is inadmissible under both the Constitution of the United States and the Constitution of North Carolina. *State v. Simmons*, 278 N.C. 468, 180 S.E. 2d 97 (1971). A search may be constitutionally reasonable

even though warrantless. The existence of probable cause plus some exigency such as danger to the arresting officer or the likelihood that the evidence will be destroyed or removed will justify a warrantless search. *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970).

> "Automobiles and other conveyances may be searched without a warrant under circumstances that would not justify the search of a house, and a police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile or other conveyance carried contraband materials." (Citations omitted.) *State v. Simmons*, 278 N.C. at 471, 180 S.E. 2d at 99.

Over 50 years ago, the Supreme Court thoroughly analyzed the problems faced when applying the Fourth Amendment to cases involving automobiles. In *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), a case which involved trafficking in illegal liquor, the Court held that:

> "[t]he measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." 267 U.S. at 155 and 156, 45 S.Ct. at 286, 69 L.Ed. at 552.

The Court then, as now, realized that evidence concealed in an automobile could be easily moved and that the Court should take that fact into account in determining "reasonableness" under the Fourth Amendment.

The question we face, therefore, is whether the officers had probable cause to search the van. If so, the search was reasonable, and the evidence is admissible. The Court found probable cause to search a car under similar circumstances in *Chambers v. Maroney*. In that case, two men, one wearing a green sweater, the other a trench coat, robbed a service station. Two teenagers saw a light blue compact station wagon circling the block; then they saw it speed away carrying four men one of whom was wearing a green sweater. A description of the car and

the robbers was broadcast on the radio. About an hour later, the police stopped a light blue compact station wagon with four men inside. One of the occupants was wearing a green sweater, and a trench coat was in the car. The Court held that "[o]n the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search." 399 U.S. at 52, 90 S.Ct. at 1981, 26 L.Ed. 2d at 419.

In the case before us, the robber had been described as five feet eight inches tall weighing 170 to 180 pounds and wearing black boots. A man fitting that description was seen leaving the crime scene wearing a faded blue sweat shirt, faded blue jeans, and black boots. He entered, on the passenger's side, a yellow van with the spare tire on the back door bearing license number AY9 66 or 86. A short while before the robbery, defendant Musselwhite was seen driving the van. The police later spotted a yellow van with the spare tire on the back bearing license number AY9 666. It was occupied by two white males one of whom was stocky, weighed approximately 185 to 190 pounds, and was wearing a faded blue sweat shirt, faded blue jeans, and black boots. Defendant Musselwhite was operating the van. We believe that, in light of *Chambers v. Maroney*, there was probable cause to search the van when stopped. Thus, even if the warrant is invalid, the search is nonetheless reasonable and the evidence is admissible.

[2] The balance of this opinion will deal with issues raised only in the appeal of defendant Musselwhite. Defendant Musselwhite contends that the trial court committed reversible error in instructing the jury that it could find Musselwhite guilty of aiding and abetting Artis in the commission of the robbery. We agree.

It is settled law that "a trial judge should not give instructions to the jury which are not supported by the evidence produced at trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E. 2d 186, 191 (1973).

In the present case, the trial court instructed the jury:

". . . if you find from the evidence and beyond a reasonable doubt that on September 10, 1976 Gregory B. Artis committed the crime of armed robbery at Southern Gin and Grain

Company on C Street in Fayetteville, that is, that Artis took property in the presence of James M. Gillis, that Artis carried that property away, that Mr. Gillis did not voluntarily consent to the taking and carrying away of the property;

That at the time of the taking Artis intended to deprive Gillis of the property permanently; that Gillis—I mean that Artis knew that he was not entitled to take the property, that Artis had a firearm, to wit, a pistol, in his possession at the time he obtained the property, and that he, Artis, obtained the property by endangering and threatening the lives of Mr. Gillis, Mr. Cates and Mr. Bennett with the firearm, to wit: a pistol, and further that the Defendant, Franklin Musselwhite, even though not physically present in the office of Southern Gin and Grain Company at the time of the robbery shared the criminal purpose of Gregory Artis and to the knowledge of Artis was the driver of the getaway car, and that in being such driver was in the immediate area of the robbery in a vehicle for the purpose of transporting Artis from the scene of the robbery and that in that respect the Defendant, Musselwhite, was aiding Artis at the time of the robbery it will be your duty to return a verdict of guilty of armed robbery as charged. . . ."

This Court has held that one may be convicted of aiding and abetting in the offense of robbery either if " 'he is near enough to render assistance if need be and to encourage the actual perpetration of the felony' " or if he provides " 'a means by which the actual perpetrator may get away from the scene upon completion of the offense. . . .' " (Emphasis deleted.) *State v. Lyles*, 19 N.C. App. 632, 635 and 636, 199 S.E. 2d 699, 701 and 702 (1973), *cert. denied* 284 N.C. 426, 200 S.E. 2d 662 (1973).

In the present case, the record before us is devoid of any evidence *before the jury* which even suggests that Musselwhite was near the scene of the crime, that a getaway car was used, or that the getaway car was driven by Musselwhite. Thus, it appears that there was no evidence to support the charge.

The State argues that the presumption of theft arising from the possession of recently stolen goods is applicable in this case and sufficiently supports the charge of aiding and abetting. "The presumption, however, is one of fact only and is to be considered

by the jury merely as an evidential fact along with other evidence in determining defendant's guilt." *State v. Weinstein*, 224 N.C. 645, 650 and 651, 31 S.E. 2d 920, 924 (1944); *see also State v. Warren*, 35 N.C. App. 468, 241 S.E. 2d 854 (1978), *cert. allowed* 295 N.C. 94, 244 S.E. 2d 262 (1978). "The applicability of the doctine of the inference of guilty derived from the recent possession of stolen goods depends upon the circumstance and character of the possession." 224 N.C. at 650, 31 S.E. 2d at 924. The strength of the presumption depends completely upon the "circumstances of the case." *State v. Williams*, 219 N.C. 365, 13 S.E. 2d 617 (1941). In the usual case, the presumption is used against one accused of being the actual perpetrator. In such a case, the presumption has a basis in fact once the theft is shown, since someone must have committed the theft. In this case, however, the presumption is not being so used. Here, the State's evidence unequivocably establishes that the man who robbed Southern Gin and Grain was not the defendant Musselwhite. The State urges us to apply the presumption in order to establish that the defendant drove the getaway car. Even assuming that a robbery was committed, there is absolutely no evidence that a getaway car was used. We do not believe that, absent any other evidence, the possession of recently stolen property should create the presumption (1) that a getaway car was used *and* (2) that the possessor drove the car. Such a presumption clearly would have no basis in fact. We agree with the Court's statement in *State v. Cannon*, 218 N.C. 466, 11 S.E. 2d 301 (1940), wherein the Court stated:

> "The record is barren of any evidence of larceny on the part of Howard Cannon [the defendant], unless the possession by him of the goods . . . is evidence of such guilt. While it is very generally held that the recent possession of stolen property . . . raises a presumption of fact. . . of such guilt, still it would seem that on the present record no such presumption should prevail because the State's evidence shows the larceny to have been committed by others, and fails to connect the defendant in any way with the felonious taking. . . ." 218 N.C. at 467, 11 S.E. 2d at 302.

As a presumption of fact, the presumption of theft arising from the possession of recently stolen goods is applicable in cases similar to this case. However, when the State's evidence clearly shows that the actual taking was not performed by the defendant,

absent some other evidence either to suggest that more than one person was involved or to connect the defendant with the crime, the presumption is so weak that it alone is insufficient to support a charge of aiding and abetting the robbery. If, in the new trial, the State can show either that a getaway car driven by another person was used, that another person joined in the theft, or that defendant was present, then the presumption plus that other evidence would support the charge.

The evidence seized during the search of the van is admissible against both defendants. In the appeal of defendant Artis, we, therefore, find no error. In the trial of the defendant Musselwhite, we find error in the trial court's charge to the jury. The defendant Musselwhite is, therefore, entitled to a new trial.

In the appeal of Artis—no error.

In the appeal of Musselwhite—new trial.

Judges MARTIN and ARNOLD concur.

J. FRANK TUCKER EMPLOYEE-PLAINTIFF v. FCX INCORPORATED EMPLOYER-DEFENDANT AND NATIONWIDE INSURANCE COMPANY CARRIER-DEFENDANT

No. 7718IC534

(Filed 6 June 1978)

Master and Servant § 77.2— workmen's compensation—permanent partial disability compensation denied—order interlocutory

The Industrial Commission's award of 28 February 1969 was an interlocutory award with respect to disability compensation rather than a final award which would invoke the one year statute of limitations under G.S. 97-47, since the award, by its own terms, indicated that some future compensation might be awarded in that the award stated that permanent partial disability compensation would not be paid to the plaintiff "at this time" and that the attorney's fee would be held in abeyance; there was no evidence that plaintiff ever signed a closing receipt indicating that the medical payment made on 30 July 1969 pursuant to the February order was a final payment which would bar his right to further compensation unless a claim for a change of condition was made within twelve months of the date of the last medical payment; and the fact that plaintiff's employer allowed him to return to work at the same salary, but without requiring him to do heavy manual labor because of a

known 40% permanent disability of a general nature, should not bar his subsequent claim for a permanent disability award during the statutory period in which compensation is allowed.

APPEAL by plaintiff from order of the North Carolina Industrial Commission entered 7 April 1977. Heard in the Court of Appeals 30 March 1978.

Plaintiff suffered a compensable myocardial infarction when he stumbled and fell while unloading roofing material from a railroad boxcar for defendant employer, FCX, Incorporated, (FCX), on 4 June 1968. Defendant Nationwide Insurance Company is the insurance carrier for workmen's compensation claims against defendant FCX.

A workmen's compensation claim was filed and on 17 July 1969, the full commission adopted the opinion and award of Commissioner Marshall which was rendered on 28 February 1969. The opinion stated that plaintiff had suffered a 40 percent partial general disability to perform manual labor; that since he was paid his regular salary by FCX while hospitalized and out of work, he was not entitled to temporary total disability compensation; that since his employer had modified his job by excluding manual labor and allowed him to continue working at his regular salary, he was not entitled to permanent partial disability compensation of a general nature "at this time"; that defendants should pay all medical expenses incurred as a result of the injury; and that the attorney fee should be held in abeyance "at this time."

Following his recovery, plaintiff returned to his job and continued to draw his regular salary. On 20 September 1973, his heart condition became worse. He was hospitalized on 30 November 1973 and was classified as being 100 percent disabled. By letter dated 8 March 1974, plaintiff's attorney advised the Industrial Commission that plaintiff had become totally disabled because of his heart condition and requested that his case be placed on the docket for a hearing on his claim for permanent, partial disability, temporary total disability, permanent total disability and medical care.

On 17 May 1976 Deputy Commissioner Roney conducted a hearing and found that plaintiff was injured on 4 June 1968 and missed approximately three months' work during which time he

received his regular salary; that on 28 February 1969 a final opinion and award which provided for medical expenses had been entered; that plaintiff returned to work following his recovery and continued to work until 30 November 1973 when his heart condition worsened and he became totally disabled; and that the last payment for medical treatment pursuant to the 28 February 1969 award was made on 30 July 1969. Deputy Commissioner Roney denied plaintiff's claim on the ground that it was barred because he had failed to file a claim pursuant to G.S. 97-47 within one year following the date of the last payment of bills for medical treatment pursuant to the final opinion and award of 28 February 1969.

On 7 April 1977, the full commission affirmed and adopted the opinion of Deputy Commissioner Roney in its entirety. Plaintiff appealed.

Cahoon & Swisher, by Robert S. Cahoon, for plaintiff appellant.

Herman Winfree for defendant appellee.

BRITT, Judge.

Plaintiff makes two assignments of error which he consolidates into one argument. He contends that the opinion of 28 February 1969 which awarded medical expenses and found that he had sufferd a compensable 40 percent permanent partial general disability to perform manual labor was not a final award within the meaning of G.S. 97-47. He argues that the award was not final because it stated that no permanent partial disability compensation was awarded at that time since his employer had allowed him to continue working after the accident at the same salary and that the attorney's fees were to be held in abeyance. He argues that the language of the award clearly contemplates that both permanent partial disability compensation and counsel fees would be awarded at a later date. We find merit in this contention.

In *Watkins v. Motor Lines*, 279 N.C. 132, 136-37, 181 S.E. 2d 588 (1971), the Supreme Court discussed G.S. 97-47 in the following manner:

> G.S. 97-47, in pertinent part, provides: "Upon its own motion or upon the application of any party in interest on the grounds of a change of condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this article, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review shall be made after twelve months from the date of the last payment of compensation pursuant to an award under this article . . . ." The Commission's authority under this statute is *limited to review of prior awards*, and the statute is inapplicable in instances where there has been no previous final award. *Biddix v. Rex Mills*, 237 N.C. 660, 75 S.E. 2d 777 (1953); *Pratt v. Upholstery Co.*, 252 N.C. 716, 115 S.E. 2d 27 (1960). In such cases, jurisdiction is retained by and remains in the Commission pending a termination of the case by final award. *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865 (1943). No statute runs against a litigant while his case is pending in court. *Hanks v. Utilities Co.*, 210 N.C. 312, 186 S.E. 252 (1936).

The issue presented by the instant case is whether the award of 28 February 1969 was a final award which is subject to the one-year statute of limitations created by G.S. 97-47.

Although research fails to reveal a case with a factual situation identical to the present case, an examination of cases requiring the determination of what is a final award is instructive. In *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865 (1943), the plaintiff suffered a back injury which resulted in a 33⅓ percent general partial disability and prevented him from doing heavy manual labor. Seven days after the accident, plaintiff's employer allowed him to return to work in a position not involving heavy manual labor and paid him the same salary he was earning prior to the accident. The Industrial Commission order provided that plaintiff's medical bills should be paid by the employer or the insurance carrier and that plaintiff was entitled to the statutory compensation for 300 weeks from the date of the accident less such time as he was paid full wages. On appeal, the superior court

held that the Industrial Commission could not order compensation payment in the above manner.

On appeal to the Supreme Court the superior court was reversed even though the Supreme Court conceded that the plaintiff had not suffered a disability within the meaning of the act. Under the act, "wages earned, or the capacity to earn wages, is the test of earning capacity, or to state it differently, the diminution of the power or capacity to earn is the measure of compensability." *Branham v. Panel Co., supra* at 237. Since the plaintiff in *Branham* was earning the same amount of wages after the injury that he was earning prior to the injury, the court held that he failed to show any compensable injury or incapacity at the time of the award and that he was not entitled to compensation in addition to his regular salary.

However, the court stated that the Industrial Commission had not exceeded its authority by leaving the compensation award open for 300 weeks.

> To protect the employee against the possibility that the employer might, after the expiration of 12 months, sec. 24, discontinue the employment and thus defeat the rights of the employee, the commission after finding the existence of the disability, directed that an award issue subject to specified limitations. The court below entered judgment striking this provision and affirming the judgment of the commission as thus modified. The exception to the judgment challenges the correctness of this ruling. It must be held for error.
>
> The commission adjudged the rights and liabilities of the parties. It then directed compensation at the statutory rate "at any time it is shown that the claimant is earning less," etc., during the statutory period of 300 weeks. By this order the commission, in effect, retained jurisdiction for future adjustments. In so doing it did not exceed its authority.

Branham v. Panel Co., supra at 238.

In *Pratt v. Upholstery Co.*, 252 N.C. 716, 115 S.E. 2d 27 (1960), the court was faced with another situation which is analogous to the instant case. In that case plaintiff received compensation for temporary disability pursuant to an agreement ap-

proved by the Industrial Commission on 20 May 1957. On 20 August 1957, a medical report indicating a question existed with respect to plaintiff's permanent disability rating was submitted to and approved by the commission. On 19 August 1957, plaintiff returned to work, but was employed in a different capacity due to her injury. On 19 August 1957, plaintiff received her last temporary compensation payment which had a notation: "Final payment of temporary total disability." In April 1958 a final report indicating that she had suffered a 10 percent permanent disability of her spine which might require further treatment was submitted to and approved by the commission. However, in the spring of 1959, plaintiff was informed by the Industrial Commission that her claim for permanent disability was barred by the G.S. 97-47 statute of limitations. On appeal the superior court affirmed the commission's ruling.

Plaintiff appealed and the Supreme Court reversed the ruling of the commission and the superior court denying compensation. The court stated that the first award was a preliminary interlocutory award rather than a final award because the final medical reports were not filed, because by its terms it did not purport to fix and determine the full amount of compensation, and because the employer knew that when plaintiff returned to work the amount of permanent disability had not been determined. The Court recognized that there is a factual presumption in North Carolina that disability ends when an injured employee returns to work but noted that this presumption can be overcome by facts showing partial incapacity after a return to work. In addition, the court stated that the notation on the last compensation check that it was a final payment of temporary total disability did not make it the final payment of compensation to which plaintiff was entitled. Even though plaintiff's signature on a closing receipt which stated that it was a final settlement and that no further compensation would be paid unless request for hearing for change of condition was made within a year from the date of the receipt would have acquitted the employer, the plaintiff was never asked to sign such an agreement.

The court finally summarized its reasoning in the following manner:

> It all comes to this: The agreement presented to the Commission invoked the judicial authority of the Commis-

sion, a preliminary and interlocutory award was made by approval of the agreement, there has been no final determination of compensation, and claimant has not waived her right to such adjudication. The Commission does not exceed its authority when it retains jurisdiction for further adjustments pending final award. *Branham v. Panel Co.*, 223 N.C. 233, 238, 25 S.E. 2d 865. G.S. 97-47 is inapplicable if there has been no final award. *Biddix v. Rex Mills, supra,* at page 666.

But it is asserted that there was a change in claimant's condition within the meaning of G.S. 97-47. No case decided by this Court has come to our attention in which the factual situation here involved has been termed a "change of condition." Change of condition "refers to conditions different from those existent when the award was made; and a continued incapacity of the same kind and character and for the same injury is not a change of condition . . . the change must be actual, and not a mere change of opinion with respect to a pre-existing condition." 101 C.J.S. Workman's Compensation, sec. 854(c), pp. 211-2. Whether there has been a change of condition is a question of fact; whether the facts found amount to a change of condition is a question of law. Change of condition is a substantial change, after a final award of compensation, of physical capacity to earn and, in some cases, of earnings. *Hill v. DuBose*, 234 N.C. 446, 67 S.E. 2d 371. *Knight v. Body Co.*, 214 N.C. 7, 197 S.E. 563. *Smith v. Swift & Co.*, 212 N.C. 608, 194 S.E. 106. Changes of condition occurring during the healing period and prior to the time of maximum recovery and the permanent disability, if any, found to exist at the end of the period of healing are not changes of condition within the meaning of G.S. 97-47.

It is our opinion, and we so hold, in the instant case that G.S. 97-47 does not bar employee's claim in that, at the time she requested a hearing there had been no final award of compensation which could be ended, increased or diminished by review, no change of condition was involved, and she had not waived her right to a final adjudication.

Pratt v. Upholstery Co., supra at 722.

Applying the principles in the *Watkins*, *Branham*, and *Pratt* cases to the instant case, we conclude that the 28 February 1969

award was not a final award within the meaning of G.S. 97-47 but a preliminary, interlocutory award. By its own terms the award indicates that some future compensation may be awarded because it states that permanent partial disability compensation will not be paid to the plaintiff "at this time" and that the attorney's fee will be held in abeyance. In addition, the record does not indicate that plaintiff ever signed a closing receipt indicating that the medical payment of 30 July 1969 was a final payment which would bar his right to further compensation unless a claim for a change of condition was made within twelve months of the date of the last medical payment. In fact, there is no evidence that plaintiff was even aware of the date on which the final medical payment was made since the only testimony on that point was given by plaintiff's doctor who stated that "[t]he last record of payment for my medical care to [plaintiff] under his Workmen's Compensation Award [was] July 30, 1969." Finally, the fact that plaintiff's employer allowed him to return to work at the same salary, but without requiring him to do heavy manual labor because of a known 40 percent permanent disability of a general nature should not bar his subsequent claim for a permanent disability award during the statutory period in which compensation is allowed especially when the original award by the commission expressly left the question open, and there is no evidence that plaintiff ever signed a closing receipt indicating that he considered the 28 February 1969 opinion and award a final adjudication of his rights.

Although there are several cases involving factual situations similar to the instant case and holding that the claimant has received a final award invoking the one-year statute of limitations under G.S. 97-47, they are distinguishable from the instant case. In *Dail v. Kellex Corp.*, 233 N.C. 446, 64 S.E. 2d 438 (1951), the Industrial Commission gave the plaintiff an award for 20 percent permanent partial disability and reserved the right to enter an award for temporary total disability if it occurred within 300 weeks from the date of the accidental injury. On appeal the superior court reversed the 300 week provision and the Supreme Court affirmed on the ground that the Industrial Commission did not have the authority to make an award and then reserve the right to modify it for 300 weeks due to a change in condition when G.S. 97-47 only allows one year.

The court then distinguished the *Branham* case due to its different factual basis. In both *Branham* and the instant case the claimants returned to work despite their disability and the Industrial Commission's original awards did not make any provisions for a stated amount of permanent partial disability compensation.

In *Smith v. Red Cross*, 245 N.C. 116, 95 S.E. 2d 559 (1956), the parties entered into an agreement which was approved by the Industrial Commission and provided compensation for total temporary disability for a specified number of weeks. The injured employee executed a closing receipt stating that a claim for further compensation due to a change of conditions would have to be made within one year from the date of final payment under the agreement pursuant to G.S. 97-47. More than a year later, plaintiff filed a claim for permanent partial disability which the court held was barred by G.S. 97-47. Specifically, the court held that the agreement approved by the commission and the closing receipt signed by the plaintiff more than a year prior to the filing of the claim for permanent disability put the case beyond the time given by G.S. 97-47. In the instant case, the plaintiff never received any compensation for permanent partial disability, never signed a closing receipt, and had specific language in the Industrial Commission award which indicated that although no permanent disability compensation would be awarded "at this time," due to his working situation, it may be awarded at a later date.

Finally, in *Harris v. Contracting Co.*, 240 N.C. 715, 83 S.E. 2d 802 (1954), the Industrial Commission order awarded compensation for temporary partial disability and then retained the case for 300 weeks from the date of the accident for such future adjustments as may be necessary for any fluctuations in claimant's ability to work and earn wages during said period. On appeal, the court rejected the Industrial Commission's attempt to retain jurisdiction, but factually distinguished the *Branham* case in which retention of jurisdiction was approved on the grounds that no final award had been made in that case. The court noted that in *Branham*, the employer retained the injured employee, gave him light work and paid him the same wages he had earned prior to the injury. The Industrial Commission was allowed to retain jurisdiction in *Branham* to prevent the employer from dismissing the employee after twelve months in order to defeat his rights under the act.

An examination of the facts in the instant case reveals that it is more analogous to the *Branham* situation in which retention of jurisdiction was allowed than it is to the *Harris* case in which retention of jurisdiction was disapproved. The employer in the present case retained the plaintiff and continued paying him the same wages that he was earning prior to the injury even though he was no longer able to perform heavy manual labor. Since plaintiff was receiving his regular salary at the time of the Industrial Commission order, no disability compensation could be awarded at that time. However, the commission retained jurisdiction over the compensation question by implying that the disability compensation and the attorney fees could be awarded at a later date. In effect, the commission entered an interlocutory award on the disability compensation question in order to protect the employee's rights in the event that the employer terminated his employment after the statute of limitations period.

For the reasons stated, we conclude that the award of 28 February 1969 was an interlocutory award with respect to disability compensation rather than a final award which would invoke the one-year statute of limitations under G.S. 97-47. Since G.S. 97-47 is inapplicable, plaintiff is entitled to a hearing before the Industrial Commission to determine the amount of disability compensation if any to which he is entitled.

Order reversed and cause remanded to the Industrial Commission.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. WESLEY DALE JONES

No. 775SC940

(Filed 6 June 1978)

1. Kidnapping § 1.2— removal to terrorize—sufficiency of evidence

The State's evidence in a kidnapping case was sufficient to allow the jury to find that defendant's purpose in removing the victim was to terrorize her within the meaning of G.S. 14-39(a)(3) where it tended to show that defendant

told the victim, who had broken off her engagement to defendant, that he was going to do something to her that would make her remember him for the rest of her life.

2. **Criminal Law § 116.1— defendant's failure to testify—sufficiency of instructions**

The trial court's instruction that the jury "must be very careful not to allow his silence, his failure, his election not to testify to influence your decision in any way" was not insufficient when considered with the court's other instructions that defendant had a right not to testify and that his decision not to testify should not be used against him in any way.

3. **Kidnapping § 1.3— instructions—purpose to terrorize**

The trial court in a prosecution for aggravated kidnapping did not instruct the jury that whether the victim was terrorized was an element of the offense but properly distinguished between the defendant's purpose to terrorize, an element of the offense, and the effect of defendant's action upon the victim, which is not an element of the offense.

4. **Kidnapping § 1.3— aggravated kidnapping—failure to submit lesser offenses**

The trial court in a prosecution for aggravated kidnapping did not err in failing to instruct as to a lesser offense of the crime charged where the State presented positive evidence as to each element of the crime charged and there was no conflict in the evidence.

APPEAL by defendant from *James, Judge*. Judgment entered 1 July 1976, in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 28 March 1978.

Defendant was charged in an indictment, proper in form, with the kidnapping of Starr Lynn Godbey, to which charge he entered a plea of not guilty. At trial the State presented evidence which tended to show that on 22 January 1976 at approximately 2:00 p.m., defendant went to the Godbey residence and held Starr Lynn Godbey's mother, her brother, and a friend of her brother at gunpoint for approximately 2½ hours, until Starr Lynn returned home from Cape Fear Technical Institute, where she had been attending classes; that defendant and Starr Lynn had previously been engaged but that Starr Lynn had broken off the relationship; that defendant forced Starr Lynn to leave with him in the Godbey family car after her arrival home from school; that defendant ultimately drove Starr Lynn to a pizza parlor where defendant was overcome and disarmed by a bystander, and apprehended by police, and where Starr Lynn was thus released.

The defendant offered no evidence.

The jury returned a verdict of guilty of aggravated kidnapping. From judgment imposing a term of imprisonment for not less than twenty-five nor more than thirty years, defendant appealed.

Attorney General Edmisten, by Associate Attorney J. Chris Prather, for the State.

James K. Larrick for defendant.

BROCK, Chief Judge.

[1] Defendant brings forward four assignments of error in four arguments. For his assignment of error number 1, defendant contends that the trial court erred in denying his motions for directed verdict and to set aside the verdict.

The crime of kidnapping is defined by G.S. 14-39 as follows:

> "§ 14-39.—(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.
>
> (b) Any person convicted of kidnapping shall be guilty of a felony and shall be punished by imprisonment for not less than 25 years nor more than life. If the person kidnapped, as defined in subsection (a), was released by the defendant in a safe place and had not been sexually assaulted or seriously injured, the person so convicted shall be punished by imprisonment for not more than 25 years, or by a fine of not more than ten thousand dollars ($10,000), or both, in the discretion of the court."

Thus in order for defendant to be convicted of the statutory crime of kidnapping, the State was required to prove that the removal of Starr Lynn was for one of the purposes enumerated in subsections (a)(1) through (a)(3), *supra*. The only purpose upon which the trial judge instructed the jury was that set out in subsection (a)(3), to wit: terrorizing Starr Lynn. Defendant, apparently conceding that there was sufficient evidence on the other elements of G.S. 14-39, contends nevertheless that there was no direct evidence to establish that defendant's purpose for removing Starr Lynn was to terrorize her.

A motion for directed verdict of not guilty has the same legal effect as a motion for nonsuit; both test the sufficiency of the evidence to go to the jury. *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967). Such a motion is properly denied if there is substantial competent evidence of all material elements of the offense charged; the evidence is considered in the light most favorable to the State, giving the State the benefit of every reasonable inference which can be drawn from the evidence. *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971). Applying these principles, we are of the opinion that the State's evidence was sufficient to allow the jury to find that defendant's purpose in removing Starr Lynn was to terrorize her.

Mrs. Betty Godbey, Starr Lynn's mother, testified as follows:

> "Then he said Starr come on you are going with me. 'You are going for a ride.' She said she was not going, and I said 'Wesley she is not going with you.' I didn't know to what extent we could hold out our saying 'She is not going.' Then he took the gun and pulled out the hammer and put it on her forehead right here and he said 'Starr Lynn, come on, you are going with me.' And when he did this, he told her that he hated her and that he was going to do something to her that would make her remember him so long as she lived. He made this statement before when we were in the den talking that he was going to do something to her that would make her hate him so long as she lived."

Jody Godbey, brother of Starr Lynn, testified that defendant "said he wanted to make Starr remember him the rest of her life

and he wanted to go to prison and be thrown into the darkest or deepest corner and let them throw the key away so he would never see sunlight again."

Webster's Third New International Dictionary of the English Language—Unabridged (1968) defines "terrorize" as follows: "1: to fill with terror or anxiety: scare 2: to coerce by threat or violence . . . to excite fear . . . ." "Terror" is defined as "a state of intense fright or apprehension."

As to the definition of "terrorize", the trial judge instructed the jury as follows: "The word 'terrorize' I instruct you has some kinship to fear, but I instruct you that probably [sic] understood it means not ordinary concern or ordinary fear, but some degree—some higher degree of fear in order to constitute terror . . . ." In our opinion, the trial judge was correct in defining terror for purposes of G.S. 14-39, as involving more than ordinary fear. However, under any of the above definitions, we hold that the testimony set out *supra* was sufficient to go to the jury and to allow the jury to find that defendant's purpose was, at the very least, to terrorize Starr Lynn. Defendant's assignment of error number 1 is overruled.

[2] Defendant excepts, in his assignment of error number 2, to the trial judge's charge on defendant's election not to testify at trial. The complete charge given by the trial judge as to this matter is set out as follows:

> "Now, the defendant in this case, as you have observed, has not testifed. I instruct you that the law of North Carolina gives him this privilege. This same law of North Carolina also assures him that his decision not to testify will not be used against him in any way in this case. *Therefore, you must be very careful not to allow his silence, his failure, his election not to testify to influence your decision in any way.*" (Emphasis added.)

The emphasized portion of the above instruction is the subject of defendant's assignment of error; defendant contends that in the one sentence, the judge did not positively advise the jury not to consider adverse to defendant his election not to testify. Defendant asks us to isolate the one sentence. The rule has oft been stated that a charge must be construed contextually and isolated portions will not be held prejudicial when the charge as a whole

is correct. *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683, *cert. denied* 409 U.S. 948, 34 L.Ed. 2d 218, 93 S.Ct. 293 (1972). However, reading the charge as a whole, we find that it was sufficient to make clear to the jury that defendant had the right to offer or refrain from offering evidence as he saw fit, and that his failure to testify was not to be considered by the jury as the basis for any inference adverse to him. *See State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974); *State v. Alston*, 27 N.C. App. 11, 217 S.E. 2d 207 (1975). We also note that defendant did not request an instruction on his failure to testify, and that in such a case, it is the better practice for the trial judge to make no reference to the circumstance. However, it is not error for the judge to do so, providing, as here, the instruction is correct and complete. *State v. Baxter, surpa; State v. Alston, supra.* Defendant's assignment of error number 2 is overruled.

[3] In assignment of error number 3, defendant contends that the trial court committed prejudicial error in his instructions to the jury as to the elements of aggravated kidnapping. We disagree.

The trial judge correctly charged as to the elements of kidnapping as follows:

> "Now, in order for you to find the defendant guilty of aggravated kidnapping as here charged, the State must prove six things to you beyond a reasonable doubt. They are these: first, that the defendant removed from one place to another the alleged victim Starr Lynn Godbey; second that the defendant Jones did this unlawfully; third, that the defendant did this for the purpose of terrorizing the alleged victim Starr Lynn Godbey; fourth, that at the time, Starr Lynn Godbey had reached and passed her sixteenth birthday; fifth, that Starr Lynn Godbey did not consent to her being removed from her home to any other place. The contention of the State being that the defendant removed her from her home and required her to get into an automobile in order to be transported away; that he required her to do it by the use or threatened use of a firearm—a thirty-two caliber revolver; the sixth requirement is that Starr Lynn Godbey was not released by the defendant in a safe place."

The judge then proceeded to define "terrorize" as follows:

> "The word 'terrorize' I instruct you has some kinship to fear, but I instruct you that probably [sic] understood it means not ordinary concern or ordinary fear, but some degree—some higher degree of fear in order to constitute terror; and, that therefore, the evidence in this case should be such to satisfy you that Starr Lynn Godbey was terrorized. That is to say that she was put in fear to a high degree not just ordinary concern to some extent or to ordinary fear in a mild sense of the word, but something more potent than that, something akin to terror as it is ordinarly understood."

After retiring for deliberations, the jury returned and requested the trial judge to restate the elements of the offense; this the judge did, and correctly so, as he had done originally, as set out *supra*. The judge then attempted to define "terrorize" once again, as follows:

> ". . . I call your attention to the fact that as the law is stated, which Mr. Larrick read to you '. . . that if any person shall unlawfully confine, restrain, or remove from one place to another any person for the purpose of holding for ransom or as a hostage or using as a shield or facilitating the commission of any felony, or facilitating flight of any person, or doing serious bodily harm or terrorizing the person so confined, removed . . .' and so forth. You see the law says if it is for that purpose, that would not necessarily mean that the person removed had to be terrorized if that was in fact, if it had been the purpose of the kidnapper to do that. That is the phraseology of the law . . . . I may say this further, Ladies and Gentlemen, that since in order to be guilty of aggravated kidnapping, the law requires that the person charged must have removed the victim from one place to another for the purpose of terrorizing. It would follow that the victim did not necessarily have to be terrorized, he or she might or might not be terrorized. If it was the purpose of the alleged kidnapper to do that, you would ordinarily, of course, consider the evidence of his actions and his behavior in order to determine if that was or was not his purpose, but the effect of his actions, whether it did or did not terrorize, would be secondary at least to the initial inquiry of whether or not that was his purpose."

Defendant contends that the trial judge inadvertently instructed the jury incorrectly that whether the victim Starr Lynn Godbey was terrorized was an element of the offense.

We again must read the charge contextually. In so doing, we are convinced that the trial court instructed the jury properly that one element of the crime of kidnapping is the purpose of the defendant to terrorize his victim. The reference to the effect of the defendant's actions on Starr Lynn Godbey related to an attempt by the trial judge to force the jury to distinguish between ordinary fear and terror. As seen in the portion of the charge given at the request of the jury, as set out *surpa*, the judge made a particular effort to distinguish between the defendant's purpose to terrorize, an element of the offense, and the effect of defendant's action upon the victim, which is not an element of the offense. Reading the charge contextually and as a whole, we are of the opinion that it fairly and clearly presented the law to the jury. *See State v. Brown*, 25 N.C. App. 10, 212 S.E. 2d 187, *appeal dismissed* 287 N.C. 523, 215 S.E. 2d 150 (1975), and cases cited therein. Defendant's assignment of error number 3 is overrruled.

[4] In his fourth and final assignment of error, defendant argues that the trial judge erred in failing to instruct as to a lesser offense of the crime charged. The substance of defendant's argument is that the jury should have had the opportunity, based upon the weakness of the State's evidence relating to defendant's purpose in removing Starr Lynn Godbey, to convict defendant of a lesser degree of the crime charged.

The applicable legal principles are set out in *State v. Riera*, 276 N.C. 361, 368, 172 S.E. 2d 535, 540 (1970), as follows:

> "It is also well recognized in North Carolina that when a defendant is indicted for a criminal offense he may be convicted of the charged offense or of a lesser included offense when the greater offense charged in the bill contains all the essential elements of the lesser offense, all of which could be proved by proof of the allegations of fact contained in the indictment. (Citations omitted.) Further, when such lesser included offense is supported by some evidence, a 'defendant is entitled to have the different views arising on the evidence presented to the jury upon proper instructions and an error in this respect is not cured by a verdict finding the defend-

> ant guilty of a higher degree of the same crime, for in such case, it cannot be known whether the jury would have convicted of the lesser degree if the different views, arising on the evidence, had been correctly presented in the court's charge.' (Citations omitted.) When there is evidence to support the milder verdict, the court must charge upon it even when there is no specific prayer for the instruction. (Citation omitted.)"

In *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E. 2d 706, 714 (1972), the Supreme Court further explained the above principles as follows:

> "Equally well recognized is the rule that the court is not required to submit to the jury the question of defendant's guilt of a lesser degree of the crime charged in the indictment when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime. (Citations omitted.)"

Furthermore, "[t]he mere contention that the jury might accept the State's evidence in part and might reject it in part is not sufficient to require submission to the jury of a lesser offense." *State v. Black*, 21 N.C. App. 640, 643-644, 205 S.E. 2d 154, 156, *affirmed* 286 N.C. 191, 209 S.E. 2d 458 (1974).

The State having presented positive evidence as to each element of the crime of kidnapping, and there being no conflict in the evidence, the trial judge was not compelled to instruct the jury on a lesser included offense. Defendant's assignment of error number 4 is overruled.

In the trial of this defendant, we have found

No error.

Judges HEDRICK and MITCHELL concur.

EULA WOOD, EMPLOYEE v. J. P. STEVENS & COMPANY, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY

No. 7710IC605

(Filed 6 June 1978)

Master and Servant § 68— occupational disease—applicable statute—byssinosis *not occupational* disease

G.S. 97-53(13) as it existed in 1958 when plaintiff was last exposed to the cotton dust which allegedly caused her disease of byssinosis must determine the rights and liabilities of the parties. Plaintiff's disease, diagnosed as byssinosis and described in the Industrial Commission's opinion as "an irritation of the pulmonary air passages" is not included in the coverage by G.S. 97-53(13) of "infection or inflammation of . . . oral or nasal cavities," and it was not necessary for the Commission to admit expert testimony on the issue of whether "oral or nasal cavities" encompassed the "pulmonary air passage."

Judge Mitchell dissenting.

APPEAL by plaintiff from the opinion of the North Carolina Industrial Commission entered 10 February 1977. Heard in the Court of Appeals 25 April 1978.

This is a proceeding under the Workmen's Compensation Act instituted by Eula Wood to recover for a disease allegedly contracted in her employment with the defendant. In her claim for compensation filed 5 December 1975, the plaintiff alleges that she contracted byssinosis "prior to the 1st day of July, 1958, at Roanoke Rapids, Halifax [County]"; that the disease was "caused by regular exposure to cotton dust for approximately 48 years in spinning area"; and that as a result of this disease she suffers "permanent total disability from impairment of respiratory pulmonary functions."

In response to the plaintiff's claim the defendants, her employer and its insurance carrier, denied liability on the ground that the alleged occupational disease was not covered by the Workmen's Compensation Act as it existed at the time the disease was contracted.

On 7 December 1976 the parties stipulated to the following:

1. The legal issue of coverage should be determined before proceeding with further medical examination or hearing for the purpose of presenting factual evidence in this cause;

. . .

4. At the time of the alleged contracting of the alleged occupational disease, the parties were subject to and bound by the provisions of the Workmen's Compensation Act.

5. The employer-employee relationship existed between plaintiff and defendant employer at that time.

After a hearing before the Deputy Commissioner, the plaintiff made a motion for leave to present further evidence relevant to the technical and medical definitions of certain terms in G.S. 97-53 as it appeared in 1958 in order to show that the plaintiff's alleged occupational disease was included therein. On 10 February 1977 the Commission filed an opinion in which it denied the plaintiff's motion and addressed the issue of whether byssinosis, the disease allegedly contracted by the plaintiff, is compensable under the Workmen's Compensation Act. On the basis of the stipulated facts, the Commission concluded that only occupational diseases enumerated in G.S. 97-53 are compensable; that byssinosis was not included in the statute at the time of the plaintiff's last exposure; and that, therefore, the plaintiff's disease is not compensable and her claim should be denied. The plaintiff appealed.

Davis & Hassell, by Charles R. Hassell, Jr., for the plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay, by Dan M. Hartzog and George W. Dennis III, for the defendant appellees.

HEDRICK, Judge.

Our initial inquiry must focus on the plaintiff's second assignment of error in which she contends that G.S. 97-53(13) as amended in 1971 is applicable to her claim for compensation under the Workmen's Compensation Act. A discussion of this assignment must begin with an examination of the relevant statutes.

The Workmen's Compensation Act, enacted in 1929 as Chapter 97 of the General Statutes, was originally designed to provide compensation for employees who incur injuries by accident in the normal course of their employment. *Henry v. Leather Co.*, 234 N.C. 126, 66 S.E. 2d 693 (1951). In its inception, the Act

did not provide coverage for any diseases contracted in employment except those which result "naturally and unavoidably from . . . [an] accident." G.S. 97-2(6). In 1935 our legislature, recognizing that employees who suffer from occupational diseases should logically receive the same benefits under the Act as those suffering from injuries, passed remedial legislation to achieve this objective. *See* G.S. 97-52 and G.S. 97-53 (1935). General Statute 97-52 declares that "[d]isablement or death of an employee resulting from an occupational disease described in G.S. 97-53 shall be treated as the happening of an injury by accident within the meaning of the North Carolina Workmen's Compensation Act." Thus, G.S. 97-53 contains the comprehensive list of occupational diseases for which compensation is provided in the Act. Conversely, unless the disease with which the plaintiff was allegedly afflicted as a result of her employment with the defendant is among those diseases listed, she is not entitled to compensation therefor under the Workmen's Compensation Act. The plaintiff seeks coverage on the basis of G.S. 97-53(13).

The evolution of G.S. 97-53(13) from the time of plaintiff's employment to the present is central to the arguments raised on this appeal. In 1958 when the plaintiff retired from her employment with defendant, Subsection 13 of G.S. 97-53 read as follows:

> Infection or inflammation of the skin or eyes or other external contact surfaces or oral or nasal cavities due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors, and any other materials or substances.

In 1963 the statute was amended to provide:

> Infection or inflammation of the skin, eyes, or other external contact surfaces or oral or nasal cavities or any other internal or external organ or organs of the body due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors, and any other materials or substances.
>
> The provisions of this subdivision shall not apply to cases of occupational diseases not included in said subdivision prior to July 1, 1963, unless the last exposure in an occupation subject to the hazards of such disease occurred on or after July 1, 1963.

Presently, as a result of its amendment in 1971, Subsection 13 reads as follows:

> Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

The Session Laws in which the 1971 amendment was enacted include a proviso that the amendment is applicable "only to cases originating on and after July 1, 1971." 1971 N.C. Sess. Laws, ch. 547, § 3.

The plaintiff argues that since her condition was not diagnosed and her claim was not filed until 1975, then her case originated after the effective date of the 1971 amendment. Thus, she concludes the terms of the more expansive present version of G.S. 97-53(13), which manifestly includes her disease, are applicable to her claim. A similar contention was recently answered by this Court in *Booker v. Duke Medical Center*, 32 N.C. App. 185, 231 S.E. 2d 187, *cert. allowed*, 292 N.C. 466, 233 S.E. 2d 921 (1977). In that case the plaintiffs, widow and children of Robert S. Booker, filed a claim on 16 December 1974 based on his death from an alleged occupational disease, serum hepatitis, on 3 January 1974. The evidence tended to show that Booker had been employed as a laboratory technician whose duties included testing blood samples taken from hospital patients. Apparently, the disease was transmitted from a blood sample of an afflicted patient through an abrasion on the decedent's finger. Booker's condition was diagnosed on 4 July 1971. On the basis of this evidence the plaintiffs were granted an award by the Commission. On appeal Judge Parker, speaking for this Court, noted as a preliminary matter that it was necessary to determine whether G.S. 97-53(13) was applicable in the form in which it appeared prior to the 1971 amendment or thereafter. Judge Parker wrote as follows:

> We hold that the version which was in effect when Mr. Booker contracted the disease, rather than the subsequently enacted version, applies for purposes of deciding this case. The 1971 Act was ratified on 14 June 1971, and the Legislature demonstrated a clear intention that it operate

> prospectively only by providing that it be effective from and after 1 July 1971 and "apply only to cases originating on and after" that date. For purposes of the Workmen's Compensation Act a case is normally considered as "originating" on the date when the accident giving rise to injury occurred or, in case of an occupational disease, when the disease is contracted. We believe this to be the construction intended by the Legislature in adopting the 1971 Act. To hold otherwise would be to provide *ex post facto* coverage for diseases contracted under conditions existing before the statute providing coverage was enacted. Accordingly, we shall apply the provisions of the 1963 rather than those of the 1971 Act in deciding this case. [Citations omitted.]

32 N.C. App. at 190, 231 S.E. 2d at 191. We think it is clear that the proviso setting the effective date of the 1971 amendment refers to the date on which the disease was contracted and not to the date on which the claim was filed. This conclusion is particularly appropriate in view of the amendments which spanned the interval between the date the plaintiff retired and the date her disease was diagnosed. The proviso to the 1963 amendment stated in unequivocal terms that the date of the last exposure to the disease determines the applicability of the amendment. Since the 1963 amendment could in no event have applied to plaintiff's claim, it follows that the 1971 amendment was not intended by the legislature to apply.

The plaintiff cites several cases from other jurisdictions as support of her argument that her case originated after the effective date of the 1971 amendment. *See American Bridge Division, U.S. Steel Corp. v. McClung*, 206 Tenn. 317, 333 S.W. 2d 557 (1960); *Greener v. DuPont*, 188 Tenn. 303, 219 S.W. 2d 185 (1949); *Kress v. Minneapolis-Moline Co.*, 258 Minn. 1, 102 N.W. 2d 497 (1960); *Peak v. State Compensation Commissioner*, 91 S.E. 2d 625 (W.Va. 1956); *Sizemore v. State Compensation Commissioner*, 219 S.E. 2d 912 (W.Va. 1975). We have carefully examined all of these authorities and find that in each case with the exception of the West Virginia cases the plaintiff had been employed subsequent to the effective date of the amendment expanding coverage. Thus, in each case the plaintiff's last exposure to the disease contracted was after the legislature had amended the statute. In the West Virginia cases the court drew a distinction between workmen's

compensation claims filed by the employee himself and those filed by his survivors and held that in the latter case the statute as it appeared on the date of death of the employee determines coverage. *Sizemore v. State Compensation Commissioner, supra.*

In *Booker* our Court clearly aligned North Carolina with the majority view which makes no such distinction and in either case looks to the laws as of the date of the accident or the date the disease was contracted by the employee. We hold that G.S. 97-53(13) as it existed in 1958 when the plaintiff was last exposed to the cotton dust which allegedly caused her disease of byssinosis must determine the rights and liabilities of the parties.

By her second assignment of error the plaintiff contends that her claim is compensable under the 1958 version of the statute. In this regard she argues that an interpretation of G.S. 97-53(13) should be based upon "expert medical testimony." Specifically, plaintiff argues that her disease, diagnosed as byssinosis and described in the Commission's opinion as "an irritation of the pulmonary air passages" is included in the coverage by G.S. 97-53(13) of "[i]nfection or inflammation of . . . oral or nasal cavities."

In defining the terms in a statute, it is the primary duty of the courts to discern the intent of the legislature in its employment of such words. *Greensboro v. Smith*, 241 N.C. 363, 85 S.E. 2d 292 (1955). To this end, words in a statute will ordinarily be defined according to their "natural, approved, and recognized meaning." *Cab Co. v. Charlotte*, 234 N.C. 572, 68 S.E. 2d 433 (1951).

The plaintiff relies upon *Henry v. Leather Co.*, 234 N.C. 126, 66 S.E. 2d 693 (1951), for the proposition that technical words can only be interpreted with reference to expert testimony. In *Henry* a claim was filed by the plaintiff seeking workmen's compensation for a disease which he allegedly contracted as a result of his employment. The plaintiff claimed to suffer from "[t]enosynovitis, caused by trauma in employment," covered by G.S. 97-53(21). On appeal the defendants argued that there was no evidence to support the finding of the Commission that the disease was caused by trauma. The Supreme Court in discussing the meaning of "trauma" pointed out that technical words used in a statute

should be interpreted according to their technical meanings. The court then deduced a definition of the term from medical treatises, dictionaries, and expert testimony.

Undoubtedly, the terms here in controversy take on some technical connotations when used in a medical context. However, it does not follow that it is necessary in every case to resort to expert testimony to decipher their meanings. It is true that a medical word may be so highly technical in a certain usage that only one trained in the profession is qualified to ascertain its meaning. On the other hand, the same word used in another context may be susceptible of lay understanding. For example, while medical authority may be indispensable in determining the technical meaning of "foot" and its precise anatomical dimensions, it would not be necessary to support the conclusion that the foot does not encompass the knee. Thus, while the court in *Henry* stated that technical words should be construed in accordance with their technical connotations, it did not extend this rule to require the courts to rely on expert testimony in every case.

In the present case it is necessary to determine whether "an irritation of the pulmonary air passage" is encompassed by the terms "[i]nfection or inflammation of . . . oral or nasal cavities." While we can conceive of contexts in which the meanings of these terms might prove elusive to the untrained mind, we think that our determination in this case is clearly guided by the definitions of the words involved.

According to Webster's Third New International Dictionary 1585 (unabr. 1967), "oral" means "of, relating to, or belonging to the mouth." Within the definition of "mouth" we find it described as "the cavity bounded externally by the lips or jaws and internally by the pharynx or gullet that encloses in the typical vertebrate the tongue, gums, and teeth." Webster's, *supra* at 1479. "Nasal cavity" is defined as "the vaulted chamber that lies between the floor of the cranium and the roof of the mouth of higher vertebrates extending from the external nares to the pharynx." Webster's, *supra* at 1504. Finally "pulmonary" means "of, relating to, or associated with the lungs." Webster's, *supra* at 1840.

In view of these definitions and according to common understanding, it is inconceivable to us that any physical descrip-

tion of oral or nasal cavities could include the lungs. In our opinion it was not necessary for the Industrial Commission to admit expert testimony on the issue of whether "oral or nasal cavities" encompass the "pulmonary air passage." Thus, we hold that the plaintiff's alleged disease of byssinosis was not compensable under G.S. 97-53(13) in its 1958 form.

The order appealed from is affirmed.

Affirmed.

Chief Judge BROCK concurs.

Judge MITCHELL dissents.

Judge MITCHELL dissenting.

I find the intent of the General Assembly in making the 1971 amendment to G.S. 97-53(13) applicable "only to cases originating on and after July 1, 1971" to be less than clear. More importantly, however, I would hold that "pulmonary air passages" include the "oral or nasal cavities" which come within the coverage provided by the statute in 1958. In order for air to reach the lungs, it must pass through either the oral or nasal cavities and, thereby, employ them as pulmonary air passages. Courts consistently favor such liberal constructions of the provisions of the Workmen's Compensation Act in favor of claimants. *Petty v. Transport, Inc.*, 276 N.C. 417, 173 S.E. 2d 321 (1970). Therefore, I respectfully dissent from the opinion of the majority.

WALLACE A. McADAMS v. UNION SECURITY LIFE INSURANCE COMPANY

No. 7728DC590

(Filed 6 June 1978)

1. Rules of Civil Procedure § 50— directed verdict—party having burden of proof

The rule that a trial court cannot direct a verdict in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses did not apply to prohibit a directed verdict for defendant insurer, which had the burden of proof on a contested issue, where

the testimony of defendant's witness tended only to explain and clarify the plaintiff's evidence and not to contradict it.

2. **Insurance § 39— disability insurance—preexisting sickness—arteriosclerotic heart disease with coronary insufficiency**

Arteriosclerotic heart disease with coronary insufficiency constituted a "sickness" within the meaning of a provision excluding disability insurance coverage for any disability "to which a contributing cause directly or indirectly is . . . sickness contracted prior to the beginning date of the individual term of insurance" where the terms "sickness" and "disease" were used synonymously in the policy. Therefore, the trial court properly directed a verdict for defendant insurer in plaintiff's action to recover under the disability policy where plaintiff's evidence showed that he suffered from arteriosclerotic heart disease with coronary insufficiency prior to his coverage under defendant's policy.

APPEAL by plaintiff from *Allen (C. Walter), Judge.* Judgment entered 24 February 1977 in District Court, BUNCOMBE County. Heard in the Court of Appeals 30 March 1978.

This is an action for benefits under a group policy of insurance against disability by accident or sickness. The plaintiff, Wallace A. McAdams, obtained insurance under the policy on 31 October 1973 in connection with his installment purchase of an automobile. The effect of the policy was to provide that the defendant, Union Security Life Insurance Company, would pay an amount equal to the plaintiff's installment payments on the automobile each month in the event the plaintiff became totally disabled and unable to work "as a result of sickness originating during" the period of coverage. Specifically excluded from coverage was any disability "to which a contributing cause directly or indirectly is . . . sickness contracted prior to the beginning date of the individual term of insurance." The individual term of insurance began on 31 October 1973 and was to run for three years. The plaintiff was not required to provide any evidence of insurability.

The plaintiff offered evidence tending to show that he had consulted Dr. Odes Michael in February of 1973 complaining of hoarseness and a sore throat. During the course of a general physical examination at that time, Dr. Michael performed several tests and a general physical examination. He gave the plantiff medicine in the form of two different types of pills, and told the plaintiff he had an irregularity in his heart. Shortly after 20 February 1973, the plaintiff received a letter from Dr. Michael informing him that his physical examination of 22 January 1973

revealed arteriosclerotic heart disease, coronary insufficiency and chronic bronchitis. The plaintiff testified that between that examination and the time he took out the insurance policy he did not have any more problems with his chest.

During the summer of 1974 the plaintiff was hospitalized. At that time he was continuing the medication prescribed by Dr. Michael in January of 1973. During July of 1975, the plaintiff was again hospitalized for chest pains.

In August of 1975 the plaintiff submitted a claim to the defendant on the disability policy. The proof of claim report which he filed contained an insurance statement, a physician's authorization, an employer's statement and an attending physician's statement of disability. Both the insured's statement signed by the plaintiff and the attending physician's statement of disability signed by Dr. Michael indicated that the plaintiff's disability was arteriosclerotic heart disease with coronary insufficiency first diagnosed and treated on 22 January 1973. Both parties stipulated that each of these documents was admissible and genuine. At the close of the plaintiff's evidence, the defendant moved for a directed verdict in its favor pursuant to G.S. 1A-1, Rule 50. The defendant stated as grounds for the motion that all of the evidence of the plaintiff, taken in the light most favorable to him, showed that there was no question as to the inception of his illness. The trial court denied this motion, and the defendant proceeded to offer evidence.

The defendant's evidence consisted of testimony by Dr. Michael. The defendant's evidence tended to show that Dr. Michael first saw the plaintiff professionally on 18 January 1973. At that time he obtained a medical history from the plaintiff by having him complete a four-page questionnaire. Dr. Michael's impression then was that the plaintiff suffered from arteriosclerotic heart disease with left bundle branch block and cardionegali, which is an enlarged heart, and congestive heart failure. The diagnosis was based on plaintiff's electrocardiogram and chest X-rays, as well as a physical examination.

At Dr. Michael's suggestion, he next saw the plaintiff on 20 February 1973. After that examination, he wrote the plaintiff the letter referred to in the plaintiff's evidence.

Dr. Michael testified that his diagnosis of the plaintiff's condition in January of 1973 and continuing to the present was not merely arteriosclerosis. It was arteriosclerotic heart disease with coronary insufficiency. He testified that this was not the same as generalized arteriosclerosis. On cross-examination, Dr. Michael testified that he would not expect to find arteriosclerotic heart disease with coronary insufficiency present to some degree in a person of middle age.

The defendant offered other evidence through Dr. Michael. As this evidence tended in some respects to contradict the plaintiff's evidence, it will not be set forth or considered in this opinion.

The defendant rested and renewed its motion for a directed verdict in its favor. The plaintiff also moved for a directed verdict in his favor. The trial court denied the plaintiff's motion and granted the motion of the defendant for a directed verdict at the close of all of the evidence. The plaintiff appealed.

Morris, Golding, Blue & Phillips, by Stephen Kropelnicki, Jr., for plaintiff appellant.

Adams, Hendon & Carson, P.A., by Geo. Ward Hendon, for defendant appellee.

MITCHELL, Judge.

The plaintiff brought forward on appeal only his assignments asserting that the trial court erred in granting the defendant's motion for a directed verdict at the close of all of the evidence and in entering the judgment. He specifically abandoned his assignment relative to the denial of his motion for directed verdict in his favor. We limit our review and opinion to a consideration of those assignments brought forward.

It is elemental that, on a motion by a defendant for a directed verdict, the plaintiff's evidence must be taken as true and all the evidence must be considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom. *Farmer v. Chaney*, 292 N.C. 451, 233 S.E. 2d 582 (1977); *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977). Any conflict in the

evidence must be resolved in the plaintiff's favor. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973).

The plaintiff contends that his evidence made out a prima facie case of loss within the coverage of the policy, and that the burden was upon the defendant to prove that it was relieved of liability by an exclusion or limitation of the policy. The plaintiff argues, therefore, that the trial court erred in granting a directed verdict in favor of the defendant, as the defendant was a party having the burden of proof on a contested issue.

[1] In support of this argument, the plaintiff refers us to *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). That case held that a trial court, acting pursuant to G.S. 1A-1, Rule 50, cannot direct a verdict in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. 278 N.C. at 417, 180 S.E. 2d at 311. No such situation is presented by the case *sub judice*. Here, the defendant was not required to rely upon the credibility of its witness. The defendant's witness, Dr. Michael, did not substantially contradict the plaintiff's evidence, which consisted largely of the testimony of the plaintiff. Rather, Dr. Michael's testimony tended to explain and clarify the plaintiff's testimony and not to vary with that testimony. Thus, the prohibition of *Cutts* is inapplicable to the present facts. *See Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976).

[2] The plaintiff's own testimony, as well as other evidence introduced by him, clearly indicated that he suffered from arteriosclerotic heart disease with coronary insufficiency which was diagnosed and treated no later than February of 1973. His evidence also clearly indicated that he was specifically informed by Dr. Michael no later than February of 1973 that he was afflicted with this specific disease. Additionally, the plaintiff's evidence indicated that the documents submitted in support of his claim under the policy themselves specifically stated that the disease causing his disability had arisen prior to his being brought under the coverage of the defendant's policy. The defendant's evidence, in the form of Dr. Michael's testimony, was not significantly at variance with the plaintiff's evidence and could be considered by the trial court in ruling upon the defendant's motion for a directed verdict. *Hincher v. Hospital Care Asso.*, 248 N.C. 397, 402, 103 S.E. 2d 457, 461 (1958). Although *Hincher* dealt with a motion to nonsuit, the rules regarding directed verdicts

pursuant to Rule 50 are the same as those previously controlling nonsuit. *Younts v. Insurance Co.*, 281 N.C. 582, 189 S.E. 2d 137 (1972); *see also, Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976).

In the instant case it was apparent that the testimony of Dr. Michael for the defendant tended to harmonize with, explain and clarify the plaintiff's testimony without contradicting that testimony. The only legitimate conclusion which could be drawn from the plaintiff's testimony alone or in conjunction with that of the defendant was that the plaintiff suffered from arteriosclerotic heart disease with coronary insufficiency prior to his coverage under the defendant's policy. It is equally unchallengeable that the defendant's disability arose from this disease. If this establishes the defendant's affirmative defense as a matter of law, the directed verdict in favor of the defendant was proper. *Hincher v. Hospital Care Asso.*, 248 N.C. 397, 402, 103 S.E. 2d 457, 461 (1958).

The plaintiff next contends that the established fact of his preexisting arteriosclerotic heart disease with coronary insufficiency did not establish an affirmative defense under the specific exclusion of the policy relied upon by the defendant. That provision of the policy specifically excluded from coverage any disability "to which a contributing cause directly or indirectly is . . . sickness contracted prior to the beginning date of the individual term of insurance." The plaintiff contends that his condition was not a "sickness" as referred to in the policy. He contends that the term "sickness" may not be equated with the term "disease" or similar terms. We do not agree.

Throughout the proof of claim report submitted to the defendant by the plaintiff and introduced into evidence, it is apparent that the two terms are used synonymously. Additionally, the Supreme Court of North Carolina has indicated that the terms "disease" and "sickness" are synonymous absent some indication that the parties intended otherwise. *See, Glenn v. Insurance Co.*, 220 N.C. 672, 676, 18 S.E. 2d 113, 115 (1942). We think, therefore, that the plaintiff's proven preexisting "disease" constituted a preexisting "sickness."

We have recently indicated that whether preexisting arteriorsclerosis is to be viewed as a disease or a normal condi-

tion of aging when recovery is sought under an insurance policy is, in some cases, a question of fact for the jury. *Emanuel v. Insurance Co.*, 35 N.C. App. 435, 242 S.E. 2d 381 (1978). In that case, however, we were faced only with evidence of arteriosclerosis. No such question need be presented to the jury in cases such as the one *sub judice* in which all of the evidence indicates the plaintiff suffered from arteriosclerotic heart disease with coronary insufficiency which caused the disability and existed prior to his coverage by the defendant's policy. We find that the established fact of the plaintiff's preexisting disease was sufficient to establish the truth of the defendant's affirmative defense as a matter of law, and the trial court properly granted the defendant's motion for a directed verdict. *Hincher v. Hospital Care Asso.*, 248 N.C. 397, 402, 103 S.E. 2d 457, 461 (1958).

The plaintiff has also assigned as error the signing and entering of the judgment after the directed verdict by the trial court. This assignment is without merit. When the motion for a directed verdict under Rule 50 was granted, the defendant was entitled to a judgment on the merits unless the court permitted a voluntary dismissal of the action under G.S. 1-1A, Rule 41(a)(2). *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). As a voluntary dismissal was neither requested nor granted, the trial court's entry of judgment was proper. The judgment of the trial court was without error and is

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. VINCENT McLEOD, DOROTHY McLEOD, AND LINDA K. MOORE

No. 784SC18

(Filed 6 June 1978)

1. Searches and Seizures § 23— search warrant—sufficiency of officer's affidavit

Information in a police officer's affidavit was sufficient to show probable cause necessary to support a search warrant where the officer related that he and another officer observed a person go into the building for which the search warrant was issued and come out with approximately one ounce of marijuana which the person then gave to the officer, and this person had previously been

sent into the building by the officers for the purpose of buying marijuana. The fact that the person sent into the building to buy marijuana was an informant did not, in itself, alter the nature of the officer's personal observations and render the search warrant one issued upon the hearsay statement of a confidential informant for the purpose of determining probable cause.

2. **Searches and Seizures § 20— search warrant—sufficiency of affidavit**

As set forth in *Spinelli v. U.S.*, 393 U.S. 410, and *Aguilar v. Texas*, 378 U.S. 108, the two-pronged test for determining whether an affidavit is sufficient to show probable cause is: (1) the affidavit must contain facts from which the issuing officer 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; (2) 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.

3. **Searches and Seizures § 23— information from unidentified informant—showing of reliability unnecessary**

Even though an officer's affidavit which constituted the application for a search warrant contained some information which may have come from an unidentified informant, the credibility of the informant or the reliability of such information need only be shown when it is necessary that such hearsay be relied upon in finding the requisite probable cause.

4. **Searches and Seizures § 23— marijuana in premises to be searched—sufficiency of affidavit**

Since it is required only that an affidavit contain facts from which a magistrate can determine that there are reasonable grounds to believe that contraband is present in the place to be searched in order to justify a warrant authorizing a search of a building, it was not necessary that an officer's affidavit establish which of the individuals in the building to be searched were engaged in selling marijuana.

5. **Searches and Seizures § 23— "controlled buy" of marijuana—probable cause established**

Though it would be a better practice for officers conducting "controlled buys" of narcotics to search the individual making the purchase prior to its actually being made and to specifically set forth this fact in the affidavits by which they seek search warrants, failure to do so in this case was not fatal, since the police officer's statements in his affidavit as to his personal observations concerning marijuana purchases in the building in question remained sufficient to establish probable cause.

APPEAL by the State from *Peel, Judge*. Judgments entered 30 November 1977 in Superior Court, ONSLOW County. Heard in the Court of Appeals 3 May 1978.

The defendants are presently charged by bills of indictment with felonious possession of marijuana with intent to manufacture, sell and deliver. Prior to trial on these charges, the defendants moved to suppress evidence obtained as the result of a

search of a building, and seizure of marijuana and other items found therein, pursuant to a search warrant. During a pretrial voir dire hearing to determine the admissibility of the evidence seized during this search, the State introduced only the application for the search warrant and the search warrant relied upon as authorizing the search and seizure of 15 August 1977. The trial court allowed the motions to suppress of all three defendants. The State gave timely notice of appeal pursuant to G.S. 15A-979(c).

Attorney General Edmisten, by Associate Attorney Patricia B. Hodulik, for the State.

Frazier and Moore, by Thomasine E. Moore, for defendant appellee.

MITCHELL, Judge.

The State as appellant assigns as error the judgments of the trial court granting each defendant's motion to suppress evidence seized during a search pursuant to the search warrant. The State contends that the affidavit constituting the application for the search warrant was sufficient on its face to show probable cause for the issuance of the warrant. The affidavit set forth the following:

APPLICATION FOR SEARCH WARRANT

I, Robert D. Toth Special Operation Div., Jacksonville Police Dept., Jacksonville, N.C., being duly sworn, hereby request that the court issue a warrant to search the place described in this application and to find and seize the items described in this application. There is probable cause to believe that certain property, to wit: Marijuana constitutes evidence of a crime, to wit: Possession With The Intent To Sell And Deliver Marijuana, and the property is located in the place described as follows: (Unmistakably describe the building, premises, vehicle or person—or combination—to be searched.) Said Building Is Located next to the railroad tracks on Court Street it is the first building on the right as you cross the tracks headed toward Kerr St. Said building has the mailing address of 413 South Court Street said building has the name of McLeod's Designs & Arts.

The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: On 2-3-77 a undercover buy was made from Vincent McLeod for

a $20 bag of marijuana at that time said buy was controlled by Officer Buchanan, Phillips and Sam Hudson of the Special Operation Div. Jacksonville Police Dept. Said informer was search at the station and officer watch the informer go in and come out and said informer gave officer Phillips one ounce of marijuana that came from Vincent McLeod. Now on this date 8-15-77 officers of the special operation Div. had a undercover informer go into Mc.Leod building where said informer bought one ounce of marijuana for the price of $20 and said informer was controlled by officer Toth of the Special Operation Div. officer Toth let informer out of the car and he along with a reserve officer Moseman watch said informer go into McLeod's and come out and give officer Toth a ounce of Marijuana that the informer had purchased from Mrs. McLeod and other black female near the sewing machine in the store. Said buy was controled by me that is officer Toth along with officer Moseman, Hudson, Sgt. Brown, Sheffield, and Siwinski of the Jacksonville Police Dept.

s/ROBERT D. TOTH
Signature of Applicant

(Sworn to and subscribed before me this 15 day of August, 1977.)
s/G. L. MATTOCKS Mag.
Assistant Deputy Clerk of Superior Court
Magistrate/District/Superior Court Judge

[1] We find the information in the affidavit of Officer Robert D. Toth of the Jacksonville Police Department, relative to the purchase on 15 August 1977 of marijuana from the building to be searched, sufficient, standing alone, to show the probable cause necessary to support the search warrant issued on the same date. In that portion of the affidavit, Officer Toth related that he and another officer of the Jacksonville Police Department observed a person go into the building, for which the search warrant was issued, and come out with approximately one ounce of marijuana which the person then gave to Toth. This person had been previously sent into the building by the officers for the purpose of buying marijuana. No more information was required in order to establish the probable cause necessary to support the search warrant issued by the magistrate. *See State v. Oldfield*, 29 N.C. App. 131, 223 S.E. 2d 569, *cert. denied* 290 N.C. 96, 225 S.E. 2d 325 (1976).

There is a vast difference between the proof required to establish probable cause to conduct even a warrantless search and that required to establish guilt. *Draper v. United States*, 358 U.S. 307, 3 L.Ed. 2d 327, 79 S.Ct. 329 (1959). Still less information is required to establish probable cause for the issuance of a search warrant. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971). In *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964), the Supreme Court of the United States specifically stated:

> [W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," . . . and will sustain the judicial determination so long as "there was substantial basis for [a magistrate] to conclude that [the items for which the search was authorized] were probably present. . . ."

378 U.S. at 111, 12 L.Ed. 2d at 726, 84 S.Ct. at 1512.

The personal observation of the affiant, a police officer, was sufficient to support the magistrate's finding of the probable cause necessary for the issuance of a warrant. The fact that the person sent into the building to buy marijuana was an informant does not, in itself, alter the nature of the officer's personal observations and render this a search warrant issued upon the hearsay statement of a confidential informant for purposes of determining probable cause.

[2] In *Aguilar* and *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969), the Supreme Court of the United States created a "two-pronged" test for determining whether an affidavit is sufficient to show probable cause. First, the affidavit must contain facts from which the issuing officer 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. Second, 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 find the personal observations of the police officer as set forth in the affidavit in the case *sub judice* to meet the first "prong" of the test.

[3] The second "prong" of the *Aguilar* test is not applicable here. Even though the affidavit contained some information which may have come from an unidentified informant, we think the credibility of the informant or the reliability of such information need only be shown when it is necessary that such hearsay be relied upon in finding the requisite probable cause. As previously indicated, the facts here do not present us with a situation requiring such reliance, and the "second prong" of *Aguilar* does not come into play.

[4] The defendants contend that the affiant did not personally observe the sale of the marijuana on 15 August 1977, and probable cause did not, therefore, exist for a search of their premises. We note that the affidavit is inartfully drawn and does not indicate whether the information as to which of the defendants made the actual sale was based upon personal observation of the affiant or hearsay from the person purchasing the marijuana. For this reason we must assume it was based upon hearsay. We do not find, however, that this information was crucial to the validity of the warrant. It was only required that the affidavit contain facts from which the magistrate could determine that there were reasonable grounds to believe that contraband was present in the *place to be searched* in order to justify a warrant authorizing a search of the building. *State v. Hayes*, 291 N.C. 293, 299, 230 S.E. 2d 146, 150 (1976); *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972). It was not, therefore, necessary that the affidavit establish which of the individuals in the building were then engaged in selling the marijuana.

The fact that possible hearsay is included in the affiant's statements of personal observations and not identified as such does not in itself invalidate the affidavit. *See United States v. Ventresca*, 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965). Where, as here, personal observations of the affiant clearly identified as such are sufficient to support the magistrate's finding of probable cause, the mingling of possibly unsupportable hearsay in no way diminishes or removes the support for such finding.

[5] The defendants next contend that the failure of the affidavit to state that the person making the purchase was searched before and after entering the buiding renders it insufficient to state facts from which the magistrate could determine there were

reasonable grounds to believe that contraband in the form of marijuana was present in the building. The defendants base this argument upon the admitted fact that the person employed to make the purchase was also a police informant. They argue he could have had marijuana on his person prior to entering the building and used it for the purpose of "framing" the defendants. We find this contention without merit.

We recognize that narcotics informants frequently do not enjoy reputations for veracity. Undoubtedly it would be a better practice for officers conducting "controlled buys" of narcotics to search the individual making the purchase prior to its actually being made and to specifically set forth this fact in the affidavits by which they seek search warrants. Failure to do so in this case was not, however, fatal.

The affiant's statements as to his personal observations remained sufficient to establish probable cause. As we have previously pointed out, affidavits used to establish probable cause are tested by much less rigorous standards than the standards governing admissibility of evidence at trial. Only the probability and not a prima facie showing of criminal activity is necessary to meet the standard of establishing probable cause. 11 Strong, N.C. Index 3d, Searches and Seizures, § 22, p. 521.

The defendants also contend that the scope of the search warrant was exceeded in that items were seized which were not contraband. We have reviewed the officer's return listing the items seized, which was included in the record on appeal, and find that the great majority of items are identified as various types of envelopes containing marijuana or as other items containing marijuana residue. The return also indicates that pills of various colors and a silver cigarette holder were seized. We find no merit in this contention. *State v. Oldfield*, 29 N.C. App. 131, 223 S.E. 2d 569, *cert. denied* 290 N.C. 96, 225 S.E. 2d 325 (1976).

For the reasons previously set forth, we hold the trial court erred in the case of each of these defendants by granting the motions to suppress. We must reverse those judgments and remand each of these cases to the trial court for further proceedings consistent with law.

Reversed and remanded.

Judges PARKER and HEDRICK concur.

IN THE MATTER OF: MICHAEL W. SARVIS, WILLIAM E. FURR, WADE H. RABON, RALPH A. McCRAY, CLAY I. CALL, MIKE H. KIVETT, BOBBY W. RABON, JAMES K. BURCHETT, HARRISON E. EMMERT, ARNOLD B. SMITH, ROBERT J. CAMP, CHARLES W. CLARK, JR., H. T. VARNUM, HOWARD D. PEEL, MIRLIN H. PEEL, EUGENE C. McCRAY, EMPLOYEES, HIGH POINT SPRINKLER COMPANY, EMPLOYER; AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 7718SC626

(Filed 6 June 1978)

1. **Master and Servant § 109— unemployment compensation—striking employees—replacement of employees—offer to return to work**

The statute disqualifying for unemployment compensation benefits a person whose unemployment "is caused by a labor dispute in active progress," G.S. 96-14(5), does not necessarily disqualify striking employees who are subsequently replaced by permanent replacements where there is a genuine offer on the part of the employees to return to work. Whether replacements are permanent, thereby severing the employer-employee relationship and ending the labor dispute, depends upon the facts of the particular case.

2. **Master and Servant § 109— unemployment compensation—striking employees—replacement of employees—offer to return to work—effect of union certification petition**

Where sixteen employees went on strike because of a labor dispute with their employer, the employer notified the employees to return to work by 2 March or permanent replacements would be hired, on 2 March a petition for certification of a union as bargaining agent at the employer's premises was filed with the NLRB, the employees on 5 March notified the employer of their unconditional offer to return to work, and fourteen of the employees were not rehired because replacements had been found for them, the labor dispute was no longer "in active progress" after the unconditional offer to return to work on 5 March, and the fourteen employees were entitled to unemployment compensation benefits after that date, unless the trial court should find that the petition for certification filed with the NLRB was related to the strike and would prolong the employer-employee relationship.

3. **Master and Servant § 109— unemployment compensation—striking employees—replacement of employees—offer to return to work—unfair labor practice charge**

Striking employees who were replaced and who made an unconditional offer to return to work were not disqualified to receive unemployment compen-

sation benefits because they filed an unfair labor practice charge with the NLRB since (1) the charge was not related to the strike and (2) employees otherwise entitled to unemployment compensation benefits cannot be deprived of such benefits because they exercised rights given them by the National Labor Relations Act.

APPEAL by Michael W. Sarvis and other employees and Employment Security Commission of North Carolina from *Collier, Judge*. Decision entered 29 March 1977, in Superior Court, GUILFORD County. Heard in the Court of Appeals 26 April 1978.

On 27 February 1976, a labor dispute arose between sixteen employees (hereinafter Employees) of High Point Sprinkler Company (hereinafter Employer), concerning wages, fringe benefits, accounting methods for handling the profit sharing plan for Employees, and the attempted transfer of one employee to Macon, Georgia. Employees went on strike and formed and maintained picket lines until 5 March 1976. On 1 March Employer notified Employees that unless they reported to work the following day permanent replacements would be sought.

None of the Employees returned to work and, on 3 March 1976, Employer hired fifteen replacements. Thereafter, on 5 March, Employees notified Employer of their "unconditional offer" to return to work immediately. Two of the strikers subsequently returned to work, but the remaining Employees were not rehired because Employer no longer had work available for them.

Meanwhile, on 4 March, Employer had filed separation notices with the Employment Security Commission (hereinafter Commission) stating that each employee, being an economic striker in a labor dispute, had been replaced by a permanent replacement. Employer requested that its unemployment benefits account not be charged in the event such Employees were otherwise eligible to receive unemployment compensation benefits. Employees later applied to the Commission for such benefits, and on 19 March 1976, Employer's request for noncharging was disallowed. In early April 1976, a Special Appeals Deputy affirmed the ruling and held that, pursuant to G.S. 96-14(5), Employees were disqualified for benefits from 27 February to 6 March 1976, the day following their unconditional offer to return to work, but that they were not so disqualified thereafter. The Commission affirmed the Special Appeals Deputy, and Employer then appealed to Superior Court.

The Superior Court affirmed the facts found by the Special Appeals Deputy but reversed the Commission's conclusions of law.

In order to interpret the labor dispute provisions of the State Employment Security Laws, the Court concluded that the definition of "labor dispute" as found in the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, should apply. That definition is as follows:

> "(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." Title 29 U.S.C. § 113(c).

The court also concluded that under the Employment Security Law the hiring of replacements to fill the job positions of the employees was irrelevant because unemployment originally caused by a labor dispute is not changed as to its cause by subsequent events.

On or about 9 March 1976 Employees filed an unfair labor practice charge before the National Labor Relations Board (NLRB). As to this activity, the court concluded that "a finding as to the period of pendency of such charge is relevant and necessary," and the cause was remanded to the Commission for a finding as to the date on which such charge was brought to a final determination.

A Petition for Certification of Bargaining Representative also was filed before the NLRB. The court concluded that Employees' disqualification "would continue so long as any such Petition was pending." The court directed the Commission to make a finding of fact "as to whether such a Petition was filed and, if so, when it was filed and the period during which it was pending, such period ending when such petition was either withdrawn or dismissed, or the results of an election conducted pursuant thereto were finally certified without further proceedings in relation thereto pending before the NLRB."

From the Order remanding the case to the Commission for findings relating to the pendency of the proceedings before the NLRB, both Employees and the Commission appealed.

Smith, Patterson, Follin, Curtis & James, by Henry N. Patterson, Jr., and Michael K. Curtis, for Employee appellants.

Howard G. Doyle and Thomas S. Whitaker for Commission appellant.

Turner, Enochs, Foster & Burnley, by C. Allen Foster and Eric P. Handler, for Employer appellee.

ARNOLD, Judge.

G.S. 96-14 reads in pertinent part:

> "An individual shall be disqualified for [unemployment compensation] benefits:
>
> * * *
>
> "(5) For any week with respect to which the Commission finds that his total or partial unemployment is caused by a labor dispute in active progress . . . at the factory, establishment, or other premises at which he is or was last employed . . . ."

[1] A reading of the statute, and relevant case law from other jurisdictions, supports a conclusion that Section (5) does not necessarily disqualify striking employees who are subsequently replaced by permanent replacements where there is a genuine offer on the part of the employees to return to work. First of all, the disqualification, according to the statute, does not apply unless it is found that the unemployment "is caused by a *labor dispute in active progress . . .*." The trial court's conclusion that "unemployment which is originally caused by a labor dispute is not changed as to its cause by . . . subsequent events" cannot be supported from the statute unless the phrase "in active progress," modifying "labor dispute," is deleted. The General Assembly may accomplish this by a simple amendment, but this Court cannot.

Secondly, decisions from our sister states which have considered this question should not be disregarded. For example, in

Ruberoid Co. v. California Unemployment Ins. Appeals Board, 59 Cal. 2d 73, 74, 27 Cal. Rptr. 878, 879, 378 P. 2d 102, 103 (1963), the Supreme Court of California held

> "[T]hat since the permanent replacement at once prevents any choice or volition on the part of the worker to return to the job and since it severs the trade dispute as the cause of unemployment, the disqualification of the section no longer operates."

See also Sprague & Henwood, Inc. v. Unemployment Compensation Board of Review, 207 Pa. Super. 112, 215 A. 2d 269 (1965); *Texas Employment Commission v. Hodson*, 346 S.W. 2d 665 (Tex. Civ. App., 1961); *Knight-Morley Corp. v. Emp. Sec. Comm.*, 352 Mich. 331, 89 N.W. 2d 541 (1958).

On the other hand, however, whether replacements are permanent, thereby severing the employer-employee relationship and ending the labor dispute, depends upon the facts of the particular case. In *Special Products Company v. Jennings*, 209 Tenn. 316, 353 S.W. 2d 561 (1961), for example, the Tennessee court held that employees were entitled to benefits on the day they decided the strike was a lost cause and offered to return to work. In the *Sprague & Henwood* case, *supra*, the analysis was much more thorough:

> "In the instant case the employer severed the employment relationship by its letter to the claimants, with the same result to the relationship as if the employee had accomplished it by resignation. The letter, in so many words, advised the employee that he had been permanently replaced; his seniority was dissolved; the balance of his bond account was returned; the amount contributed to the retirement plan was returned; his life insurance and hospitalization were terminated; and he was instructed to remove all his personal belongings still on the plant property. From the time of this notice he was not only removed from actual labor because of the strike but the employment relationship was severed by the employer." 207 Pa. Super. at 117, 215 A. 2d at 272.

[2] In the present case, facts found by the Special Appeals Deputy and adopted by the Commission, were affirmed by the

Superior Court. Those findings reveal that a labor dispute arose between Employer and Employees on 27 February 1976. Furthermore, it was found that the dispute involved "wages, fringe benefits, and specifically the accounting methods for handling the profit sharing plan for the employees of the fabricating department. The dispute further involved the attempted transfer of one employee from the fabricating department to the construction department at a location in Macon, Georgia." On 1 March 1976, picket lines were formed. On that same day, Employer notified the striking Employees to return to work by 8:00 a.m. on Tuesday, 2 March 1976, and that Employer had no choice except to seek permanent replacements if Employees did not return to work. On or about 5 March 1976 Employees, according to the findings of fact adopted by the Superior Court, notified Employer of their "unconditional offer" to return to work. However, Employer by then had replaced fourteen of the sixteen striking Employees and did not have work available for the fourteen Employees.

Based on the record before this Court, it cannot be determined whether on 5 March 1976, when Employees offered unconditionally to return to work, the labor dispute was no longer "in active progress." The only evidence which might tend to show that the dispute was not over on 5 March was that on 2 March 1976 a petition for certification of the Upholsterer's International Union of North America as bargaining agent at Employer's premises was filed with the NLRB. While it was conceded upon oral argument of this appeal that Employees were members of this Union, there is no evidence, and no finding of fact, to indicate that the petition would prolong the employee-employer relationship between Employees and Employer, or that the petition was related in any way to the strike.

If the petition filed 2 March 1976 is found to be unrelated to the dispute which led to the strike, then it is concluded that Employees are entitled to benefits as of 6 March 1976. If it is not so found then Employees are not entitled to those benefits, and their disqualification would continue for so long as the petition was pending before the NLRB.

[3] The 9 March 1976 filing of the unfair labor practice charges does not alter this conclusion. Findings of fact adopted by the Superior Court indicate that the charges filed with the NLRB by Employees against Employer alleged "discrimination in regard to

the hire and tenure of employment in order to discourage membership in a labor organization." Such filing, therefore, is not related to the strike and cannot be the basis upon which to deny benefits to Employees.

As to the 9 March 1976 charges filed, Employees bolster their position by *Nash v. Florida Industrial Commission*, 389 U.S. 235, 19 L.Ed. 2d 438, 88 S.Ct. 362 (1967), in which the United States Supreme Court held that an employee entitled to and receiving unemployment compensation could not be denied those benefits simply because she filed an unfair labor practice charge before the NLRB. Hence, in the instant case, if Employees were entitled to unemployment compensation benefits as of 6 March 1976 they could not be deprived of such benefits because they exercised rights given them by the National Labor Relations Act.

In summary, the case is remanded to the Commission for findings of fact as to whether the 2 March 1976 election petition was related to the labor dispute which arose 27 February 1976, and for entry of an order consistent with the views expressed in this opinion.

Remanded.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. BERNARD LEE PENN

No. 7721SC983

(Filed 6 June 1978)

1. Homicide § 16.1— dying declarations—admissibility

In a prosecution for second degree murder, the trial court properly allowed into evidence as dying declarations statements made by deceased while he was in the hospital, since the evidence tended to show that deceased suffered serious injuries when he was shot; the doctor attending deceased told him that his condition was serious, told him that he could die, and advised deceased as his condition worsened; and deceased asked to see his minister, wife and children because he didn't think he was going to make it.

2. Homicide § 28— self-defense—jury instructions proper

In a prosecution for second degree murder, the jury clearly and correctly understood from the trial court's instructions that they should find defendant not guilty if, under the circumstances as they existed at the time of the killing, the State had failed to satisfy them beyond a reasonable doubt that defendant did not have a reasonable belief that he was about to suffer death or serious bodily harm at the hands of the victim, or that defendant used more force than reasonably appeared to him to be necessary, or that defendant was the aggressor.

APPEAL by defendant from *Long, Judge*. Judgment entered 14 July 1977, Superior Court, FORSYTH County. Heard in the Court of Appeals 31 March 1978.

Defendant was charged with second degree murder, convicted by the jury, and appeals from the judgment entered on the jury verdict.

Two witnesses for the State testified that they saw defendant shoot deceased, Leon Brenner Johnson. One witness knew both men; the other, only defendant. According to their testimony, the incident occurred under a street light, and both had a clear, unobstructed view of the area. Defendant was in an automobile and Johnson was standing in the street begging defendant "to give him his money." They were arguing. The motor of the car was not running, and the door was open. Defendant told deceased that he did not have his money. One witness testified that at that point deceased threw down his hat and coat and "grabbed at" defendant but did not touch him. The other witness said she did not see this. Both witnesses testified that defendant shot deceased from the car, then moved away in the car and "mighty quickly" drove back up to where deceased was lying in the street, got out of his car and shot him again, and got back in the car and left. After that shot, deceased did not move. Both witnesses were positive in their identification of defendant as the person who shot Johnson, and no objection was interposed to their testimony, either with respect to what happened or their identification of defendant as the culprit. One of them called the police and an ambulance. Deceased was alive when the officers arrived, bleeding profusely from his shoulder and stomach. He was vomiting, and his eyes were rolled back in his head. He was not able to talk with the officer. The shooting occurred in the early morning of 26 February 1977. The victim was hospitalized, underwent surgery, and died on 14 March 1977. During the period of

hospitalization, he told three persons about the shooting and identified defendant as the person who shot him. To this testimony defendant objected, excepted to the court's overruling the objection, and assigns as error the court's allowing the evidence to be heard by the jury.

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

Harper and Wood, by J. Clifton Harper, for defendant appellant.

MORRIS, Judge.

[1] In addressing defendant's first assignment of error, we look first at G.S. 8-51.1 "Dying declarations" which provides:

> "The dying declarations of a deceased person regarding the cause or circumstances of his death shall be admissible in evidence in all civil and criminal trials and other proceedings before courts, administrative agencies and other tribunals to the same extent and for the same purposes that they might have been admissible had the deceased survived and been sworn as a witness in the proceedings, subject to proof that:
>
> (1) At the time of the making of such declaration the deceased was conscious of approaching death and believed there was no hope of recovery;
>
> (2) Such declaration was voluntarily made."

Before the court allowed the witnesses to testify as to what Johnson told them while he was in the hospital, testimony was heard on voir dire from Dr. Jarman, Officer McFadden, Clyde Thomas, and James Albert Johnson. Whether a dying declaration is admissible is a question for the trial court, and his ruling is reviewable on appeal only with respect to whether there was sufficient competent evidence tending to show facts essential to support his ruling. *State v. Bowden*, 290 N.C. 702, 228 S.E. 2d 414 (1976).

Dr. Jarman testified that as to the abdominal wound "the bullet passed into the abdominal cavity, going a little bit backwards, and in its course severed the left femoral vein, which

is the main vein draining the left leg, traversed the sigmoid colon, which lies a little bit on the left side, through two loops of small intestine before severing the right internal and external iliac veins, which is the main veins draining the pelvis and the right leg, and lodging itself in the patient's right flank." The wound to the right shoulder "went downwards and backwards through the axilla, or the armpit, and severed the axillary artery and the axillary vein, which constitute the main blood supply and venous drainage of his right arm." The doctor talked to Johnson about his condition after he performed surgery on Johnson on 27 February and on each day thereafter until Johnson died. He described to Johnson the nature of his injuries, the surgical procedures which had been performed, and "the fact that he had at that time already shown manifestations of life-threatening complications, specifically renal failure and a bleeding disorder. I told him that it was a very significant possibility that either or both of those complications could result in his death." The doctor advised Johnson of the treatment they were adopting for him but told him there was no guarantee that it would be successful. These statements were reinforced each subsequent day. Johnson was advised of his progress each day, whether he was getting better or worse. He was getting worse and the doctor told him this each day. The practice at that hospital was to keep the patient informed daily of his condition. Johnson was told that there was a possibility he could die, and, as that possibility became more certain, he was so advised. Although the doctor did not at any time tell Johnson that he was going to die, he did tell him that his condition was worsening daily and there was a possibility of his losing his life. His condition deteriorated rapidly after 7 March, and he was conscious only intermittently after that date. From 1 March to the time of his death he was dialyzed every day.

When Officer McFadden talked with Johnson on 28 February, Johnson was in the intensive care unit and could not talk because there were tubes "down his mouth" running down his throat. He understood what Officer McFadden asked him and shook his head affirmatively in answer to questions as to whether defendant had shot him.

Clyde Thomas testified that on 28 February he visited Johnson and that Johnson mumbled that defendant had shot him and that he wanted to see the pastor of his church because he

didn't think he was going to make it; that he was really messed up. The next day he told Thomas that he'd like to see his wife and children "before he leaves here" because he wouldn't "be around much longer."

In *State v. Cousin*, 291 N.C. 413, 230 S.E. 2d 518 (1976), the Court quoted what was said in *State v. Bowden, supra*, as follows:

> "The admissibility of a declaration as a dying declaration is a question to be determined by the trial judge, and when the judge admits the declaration, his ruling is reviewable only to determine whether there is evidence tending to show facts essential to support it. [Citation omitted.] Under the new statute, the declaration must have been voluntary and made when the declarant was conscious of approaching death and without hope for recovery. It is the requirement that the declarant be aware of his impending death that has most often concerned the courts under the case law and now concerns us under the statute. We note, without deciding, that the words, 'no hope of recovery' in the statute may make the statutory exception to the hearsay rule more restrictive than existing case law. However, we believe that on the facts of this case, the declarant Larry Lovett must have believed that there was no hope for recovery. It is not necessary for the declarant to state that he perceives he is going to die. If all the circumstances, including the nature of the wound, indicate that the declarant realized death was near, this requirement of the law is satisfied. [Citation omitted.]" *State v. Cousin*, 291 N.C. at 419-420, 230 S.E. 2d at 522.

A case with striking similarities to the one *sub judice* is *State v. Stevens*, 295 N.C. 21, 243 S.E. 2d 771 (1978). There the Court, speaking through Chief Justice Sharp, referring to the Court's statement in *Bowden* and *Cousin* that the words "no hope of recovery" contained in G.S. 8-51.1 might have the result of imposing more restrictions on the statutory exception to the hearsay rule than the existing case law, said:

> "We have now concluded that the statutory prerequisites that the deceased must have been 'conscious of approaching death and believed that there was no hope of recovery' do not change our case-law requirements that in order to be ad-

missible the declarations of a decedent must have been 'in present anticipation of death.' " (Citations omitted.)

The Court further said that:

"[I]t is enough if he 'believed he was going to die.' *State v. Tate*, 161 N.C. 280, 282, 76 S.E. 713, 714 (1912). *Accord, State v. Bright*, 215 N.C. 537, 2 S.E. 2d 541 (1939); *State v. Boggan*, 133 N.C. 761, 763, 76 S.E. 111, 114 (1903). Obviously, if one believes he is going to die, he believes there is 'no hope of recovery.' " *Id.* at 29.

We are of the opinion that the evidence tends to show facts essential to support the court's ruling, i.e. that at the time Johnson identified defendant as the person who shot him, he "was conscious of approaching death and believed there was no hope of recovery." No question is raised with respect to voluntariness. We note parenthetically that without objection two eye witnesses had already made positive identification of defendant as the assailant. This assignment of error is overruled.

[2] By defendant's only other assignment of error, the instructions to the jury as to self-defense are challenged. Defendant contends that the instruction as given required the State to prove that defendant did not use more force than reasonably appeared to be necessary rather than that the defendant did use more force than reasonably appeared necessary, thus placing a lesser standard on the State which omitted the element of apparent necessity from the instruction on self-defense. The court clearly, thoroughly, and accurately instructed the jury on the law relating to self-defense and clearly charged the jury the burden was on the State to prove that defendant did not act in self-defense. Each element of self-defense was concisely given and the court emphasized that the circumstances, including the amount of force, should be considered as they appeared to the defendant at the time. We think the jury clearly understood that they should find the defendant not guillty if, under the circumstances as they existed at the time of the killing, the State had failed to satisfy them beyond a reasonable doubt that defendant did not have a reasonable belief that he was about to suffer death or serious bodily harm at the hands of Johnson, or that defendant used more force than reasonably appeared to him to be necessary, or that defendant was the aggressor.

"If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for reversal. *State v. Hall*, 267 N.C. 90, 147 S.E. 2d 548 (1966). Furthermore, insubstantial technical errors which could not have affected the result will not be held prejudicial. *State v. Norris*, 242 N.C. 47, 86 S.E. 2d 916 (1955)." *State v. McWilliams*, 277 N.C. 680, 685, 178 S.E. 2d 476, 479 (1970).

We cannot perceive that the error complained of could have affected the result here, particularly when the charge as a whole so clearly gave the jury the law of self-defense. This assignment of error is also overruled.

No error.

Judges MARTIN and ARNOLD concur.

JEANNIE RAPPAPORT v. DAYS INN OF AMERICA, INC.

No. 7716SC537

(Filed 6 June 1978)

Negligence § 57.11— fall in motel parking lot—insufficient evidence of negligence

In an action to recover for personal injuries sustained by plaintiff when she fell in the parking lot of defendant's motel, evidence was insufficient to support a finding of negligence by defendant which was the proximate cause of plaintiff's injuries, since plaintiff's evidence that she fell while walking in darkness in defendant's parking lot left the cause of her fall a matter of conjecture; it was not negligence for defendant to construct a sidewalk adjacent to its motel building elevated six or seven inches above the adjoining parking lot; and plaintiff's evidence left unexplained why the lighting in the parking lot, which was adequate for her companions, was inadequate for her.

Judge WEBB dissenting.

APPEAL by plaintiff from *Smith (Donald L.), Judge*. Judgment entered 3 March 1977 in Superior Court, ROBESON County. Heard in the Court of Appeals 31 March 1978.

Plaintiff brought this action to recover damages for personal injuries sustained by her on 25 March 1976 when she fell on the

parking lot of defendant's motel. She alleged that her fall and resulting injuries were proximately caused by defendant's negligence in designing and maintaining an area in the parking lot outside of its motel building without proper lighting, in failing to inspect the parking area to insure that it was properly lighted, in failing to warn plaintiff of inadequate lighting and of raised portions of the pavement in the area where plaintiff was directed to park, and in designing different levels of pavement where inadequate lighting was provided. Defendant denied that it was negligent and pled plaintiff's contributory negligence.

Plaintiff presented evidence to show the following: On 25 March 1976 plaintiff, who was then 82 or 83 years old, was travelling by automobile with her daughter and son-in-law from Maryland to Florida. At approximately 9:00 p.m. they stopped for the night at defendant's motel in Lumberton, N.C. None of them had previously been there. After registering, plaintiff's son-in-law drove to the rear of the motel to the general area where he had been directed to park for the second floor rooms to which they had been assigned. He parked the car on the asphalt paved parking lot up against a concrete walkway which was adjacent to the motel building. This walkway was elevated approximately six to seven inches above the level of the asphalt paved parking lot. The weather was clear and warm. It was very dark. Where they parked, the only lights on the outside of the motel were those on the upper and lower porches, but some obstruction prevented those lights from shining on the area where the car was parked. Two spotlights on the brick wall in the immediate vicinity were not burning. Before turning out the headlights on the automobile, defendant's son-in-law saw the step-up or rise in the concrete sidewalk but made no comment to the other passengers in the car about that rise.

After parking the automobile and turning off its headlights, plaintiff's son-in-law got out of the car, opened the trunk, and took out three bags. He and plaintiff's daughter then walked toward their rooms carrying the bags, with plaintiff's daughter walking in front. Plaintiff, who had been riding as a passenger in the rear seat of the automobile, got out of the car and followed them, walking ten to fifteen feet behind her son-in-law. As she did so, she fell and was injured. Plaintiff's son-in-law heard her cry out and ran back to her. He found her in a seated position on the pave-

ment of the parking lot at a spot directly opposite the front door of their car and within a couple of feet of the concrete walk.

Plaintiff testified:

> I was walking and I made a step, I think, or it was so dark that I couldn't see what it was. And I must have put my foot on the little place there. All I know is that I fell back. . . .
>
> When I fell back I hit nothing but pavement. I do not know whether it was asphalt or on concrete that I hit.
>
> * * *
>
> I fell approximately eight to six feet from the building but I cannot be too sure.
>
> * * *
>
> In describing exactly what cause me to fall, all I can say is that it was dark and it must have been a step there that I missed, that I didn't see. And I fell back.
>
> * * *
>
> . . . I do not know what I fell over, and all I know is that I was trying to get up. I didn't know what was there because it was dark and I fell back, and could not see what I fell on. . . . The location of my fall was probably a couple of feet away from the automobile. I fell as I was taking a step upward, but I am not sure whether it was upward or straight. I felt something there but I didn't know whether there was a step there or not but I knew that I didn't make it.
>
> * * *
>
> . . . When I walked around the car it was pitch dark there. If there were lights and light fixtures where I fell and if they were burned out I do not know when they were burned out. There was nothing hidden about the fact that it was dark outside and I did realize that it was dark, and I proceeded where I was going.
>
> * * *

> At the time that I fell I was looking in front of me. I can't say that I was looking just straight ahead but I was walking like anybody walks. I didn't look at my feet, I was just walking. I was looking straight ahead because I was walking and I thought it was straight.

Plaintiff's son-in-law, Leon Sherman, testified:

> I would not say it was too dark for me to see, and I knew about the rise in the sidewalk from the parking area because I saw it when I pulled my car in the parking space. . . .
>
> * * *
>
> The three of us moved toward the motel and neither I nor my wife had any problem.

Plaintiff's daughter testified:

> I saw my mother when she got out of the automobile. I saw her walk toward the front of the car and then I saw her turn around and walk toward the back of the car around the trunk and Mr. Sherman had already closed the trunk and I was ahead of him. I walked ahead because I had the keys. I could see well enough to know that my mother was walking fine and had no problem once she got out of the car. . . .
>
> * * *
>
> My mother is a very spry lady, and despite not seeing any lights I left her and I don't have any idea what she fell over or how she fell, but she fell. . . . I knew that the lighting condition on that night was dark but I was able to walk toward my room in the lighting conditions that were there. There was nothing concealed about the lighting conditions.

At the close of plaintiff's evidence, defendant moved for a directed verdict on the grounds that plaintiff's evidence failed to disclose any actionable negligence on the part of the defendant and showed that plaintiff was contributorily negligent as a matter of law. The court allowed the motion, and plaintiff appealed.

John CB. Regan III for plaintiff appellant.

Anderson, Broadfoot and Anderson by Hal. W. Broadfoot for defendant appellee.

PARKER, Judge.

The question presented is whether plaintiff's evidence, considered in the light most favorable to her, was sufficient to support a finding of negligence by the defendant which was the proximate cause of plaintiff's injuries. We agree with the trial court's conclusion that it was not.

"An innkeeper is not an insurer of the personal safety of his guests." *Page v. Sloan*, 281 N.C. 697, 702, 190 S.E. 2d 189, 192 (1972). He is only required to exercise due care to keep his premises in a reasonably safe condition and to give his guests or invitees warning of any hidden peril or unsafe condition of which he has knowledge or which he could discover by reasonable inspection and supervision. *Jones v. Pinehurst, Inc.*, 261 N.C. 575, 135 S.E. 2d 580 (1964); *Barnes v. Hotel Corp.*, 229 N.C. 730, 731, 51 S.E. 2d 180, 181 (1949). Moreover, "[t]here is no presumption or inference of negligence from the mere fact that an invitee fell to his injury while on the premises, and the doctrine or res ipsa loquitur does not apply to a fall or injury of a patron or invitee on the premises, but the plaintiff has the burden of showing negligence and proximate cause, and in this connection allegations of negligence in aspects not supported by the evidence must be disregarded." 9 Strong's N.C. Index 3d, Negligence § 53.4, pp. 482-83.

Plaintiff's evidence in the present case, even when viewed in the light most favorable to her, leaves the cause of her fall a matter of conjecture. The theory advanced by her counsel is that she fell when she walked forward in the darkness and stumbled against the raised concrete walkway adjacent to the motel building, but her evidence leaves it to speculation whether this occurred. Plaintiff had the burden to show the cause of her fall. She failed to carry that burden.

Even if it be assumed that plaintiff fell in the manner her counsel contends, still her evidence fails to show that her fall and resulting injuries were caused by any actionable negligence on the part of the defendant. It was not negligence for the defendant to construct and maintain a concrete walkway adjacent to its motel building elevated some six or seven inches above the adjoining parking lot. Such walkways, requiring a step up by one walking from the parking area to the motel building, are so com-

mon that the possibility of their presence should be anticipated by prudent persons. " 'Generally, in the absence of some unusual condition, the employment of a step by the owner of a building because of a difference between levels is not a violation of any duty to invitees.' " *Reese v. Piedmont, Inc.*, 240 N.C. 391, 395, 82 S.E. 2d 365, 368 (1954); *accord, York v. Murphy*, 264 N.C. 453, 141 S.E. 2d 867 (1965); *Garner v. Greyhound Corp.*, 250 N.C. 151, 108 S.E. 2d 461 (1959).

Plaintiff alleged that defendant was negligent in failing to provide proper lighting, and she presented evidence that two spotlights on the brick wall in the vicinity where she fell were not burning. However, she presented no evidence to show how long these had been out or to show that defendant knew the spotlights were out or should have discovered this by reasonable inspection. Her evidence leaves unexplained why the lighting, which was adequate for her companions, was inadequate for her. We find plaintiff's evidence insufficient to show that any negligence of the defendant was the proximate cause of her injuries.

Drumwright v. Theatres, Inc., 228 N.C. 325, 45 S.E. 2d 379 (1947), cited and relied on by plaintiff, is distinguishable on its facts. In that case the plaintiff fell inside a darkened theatre when her foot slipped on a step of uneven width while she was walking down the aisle in the balcony where she had been directed to go by an usher. A majority of our Supreme Court reversed judgment of nonsuit for the defendant. In that case the plaintiff's evidence disclosed the exact cause of her fall, the precise place it occurred, and the fact that defendant's employee had directed her to go to the very place where she fell and was injured. In the present case plaintiff's fall occurred, not in the darkened interior of a building, but out of doors; the cause of her fall is left to conjecture; the place where it occurred is not precisely fixed; and, finally, plaintiff and her companions were directed by defendant's employees only as to the general area where they should go. We do not consider *Drumwright v. Theatres, Inc.*, as controlling on the facts of this case.

Since we find that plaintiff's evidence was insufficient to permit any inference of actionable negligence on the part of the defendant, it is not necessary that we pass on defendant's additional contention that plaintiff's evidence disclosed her con-

tributory negligence as a matter of law. The judgment directing verdict for defendant is

Affirmed.

Judge VAUGHN concurs.

Judge WEBB dissenting.

I dissent because I believe we are bound by *Drumwright v. Theatres, Inc.*, 228 N.C. 325, 45 S.E. 2d 379 (1947). In that case, the patron of a movie theatre was directed to the balcony by an usher. The balcony was dark and there were no floor lights or seatlights. The steps were uneven in width—the succession being a narrow step, then a wider step. The plaintiff took a false step and fell when she thought she was on a wide step rather than a narrow one. The Supreme Court held that on this evidence, the case should have gone to the jury. I believe *Drumwright* is factually indistinguishable from this case. In each case, the plaintiff entered the premises of the defendant as a business invitee; the plaintiff was directed to an area of the premises by an agent of the defendant; the plaintiff could be expected to walk through a dark area of the premises, and there was an irregularity in the area in which the plaintiff was to walk.

The majority opinion holds that the cause of the plaintiff's fall is left to speculation by the evidence. I believe that the evidence that the plaintiff was walking toward the curb, and immediately after the fall she was found approximately a "couple" of feet from the curb is sufficient upon a fair and reasonable consideration to permit the jury to find that the plaintiff tripped on the curb. *Moore v. Moore*, 268 N.C. 110, 150 S.E. 2d 75 (1966).

LLOYD M. FONVIELLE & WIFE, BARBARA B. FONVIELLE v. SOUTH CAROLINA INSURANCE CO., ROGER BENTON & DELORES BENTON

No. 778SC546

(Filed 6 June 1978)

Insurance § 85— automobile liability policy—non-owned automobile—resident of same household

In an action to determine whether defendant daughter who had an accident while driving her brother's automobile was covered by a provision of defendant father's automobile liability policy covering a relative of the insured who is a resident of the same household as insured in the operation of an automobile not owned by a relative who is a member of the same household, the evidence was sufficient to support the court's finding that the daughter was a "resident" of the insured father's household at the time of the accident where it showed that the daughter had a job in Washington, D. C. and returned to her father's home at Thanksgiving and Christmas vacations in 1974; she had been at her father's home about two weeks when the accident occurred on 22 December 1974; the daughter considered her father's home as her home, still received her mail there and had a phone there listed in her name for which she did not pay; and before the accident, she intended to return to Washington to work. However, the court erred in concluding that the daughter was covered under the policy where the court made no finding as to whether the brother who owned the automobile was a member of the insured father's household.

APPEAL by defendants from *Smith, Judge (David I.)*. Judgment entered 11 March 1977 in Superior Court, WAYNE County. Heard in the Court of Appeals 3 April 1978.

Plaintiffs instituted a declaratory judgment suit to determine whether defendant-father's automobile liability insurance policy covered defendant-daughter who was driving her brother's automobile when she hit plaintiffs. The brother had no automobile insurance and plaintiffs had recovered under their own uninsured motorists coverage. Defendant-father's policy insured "(b) with respect to a *non-owned* automobile, (1) the named insured, (2) *any relative*, but only with respect to a private passenger automobile or trailer, provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, . . ." [Emphasis added.] The policy defined "relative" as "a relative of the named insured *who is a resident of the same household.*" [Emphasis added.] The policy did not

define the term "resident." It defined "non-owned automobile" as "an automobile or trailer *not owned by* or furnished for regular use of *either the named insured or any relative*, other than a temporary substitute automobile; . . ." [Emphasis added.] At pretrial conference, it was stipulated that the case would be decided without a jury, that defendant-father was a resident of 315 Denmark Street, Goldsboro, that defendant-driver Delores was his daughter, that she was driving her brother's car with his express permission and within the scope of that permission. Plaintiffs requested the following stipulation but did not receive it:

> "(e) On the date of the accident as aforesaid, Roger Benton, Jr., [brother] was not a 'resident' as that phrase is used in the aforesaid automobile liability insurance policy and his 1973 Ford automobile was a 'non-owned automobile' as defined by policy #305 03 41 issued to Roger Benton, Sr."

Counsel for the parties agreed that the following were the issues to be determined and declared by the court:

> "a) On December 22, 1974, was Delores Benton a resident of the same household of the named insured, Roger Benton, Sr., within the meaning of that phrase as used and defined in automobile liability insurance policy #305 03 41?
>
> Answer: _____
>
> b) On December 22, 1974, was Delores Benton an insured of the Defendant, South Carolina Insurance Company, pursuant to the terms of its insurance contract, policy #305 03 41, insured to Roger Benton, Sr.
>
> Answer: _____"

At trial plaintiffs presented both Delores Benton's deposition and her live testimony. Her testimony tended to show that she had lived with her parents until she was 20 or 21, that she then moved to a neighbor's house, staying there until moving to Washington, D. C. She found a job in a hotel in Washington and returned to her parents' home, in 1974, at Thanksgiving and Christmas vacations. She had been at her parents' home about two weeks when she had the accident. At the time of the accident, she considered her father's home on Denmark Street as her home, still received her mail there and had a phone listed in her

name for which she did not pay. Before the accident, she intended to return to Washington to work. After the accident she decided to stay with them until she was better, until May 1975. She testified that her brother Roger, Jr. lived in Brooklyn, New York. Delores's mother testified that Delores was living in Washington and was only visiting at the time of the accident.

The trial court found:

> "8. That from approximately two weeks prior to the date of the accident on or about December 22, 1974, until May, 1975, Delores Benton lived and was physically present in the home of her father, Roger Benton, Sr., at 315 Denmark Street in Goldsboro, North Carolina."

The court then concluded that Delores was a resident of her father's household at the time of the accident and was an insured of defendant-insurance company. From the order so adjudging, defendants appeal.

Freeman, Edwards & Vinson by James A. Vinson III for plaintiff appellees.

Taylor, Warren, Kerr & Walker by Robert D. Walker, Jr. for defendant appellants.

CLARK, Judge.

Under the terms of the automobile liability policy issued by defendant South Carolina Insurance Company to the named insured, Roger Benton, Sr., the operator of the automobile, Delores Benton, owned by her brother, Roger Benton, Jr., at the time of the collision on 22 December 1974, was an insured if (1) Delores Benton was a resident of the same household of the named insured, and (2) Roger Benton, Jr. was not a resident of the same household of the named insured.

The term "resident" is not defined in the insurance policy. Such term, if not defined, is capable of more than one definition and is to be construed in favor of coverage. *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410 (1966), has made this rule of construction clear:

> "When an insurance company, in drafting its policy of insurance, uses a 'slippery' word to mark out and designate

> those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the term. All who may, by any reasonable construction of the word, be included within the coverage afforded by the policy should be given its protection. If, in the application of this principle of construction, the limits of coverage slide across the slippery area and the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be bound." 266 N.C. at 437-8, 146 S.E. 2d at 416.

But a rule of construction cannot supply a material element even in the case of a "slippery" term as long as the term has some meaning. *Jamestown* considered "resident" a slippery term but was able to give some definition to its material elements. Intent to remain at a place seems determinative, although not intent to remain permanently. It is clear that the intent necessary to show residence is not that necessary to show domicile. *Jamestown, supra; Newcomb v. Insurance Co.*, 260 N.C. 402, 133 S.E. 2d 3 (1963). *Jamestown, supra*, citing 17A Am. Jur., Domicile, § 9, has it:

> " ' "Residence" has many shades of meaning—from mere temporary presence to the most permanent abode. Generally, however, it is used to denote something more than mere physical presence, *in which event intent is material.* "Residence," as a legal term, is something more than the mere actual presence in a locality, even where it is not equivalent to domicile.
>
> * * *
>
> *'Any place of abode or dwelling place constitutes a residence, however temporary it may be, while the term "domicile" relates rather to the legal residence of a person or his home in contemplation of law.'* " [Emphasis added.] 266 N.C. at 437, 146 S.E. 2d at 415. Also see 25 Am. Jur. 2d, Domicile, § 4.

In *Jamestown, supra*, an adult son, staying at his father's house until he found a place more suitable for his new job, was deemed a resident of his father's house. *Newcomb, supra*, emphasizing that residency is determinable on the basis of conditions existing

at the time the accident occurs, considered a husband and wife, staying with the wife's mother until one of the adult sons returned, residents of the mother's household even though the couple had a cottage-home elsewhere.

The evidence relating to the residency of defendant Delores Benton was conflicting. But in light of the foregoing decisions we find the evidence sufficient to support the finding of the trial court that Delores Benton was a resident relative of the household of the named insured, her father Roger Benton, Sr.

But the only evidence which speaks to the issue of whether Roger Benton, Jr., was a resident of the household was Delores Benton's testimony that her brother lived in Brooklyn, New York, and disappeared after the accident, and his mother's testimony listing the children living in the household at the time of the collision, which list did not include either Delores or Roger, Jr. The trial court made no finding of fact on the issue of whether Roger Benton, Jr., was a resident of the household of his father, the named insured. Since there was no such finding, there was no support for the conclusion that Delores Benton was an insured under the policy.

Plaintiffs make the argument that the burden of proof was on defendants to show that Roger Benton, Jr., was a resident of the household of the named insured, because the "non-owned automobile" provision requiring that the owner of the automobile involved in the accident be a nonresident was an exclusion. In an action on an automobile liability policy, the burden is upon insured to show coverage, and, if insured relies upon a clause excluding coverage, the burden is on the insurer to establish the exclusion. *Insurance Co. v. McAbee*, 268 N.C. 326, 150 S.E. 2d 496 (1966); 7 Strong's N.C. Index 3d, Insurance, § 108. But although the "non-owned automobile" provision, if not met, does exclude coverage, it is not itself an exclusionary provision. Unless a plaintiff alleges and proves facts sufficient to demonstrate the provision is met, he or she cannot be held to have made out a *prima facie* case for coverage, which case plaintiff must make before the burden to show non-coverage or exclusion is switched to defendant-Insurance Company. *McAbee, supra.*

The evidence of Roger Benton, Jr.'s, nonresidency may have been sufficient to support a finding of nonresidency by the trial

court, though the evidence from which Roger Benton, Jr.'s, intent could be inferred was sparse. *Jamestown, supra,* quotes with approval from a Washington case, *American Universal Insurance Company v. Thompson,* 62 Wash. 2d 595, 384 P. 2d 367 (1963) to support the seemingly anomalous result in the application of the rule of construction mentioned earlier that construction of the term "resident" in favor of coverage might cause a court to define very broadly in one case and very narrowly in another. In a situation such as the one *sub judice,* the rule could lead to a narrow definition of "resident" so as to exclude Delores's brother and permit his car to be a proper "non-owned automobile" while also leading to a broad definition of "resident" so as to include Delores as a covered relative operating a "non-owned automobile."

For error in the failure of the trial court to make proper findings of fact on the issue of the residency of Roger Benton, Jr., the conclusion that Delores Benton was an insured under the automobile liability policy was not supported by the findings of fact. The judgment is reversed and the cause remanded for a new trial on all issues consistent with this opinion.

Reversed and remanded.

Judges BRITT and ERWIN concur.

STATE OF NORTH CAROLINA v. ROBERT LEE BASS

No. 7811SC21

(Filed 6 June 1978)

1. Homicide § 21.2— voluntary manslaughter—wound inflicted by defendant—sufficiency of evidence

The State's evidence was sufficient for the jury in a voluntary manslaughter prosecution where it tended to show that, immediately before the victim was shot, the victim left defendant's service station without paying for the gasoline his companion had pumped into the car; a witness saw defendant fire a pistol in the direction of the car in which the victim was riding and heard defendant admit shooting at the "fellows [who] stole some gas"; and another witness saw the car between the service station and the first stop sign when the shots were fired.

2. Homicide § 30.3— voluntary manslaughter—submission of involuntary manslaughter

Evidence in a voluntary manslaughter prosecution that defendant fired shots toward the car in which the victim was riding and struck and killed the victim was sufficient to support the court's charge on the lesser included offense of involuntary manslaughter, since the evidence would support a finding that defendant was not actually aiming his shots at any individual and did not intentionally shoot the victim, and that his shooting of the victim resulted from culpable negligence.

3. Criminal Law § 112.4— charge on circumstantial evidence—beyond a reasonable doubt

It was not necessary for the court, when instructing on circumstantial evidence, to state that such evidence must prove the defendant's guilt beyond a reasonable doubt where the court in other portions of the charge fully instructed the jury that defendant could be convicted only if the State proved his guilt beyond a reasonable doubt.

APPEAL by defendant from *Rouse, Judge*. Judgment entered 8 September 1977 in Superior Court, HARNETT County. Heard in the Court of Appeals 3 May 1978.

Defendant was tried on his plea of not guilty to an indictment charging him with involuntary manslaughter in connection with the death of Hugh Sanders, which occurred on 9 April 1977.

At trial, the State presented first the testimony of Joe Proceno, who testified that on the date of Sanders's death, he and Sanders, along with another friend, Arthur Copson, were driving through North Carolina on their way to their homes in Delaware. Traveling on Interstate Highway 95, Proceno was driving his Buick automobile, and Sanders was sitting in the passenger's seat in the front of the car while Copson slept in the back seat. Sometime between 7:00 a.m. and 8:00 a.m., they stopped at the Robbie Ann Service Station to purchase gasoline. After observing only one man sitting in the service station, Proceno proceeded to pump gasoline into his automobile. Proceno got back in the car to get money, but when no one came out to take the money, Proceno drove away without paying. Before they got to a stop sign, Proceno heard a shot as the glass shattered on Sanders's side of the car. Sanders slumped over onto Proceno's lap, and Proceno heard more shots. They got back onto the interstate highway and traveled to the next exit before stopping to call an ambulance.

Copson testified that he awoke as the car pulled out of the service station and shortly thereafter heard a shot, that the glass on the passenger's side shattered, and that Sanders slumped over with a bullet hole in the right side of his head.

Thomas Sessoms, testifying for the State, stated that on the morning of 9 April he was at a restaurant adjacent to the Robbie Ann Service Station. As he was leaving the restaurant, he heard a shot and drove toward the service station where he heard another shot. He then saw defendant firing a third shot with a pistol. Defendant was pointing the pistol toward some automobiles located near the entrance ramp for the interstate highway, but Sessoms was unsure exactly which automobile was the target of the shots. Sessoms approached defendant and "asked him what was wrong. He said 'Them fellows stole some gas from him' he said 'he shot at them.' "

Another witness for the State, Odell Robinson, testified that on 9 April he went to the Robbie Ann Service Station to work for defendant. A few seconds after arriving at the station, he heard shots which were fired by defendant with a pistol. Robinson did not know where defendant was aiming the shots. Robinson testified:

> I heard Mr. Bass say "Hey" and that was all. I heard two shots fired. At the time I heard the shots the particular car was between the station and the first stop sign.

A pathologist, stipulated by defendant to be an expert, testified that he performed an autopsy on Sanders and that in his opinion Sanders died because of a missile wound on the right side of his head.

The State rested, and defendant presented the testimony of a deputy sheriff who had talked to Proceno and Copson on the day of the shooting. The deputy sheriff testified that the initial story Proceno and Copson told him was different from the story they presented in testifying for the State. Proceno also failed to identify defendant at a lineup. However, Proceno and Copson told the deputy later that same day that the shooting occurred after they had taken four dollars worth of gas without paying. Defendant also presented a number of character witnesses.

The jury found defendant guilty of involuntary manslaughter. From judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Alan S. Hirsch for the State.

Stewart and Hayes by D. K. Stewart for defendant appellant.

PARKER, Judge.

[1] Defendant's first assignment of error is directed to the trial court's denial of his motions for nonsuit. Citing *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967), he contends that there was insufficient evidence that he shot the deceased and that the evidence shows, at most, no more than a mere opportunity to commit the offense. We disagree. Admittedly, no witness testified that he observed defendant fire the particular shot which was shown to have struck Sanders and caused his death. However, there was evidence that immediately before the shooting occurred, the victim left defendant's service station without paying for the gasoline his friend had pumped into the car. A witness testified that he saw defendant fire the pistol in the direction of the car in which Sanders was riding, and this witness also testified that defendant admitted shooting at the " 'fellows [who] stole some gas.' " Another witness testified that the car was between the service station and the first stop sign when the shots were fired. This evidence is clearly sufficient to support a jury verdict finding that a crime occurred and that it was committed by defendant. Therefore, this assignment of error is overruled.

[2] Defendant was charged with voluntary manslaughter. By his second assignment of error he contends that the trial judge erred in submitting the charge of involuntary manslaughter to the jury because there was no evidence of involuntary manslaughter. He argues that the State's theory at trial was that defendant intentionally shot the deceased and that there was no evidence that defendant was culpably negligent. The evidence at trial showed that the victim was shot and that defendant had fired a pistol in the victim's direction. This evidence certainly supports an inference that the shooting of the victim was intentional. However, intent can seldom be proved with objective certainty, *see State v.*

Bell, 285 N.C. 746, 208 S.E. 2d 506 (1974); *State v. Wingard*, 10 N.C. App. 101, 177 S.E. 2d 765 (1970), and this evidence would also support a finding that defendant was not actually aiming his shots at any individual. Such a finding would amount to the culpable negligence required to support a charge of involuntary manslaughter. *See State v. Neal*, 248 N.C. 544, 103 S.E. 2d 722 (1958). Moreover, error, if any occurred, in submitting the lesser included offense of involuntary manslaughter was favorable to defendant, and he is without standing to challenge the verdict. *State v. Vestal*, 283 N.C. 249, 195 S.E. 2d 297 (1973); *State v. Chambers*, 21 N.C. App. 450, 204 S.E. 2d 560 (1974).

[3] By his third assignment of error defendant contends that the court committed error in its charge "as it relates to circumstantial evidence." This assignment of error is based on defendant's exception No. 4 which singles out the following portion of the charge:

> Now, members of the jury, the State in this case relies in part upon what is known as circumstantial evidence. Now, circumstantial evidence is recognized as accepted proof in a court of law. However, you must find the defendant not guilty unless all of the circumstances considered together exclude every reasonable possibility of innocence and points conclusively to guilt.

In his brief, defendant concedes that "the trial judge in this case stated the rule correctly as far as he went." His contention is that "the judge erred in the instruction by virtue of the fact that he failed to instruct the jury that the circumstantial evidence must prove the defendant's guilt beyond a reasonable doubt," and he cites *State v. Lowther*, 265 N.C. 315, 144 S.E. 2d 64 (1965) for the proposition that when the State relies on circumstantial evidence for a conviction, the jury must be satisfied beyond a reasonable doubt of the defendant's guilt before it can return a verdict of guilty. In our opinion, the portion of the court's charge which is the subject of defendant's exception No. 4 makes this abundantly clear. Moreover, it is elementary that in every criminal case, no matter what type of evidence the State relies upon, whether it be direct, or circumstantial, or both, the jury must be satisfied beyond a reasonable doubt of the defendant's guilt before it can return a verdict of guilty. In the present case at the beginning of

the charge the court correctly and fully instructed on this point when it defined reasonable doubt and instructed the jury that defendant could be convicted only if the State proved his guilt beyond a reasonable doubt. Again, in its mandate the court correctly instructed on this point. It was not necessary, as defendant contends, for the court to repeat the same instruction, using the words "beyond a reasonable doubt," when it instructed the jury concerning circumstantial evidence. Defendant's third assignment of error is overruled.

We have carefully examined all of defendant's remaining assignments of error and find no prejudicial error.

No error.

Judges HEDRICK and MITCHELL concur.

GARY S. BEAL v. K. H. STEPHENSON SUPPLY COMPANY, INC.

No. 7711SC487

(Filed 6 June 1978)

1. **Rules of Civil Procedure § 50— motion for directed verdict—judgment n.o.v.—consideration of all admitted evidence**

All evidence admitted, whether competent or not, must be given full probative force in determining the correctness of a directed verdict or of a judgment notwithstanding the verdict.

2. **Evidence § 32.2— parol evidence rule—term of employment contract**

Testimony tending to show that the contract of employment sued on was for a definite term of three years did not violate the parol evidence rule where other evidence showed that the written contract was not the complete agreement between the parties, and the testimony did not contradict or change any provision of the written contract.

3. **Master and Servant § 10.2— employment contract—wrongful discharge—judgment n.o.v.**

The trial court erred in granting defendant's motion for judgment notwithstanding the verdict for plaintiff in an action on a contract of employment where the evidence, including testimony that the contract was for a definite term, did not require a finding that there was just cause for defendant's discharge of plaintiff.

4. Rules of Civil Procedure § 50— judgment n.o.v.—necessity for motion for new trial

A party gaining judgment notwithstanding the verdict must also seek a ruling on a motion for a new trial if he wishes to allege any error in the trial or to preserve for appellate review any question other than the sufficiency of the evidence.

APPEAL by plaintiff from *McLelland, Judge*. Judgment entered 16 March 1977 in Superior Court, LEE County. Heard in the Court of Appeals 9 March 1978.

Plaintiff brought this action for damages alleged to have resulted from defendant's wrongful breach of a contract of employment. His testimony tended to show that he contracted with the K. H. Stephenson Supply Company to work as an accountant from 15 April 1973 to 31 December 1976 at a specified salary, and that the terms of the contract required him to perform accounting services for the Stephenson Company and related companies. The plaintiff also introduced into evidence the following paperwriting executed by himself and Kyle H. Stephenson, the president of K. H. Stephenson Supply Company, Inc.

> "This agreement, made this 26th day of March, 1973, between Gary S. Beal, of the first part, and Kyle H. Stephenson of K. H. Stephenson Supply Co. of the second part, witnesseth:
>
> That the said Gary S. Beal agrees faithfully and diligently to serve the said Kyle H. Stephenson, as controller, in the office of the said K. H. Stephenson Supply Co. for the sum of $15,000 per annum. In consideration of which service so to be performed the said Kyle H. Stephenson agrees to pay the said Gary S. Beal the sum of $1,250.00 per month.
>
> The following conditions of employment are to be made a part of the contract:
>
> (a) The movement of household goods of Gary S. Beal are to be paid by K. H. Stephenson Supply Co.
>
> (b) A minimum of two weeks paid vacation is to be granted per annum.
>
> (c) Salary increments are to be 5%, 7½%, and 10% for the three year period beginning January 1, 1974. The base

for these increments will be the per annum gross salary of the prior year.

(d) Company provided transportation will be mutually agreed upon at a later date.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written."

Plaintiff's evidence tended to show that he was discharged, without just cause, on 17 December 1974. Defendant offered evidence tending to show that plaintiff's dismissal from employment had been for just cause. Defendant's motion for a directed verdict was denied. The jury answered the issues in plaintiff's favor and awarded him $8,846.88 in damages.

Defendant moved for a judgment notwithstanding the verdict, contending that plaintiff's evidence disclosed just cause for defendant's discharge of plaintiff. He did not move in the alternative for a new trial. Defendant's motion, as made, was denied. The judge, on his own motion, however, entered judgment for defendant notwithstanding the verdict because he then felt that testimony, which should have been excluded under the parol evidence rule, had been erroneously considered by the jury.

Plaintiff's action was dismissed with prejudice.

McDermott & Parks, by O. Tracy Parks III, for plaintiff appellant.

Hoyle & Hoyle, by Kenneth R. Hoyle and J. W. Hoyle, for defendant appellee.

VAUGHN, Judge.

[1, 2] Plaintiff's appeal presents the question of whether judgment notwithstanding the verdict was properly entered against him. Judgment notwithstanding the verdict should be granted only when the evidence is insufficient as a matter of law to support the verdict. Where the evidence admitted at trial, taken in the light most favorable to the non-moving party with all reasonable inferences drawn in his favor, is sufficient to support the verdict, it should not be set aside. *Summey v. Cauthen*, 283

N.C. 640, 197 S.E. 2d 549 (1973); *Brokers, Inc. v. High Point City Board of Ed.*, 33 N.C. App. 24, 234 S.E. 2d 56 (1977), *cert. den.*, 293 N.C. 159, 236 S.E. 2d 702. The ground for granting judgment notwithstanding the verdict was that the jury had before it parol evidence that added to the written agreement and thus violated the parol evidence rule. The parol evidence was admitted over defendant's objection and tended to show that the employment contract was for a definite term of three years. The general rule is that all evidence admitted, whether it be competent or not, must be given full probative force in determining the correctness of a directed verdict or of a judgment notwithstanding the verdict. *Bishop v. Roanoke Chowan Hospital, Inc.*, 31 N.C. App. 383, 229 S.E. 2d 313 (1976); *see Dixon v. Edwards*, 265 N.C. 470, 144 S.E. 2d 408 (1965).

The trial judge, however, stated that the parol evidence rule was "not really a rule of evidence, but of substantive law" and that plaintiff's parol evidence, as a matter of law, could not be used to prove that there was a definite term of employment. We note, however, that the Supreme Court of North Carolina has elected to treat the rule as one of evidence in the sense that evidence admitted in violation of the rule, if admitted without objection, may be considered and allowed to prove facts that would otherwise not be provable at all. *Bishop v. DuBose*, 252 N.C. 158, 113 S.E. 2d 309 (1960). In *Products Corporation v. Chestnutt*, 252 N.C. 269, 275, 113 S.E. 2d 587, 593 (1960), the Court noted that, while there was much authority for the proposition that the rule was not one of evidence but of substantive law, "[t]here are North Carolina decisions which treat it solely as a rule of evidence." The Court then declined to explore the question further, and we need not do so on this appeal. Our conclusion is that parol evidence was properly admitted to prove a definite three-year term of employment.

When a contract is reduced to writing, parol evidence cannot vary its terms. When a contract is partially parol and partially written, parol evidence may prove the parol terms. *Hoots v. Calaway*, 282 N.C. 477, 193 S.E. 2d 709 (1973); *Williams & Assoc. v. Ramsey Products Corp.*, 19 N.C. App. 1, 198 S.E. 2d 67, 69 A.L.R. 3d 1348 (1973), *cert. den.*, 284 N.C. 125, 199 S.E. 2d 664.

[3] "A contract for service must be certain and definite as to the nature and extent of the service to be performed, the place

where, and the person to whom it is to be rendered, and the compensation to be paid, or it will not be enforced." *Croom v. Goldsboro Lumber Co.*, 182 N.C. 217, 220, 108 S.E. 735, 737 (1921); *McMichael v. Borough Motors, Inc.*, 14 N.C. App. 441, 444, 188 S.E. 2d 721, 722 (1972). The paperwriting which the court apparently characterized as a complete contract purports on its face to be an agreement between plaintiff and Kyle Stephenson individually and calls for the performance of services for K. H. Stephenson Supply Co. The parties both offered evidence which tended to show that plaintiff's employment was terminated due to suspected irregularities in work done for S & H Floral Garden. The paperwriting does not mention S & H, yet the testimony that plaintiff was expected to perform accounting duties for the Floral Garden was undisputed. Indeed, Kyle Stephenson, the president of the defendant corporation, testified that the work for the other business "was all figured in the original contract." This alone is enough to show that the paperwriting did not constitute the entire agreement between the parties. We also point out that the written agreement does not set a date for plaintiff to begin employment even though there is undisputed evidence that the parties agreed that he would begin work on 15 April 1973. Indeed, about the only element of an enforceable employment contract which is definite on the face of the paperwriting is the amount of compensation to be paid. Since the parties agreed there were some other terms, it cannot be said as a matter of law that the paperwriting represented the whole contract between the parties. Evidence that the parties agreed that plaintiff would be employed by K. H. Stephenson Supply Company from 15 April 1973 to 31 December 1976 neither contradicts nor changes that which is written. The only pertinent term from the written agreement provides that "[s]alary increments are to be 5%, 7½%, and 10% for the three year period beginning January 1, 1974." As defendant points out, this provision alone is insufficient to show that the contract was for a definite period. *Freeman v. Hardee's Food Systems, Inc.*, 3 N.C. App. 435, 165 S.E. 2d 39 (1969). Nevertheless, it is not contradicted or changed by an additional contract provision that the term of the employment be from 15 April 1973 to 31 December 1976. Thus the parol evidence as it tended to prove that the contract was for a definite term was properly admitted. When the parol evidence is given its full probative force, it is sufficient to support the verdict. The evidence does not,

when considered in the light most favorable to plaintiff, require a finding that there was just cause for defendant's discharge of plaintiff. The judgment notwithstanding the verdict should be reversed and judgment should be entered on the verdict. *Snellings v. Roberts*, 12 N.C. App. 476, 183 S.E. 2d 872 (1971), *cert. den.*, 279 N.C. 727, 184 S.E. 2d 886; *Musgrave v. Savings & Loan Assoc.*, 8 N.C. App. 385, 174 S.E. 2d 820 (1970).

[4] Although G.S. 1A-1, Rule 50, provides that "[a] motion for a new trial may be joined with this motion [for judgment notwithstanding the verdict], or a new trial may be prayed for in the alternative," defendant did not at any time move for a new trial. By his failure to seek a conditional ruling on this question, he has also failed to preserve for our review any errors which may have entitled him to a new trial. *See Hoots v. Calaway, supra; see also* 2 McIntosh, North Carolina Practice & Procedure, § 1488.45 (Phillips Supp. 1970). A party gaining judgment notwithstanding the verdict should also ask for a ruling pursuant to G.S. 1A-1, Rule 50(c)(1), on the motion for a new trial if he wishes to allege any error in the trial or to preserve any question other than the sufficiency of the evidence for appellate review.

Reversed and remanded for entry of judgment on the verdict.

Judges PARKER and WEBB concur.

STATE OF NORTH CAROLINA v. DAVID MONDS

No. 774SC1051

(Filed 6 June 1978)

1. Constitutional Law § 53— speedy trial—delay of trial after extradition

The trial court properly denied defendant's motion to dismiss the charges against him for failure to give him a speedy trial where the alleged criminal acts occurred in December 1974; defendant was charged in late 1976, arrested in Connecticut in December 1976, extradited to North Carolina on 19 February 1977, and tried in September 1977; the cases were continued from term to term from February until August; all the continuances were for defendant's convenience except one at which term the district attorney called for trial a murder case which lasted for four days; the accused in the murder case had been in jail longer than defendant; the case was not set for trial the first term

defendant was in North Carolina because the district attorney did not know he had returned; and defendant failed to show any prejudice caused by the delay.

2. **Criminal Law § 99.4— repetitious testimony—court's statement—no expression of opinion**

The trial court did not express an opinion in stating to defense counsel that a witness had "already said that three or four times."

3. **Criminal Law § 99.3— statement by trial court—no expression of opinion**

Where the district attorney contended that a statement by defendant's companion to an SBI agent that "I was going to be going" was misprinted and should have read "I was going to be whoring," the trial court did not express an opinion in stating, "I read the statement and I did not understand it. I did not know what it meant," or in instructing the jury to disregard any reference to "whoring."

4. **Criminal Law § 99.6— withdrawal of question—court's statement—no expression of opinion**

The trial court did not express an opinion in stating to defense counsel, "You may withdraw the question. I am inclined that someone else may ask it."

5. **Forgery § 1— instructions—check capable of defrauding**

The trial court's instruction that an element of forgery was "that the check appeared to be genuine" adequately stated the element of forgery that "the check as made was apparently capable of defrauding."

6. **Criminal Law § 10.3— accessory before the fact—instructions—absence from crime scene**

The trial court did not err in failing to instruct that an element of accessory before the fact to forgery and uttering was that defendant was not present when the principal committed the offenses where the undisputed evidence showed that defendant was not present when the principal forged a check and uttered it.

APPEAL by defendant from *Martin (Perry), Judge*. Judgment entered 22 September 1977 in Superior Court, ONSLOW County. Heard in the Court of Appeals 25 April 1978.

Defendant was tried on two counts of aiding and abetting in forgery of a check, two counts of aiding and abetting in the uttering of a forged check, one count of accessory before the fact to forgery of a check, and one count of accessory before the fact to uttering of a forged check. Upon a verdict of guilty on all counts, he was sentenced to prison for consecutive prison terms totaling 18 years.

Facts necessary for the decision in this case will be more fully set out in the opinion.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders, for the State.

John R. Parker, for the defendant.

WEBB, Judge.

The defendant contends by his assignments of error that (1) the charges against him should have been dismissed for failure to give him a speedy trial, (2) the judge expressed an opinion on the evidence in violation of G.S. 1-180, (3) there was error in the charge as to aiding and abetting forgery and aiding and abetting uttering a forged check, and (4) there was error in the charge as to being an accessory before the fact of forgery and accessory before the fact of uttering a forged check.

[1] [1] As to the defendant's contention that the charges against him should have been dismissed for failure to give him a speedy trial, the superior court, before trial, had a hearing on the defendant's motion to dismiss on this ground. It made findings which were supported by the evidence that the alleged criminal acts of the defendant occurred in December, 1974, that the defendant was charged in late 1976, arrested in Connecticut in December, 1976, and extradited to North Carolina on 19 February 1977. The court further found that the cases were continued from term to term from February until August when the defendant made a motion for a speedy trial. The cases against the defendant were tried in September, 1977. All the continuances were for the convenience of the defendant except one at which term the district attorney called for trial a murder case which took four days to try. The defendant in the murder case had been in jail longer than the defendant in this case. The defendant's case was not set for trial the first term he was in North Carolina after extradition because the district attorney did not know he had returned. The defendant did not show any prejudice by the delay in his trial.

Taking into account the length of the delay, the cause of the delay, waiver by the defendant, and prejudice to the defendant caused by the delay, we hold the superior court was correct in denying the motion to dismiss for failure to grant a speedy trial. *State v. McKoy*, 294 N.C. 134, 240 S.E. 2d 383 (1978); *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972), and *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969).

[2] Defendant contends that on four occasions the trial judge expressed an opinion on the evidence in violation of G.S. 1-180. We disagree.

[2] The statement to which the defendant first objects came after a witness had testified several times on redirect examination that he was unable to identify a particular check writing machine as printing the writing on a check allegedly forged. On recross examination, defense counsel asked a question designed to again point out that the witness could not positively connect the check machine and the check. Then, the following exchange occurred:

> "COURT: Hasn't he already said that three or four times? Isn't that what you are saying?
>
> WITNESS: Yes, sir.
>
> COURT: I thought all of you understood that by now."

We do not interpret the judge's remarks as an opinion on the evidence. We believe that he was simply exercising his discretion in conducting the trial by pointing out to defense counsel that the question had been answered. *See State v. Grant*, 19 N.C. App. 401, 199 S.E. 2d 14 (1973).

[3] The second alleged instance of improper comment occurred after a dispute between defense counsel and the district attorney as to what statement was given by Kathleen Mullins to SBI Agent Marshall Evans. Defense counsel contended that the statement made was "I was going to be going", but the district attorney argued that the statement was misprinted and should have read: "I was going to be whoring." Judge Martin then said, "I read the statement and I did not understand it. I did not know what it meant." After further discussion as to the actual statement of Kathleen Mullins, Judge Martin delivered this instruction to the jury:

> ". . . the lady is not charged in any bill of indictment with prostitution. . . . I'm going to ask you to dismiss totally from your mind the word that you just heard Mr. Evans, 'whoring', if it was a part of this statement it had no bearing on this case . . . do not consider that in your deliberations."

We hold that Judge Martin did not express an opinion on the evidence, and his instructions protected defendant from any potential prejudicial effect the statement might have engendered in the minds of jurors.

[4] Defendant also contends that it was error for the trial judge to state to defense counsel, "You may withdraw the question. I am inclined that someone else may ask it." This statement was made after defense counsel asked a witness a question, objected to the witness's response, and then had his objection challenged by the district attorney on the basis that defense counsel had asked the witness a question he did not want answered. We believe no prejudice resulted from the judge's statement. We interpret Judge Martin's statement as a ruling that defense counsel could withdraw his question and that the district attorney could later ask the question.

Fourth, the defendant contends the trial judge expressed an opinion as to the weight of the evidence by taking a disproportionate amount of time to recapitulate the contentions of the State as compared to the contentions of the defendant. In view of the fact that no evidence was offered by defendant, we do not find that the length of the summary of the State's evidence violates G.S. 1-180. *State v. King*, 256 N.C. 236, 123 S.E. 2d 486 (1962).

[5] [3] The jury instructions on aiding and abetting forgery are challenged on the grounds that an essential element of the crime was omitted from the charge. Defendant contends that the jury was not instructed to find that the checks which the defendant had allegedly aided and abetted in forging had an apparent capability to defraud. *See State v. Greenlee*, 272 N.C. 651, 159 S.E. 2d 22 (1968). The jury was charged that it must find beyond a reasonable doubt:

> "That . . . made falsely a check.
>
> Secondly, that at the time . . . falsely made the check, he or she intended to defraud.
>
> Thirdly, that the check appeared to be genuine."

This instruction is taken from the Pattern Jury Instructions, N.C.P.I.—Crim. 221.10. The three elements of forgery are (1) a

false writing of the check, (2) an intent to defraud on the part of the defendant, and (3) the check as made was apparently capable of defrauding. *State v. Greenlee, supra.* No particular form of charge is required so long as the charge adequately explains the law. We hold that the sentence "the check appeared to be genuine" adequately states the third element of forgery that "the check as made was apparently capable of defrauding." In *State v. McAllister*, 287 N.C. 178, 214 S.E. 2d 75 (1975), the Court had before it a charge similar to that of the case at bar. The case was decided on another point without mention of the charge.

[6] [4] The defendant also assigns as error the charge of the court as to accessory before the fact of forgery and accessory before the fact of uttering a forged check. The court in its charge followed the Pattern Jury Instructions, N.C.P.I.—Crim. 202.30. The charge did not include an instruction that the jury must be satisfied beyond a reasonable doubt that the defendant was not present when the principal committed the offense. This Court approved a similar charge in *State v. Allen*, 34 N.C. App. 260, 237 S.E. 2d 869 (1977), *cert. denied*, 293 N.C. 741, 241 S.E. 2d 516 (1978). It is true that *State v. Sauls*, 291 N.C. 253, 230 S.E. 2d 390 (1976); *State v. Bass*, 255 N.C. 42, 120 S.E. 2d 580 (1961), and *State v. Buie*, 26 N.C. App. 151, 215 S.E. 2d 401 (1975) have said that an essential element of the crime of accessory before the fact is that the defendant not be present. *Allen* held it was not prejudicial error for the court not to charge that the jury must find the defendant was not present since the undisputed evidence was that he was absent. That is what all the evidence showed in this case. As to the forging and uttering the forged check on 5 December 1974, all the evidence was to the effect that the defendant was not in the presence of the person who forged the check and uttered it, but that the defendant had aided and counseled the perpetrator of the forgery and uttering before these crimes were committed. We hold that it was not necessary to charge that the jury would have to find the defendant was not present.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. FRANKLIN DENNIS MORTON AND SHERRILL DEVON TUCK

No. 779SC678

(Filed 6 June 1978)

1. **Criminal Law § 76.9— voir dire findings unsupported by evidence—error not corrected on subsequent voir dire**

Where the trial court makes findings of fact after a voir dire hearing which are not supported by the evidence, such error is not cured by having another voir dire hearing later in the trial at which evidence is offered that supports the original findings.

2. **Criminal Law § 75.11— waiver of constitutional rights—voluntariness—sufficiency of evidence**

Defendant's answering of questions during an interrogation coupled with his statement at an earlier interrogation, "Well, I'll tell you" and his statement at the subsequent interrogation that he did not want an attorney was sufficient for the judge conducting the voir dire hearing to conclude that defendant knowingly and understandingly waived his right to counsel and his right to remain silent at the subsequent interrogation; moreover, the voluntariness of the earlier confession was not affected by the facts that defendant was a minor; when the officer explained defendant's rights to him, the officer said, "those . . . may be written a little bit different on the paper, but it's the same thing"; the officer refused to tell defendant how much time he could get; three of defendant's friends were in the room with him and they were crying and telling defendant to tell the truth; and the officer did not call defendant's parents or his grandfather with whom he was living.

APPEAL by the defendant, Franklin Dennis Morton, from *Canaday, Judge*. Judgment entered 1 April 1977 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 9 January 1978.

The defendants, Franklin Dennis Morton and Sherrill Devon Tuck, were each charged in separate bills of indictment with armed robbery. Defendant Morton, before pleading, made a motion to quash the bill of indictment, which motion was denied. The cases were consolidated for trial. Before the State had concluded its evidence, the defendant, Sherrill Devon Tuck, withdrew his plea of not guilty and entered a plea of guilty. The defendant, Franklin Dennis Morton, was convicted of armed robbery. From a prison sentence of not less than 35 nor more than 40 years, defendant Morton appeals.

The State's evidence tended to show that on 27 September 1976, Roger Lee McGarr was robbed while working in The Pantry, a convenience store in Oxford, North Carolina. Mr. McGarr testified that three black men came into The Pantry, two of whom were armed with pistols and robbed him. He testified further that they were wearing stocking masks and he was unable to identify them.

The State offered the testimony of Henry Royster, a detective with the City of Oxford Police Department. When the defendant objected to the testimony of Mr. Royster as to a statement made to him by the defendant, Judge Canaday conducted a *voir dire* hearing out of the presence of the jury.

At the *voir dire* hearing, the evidence showed that Mr. Royster, while investigating the robbery at issue in this case as well as other incidents, took Franklin Dennis Morton and Sherrill Devon Tuck into custody on 29 November 1976. He separated them and carried defendant Morton into a room where also present were Mrs. Eunice White, an employee of the Oxford Police Department, Diane Jones, Shirley Holman, and Nathaniel Harris, who were friends of the defendant. Shirley Holman described herself as defendant Morton's girl friend. Mr. Royster testified that all four of them were suspects. There was evidence that the two girls were crying and telling defendant Morton to tell the truth. Mr. Royster fully advised the defendant of his constitutional rights as to self-incrimination and to be represented by an attorney. Defendant Morton refused to sign a written waiver of his constitutional rights, but according to the testimony of Mr. Royster, defendant Morton, after some conversation said, "Well, I'll tell you" and made a statement implicating himself in the robbery.

The defendant offered testimony at the *voir dire* hearing, including his own testimony, in which he denied waiving any rights and denied making any statement which implicated him in the robbery. The evidence further showed that defendant Morton fled from the interrogation room and was apprehended a few days later on 2 December 1976.

At the conclusion of the testimony at this *voir dire* hearing, Judge Canaday made findings of fact and conclusions of law sufficient to admit into evidence the statement of defendant Morton to

Mr. Royster on 29 November 1976, and also a statement made by defendant Morton to Mr. Royster at a second interrogation that occurred on 2 December 1976. There was no evidence at this *voir dire* hearing as to what occurred at the interrogation on 2 December 1976.

After the jury had returned to the courtroom, Mr. Royster resumed his testimony. Defendant Morton objected to testimony as to any statement he made to Mr. Royster on 2 December 1976. The court then conducted a second *voir dire* hearing out of the presence of the jury as to the interrogation of 2 December 1976. At this hearing, Mr. Royster testified that after defendant Morton was arrested on 2 December 1976, he interrogated him alone at the Oxford Police Department building. Mr. Royster further testified that he fully advised the defendant of his constitutional rights and when he asked the defendant if he wanted a lawyer, the defendant said he did not want one at that time. According to Mr. Royster, defendant Morton then made a full confession. Defendant Morton, at the second *voir dire* hearing, denied being advised of his rights or making a confession. The court made no findings of fact after the second *voir dire* hearing.

Attorney General Edmisten, by Associate Attorney J. Chris Prather, for the State.

Watkins, Finch and Hopper, by William T. Watkins, for defendant appellant.

WEBB, Judge.

[1] The defendant Morton has challenged the court's findings as to the admissibility of his confessions. We believe this assignment of error has merit. We are faced with the question as to whether if the court makes findings of fact after a *voir dire* hearing which are not supported by the evidence, this is cured by having another *voir dire* hearing later in the trial, at which evidence is offered that supports the original findings. We believe that *State v. McCloud*, 276 N.C. 518, 173 S.E. 2d 753 (1970) stands for the proposition that, if possible, all evidence bearing on the admissibility of a confession should be offered at the *voir dire* hearing at which the ruling is made.

The evidence adduced at the second *voir dire* hearing was available to the State and could have been offered at the first hearing. We hold that the findings of fact unsupported by evidence at the first hearing was an error not cured by evidence offered at a second hearing and the admission of evidence as to the defendant Morton's statement of 2 December 1976 without findings of fact to support it constitutes error requiring a new trial.

[2] The defendant Morton contends there was not sufficient evidence to support the admission of his statements to Mr. Royster. Since this question could arise in a new trial, we shall discuss it.

Mr. Royster testified at the second *voir dire* hearing that when he questioned defendant Morton on 2 December 1976, defendant Morton first said he did not want an attorney and then began answering questions. This brings forward the question of whether the defendant consciously waived his right to remain silent. *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971) holds that the answering of questions by the defendant during an interrogation does not of itself constitute the waiver of the right to remain silent. In this case we hold that the defendant's answering of questions during the interrogation of 2 December 1976, coupled with his statement at the 29 November 1976 interrogation, "Well, I'll tell you" and his statement on 2 December 1976 that he did not want an attorney, is sufficient evidence for the judge conducting the *voir dire* hearing to conclude that the defendant knowingly and understandingly waived his right to counsel and his right to remain silent on 2 December 1976. For other cases on this subject, *see State v. Turner*, 281 N.C. 118, 187 S.E. 2d 750 (1972); *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975); *State v. Bock*, 288 N.C. 145, 217 S.E. 2d 513 (1975); *State v. Lightsey*, 6 N.C. App. 745, 171 S.E. 2d 27 (1969); *State v. Smith*, 26 N.C. App. 283, 215 S.E. 2d 830 (1975); *State v. Fuller*, 27 N.C. App. 249, 218 S.E. 2d 515 (1975), and *State v. Harris*, 27 N.C. App. 412, 219 S.E. 2d 266 (1975).

Defendant Morton contends that he could not have made a valid confession on 29 November 1976 for the following reasons, among others: He was a minor; when Mr. Royster explained the defendant's rights to him, Mr. Royster said, "those . . . may be

written a little bit different on paper, but it's the same thing"; Mr. Royster refused to tell the defendant how much time he could get; three of the defendant's friends were in the room with him who were crying and telling the defendant to tell the truth, and Mr. Royster did not call the defendant's parents or his grandfather, with whom he was living. For cases dealing with these questions raised by the defendant, *see State v. Hill*, 276 N.C. 1, 170 S.E. 2d 885 (1969); *State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971); *State v. Justice*, 3 N.C. App. 363, 165 S.E. 2d 47 (1968). We do not believe these factors relied on by the defendant taken singly or together vitiate the results of either interrogation.

The defendant was seventeen years of age at the time of the interrogations and had completed the eighth grade. He should have had the intelligence to understand his rights as explained to him by Mr. Royster. We see nothing wrong with Mr. Royster's statement, "those . . . may be written a little bit different on the paper, but it's the same thing." We believe that according to Mr. Royster's testimony, he gave the defendant a very good verbal explanation of his rights and his statement as to its being the "same thing" was only telling the defendant the truth. It was not Mr. Royster's province to tell the defendant how much time he would receive. In view of the stringent requirements the courts have placed on officers not to offer any threat or hope of reward at the time of interrogation, we can understand why Mr. Royster was careful not to tell the defendant what his sentence might be. We concede it may be more likely that the defendant would have waived his rights if he had his good friends in the room with him asking him to tell the truth. The question is whether the defendant waived his rights knowingly, voluntarily and understandingly without coercion or hope of reward. We do not believe the advice of friends "to tell the truth" would be a threat or a promise sufficient to vitiate the confession of the defendant in this case.

We hold there was sufficient evidence at the two *voir dire* hearings that the court could find that the statements of the defendant on 29 November 1976 and 2 December 1976 were made freely, voluntarily and understandingly.

The defendant has also raised a question as to the validity of the bill of indictment. Since we have ordered a new trial on other

grounds, we do not pass on this question. Suffice it to say the district attorney might be well advised to seek a new bill of indictment which would comport with the objection made to the present bill.

Reversed and remanded.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. TOMMY McCORMICK

No. 7815SC39

(Filed 6 June 1978)

1. **Constitutional Law § 30— failure to comply with discovery order—admissibility of evidence**

A written statement of a witness was not barred by the trial court's order restricting admission of evidence not given defendant pursuant to a pretrial discovery order, though the State failed to provide defendant with a copy of the statement prior to trial, since the court's order provided that such evidence could not be introduced without first obtaining permission of the court outside the presence and hearing of the jury, and the State, after mentioning the witness's statement, obtained permission to introduce it from the court during a conference at the bench.

2. **Criminal Law § 99.3— failure to hear defendant on objection—no error**

There was no error prejudicial to defendant in the trial court's failure to hear him upon his objection to a line of questioning, since the court had just heard defendant on an objection to the same line of questioning.

3. **Criminal Law § 99.5— court's use of word "harassed"—no expression of opinion**

The trial court's use of the term "harassed" in describing a witness for whom the State had requested permission to leave the courtroom is not approved by the Court on appeal, but its use did not amount to an expression of opinion necessarily harmful to defendant.

4. **Criminal Law § 99.10— court's examination of defendant—error**

In a prosecution for felonious breaking and entering and felonious larceny where the indictment alleged that the crime took place on or about March 11 and defendant put on extensive evidence concerning his whereabouts on March 11, the trial court's questions, put to defendant after counsel for both defendant and the State had questioned him, as to his whereabouts on March 8-10 in no way clarified evidence about which defendant had been testifying,

but instead amounted to a cross-examination of defendant which was calculated to impeach defendant and deprecate his testimony before the jury.

APPEAL by defendant from *David I. Smith, Judge.* Judgment entered 19 August 1977, in Superior Court, ALAMANCE County. Heard in the Court of Appeals 4 May 1978.

Defendant was indicted for felonious breaking and entering and for felonious larceny. He waived arraignment and entered a plea of not guilty. Prior to trial, defendant made a request for voluntary discovery and, thereafter, a motion for discovery pursuant to G.S. 15A-902(a). Having received no documents in response to his request, defendant filed a motion *in limine* to prohibit the State from introducing any evidence not disclosed pursuant to his motion. Defendant's motion was granted.

At trial, the State put on evidence tending to show that on 11 March 1976, Thomas L. Clark discovered that his twelve gauge Ithaca shotgun and .44 Magnum pistol were missing from his home. Robert Dickey, who was serving time for convictions for various breakings and enterings, testified that he and defendant entered the Clark home sometime early in 1976 and took the shotgun and pistol.

Defendant put on evidence tending to show that on 11 March he stayed at his sister's home all day taking care of his niece who was sick. He contended, and put on evidence tending to show, that witness Dickey testified as he did because defendant and Dickey had quarrelled when defendant discovered that Dickey and another had taken a stereo and television from the home of two women defendant had met.

The jury returned a verdict of guilty of felonious breaking, entering, and larceny, and the court sentenced defendant to six to eight years imprisonment for the breaking and entering and to a suspended five year consecutive sentence for the larceny count. Defendant appeals.

Attorney General Edmisten, by Associate Attorneys Douglas A. Johnston and Lucien Capone III, for the State.

John P. Paisley, Jr., for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in allowing into evidence certain statements made by witness Dickey. According to defendant's contention, these statements were barred by the court's order granting defendant's motion *in limine* for failure of the State to turn over documents as required by Article 48 of Chapter 15A of the General Statutes. We do not agree.

The record disclosed that defendant in his motion for discovery requested "[a]ll written . . . statements of a co-defendant which the State intends to offer at trial as provided by G.S. 15A-903(b)." Dickey, of course, was not a co-defendant and, thus, the State was not bound to submit copies of Dickey's statement under this portion of defendant's motion. However, defendant also requested:

> "Any books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, and/or any other tangible objects which the State intends to offer at trial, specifically but not limited to any documents showing ownership of the twelve-gauge Ithaca shotgun and the forty-four Magnum pistol, in the name of Thomas L. Clark."

We believe this portion of defendant's request clearly included the written statement by Dickey and it should have been submitted to the defendant. Nevertheless, the order filed by the court granting defendant's motion *in limine* did not irreversibly deny the State the right to put on evidence. The order stated in part:

> NOW, THEREFORE, IT IS ORDERED as follows:
>
> * * * *
>
> "That the State and counsel for the State are further ordered to instruct the State, its witnesses and all its counsel, not to mention, refer to, interrogate concerning, or attempt to convey to the jury in any manner, either directly or indirectly any evidence and/or other information requested in the defendant's Request for Voluntary Discovery and/or Motion for Discovery, *without first obtaining permission of the Court outside the presence and hearing of the jury . . .*." [Emphasis added.]

The record shows that the court sustained defendant's objection to the reading of the statement, and then the following occurred:

"MR. ALDRIDGE: May I approach the bench, your Honor?

"COURT: Yes.

(Conference at the bench.)

"COURT: Objection is overruled.

"Members of the jury, this—the following testimony of Mr. Morton is for the sole purpose of corroborating the testimony of Mr. Robert Allen Dickey, a previous witness, if in fact it does corroborate Mr. Dickey's testimony. Again, you will decide whether or not it does. It is admitted for no other purpose, and you will consider it for no other purpose."

Under the facts as presented, therefore, we believe that the State complied with the court's order restricting admission of evidence. The error of allowing mention of the document prior to the court's determination of admissibility was rendered harmless by the court's subsequent ruling.

We next consider defendant's argument that the trial court erred in unfairly expressing an opinion in violation of G.S. 1-180. G.S. 1-180 forbids the trial judge from expressing an opinion as to what facts of a case have been established. Defendant argues that the trial court expressed an opinion at three different points during the trial.

[2] First, defendant contends that the court erred by failing to allow him to be heard upon the Court's ruling on a motion. Defendant's argument is based on the following portion of the record:

"Q. Was anyone with you when you went to this residence?

"A. Yes, sir.

"MR. PAISLEY: Your Honor, again object and would like to be heard on this objection.

"COURT: Overruled.

"A. Yes, sir, your Honor.

MR. PAISLEY: Your Honor, I request to be heard.

"COURT: Denied. Move on.

"A. Yes, sir."

We cannot find in this portion of the record, and defendant does not show us, any prejudice resulting to him. He simply argues that the trial court "did not even extend to defendant's counsel the courtesy to be heard upon his objection, tending to discredit defendant's counsel and his case in the eyes of the jury." Taking into consideration the fact that the trial court had just heard defendant on an objection to this line of questioning, we find no error prejudicial to defendant.

[3] We also find no prejudicial error in the trial court's use of the word "harassed" in the following discussion:

"(At this time, the State requested that Mr. Clark be permitted to leave the courtroom.)

"MR. PAISLEY: Your Honor, we're not sure; but particularly after we put Mr. McCormick on the stand, we may have a question of him at that time depending on—

"COURT: He's been down here long enough and been harassed enough; so I'm going to let him go. He can—unless you can show me some reason why you need him any longer."

While we fail to understand the trial court's use of the term "harassed" and while we do not approve it, we cannot find that this expressed an opinion necessarily harmful to defendant.

[4] Finally, defendant argues that the trial court erred in posing certain questions to defendant while defendant was on the witness stand and after counsel for both defendant and the State had questioned him. This argument has merit. We agree that the trial court, in questioning the defendant, expressed an opinion in violation of G.S. 1-180.

The record is unclear about when the alleged breaking and entering occurred. The indictment stated "on or about the 11th day of March, 1976"; there was evidence to show that the Clarks

had first missed the shotgun and pistol on the 11th day of March, and defendant put on extensive evidence concerning his whereabouts on March 11. No other date was mentioned until the trial court asked the following questions of defendant:

"COURT: And what did you do on March the 10th, Mr. McCormick? The morning of March the 10th?

"A. About the—that—that whole time I—I never—I never did usually get up—well, about that time, you know, I'd usually sleep until about 12:00 or 1:00 o'clock, something like that.

"COURT: What did you do March the 9th?

"A. About the same time, you know, that was—at that time, period of time, I was playing a lot of pool over at the Idle Hour in Burlington and I'd usually just stay—hang around the house and sleep and rest until, you know, it was time for the pool room to open and I'd go over there and usually stay over there until closing time and then I'd come home.

"COURT: March the 8th?

"A. Sir?

"COURT: What did you do on the morning of March the 8th?

"A. I guess the same—well, about the same—like I said, the whole time, about the whole time of that—say that month it was, you know, the pool room was—it was a good time for playing pool. It was a lot of people around playing pool, coming through and everything. I played a lot of pool."

While a trial court may ask competent questions to a witness in order to clarify his testimony, he must exercise extreme care that he not express an opinion on the facts. *State v. Kimrey*, 236 N.C. 313, 72 S.E. 2d 677 (1952). We find that here, as in the *Kimrey* case, the trial court's questions amounted to a cross-examination of defendant which was calculated to impeach defendant and deprecate his testimony before the jury. As far as we can tell, the questions propounded in no way clarified evidence about which defendant had been testifying; indeed, they related solely to defendant's activities on days not previously mentioned and had

the effect of impeaching defendant's recollection as to his activities on 11 March. While this may have been a proper line of questioning by the district attorney, it was clearly not proper when undertaken by the trial court. G.S. 1-180 was violated and defendant is entitled to a new trial.

New trial.

Judges BRITT and ERWIN concur.

STATE OF NORTH CAROLINA v. DAVID EUGENE ABERNATHY

No. 7725SC1068

(Filed 6 June 1978)

Homicide §§ 24.2, 24.3 — absence of malice — self-defense — burden of proof — instructions — failure to perfect appeal — waiver of objection

A defendant tried for murder waived objection to the trial court's instructions placing on defendant the burden to disprove malice and reduce the crime to manslaughter and to prove self-defense when he failed to perfect his appeal from his conviction and duly note his exceptions to the charge.

ON writ of certiorari to review order entered by *Ervin, Judge.* Order entered 10 October 1977 in Superior Court, CALDWELL County. Heard in the Court of Appeals 28 March 1978.

Defendant was charged under a proper bill of indictment with the first-degree murder of Walter Ray Holsclaw on 19 January 1974, was tried before a jury, was found guilty of murder in the second degree on 11 July 1974, and was sentenced to thirty years imprisonment. In open court, he gave notice of appeal, but the appeal was not perfected. Petitions for writs of certiorari were denied by this court on 17 December 1974 and 6 January 1975.

On 27 May 1976, defendant filed an application for a post-conviction hearing which was denied. Petition to this court for a writ of certiorari to review the denial of the application was denied on 30 December 1976. On 6 September 1977 defendant filed another application for a post-conviction hearing which was held before Judge Ervin on 27 September 1977.

On 10 October 1977 Judge Ervin entered an order finding and concluding: that at defendant's trial the presiding judge instructed the jury, *inter alia*, that the burden was on defendant to disprove malice and reduce the killing to voluntary manslaughter, and that the burden was on defendant to prove that he killed in self-defense; that the case was tried and said instructions were given before the U.S. Supreme Court rendered its decision in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508, on 9 June 1975 and its decision in *Hankerson v. North Carolina*, --- U.S. ---, 97 S.Ct. ---, 53 L.Ed. 2d 306 (1977), declaring the *Mullaney* rule to be retroactive; that the failure of defendant to except to said instructions or assign them as error does not deprive him of his right to a new trial under the circumstances of this case; and that because of said errors in the jury charge, defendant is entitled to a new trial.

On 22 November 1977 this court allowed the State's petition for a writ of certiorari to review Judge Ervin's order.

Attorney General Edmisten, by Associate Attorney Nonnie F. Midgette, for the State.

Tuttle and Thomas, by Carroll D. Tuttle, for defendant appellee.

BRITT, Judge.

The State contends first that the trial court erred in granting defendant a new trial for the reason that defendant failed to raise the question of erroneous jury instructions by perfecting the appeal from his trial. We find merit in this contention.

In not perfecting his appeal defendant failed to preserve his objection to the court's jury charge.

> Formal objection to the charge is not required, an exception and assignment of error being sufficient. However, when no exception is taken to the charge and it is not contained in the record on appeal, it is presumed that the court correctly instructed the jury on every principle of law applicable to the facts.

* * *

> An assignment of error to the charge, like other assignments of error, must be based upon an exception duly noted in the record, but such exceptions can be taken within the time allowed for the preparation of the case on appeal. This means that while exceptions to the charge may be noted after trial, such exceptions should be included in the appellant's statement of the case on appeal as served on the appellee.
>
> Where the charge is not incorporated in the appellant's statement of the case on appeal, but the charge is incorporated in the appellee's countercase, it would seem that an exception to the charge then entered by the appellant is not timely. 1 Strong's N.C. Index 3d, Appeal and Error, §§ 31 & 31.1, pp. 264-265. *See also* 1 Strong's N.C. Index 3d Appeal and Error, §§ 24, 24.1.

In footnote eight of the *Hankerson* case, the U.S. Supreme Court stated:

> 8. Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden shifting presumption involved in this case will be as devastating as respondent asserts. If the validity of such burden shifting presumptions was as well settled in the States that have them as respondent asserts, then it is unlikely prior to Mullaney many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. . . . The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, e.g. Fed Rule Crim Proc 30.

Although North Carolina does not require an objection to jury instructions to be made at the time of the trial as the federal courts do, proper exception must be taken and presented in the record on appeal or the claim of error is deemed waived. The North Carolina Supreme Court has recently upheld this principle. Several defendants petitioned for a rehearing on the grounds that the trial judge had failed in his jury instruction to place the burden of proving the absence of heat of passion or the absence

of self-defense on the State. In those cases in which the defendant had made such an assignment of error on appeal the Supreme Court allowed a new trial. *State v. Sparks*, 293 N.C. 262 (1977); *State v. Wetmore*, 293 N.C. 262 (1977). In those cases in which defendant did not make such an assignment of error, the court denied defendant's motion on the grounds that failure to bring the assignment forward on appeal was a waiver of any claim of error. *State v. Bower*, 293 N.C. 259 (1977); *State v. Crowder*, 293 N.C. 259 (1977); *State v. Jackson*, 293 N.C. 260 (1977); *State v. May*, 293 N.C. 261 (1977); *State v. Riddick*, 293 N.C. 261 (1977). Based on the recognized principle that failure to carry an assignment of error forward on appeal constitutes a waiver of that claim, we conclude that defendant in the present case waived any objection which he had to the trial court's charge when he failed to perfect his appeal and duly note his exceptions to the charge.

Defendant argues on this issue that Judge Ervin's finding that footnote eight in *Hankerson, supra*, is inapplicable because of N.C. appellate procedure and cites *State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513 (1973), and Rule 10(b)(2) of the Rules of Appellate Procedure as authority for his contention. These two authorities actually provide support for our holding in the instant case rather than the defendant's position. Rule 10(b)(2) provides:

(b) Exceptions.

* * *

(2) Jury Instructions; Findings and Conclusions of Judge. An exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference. An exception to the failure to give particular instructions to the jury or to make a particular finding of fact or conclusion of law which was not specifically requested of the trial judge shall identify the omitted instruction, finding, or conclusion by setting out its substance immediately following the instructions given, or findings or conclusions made. A separate exception shall be set out to the making or omission of each finding of fact or conclusion of law which is to be assigned as error.

In *State v. Hunt, supra,* defendant failed to request a charge concerning the legal principles of alibi evidence at trial, but on appeal excepted to the charge given and argued that the alibi instructions which were omitted due to his failure to request them should have been given automatically without the necessity of a request. Even though Rule 10(b)(2) and *State v. Hunt, supra,* do not require an objection to be made at the time of the trial in order to preserve the exception, they do require that an exception be duly noted in the record and argued on appeal in order to preserve the claim of error. Since the defendant in the present case failed to preserve his claim of error in the required manner, he is not entitled to raise the question for the first time on a motion for a new trial in a post conviction hearing.

The Post Conviction Hearing Act does not provide a substitute for appeal. *State v. White,* 274 N.C. 220, 162 S.E. 2d 473 (1968). *See* 4 Strong's N.C. Index 3d, Criminal Law § 181. "Since [relief under the Act] must be based on matters extraneous to the record, it may not be based upon asserted error in the trial court's instructions, which did not appear of record in the appeal, since in such instance the presumption is that the trial court charged the jury properly as to the law applicable to all phases of the evidence." 4 Strong's N.C. Index 3d, Criminal Law § 181, p. 911. *See State v. Cruse,* 238 N.C. 53, 76 S.E. 2d 320 (1953). "The Post Conviction Hearing Act provides every defendant adequate opportunity for the adjudication of claimed deprivations of constitutional rights which prevented him from obtaining a fair trial, provided factors beyond his control prevented him from claiming them earlier." 4 Strong's N.C. Index 3d, Criminal Law § 181, pp. 911-12. Since the defendant in the present case could have challenged the jury charge on direct appeal just as *Hankerson, Sparks* and *Wetmore* did, he is not entitled to make a collateral attack on his conviction in a post-conviction proceeding.

We have taken judicial notice of the various petitions relating to this case filed by defendant in this court. 1 Stansbury's N.C. Evidence, Brandis Revision § 13. While defendant did not perfect his appeal, his counsel, on 19 December 1974, filed in this court a petition for a writ of certiorari to perfect a late appeal. The petition is accompanied by a record on appeal duly agreed to by counsel for defendant and the district attorney and certified by the Clerk of the Superior Court of Caldwell County.

In the petition defendant's counsel stated that he had reviewed the transcript of the trial proceedings but was unable to find prejudicial error warranting a new trial. He asked that this court review the record and determine if defendant had received a fair trial. On 2 January 1975 a panel of this court denied the petition for certiorari. We have reviewed the record on appeal attached to the petition and find that no exception was made to any part of the trial judge's instructions to the jury. Thus, it is established that even if defendant's appeal had been perfected there would have been no challenge to the jury instructions.

We find it unnecesary to pass upon the State's contention that Judge Ervin erred in granting a new trial "when the homicide laws of the State of Maine and the State of North Carolina are so different that the *Mullaney* case is not authority for cases arising under North Carolina law".

For the reasons stated, the order appealed from is

Reversed.

Judges CLARK and ERWIN concur.

EARL F. BRANSTETTER v. MAJORIE F. BRANSTETTER

No. 7728DC616

(Filed 6 June 1978)

1. **Husband and Wife § 17.1— separation—tenancy by entireties not affected—accounting for improvements unnecessary**

Defendant was not entitled to an accounting for improvements she made to property, owned by the parties as tenants by the entirety, after execution of a separation agreement which granted defendant the exclusive right of occupancy, since the separation agreement did not contractually alter the character of the ownership of the tenancy by the entireties.

2. **Husband and Wife § 17.1— tenancy by entireties—divorce—basis for apportioning shares of property**

Where the parties owned property as tenants by the entirety and no tenancy in common was created until after their absolute divorce, there was no basis for apportioning the shares of the property based on expenditures made prior to the termination of the tenancy by the entirety.

3. Trusts § 13— improvements made to entirety property—doctrine of purchase money resulting trusts inapplicable

Defendant's contention that the doctrine of purchase money resulting trusts would allow her to recover for improvements made by her on property owned by the parties as tenants by the entirety is without merit since the improvements in question were made several years after the conveyance of the property, and the doctrine of purchase money resulting trusts was therefore inapplicable.

APPEAL by defendant from *Sluder, Judge.* Judgment entered 24 May 1977 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 26 April 1978.

Plaintiff filed this action for divorce on 17 March 1976. Defendant answered, admitting the allegations of plaintiff's complaint, and joined in the request for divorce. She also filed a counterclaim alleging that the parties owned certain property as tenants by entirety; and that while occupying the property under a separation agreement, she had made improvements and repairs for which she was entitled to an accounting. Plaintiff filed a reply to the counterclaim denying that defendant was entitled to an accounting and stating that he was entitled to an accounting for a reasonable amount of certain rental income collected by defendant.

On 14 September 1976, plaintiff moved for summary judgment with respect to defendant's counterclaim on the grounds that the parties had executed a deed of separation which defendant acknowledged in her answer and which constituted a termination of any rights she might have had arising out of the marriage.

Defendant responded to the summary judgment motion with an affidavit which paralleled and elaborated upon her prior pleadings. She averred that a certain parcel of land was given to her and plaintiff by her mother in 1962; that she provided the funds to construct a house on the property and plaintiff provided most of the labor; that in 1970, she and plaintiff executed a separation agreement which gave her the sole right to occupy the house and terminated all of plaintiff's rights arising out of the marriage relation; that following the separation, she made substantial improvements to the house which gave the property a market value which it did not have prior to the improvements; that she has paid all taxes on the house since 1962; and that in

1962 another parcel of property for which she provided the purchase price and intended to hold as sole owner was also deeded to her and plaintiff.

The court granted plaintiff's motion for summary judgment, ruling that the land was owned by the parties as tenants by the entirety and that there was no genuine issue arising for trial. The court dismissed defendant's counterclaim and she appealed.

Lentz & Ball, by Lloyd M. Sigman, for defendant appellant.

Riddle and Shackelford, by Robert E. Riddle, for plaintiff appellee.

BRITT, Judge.

Defendant contends that she is entitled to an accounting for improvements she made to the property after execution of the separation agreement which granted her the exclusive right of occupancy. She argues that the separation agreement was a contract which altered the interest in the property that she and plaintiff owned as tenants by the entirety; that she had a legal right to present her claim for an accounting in the form of a counterclaim to the divorce action; and that even if the contract did not alter the character of the tenancy by the entireties property, she was entitled to an accounting under the doctrine of resulting trusts. We find no merit in defendant's contentions.

[1] With respect to the contract argument, defendant states that the separation agreement contractually altered the character of the ownership of the tenancy by the entireties and that such an alteration was permissible under G.S. 39-13.3(c) and *Council v. Pitt*, 272 N.C. 222, 158 S.E. 2d 34 (1967). G.S. 39-13.3(c) and the *Council* case both involve conveyances by deed between spouses rather than separation agreement contracts, therefore, they are inapplicable to the instant case. As stated in J. Webster, Real Estate Law in North Carolina, § 116, p. 136 (1971), a tenancy by the entirety may only be terminated in certain situations:

> The tenancy by the entirety may be terminated by a *voluntary partition* between the husband and the wife whereby they execute a joint instrument conveying the land

to themselves as tenants in common or in severalty. But neither party is entitled to a *compulsory partition* to sever the tenancy.

A divorce *a vinculo*, an absolute divorce which destroys the unity of husband and wife that is essential to the existence of the tenancy, will convert an estate by the entirety into a tenancy in common. The divorced spouses become equal co-tenants.

A divorce *a mensa et thoro*, on the other hand, a divorce from bed and board which does not dissolve the marriage relation, does not sever the "unity of persons," and does not terminate or change the tenancy by the entirety in any way. In this connection, it should be observed that an estate by the entirety is not terminated or dissolved by the acts of the parties which constitute mere grounds for an absolute divorce; there must be a final decree of absolute divorce for this effect to occur.

The separation agreement provides that ". . . nothing in this Agreement shall affect the rights, title or interest that the respective parties have in and to all of the real estate held as an estate by the entireties." This statement clearly indicates that neither party intended to alter by contract the manner in which they held title to the property, but that they should hold the real estate as tenants by the entirety until an absolute divorce terminated the tenancy.

Since the property was held by the parties as tenants by the entirety, they are entitled to an equal division of the property upon termination of the estate by absolute divorce and neither party is entitled to an accounting for expenditures made on the property while the tenancy by the entirety existed.

In the case of *Wall v. Wall*, 24 N.C. App. 725, 212 S.E. 2d 238, *cert. denied* 287 N.C. 264, 214 S.E. 2d 437 (1975), the plaintiff and defendant were divorced at which time property which they had held as tenants by the entirety was converted to a tenancy in common by the divorce. Prior to that date, the defendant had paid the mortgage payments on the property and when the plaintiff filed for a partition of the property following the divorce, the defendant counterclaimed for the mortgage payments that she

had made on the property prior to the divorce. Plaintiff made a motion for summary judgment which was granted. On appeal, the lower court ruling that " '[a]s a matter of law, neither the plaintiff nor the defendant owning property as a tenancy by the entirety prior to their divorce are (sic) entitled to any reimbursement for payments on the mortgage or for other benefits to the property during their marriage' " was upheld. The court stated:

> The general rule is that upon divorce the two former spouses become equal cotenants even though one of the former spouses paid the entire purchase price. Each spouse is entitled to an undivided one-half interest in the property and is entitled to partition the property. However, expenditures for the property after the final decree of absolute divorce are treated as they normally would be in a tenancy in common. 2 Lee, North Carolina Family Law § 120 (1963); 4A Powell, Law of Real Property § 624 (1974); 27A C.J.S. Divorce § 180 (1959).
>
> In the present case, defendant's counterclaim for reimbursement includes sums allegedly paid by her on the indebtedness while she and the plaintiff owned the property as tenants by the entirety and while they owned the property as tenants in common. The stipulation between the parties supports the decree that the defendant must be given credit for all sums paid by her on the indebtedness after the judgment of absolute divorce. An estate by the entirety is a form of co-ownership of real property by a husband and wife in which each is deemed to be seized of the entire estate, with neither spouse having a separate or undivided interest therein. *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924); 2 Lee, North Carolina Family Law § 112 (1963). Thus, because of the nature of the estate by the entirety, we are of the opinion that the trial court correctly concluded that the defendant was not entitled to be reimbursed for sums paid on the indebtedness encumbering such an estate during her marriage to the plaintiff.

Applying this reasoning to the instant case, we conclude that summary judgment for plaintiff was properly granted and defendant was not entitled to reimbursement for the improvements which she made to the property while the parties owned the property as tenants by the entirety.

[2] We find no merit in defendant's second argument, namely, that the court may have refused to apportion shares of the property because it felt that it had to wait until the tenancy in common was officially created by the absolute divorce. Based on the cases and the principles cited above, it is clear that no tenancy in common was created until after the absolute divorce, therefore, there was no basis for apportioning the shares of the property based on expenditures made prior to the termination of the tenancy by the entirety. Since there was not an actual conveyance between the parties, and the separation agreement clearly states that the tenancy by the entirety property was not to be affected by the contract, the *Wall* rule governing the division of tenancy by the entirety property governs rather than the rules governing reimbursements on tenancy in common property.

[3] Finally, defendant argues that even if the separation agreement contract did not operate to change the tenancy by the entirety into a tenancy in common and create a right in defendant to recover for improvements on the property, the doctrine of purchase money resulting trusts would allow a recovery for such improvements. We find no merit in this contention.

"[I]f the wife furnishes the purchase price, the law makes no presumption that a tenancy by the entirety was created, but instead presumes that the wife intended to place title in the husband and herself on a resulting trust for the wife." J. Webster, Real Estate Law in North Carolina, § 162, p. 112 (1971). "The trust must result, if at all, at the time of the transmission of the legal estate and as part of the same transaction. The trust claimant must either pay or obligate himself to pay the purchase price before the execution of the deed and its delivery to the grantee." R. Lee, North Carolina Law of Trust § 2b, p. 13 (6th Ed. 1977).

In this case, the improvements to the property were made several years after the conveyance of the property, therefore, the doctrine of purchase money resulting trusts is inapplicable.

For the reasons stated, we conclude that the trial court correctly allowed the plaintiff's motion for summary judgment.

Affirmed.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. DANIEL JAMES HAMILTON

No. 7718SC1019

(Filed 6 June 1978)

1. **Courts § 15; Infants § 16— juvenile over 14 charged with felony—probable cause—cause for transfer**

Where a juvenile over age 14 is charged with a felony, under G.S. 7A-280 the district court may conduct one hearing to determine probable cause and a separate evidentiary hearing upon the cause for transfer to the superior court, or the district court may conduct one evidentiary hearing to determine both probable cause and the cause for transfer to the superior court.

2. **Courts § 15; Infants § 20— juvenile hearing—probable cause—transfer to superior court—no overruling of one judge by another**

Even if a district court judge's finding in a temporary custody order entered in a juvenile proceeding on June 3 that "there is probable cause for a hearing" constituted a finding of probable cause under G.S. 7A-280, the district court judge did not make a decision on June 29 to try defendant as a juvenile when he heard defendant's motion to dismiss and to recuse and ordered that the case be heard before another district court judge, and the second judge thus did not overrule the first when he conducted an evidentiary hearing on July 13 and ordered the case transferred to superior court for trial as in the case of an adult.

APPEAL by State of North Carolina from *Albright, Judge.* Judgment entered 15 September 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 5 April 1978.

On 30 May 1977 a Greensboro Police Officer filed a juvenile petition alleging that defendant, age 15, was delinquent in that on 29 May 1977 he assaulted a girl under 12 years of age, with intent to rape.

On 3 June 1977 the Public Defender was appointed counsel for defendant. On the same date after detention hearing District Judge Gentry found "probable cause for a hearing" and ordered defendant in temporary custody pending "the Hearing on the Merits scheduled for June 21, 1977, . . ."

Hearing was postponed until 29 June 1977, when defendant filed a motion alleging that Judge Gentry in Juvenile Court had previously found defendant to be delinquent, and that the petitions and orders adjudicating delinquency, pursuant to the established policy of the Superior Court of Guilford County, were

included in the pending file, which was in violation of due process. Defendant moved that pending charge be dismissed or, in the alternative, that Judge Gentry disqualify himself from hearing the pending case and transfer the case for hearing before a judge outside the Eighteenth Judicial District.

Judge Gentry then proceeded to hear the matters raised by defendant's motion. He found the established policy of the court in violation of due process, and, thereupon, disqualified himself, denied the motion to transfer the cause to another Judicial District and ordered the other proceedings removed from the file of the pending case, which was to be heard before another Judge of the Eighteenth Judicial District. Defendant excepted and gave notice of appeal.

Hearing was held on 13 July 1977 before Judge Washington. It was stipulated that records of any prior proceedings had been removed from the file of the pending cause. It was found from the evidence that the victim was four years of age, that defendant attempted to have sexual intercourse with her, bruising her body near the vagina, and concluded there was probable cause. The court found "that this is a serious criminal offense, that the interests of the community must be protected and the gravity of the alleged offense requires that it be transferred to the Superior Court for trial", and that the transfer would assure defendant a fair trial without consideration of any previous misconduct by defendant which may be shown by other records of juvenile proceedings.

Indictment charging assault with intent to rape was returned a true bill by the grand jury at the August 8th, Criminal Session, 1977.

On 19 August 1977, defendant filed in the Superior Court a motion to quash and dismiss the indictment, pleading former jeopardy, and praying that the indictment be quashed and that the cause be remanded to the District Court.

The State appeals from the order allowing defendant's motion.

Attorney General Edmisten by Assistant Attorney General James L. Stuart for the State, appellant.

Assistant Public Defender Michael F. Joseph for defendant appellee.

CLARK, Judge.

In his motion to quash the indictment the defendant alleged that the Superior Court is without jurisdiction "for the reason that the defendant has previously been placed in jeopardy," but prayed that the case be remanded to the District Court for juvenile proceedings. Defendant contends in his brief on appeal that Judge Washington had no authority to overrule Judge Gentry, who had made a finding of probable cause under G.S. 7A-280 at the 3 June 1977 hearing and made a decision to try the defendant as a juvenile on 29 June 1977. Defendant abandons the double jeopardy argument.

The State had the authority to appeal under G.S. 15-179(3) from a judgment allowing a motion to quash. We note that G.S. 15A-1445, effective 1 July 1978, repeals G.S. 15-179, and provides:

> "*Appeal by the State.*—(a) Unless the rule against double jeopary prohibits further prosecution, the State may appeal from the superior court to the appellate division:
>
> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.
>
> (2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.
>
> (b) The State may appeal an order by the superior court granting a motion to suppress as provided in G.S. 15A-979."

The record on appeal reveals that in his 3 June 1977 order Judge Gentry recited that "the matter came on for a Detention Hearing," found "that there is probable cause for a hearing to be conducted in this matter," and ordered that defendant remain in the temporary custody of the court. There is nothing to indicate that Judge Gentry heard any evidence relative to the merits of the case. It thus appears that the primary purpose of this hearing, which was held on the same day that the juvenile defendant and his mother were served with process and that same day that the court appointed counsel, was to determine temporary custody under G.S. 7A-284(a) which provides as follows:

"(a) If it appears from a petition that a child is in danger, or subject to such serious neglect as may endanger his health or morals, or that the best interest of the child requires that the court assume immediate custody of the child prior to a hearing on the merits of the case, the judge may enter an order directing an officer or other authorized person to assume immediate custody of the child. Such an order shall constitute authority to assume physical custody of the child and to take the child to such place or person as is designated in the order. The court shall conduct a hearing on the merits at the earliest practicable time within five days after assuming custody, and if such a hearing is not held within five days, the child shall be released."

In addition to ordering temporary custody in the court, Judge Gentry found "probable cause for a hearing." The meaning of this finding is not clear. G.S. 7A-280 provides, in part, that if a juvenile over age 14 is charged with a felony, "the judge shall conduct a preliminary hearing to determine probable cause . . . . If the judge finds probable cause, he may proceed to hear the case under the procedures established by this article, or if the judge finds that the needs of the child or the best interests of the State will be served, the judge may transfer the case to the superior court division for trial as in the case of adults."

[1] We find that under G.S. 7A-280 where the juvenile is charged with a felony, the District Court may conduct separate hearings, one to determine probable cause and a separate evidentiary hearing upon the cause for transfer to the Superior Court. Or the District Court may conduct one evidentiary hearing to determine both probable cause and the cause for transfer to the Superior Court. *In re Smith*, 24 N.C. App. 321, 210 S.E. 2d 453 (1974). *In re Bullard*, 22 N.C. App. 245, 206 S.E. 2d 305 (1974).

[2] We conclude that on 3 June 1977 Judge Gentry made a determination of custody under G.S. 7A-284, which did not require an evidentiary hearing on the other usual due process procedures. *Newton v. Burgin*, 363 F. Supp. 782 (W.D. N.C. 1973), *aff'd mem.*, 414 U.S. 1139, 94 S.Ct. 889, 39 L.Ed. 2d 96 (1974). Assuming that Judge Gentry's finding that "there is probable cause for a hearing," constituted a finding of probable cause under G.S. 7A-280, he did not at the 29 June 1977 hearing determine any matters other

than those raised by defendant's motion to dismiss, even though the State initially took the position that it was to be a hearing on the merits. Judge Gentry, after ruling on defendant's motion, correctly ordered a hearing before Judge Washington, who on 13 July 1977 conducted an evidentiary hearing on the question of transfer to the Superior Court for trial as an adult. In doing so, Judge Washington did not overrule Judge Gentry but followed the applicable statutory procedure.

The Superior Court erred in allowing defendant's motion to quash and dismiss and in ordering the cause remanded to District Court. The judgment appealed from is reversed and this cause is remanded to the Superior Court for trial.

Reversed and remanded.

Judges BRITT and ERWIN concur.

IN THE MATTER OF THE DRIVER'S LICENSE OF LEWIS PINYATELLO

No. 778SC645

(Filed 6 June 1978)

1. Arrest and Bail § 3.8— driving under the influence—no observation by officer—probable cause for arrest

The arresting officer had probable cause to arrest petitioner for the misdemeanor of driving under the influence, G.S. 20-138, committed outside the officer's presence, since the officer arrived at the scene of the collision in response to a call; he was the only officer on the scene; petitioner, who smelled of alcohol and was unsteady on his feet, told the officer that he was the driver of one of the cars involved in the collision; and the officer had probable cause to believe that petitioner, if left at the scene, might drive his car away and thereby injure himself or others or damage property. Hence, petitioner's contention that his arrest was illegal and that evidence related to the attempted administration of a breathalyzer test should therefore be excluded is without merit. G.S. 15A-401(b)(2)b2.

2. Automobiles § 126.3— breathalyzer test—pretended cooperation—refusal to take test—sufficiency of evidence

Evidence was sufficient to support the trial court's finding that petitioner intentionally refused to take a breathalyzer test where it tended to show that a qualified breathalyzer operator demonstrated to petitioner how he should blow into the mouthpiece; petitioner's jaws were puffed up but no air was com-

ing through the machine because petitioner was only pretending to blow; and petitioner was warned that the breathalyzer operator would have to report a refusal to take the test if petitioner did not in fact blow into the mouthpiece.

APPEAL by petitioner from *Smith (David I.), Judge.* Judgment entered 11 March 1977 in Superior Court, WAYNE County. Heard in the Court of Appeals 3 May 1978.

Petitioner sought review in the Superior Court of the Department of Motor Vehicles' order revoking his license for wilful refusal to take the breathalyzer test.

At hearing, petitioner testified that he had collided with a car, that he requested the police be called, that the officer told him he was suspected of drinking. He was not asked to take the breathalyzer test until he was in custody. He was read his rights. After talking to his attorney, he accepted the test and blew as hard as he could, but the machine did not register. He testified that he had been taking valium. Under cross-examination he testified that he had had about one small drink and that he had never taken tranquilizers, just "medication." On two prior occasions he had been asked to take the breathalyzer test, had refused once and failed once, but had never lost his license. Respondent's evidence tended to show that the officer investigating the accident noticed "a strong odor of alcohol about Mr. Pinyatello's person and he was unsteady on his feet when he walked. He swayed when he was in a stationary position." He was placed under arrest for driving under the influence of alcohol and for driving with an expired license. Pinyatello never blew sufficient air into the machine for it to work although he made four or five attempts. He refused to sign the breathalyzer officer's report that he had refused the test. The breathalyzer officer testified that the machine was working and that Pinyatello never blew enough air into the sample chamber to cause the green light to register, that he warned Pinyatello that he would have to report that Pinyatello had refused the test but that he still did not blow properly. The officer testified that Pinyatello told him before the third try that he had been taking medicine and was unable to blow, that Pinyatello fully understood his "breathalyzer" rights and that, in his opinion, Pinyatello was physically capable of blowing a sufficient quantity of air into the machine.

The trial court found that the arrest of petitioner was reasonable, that G.S. 20-16.2(a) had been fully complied with, but that the petitioner, "without just cause or excuse, voluntarily, understandingly and intentionally refused to submit to" the breathalyzer test. The court concluded that petitioner had wilfully refused to take the test in violation of law and affirmed the order revoking his license, pursuant to G.S. 20-16.2. From this judgment, petitioner appeals.

Attorney General Edmisten by Assistant Attorney General William B. Ray and Deputy Attorney General William W. Melvin for the State, appellee.

Barnes, Braswell & Haithcock by Gene Braswell and Michael A. Ellis for petitioner appellant.

CLARK, Judge.

[1] The petitioner contends that his arrest was illegal because the alleged violation of G.S. 20-138 was a misdemeanor, which was not committed in the presence of the arresting officer, and that, therefore, the evidence relating to the attempted administration of the breathalyzer test should be excluded.

G.S. 15A-401(b)(2), effective 1 July 1974, gives the officer broadened authority to arrest for crimes committed out of his presence. Prior to this statute North Carolina law limited arrest without a warrant for crimes not committed in the presence of the officer to felonies, when there was reasonable ground to believe that the person will evade arrest if not immediately taken into custody. See Official Commentary of the Criminal Code Commission following G.S. 15A-401.

The statute broadens the authority to include felonies generally and misdemeanors when the officer has probable cause to believe the person (1) has committed a misdemeanor and (2) will not be apprehended unless immediately arrested, or may cause physical injury to himself or others, or damage to property unless immediately arrested.

In the case *sub judice* the totality of the facts and circumstances surrounding the arrest and known to the arresting officer was sufficient to give him probable cause to believe that the

petitioner had operated a motor vehicle upon a public highway while under the influence of intoxicating liquor, in violation of G.S. 20-138. Officer Warrick went to the scene of the collision in response to a call. There he found that the collision occurred on a public street. While talking to the occupants of one vehicle, the petitioner approached and asserted that he had been operating the other vehicle. The officer detected a strong odor of alcohol about the person of the petitioner; his eyes were bloodshot; he was unsteady when walking and swaying when stationary.

It is apparent that the officer did not have probable cause to believe that petitioner would not be apprehended unless immediately arrested [G.S. 15A-401(b)(2)b1], but under the alternative provision [G.S. 15A-401(b)(2)b2] he had probable cause to believe that petitioner, if left at the scene while under the influence of intoxicating liquor, "may cause physical injury to himself or others, or damage to property unless immediately arrested." The evidence discloses that the arresting officer was the only officer present at the scene. There was no evidence that petitioner's vehicle was inoperable. If left at the scene while the officer left to obtain a warrant and without anyone in authority to control the petitioner by preventing him from operating his car or protecting him from traffic hazards on a public street, the officer had probable cause for believing that petitioner may cause injury to himself or others. We conclude that under the circumstances the arresting officer had probable cause to arrest the defendant for violation of G.S. 20-138 committed out of his presence.

Further, if, *arguendo*, the arrest was illegal because there was no probable cause to believe petitioner may cause physical injury or property damage, the officer had probable cause to believe that petitioner had violated G.S. 20-138, and thus the arrest was not unconstitutional. Too, G.S. 20-16.2(a) provides that administration of the breathalyzer test hinges solely upon the law enforcement officer having reasonable grounds to believe the person to have been operating a motor vehicle on the highway while under the influence of intoxicating liquor, and not upon the illegality of the arrest for that offense. *State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706 (1973); *State v. Buchanan*, 22 N.C. App. 167, 205 S.E. 2d 782 (1974); 1 Strong's, N.C. Index 3d, Arrest and Bail, § 3.8.

[2] Nor do we find merit in petitioner's argument that the evidence was not sufficient to support the finding of the trial court that petitioner intentionally refused to take the breathalyzer test. It was stipulated that Officer Spears was a qualified breathalyzer operator. He demonstrated to petitioner how he wanted him to blow into the mouthpiece. He observed that petitioner's jaws were puffed up but no air was coming through the mouthpiece because sufficient air would cause the piston to hit the top of the its chamber and make a sound, the red light to go off and a green light come on. Petitioner told Spears he had been taking medicine and was unable to blow. The blowing procedure was repeated four times after petitioner was warned that Spears would have to report a refusal to take the test. The finding of the trial court was fully supported by the evidence, independent of any opinion testimony by the arresting officer and Spears that petitioner was only pretending to blow into the mouthpiece. In a trial before a judge without a jury the ordinary rules as to competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate that which is immaterial and incompetent, and to consider only that which tends properly to prove the facts to be found. 1 Stansbury, N.C. Evidence (Brandis Rev.) § 4a, p. 10. Since there was sufficient competent evidence to support the finding of the trial court, the finding is conclusive on appeal. *Gaston-Lincoln Transit, Inc. v. Maryland Casualty Co.*, 285 N.C. 541, 206 S.E. 2d 155 (1974).

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge WEBB concur.

Cameron v. Board of Education

GEORGE EDWARD CAMERON, JR., A MINOR, BY HIS MOTHER AND NEXT FRIEND, SHIRLEY CAMERON; MITCHELL SCOTT BLACKWELL, A MINOR, BY HIS MOTHER AND NEXT FRIEND, MAE BLACKWELL; DAN ROBERSON; NOEL COUNCIL; DALLAS HOLLINGSWORTH; JAMES PERRY AND WIFE, MRS. JAMES PERRY; PATRICIA F. MERRITT; REX HOPPA; B. G. BRANTLEY; R. D. HARRINGTON; B. S. HARTLEY; ELIZA HOLLMAN; OZELLA M. BURGESS; SANDY ROBERSON; TONY POPE; JACKIE KNOTT; SHELBY CLIFTON; CONRAD GROSSMAN; ROGER KING; DOUGLAS JAMERSON; LEONARD VINSON; CHARLES ATKINS; SANDRA BARRETT; RICHARD ARMSTRONG AND WIFE, MRS. RICHARD ARMSTRONG; LUCILLE JANUARY; EVA HEARNE; JOHN BRIGGS; JANET WEATHERSBEE; ADRIAN BUSSE; BESSIE H. GRAY; ABRAM VAN HALL; SANDY MORGAN; JIMMY JUSTICE AND WIFE, CECILENE JUSTICE; FRANK EAGLES AND WIFE, MARGINE EAGLES; DR. R. K. JONES AND WIFE, MRS. R. K. JONES; KEN WILCOX AND WIFE, KATHY WILCOX; WALTER LANGDON AND WIFE, GAYE LANGDON; W. J. SMITH AND WIFE, MRS. W. J. SMITH; STANLEY BAREFOOT AND WIFE, NOMIA BAREFOOT; THOMAS HARRILL AND WIFE, CHARLOTTE HARRILL; CHARLES GODLEY AND WIFE, MRS. CHARLES GODLEY; FRED A. BYRD; RALPH NEWCOMB AND WIFE, CAROL NEWCOMB; AL LANDSBERG; DONNA PRUITT; CORBY NORRIS AND WIFE, MRS. CORBY NORRIS; CURTIS D. PEEPLES AND WIFE, MRS. CURTIS D. PEEPLES, PLAINTIFFS v. THE WAKE COUNTY BOARD OF EDUCATION, A BODY CORPORATE, DEFENDANT

No. 7710SC548

(Filed 6 June 1978)

Schools § 10.1— attack on student assignment plan—failure to exhaust administrative remedies

The trial court properly dismissed an action seeking to declare unconstitutional a student assignment plan adopted by a county board of education where plaintiffs failed to exhaust administrative remedies provided by G.S. 115-178 and G.S. 115-179.

APPEAL by plaintiffs from *Smith (Donald L.), Judge.* Judgment entered 27 June 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 30 March 1978.

Plaintiffs, children and parents of children enrolled in the Wake County Public Schools, filed a complaint on 31 May 1977 seeking a preliminary injunction against the enforcement of the 1977-1978 student assignment plan adopted by defendant on 23 May 1977. Plaintiffs also seek a declaratory judgment to have the assignment plan declared unconstitutional in that it is arbitrary and capricious.

On 24 June 1977, the defendant filed a motion pursuant to Rule 12(b) of the Rules of Civil Procedure to dismiss the complaint of the plaintiffs for failure of the complaint to state a claim upon which relief can be granted, and on the alternate ground that the plaintiffs have failed to exhaust their administrative remedies as required by N.C.G.S. §§ 115-178 and 115-179.

The motion was allowed on both grounds. Plaintiffs appealed.

Davis & Miller, by Ferd L. Davis, for plaintiff appellants.

Farmer & Crumpler, by George T. Rogister, Jr., for defendant appellee.

ERWIN, Judge.

The record before us presents the following question: "Did the trial court err in dismissing the plaintiff-appellants' complaint pursuant to N.C.G.S. 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief could be granted and failure to exhaust administrative remedies?"

We hold that the trial court properly granted the defendant's motion to dismiss the complaint of the plaintiffs for failure to exhaust administrative remedies as required by N.C.G.S. §§ 115-178 and 115-179. The General Assembly has enacted an exhaustive statute relating to assignment of students in the public schools of our State, Article 21, Chapter 115 of the N.C.G.S. entitled "Assignment and Enrollment of Pupils." The pertinent sections, G.S. 115-178 and 115-179, read as follows:

> "§ 115-178. *Application for reassignment; notice of disapproval; hearing before board.*—The parent or guardian of any child, or the person standing in loco parentis to any child, who is dissatisfied with the assignment made by a board of education may, within 10 days after notification of the assignment, or the last publication thereof, apply in writing to the board of education for the reassignment of the child to a different public school. Application for reassignment shall be made on forms prescribed by the board of education pursuant to rules and regulations adopted by the board of education. If the application for reassignment is disapproved, the board of education shall give notice to the applicant by

registered mail, and the applicant may within five days after receipt of such notice apply to the board for a hearing, and shall be entitled to a prompt and fair hearing on the question of reassignment of such child to a different school. A majority of the board shall be a quorum for the purpose of holding such hearing and passing upon application for reassignment, and the decision of a majority of the members present at the hearing shall be the decision of the board. If, at the hearing, the board shall find that the child is entitled to be reassigned to such school, or if the board shall find that the reassignment of the child to such school will be for the best interests of the child, and will not interfere with the proper administration of the school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that the child be reassigned to and admitted to such school. The board shall render prompt decision upon the hearing, and notice of the decision shall be given to the applicant by registered mail.

* * *

§ 115-179. *Appeal from decision of board.*—Any person aggrieved by the final order of the county or city board of education may at any time within 10 days from the date of such order appeal therefrom to the superior court of the county in which such administrative school unit or some part thereof is located. Upon such appeal, the matter shall be heard de novo in the superior court before a jury in the same manner as civil actions are tried and disposed of therein. The record on appeal to the superior court shall consist of a true copy of the application and decision of the board, duly certified by the secretary of such board. If the decision of the court be that the order of the county or city board of education shall be set aside, then the court shall enter its order so providing and adjudging that such child is entitled to attend the school as claimed by the appellant, or such other school as the court may find such child is entitled to attend, and in such case such child shall be admitted to such school by the county or city board of education concerned. From the judgment of the superior court an appeal may be taken by an interested party or by the board to the appellate division in

the same manner as other appeals are taken from judgments of such court in civil actions."

This Court held in *Church v. Board of Education*, 31 N.C. App. 641, 645, 230 S.E. 2d 769, 771 (1976), *cert. denied*, 292 N.C. 264, 233 S.E. 2d 391 (1977):

> "In North Carolina, our courts have held that when the Legislature has provided an effective administrative remedy by statute, then that remedy is exclusive. *Wake County Hospital v. Industrial Commission*, 8 N.C. App. 259, 174 S.E. 2d 292 (1970). See also 1 Strong, N.C. Index 3d, *Administrative Law*, § 2 (1976). In addition, our courts have held that not only is the administrative remedy exclusive but also a party must pursue it and exhaust it before restoring to the courts. See *King v. Baldwin*, 276 N.C. 316, 172 S.E. 2d 12 (1970); *Garner v. Weston*, 263 N.C. 487, 139 S.E. 2d 642 (1965); *Sinodis v. Board of Alcoholic Control*, 258 N.C. 282, 128 S.E. 2d 587 (1962); *Employment Security Commission v. Kermon*, 232 N.C. 342, 60 S.E. 2d 580 (1950); *Stevenson v. N.C. Department of Insurance*, 31 N.C. App. 299, 229 S.E. 2d 209 (1976). See also 1 Strong, N.C. Index 3d, *supra*."

The plaintiffs' complaint alleges: (1) a class action on behalf of minors who seek to represent all students now enrolled in the public schools of Wake County and all students who may be or are eligible to enroll in the Wake County Public Schools, and on behalf of citizens, taxpayers, and parents of children enrolled in the schools of Wake County; (2) that the defendant has abdicated its student assignment responsibilities to federal bureaucrats, should have made its assignments on the basis of the welfare of the pupils, and since this was not done, the court should act on behalf of the plaintiffs. The complaint fails to allege that the plaintiffs have exhausted their administrative remedies as provided by Article 21, Chapter 115 of the General Statutes.

Justice Pless, speaking for the Supreme Court in *Elmore v. Lanier, Comr. of Insurance*, 270 N.C. 674, 678, 155 S.E. 2d 114, 116 (1967), on the collateral attack of administrative procedures enacted by the Legislature, observed:

> "To permit the interruption and cessation of proceedings before a commission by untimely and premature intervention

by the courts would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies. To allow it would mean that in some instances a case might pend in the courts until a jury trial could be held, which would frequently cause unjustified delay, and result in thwarting the purpose for which the administrative investigation was established. . ."

Plaintiffs disregarded the statutes in question by failing to request reassignment, thereby taking a route wholly inconsistent with the statutes enacted by the General Assembly. The plaintiffs have attempted to substitute the Superior Court for the defendant, Board of Education. This the General Assembly has not authorized.

It is our duty to interpret the language of the statutes so as not to lead to absurd results or contravene the manifest purpose of the statutes and in a manner as will give effect to the reason and purpose of the law. *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966). The trial court properly granted the defendant's motion to dismiss.

Judgment affirmed.

Judges BRITT and CLARK concur.

SYLVIA DIANNE WILLIAMS AUMAN v. KENZIE PARKS EASTER AND JOSEPH FRAZIER HOWELL

No. 7719SC497

(Filed 6 June 1978)

1. Automobiles §§ 46, 87.4 — opinion evidence of speed — exclusion harmless error

In an action to recover for personal injuries sustained by plaintiff when she was a passenger in defendant Howell's car which was struck by defendant Easter's car when Howell turned in front of Easter, the trial court's error in refusing to allow plaintiff to state her opinion concerning the speed of Easter's car was not prejudicial since such evidence would not have established Easter's negligence, and Easter's negligence, if any, was insulated by the negligence of Howell.

2. Automobiles § 43.5; Rules of Civil Procedure § 15.2— amendment of pleading to conform to evidence

In an action to recover for personal injuries sustained by plaintiff in an automobile accident, the trial court did not err in allowing one defendant to amend his answer to allege plaintiff's contributory negligence in riding with an intoxicated driver, where plaintiff could not have been surprised at trial since another defendant had pleaded the same defense and proof had been properly admitted at trial pertaining to the defense.

3. Automobiles § 91.5— damages—sufficiency of instructions—failure to request instructions

In an action to recover for injuries sustained in an automobile accident where the court correctly instructed the jury that the amount of damages should be fixed without regard to punishing either party and without consideration of sympathy for either party, it was the responsibility of plaintiff to request special instructions if she felt that the court did not clearly instruct the jury that it should not reduce the amount of her recovery simply because she had been accused of contributory negligence in riding with a driver who had been drinking.

APPEAL by plaintiff from *McConnell, Judge.* Judgment entered 26 January 1977 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 9 March 1978.

Plaintiff seeks to recover damages for injuries she sustained in an automobile accident on 20 December 1973. Plaintiff was a passenger in an automobile driven by defendant Howell. Evidence showed that the collision occurred as Howell attempted to make a left turn from the eastbound lane of U.S. 64, a four-lane highway, onto N.C. 42, an intersecting two-lane road. Defendant Easter was traveling west on Highway 64 in the outside lane. The accident occurred near the northern curb line of highway 64. The front of the Easter car struck the passenger door of the Howell car.

Plaintiff alleges that her injuries were caused by the concurrent negligence of defendants, contending that Howell made an unsafe turn in front of oncoming traffic and that Easter drove at an unsafe speed and failed to keep a proper lookout. Each defendant denied his own negligence. Easter further alleged that plaintiff was contributorily negligent in that she voluntarily rode as a passenger with Howell, knowing that he was intoxicated. Howell was allowed to amend his answer at the close of the evidence so as to include the same allegation.

Evidence was offered tending to show the circumstances of the accident and the extent of plaintiff's injuries. Plaintiff

testified that she saw the headlights of Easter's car about one hundred sixty-five feet ahead as Howell began his turn. She also testified on *voir dire* that Easter was traveling at 65 m.p.h., however, this evidence was ruled inadmissible on the ground that she did not have time to form any opinion of Easter's speed in the few seconds she had to observe his car before the impact. Other witnesses testified that defendant Howell had only about four hours of sleep that day, that he smelled of alcohol, but that he was not intoxicated.

Defendant Easter testified that he first saw Howell's car when he was about three hundred feet from the intersection, that when he was about fifty feet away the car pulled in front of him, and that although he tried to turn to avoid collision, he was unable to do so in time. Defendant Howell testified that he first saw the Easter car seconds before the impact and after plaintiff had called to him. He had pleaded guilty to a safe movement traffic law violation.

Plaintiff showed further that her pelvis and leg were broken in the collision. She spent several months in a full body cast which was so heavy and cumbersome that she required nursing home care. There was evidence of considerable pain and suffering as well as of permanent shortening of the broken leg so that she is required to wear a built up shoe.

At the close of the evidence, verdict was directed for defendant Easter. The jury considered the issues of Howell's negligence, plaintiff's contributory negligence, and damages. They found that defendant Howell was negligent, that plaintiff was not contributorily negligent, and that she should recover $8,000 in damages. Judgment was entered on the verdict and plaintiff's motion to set aside the verdict was denied.

Ottway Burton, for plaintiff appellant.

Brinkley, Walser, McGirt & Miller, by Walter F. Brinkley, for defendant appellee, Kenzie Parks Easter; Smith, Moore, Smith, Schell & Hunter, by Stephen Millikin, for defendant appellee, Joseph Frazier Howell.

VAUGHN, Judge.

[1] Plaintiff presents several assignments of error pertaining to her case against defendant Easter, contending that the court erred in directing a verdict in his favor. The directed verdict was appropriate only if the evidence, considered in the light most favorable to the plaintiff, would not justify a verdict in her favor. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). Plaintiff was not allowed to testify that in her opinion defendant Easter approached the intersection at 65 m.p.h. although she alleged that he was negligent in driving at an excessive speed. Plaintiff should have been allowed to state her opinion. *Miller v. Kennedy*, 22 N.C. App. 163, 205 S.E. 2d 741 (1974), *cert. den.*, 285 N.C. 661, 207 S.E. 2d 755; *Herring v. Scott*, 21 N.C. App. 78, 203 S.E. 2d 341 (1974). That she had very little time to observe the oncoming car and form her opinion affects only the weight of her testimony, not its admissibility. Nevertheless, the plaintiff has not shown prejudicial error. Even had her evidence concerning Easter's speed been admitted, it did not show actionable negligence on his part. In *Hout v. Harvell*, 270 N.C. 274, 154 S.E. 2d 41 (1967), the Court held on similar facts that where there is no fact or circumstance alleged which would have given the oncoming driver timely notice that the driver of the car in which plaintiff was a passenger intended to make an unsafe turn in front of him, then the oncoming driver's speed, even if negligent, is not shown to have been a proximate cause of plaintiff's injuries. There is no evidence in this case from which a jury could have found that Howell began his turn at a time so as to make Easter's speed a proximate cause of the accident. Plaintiff testified that when she first saw the Easter vehicle coming toward her, the Easter vehicle was about one hundred and sixty-five feet away and traveling on a major highway. She also testified that to the best of her recollection, she saw the headlights before Howell began to make his turn. Easter testified that he first saw Howell when he was 300 feet away and that Howell appeared to be moving slowly into the intersection. When Easter was about 50 feet from the intersection, Howell suddenly pulled into his lane of traffic. Where the intervening negligent act was not such that it ought to have been foreseen by Easter, that act properly insulated him from liability. But for Howell's intervention, the speed of Easter's vehicle, even if excessive, would have resulted in no injury to the plaintiff. Easter's negligence, if any, was insulated by the negligence of Howell. *See Hudson v.*

Petroleum Transit Co., 250 N.C. 435, 108 S.E. 2d 900 (1959); *Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808 (1940).

[2] Another assignment of error relates to the amendment of defendant Howell's answer so as to conform to the evidence. G.S. 1A-1, Rule 15(b). The trial judge is allowed broad discretion in ruling on such motions. *Markham v. Johnson*, 15 N.C. App. 139, 189 S.E. 2d 588 (1972), *cert. den.*, 281 N.C. 758, 191 S.E. 2d 356. Leave to amend should be freely given except where the party objecting can show that he would be materially prejudiced. *Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977). In this case defendant Howell was allowed to add an allegation concerning plaintiff's contributory negligence in riding in the car with an intoxicated driver. There was no error in allowing the amendment. Plaintiff could not have been surprised at trial. Defendant Easter had pleaded the same defense, and proof had been properly admitted at trial pertaining to the defense.

[3] Another assignment of error relates to the court's instructions on the issue of damages. Plaintiff contends that the court did not clearly instruct the jury that it should not reduce the amount of her recovery simply because she had been accused of contributory negligence in riding with a driver who had been drinking. The court correctly instructed the jury that the amount of damages should be fixed without regard to punishing either party and without consideration of sympathy for either party. "When the court has sufficiently instructed the jury, if the instructions are not as full as a party desires, he should submit a request for special instructions." *Broadnax v. Deloatch*, 20 N.C. App. 430, 201 S.E. 2d 525 (1974), *cert. den.*, 285 N.C. 85, 203 S.E. 2d 57. The record does not show that any request was made.

We have considered plaintiff's other assignments of error. No prejudicial error has been shown.

No error.

Judges PARKER and WEBB concur.

JOHN W. LEWIS, D/B/A MIKE LEWIS, INC. v. DUNN LEASING CORPORATION AND JOHN WILLIS

No. 7718SC412

(Filed 6 June 1978)

1. **Landlord and Tenant § 5; Rules of Civil Procedure § 56.3— liability under a lease—summary judgment—amount due**

The trial court properly granted summary judgment for defendants on their counterclaim for payments due under a lease of a van where plaintiffs admitted the execution of the lease and an unspecified arrearage in payments thereunder. However, the court erred in entering summary judgment as to the amount of the liability under the lease where the only evidence as to the amount due was a letter, filed in answer to an interrogatory, which was addressed to the corporate plaintiff from defendants' attorney, and the competency of the letter did not appear on the face of the letter or elsewhere in the record and did not qualify as an affidavit of the defendant who verified the answers to the interrogatories.

2. **Indemnity § 2.2— indemnity provision in lease—intentional tort by lessor's employee**

An indemnity provision in an agreement for the lease of a van did not contemplate that the corporate lessor would be indemnified and the lessor's employee would be exempt from liability for the employee's intentional tort of conversion of tools and supplies in the van when it was repossessed.

APPEAL by plaintiffs from *Crissman, Judge*. Judgment entered 23 March 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 March 1978.

This action was instituted by the plaintiffs to recover damages arising from the alleged conversion of plumbing tools and supplies belonging to the individual plaintiff; said tools and supplies were located inside a Ford van leased to the corporate plaintiff by the defendant Dunn Leasing Corp. (Dunn), which was repossessed by Dunn through its agent, the defendant Willis.

The defendant Willis moved to dismiss the complaint pursuant to Rule 12(b)(6). Defendant Dunn filed an answer and asserted a purported defense and counterclaim against plaintiff Mike Lewis, Inc. for payments due under the terms of the lease; against the individual plaintiff for fraud and conversion of the leased van; and pled specifically an indemnity provision contained within the terms of the lease agreement between the corporate plaintiff-lessee, and the defendant-lessor, Dunn.

Plaintiff filed an "answer" to counterclaim, admitting the execution of the aforementioned lease and an unspecified arrearage.

Defendants next filed a motion for summary judgment, grounded upon the aforementioned lease and the indemnity provision therein. Subsequently there were filed plaintiffs' interrogatories and defendants' verified answers thereto.

On 23 March 1977, the trial court entered an order granting summary judgment for defendant Dunn on its counterclaim against the corporate plaintiff in the amount of $1,050.00 plus attorney's fees in the amount of $250.00, and dismissing plaintiffs' action against defendants. Plaintiffs appealed.

Booth, Fish, Simpson & Harrison, by Robert A. Benson, for the plaintiffs.

Alspaugh, Rivenbark & Lively, by James B. Rivenbark, for the defendants.

BROCK, Chief Judge.

Plaintiffs assign error to the trial court's order granting summary judgment in favor of the corporate defendant on its counterclaim, and dismissing plaintiffs' action against defendants.

We shall first consider whether summary judgment was proper on the counterclaim. Defendants filed no affidavits in support of their motion for summary judgment. Thus the question presented is whether defendants, the moving parties, have properly shown that there is no genuine issue as to any material fact and that the corporate defendant is entitled to judgment as a matter of law on its counterclaim in the amount of $1,050.00. The burden was on the moving parties to establish, by competent evidence, that there was no triable issue of fact. *Lineberger v. Insurance Co.*, 12 N.C. App. 135, 182 S.E. 2d 643 (1971).

[1] The only evidence before the court in the instant case was the pleadings and defendants' answers to interrogatories, both of which are properly subject to consideration by the court in ruling on the summary judgment motion. Rule 56(c). Upon examining this evidence, we note that the plaintiffs, in their reply, admitted the execution of the lease by the corporate plaintiff and an unspecified arrearage in payments thereunder. Thus there is no

genuine issue as to the fact of the corporate plaintiff's liability to the corporate defendant in some amount, and to that extent, summary judgment was appropriate.

As to the amount of the liability, the pleadings establish a counterclaim for $1,050.00 by the corporate defendant and a general denial of the amount by plaintiffs. Outside of the pleadings, the only evidence offered by defendants as to the amount due under the lease was a letter attached as an exhibit in answer to plaintiffs' interrogatory number 14, which interrogatory read as follows:

> "14. If you will do so without a motion to produce, please attach to these interrogatories any and all correspondence that took place between the defendants and the plaintiff, in which the defendants demanded payment of the plaintiff or gave notice of repossession."

The letter attached in answer to this interrogatory was merely a demand for $1,050.00 addressed to the corporate plaintiff from defendants' attorney. The competency of this unsworn letter to prove the amount of the debt does not appear on the face of the letter itself, or anywhere else in the record. Nor does this letter qualify as an affidavit of the defendant Wilson, who verified the answers to the interrogatories, on the question of the amount owed. It is not a statement of the affiant "made on personal knowledge", nor does it "show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e).

Thus defendants did not satisfy their burden of establishing by competent evidence the lack of a triable issue of fact as to the amount of unpaid lease payments. Although plaintiffs could not ordinarily rest upon their denial in the pleadings in the face of a properly supported motion for summary judgment, *Short v. City of Greensboro*, 15 N.C. App. 135, 189 S.E. 2d 560 (1972), "[w]here the evidentiary matter supporting the moving party's motion is insufficient to satisfy his burden of proof, it is not incumbent upon the opposing party to present any competent counter-affidavits or other materials. (Citation omitted.)" *Lineberger v. Insurance Co., supra*, 12 N.C. App. at 137, 182 S.E. 2d at 644.

[2] Plaintiffs next argue that the trial court erred in dismissing their complaint. The trial court apparently determined that de-

fendants were entitled to a judgment dismissing plaintiffs' complaint as a matter of law by virtue of an indemnity provision contained in the lease agreement, which read as follows:

> "10. *Indemnity.* Regardless of any insurance coverage, Lessee shall indemnify and save Lessor harmless against any and all claims or liability of every kind and nature, and all costs and expenses, including attorney's fees, incurred in connection with, relating to, defending suits or arising out of the possession, use or operation of property covered by this lease, and such liability shall not be affected by any termination of the lease or a surrender of the property; provided however, that any insurance covering such liability, if and when paid, shall be a credit upon Lessee's liability. Lessor shall not be liable to Lessee for any loss of property or other damage resulting from the theft, destruction or damage of leased property, including motor vehicles, directly or indirectly, including loss of use of such property during the time required to recover, repair, adjust, service, or replace it, and there shall be no abatement of rental during any such period."

Plaintiffs contend that the parties did not intend that the corporate defendant would be indemnified for the intentional torts of its employees. We agree.

The applicable rules of construction were set out by Justice Sharp (now Chief Justice) in *Dixie Container Corp. v. Dale*, 273 N.C. 624, 627, 160 S.E. 2d 708, 711 (1968):

> "As in the construction of any contract, the court's primary purpose in construing a contract of indemnity is to ascertain and give effect to the intention of the parties, and the ordinary rules of construction apply. 42 C.J.S. *Indemnity* § 8 (1944). It will be construed to cover all losses, damages, and liabilities which reasonably appear to have been within the contemplation of the parties, but it cannot be extended to cover any losses 'which are neither expressly within its terms nor of such character that it can reasonably be inferred that they were intended to be within the contract.' *Id.* § 12."

Nothing in the language of the aforementioned indemnity provision can reasonably be read as indicating that the parties to the lease, and especially the plaintiff corporation, contemplated that Dunn would be exempt from liability for the intentional tort of conversion.

It is the rule in this State that an indemnity contract purporting to relieve one from liability for his own negligence is not favored and will be strictly construed. *Crushed Stone v. Powder Co.*, 25 N.C. App. 285, 210 S.E. 2d 285 (1974). At the very least, this rule of construction should be extended to contracts purporting to relieve one from liability for intentional torts, and we have applied this rule in the instant case. Furthermore, we are inclined to agree with plaintiffs that if the provision at issue were construed to relieve the defendant from liability for its intentional torts, such a provision would be void as against public policy. However, it is not necessary for us to reach that question in light of our construction of the indemnity provision.

For the reasons heretofore discussed, the trial court's order granting summary judgment for defendants on the counterclaim is affirmed only insofar as it adjudicates plaintiff corporation's liability under the lease; the portions of the order granting summary judgment as to the amount of damages for nonpayment under the lease, for attorney fees, and dismissing plaintiffs' action, are reversed.

Affirmed in part; reversed in part.

Judges VAUGHN and ERWIN concur.

EVELYN B. LYVERE, PLAINTIFF APPELLANT v. INGLES MARKETS, INC., DEFENDANT APPELLEE

No. 7728SC503

(Filed 6 June 1978)

1. Negligence § 57.11 — rug blown by wind — fall of invitee — no negligence

In an action to recover for injuries sustained by plaintiff in a fall in defendant's grocery store which occurred when a gust of wind blew open the

doors of the store, blew a rug ten feet across the floor and wrapped the rug around plaintiff's legs, evidence was insufficient to be submitted to the jury, since the action of the wind in blowing the rug ten feet across the floor was not reasonably foreseeable, and since plaintiff was aware of the presence of the rug and of the fact that the wind had previously lifted a corner of the rug and tripped another person.

2. Negligence § 56— fall of invitee—evidence of conditions nine months later—evidence properly excluded

In an action to recover for injuries sustained by plaintiff in defendant's grocery store when she tripped over a rug, it was within the discretion of the trial court to exclude evidence which would have tended to show the existence of similar conditions existing more than nine months subsequent to her accident.

APPEAL by plaintiff from *Jackson, Judge.* Judgment entered 6 April 1977 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 10 March 1978.

The plaintiff filed this action for damages due to personal injuries sustained in a fall in defendant's grocery store allegedly resulting from defendant's negligence. Defendant answered denying negligence and averring contributory negligence.

Additionally, defendant alleged that, if facts were found to be as plaintiff alleged, an "Act of God" caused the fall and the defendant had no affirmative duty to warn of the alleged danger. Upon conclusion of the plaintiff's evidence, the defendant moved for a directed verdict. The trial court directed a verdict for the defendant and dismissed the action with prejudice. From this judgment plaintiff appealed.

Other pertinent facts are hereinafter set forth.

T. Bentley Leonard for plaintiff appellant.

Gray, Kimel & Connolly, by Larry S. Kimel, for defendant appellee.

MITCHELL, Judge.

The plaintiff appellant herein makes three assignments of error. The plaintiff first assigns as error the trial court's directed verdict for the defendant at the conclusion of the plaintiff's evidence, pursuant to G.S. 1A-1, Rule 50(a). Motions under this rule are directed to the sufficiency of the evidence to support a

verdict for the plaintiff, when considered in the light most favorable to the plaintiff. *Evans v. Carney*, 29 N.C. App. 611, 225 S.E. 2d 157 (1976); *Bray v. Dail*, 20 N.C. App. 442, 201 S.E. 2d 591 (1974). To determine the sufficiency of the evidence to support a verdict for the plaintiff, and thus go to the jury, all evidence supporting her claim must be taken as true, considered in the light most favorable to her, giving her the benefit of every reasonable inference which may be legitimately drawn therefrom, with contrasts, contradictions, conflicts and inconsistencies resolved in her favor. *Rose v. Motor Sales*, 288 N.C. 53, 59, 215 S.E. 2d 573, 577 (1975); *Studio, Inc. v. School of Heavy Equipment*, 25 N.C. App. 544, 546, 214 S.E. 2d 192, 193 (1975); *Bray v. Dail, supra.*

[1] In applying these rules, we turn first to the plaintiff's evidence. When viewed in the light most favorable to her, the plaintiff's evidence tends to show the following:

Late on the morning of 3 April 1975, Evelyn B. Lyvere, plaintiff herein, entered defendant's grocery store in Oteen, North Carolina to purchase several items. It was a very windy day. The plaintiff selected the items she wished to purchase and was in the process of writing a check to pay for them when she observed a young child, about three or four years old, encounter some difficulty on its way out of the store. While leaving through the front doors, the child tripped and fell due to the action of a gust of wind upon a rug which was on the floor immediately inside the front doors. The rug was about four feet long, three feet wide and of the indoor-outdoor type. When the gust of wind hit the rug, it blew up the "flap or corner" and tripped the child. However, it did not move the rug across the floor.

When the check-out clerk observed this, she said: "Somebody better take that rug up before somebody else gets hurt." She made this statement in the general direction of the business office, and loud enough to be heard by anyone therein. The rug was not removed, and there was no evidence that the statement was heard by anyone except the plaintiff.

About two minutes after the child tripped, the plaintiff, who had entered through the side doors, finished her business and attempted to leave through the same side doors, which were about twenty-five feet from the front door. As she attempted to leave, a stronger gust of wind blew the front doors open and blew the

same rug about ten feet across the floor, wrapping it around her legs and causing her to fall. The plaintiff was injured in the fall. She suffered a fractured left kneecap, disintegrating cartilage behind the same kneecap, and other damages therefrom.

We find, when these facts are viewed in the light most favorable to the plaintiff, the trial court's directed verdict and dismissal with prejudice were proper. The plaintiff, having entered the store during business hours to purchase goods, was an invitee. *Morgan v. Tea Co.*, 266 N.C. 221, 145 S.E. 2d 877 (1966); 9 Strong, N.C. Index 3d, Negligence, § 52.1, p. 473. The standard of care required of the defendant for the protection of the invitee plaintiff was the exercise of ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils or unsafe conditions insofar as they could be ascertained by reasonable inspection and supervision. *Routh v. Hudson-Belk Co.*, 263 N.C. 112, 139 S.E. 2d 1 (1964). The defendant was not an insurer of the safety of the plaintiff on the premises, however, and could only be liable for the plaintiff's injuries due to its actual negligence. *Gaskill v. A. and P. Tea Co.*, 6 N.C. App. 690, 171 S.E. 2d 95 (1969).

The plaintiff's evidence, when taken as true and in the light most favorable to her, does not reveal actionable negligence on the part of the defendant. The mere presence of a rug at the entrance of the defendant's store did not constitute actionable negligence. *Farmer v. Drug Corp.*, 7 N.C. App. 538, 173 S.E. 2d 64 (1970). Additionally, we do not think that knowlede by the defendant's clerk on the premises that the corner of the rug had been lifted by the wind a moment or two previously would support a conclusion that the action of the wind in blowing the rug some ten feet across the defendant's floor was reasonably foreseeable. The issue of foreseeability may be determined as a matter of law. *See Pridgen v. Kress & Co.*, 213 N.C. 541, 196 S.E. 821 (1938). As has been specifically stated: " 'Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted.' " *Watkins v. Furnishing Co.*, 224 N.C. 674, 676, 31 S.E. 2d 917, 918 (1944). We find as a matter of law that the plaintiff's evidence is insufficient to support a finding of foreseeable injury to the plaintiff by the

defendant and does not establish the proximate cause requisite for actionable negligence.

Even if the plaintiff's injury by action of the wind upon the rug could be found reasonably foreseeable to the defendant, the plaintiff would not be entitled to recovery. All of the plaintiff's evidence, including her own testimony, indicated that she heard the defendant's clerk shout a warning when the corner of the rug blew up and observed the same events observed by the clerk. The position and condition of the rug were as obvious to the plaintiff as to the defendant, and the defendant had no duty to warn the plaintiff of this obvious condition in the store. *Wrenn v. Convalescent Home*, 270 N.C. 447, 154 S.E. 2d 483 (1967). The plaintiff's evidence shows that she had equal knowledge in fact of the condition of the rug and the prevailing wind conditions and does not indicate she was in any way distracted. *See Dennis v. Albemarle*, 242 N.C. 263, 87 S.E. 2d 561 (1955). Thus, the defendant cannot be held accountable for her injury. *Wrenn v. Convalescent Home, supra; Farmer v. Drug Corp., supra.*

[2] The plaintiff next assigns as error the exclusion by the trial court of evidence which would have tended to show the existence of similar conditions existing more than nine months subsequent to her accident. This matter was clearly within the discretion of the trial court. *In re Will of Hall*, 252 N.C. 70, 78, 113 S.E. 2d 1, 6 (1960); *Fanelty v. Jewelers*, 230 N.C. 694, 55 S.E. 2d 493 (1949). Also, the general rule is "that inferences 'do not ordinarily run backward.' " 1 Stansbury, N.C. Evidence (Brandis Rev. 1973), § 90, *quoting, Sloan v. Light Co.*, 248 N.C. 125, 133, 102 S.E. 2d 822, 828 (1958); *see, Childress v. Nordman*, 238 N.C. 708, 78 S.E. 2d 757 (1953). The exclusion of such evidence was, therefore, a proper exercise of the trial court's discretion and was correct.

Plaintiff's remaining assignment of error, that the trial court erred in disallowing a continuance based upon the absence of a vital witness, is without merit. The record reveals that the witness in question was a physician whose testimony would have been in the nature of expert medical testimony unrelated to the issue of sufficiency of the evidence to overcome the defendant's motion for a directed verdict.

For the reasons set forth herein, the judgment of the trial court is

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. CHARLES RAY LANE

No. 776SC879

(Filed 6 June 1978)

Criminal Law § 76.2— cross-examination disclosing custodial statements and warnings—admission of statements on redirect without voir dire

Where defense counsel in a rape case elicited testimony from an officer on cross-examination that defendant had made in-custody statements to the officer, that the officer had warned defendant of his rights, and that defendant freely made the statements, the trial court properly permitted the officer on redirect examination to read defendant's statements to the jury over defendant's general objection without conducting a voir dire to determine their admissibility.

APPEAL by defendant from *James, Judge*. Judgment entered 25 February 1977 in Superior Court, HERTFORD County. Heard in the Court of Appeals 27 February 1978.

Defendant was placed on trial for rape in the second degree.

Evidence for the State tended to show the following. Vickie Baggett, age 16, was walking alone along a highway near her residence late in the evening of 21 October 1976. Defendant, a 22-year-old married man, drove up in his automobile, accompanied by his brother, and asked if she wanted a ride. Vickie replied that she did not and kept walking. Defendant left but shortly thereafter drove up alone and again accosted her. Vickie ran across the street to a house and began to beat on the front door, tearing the wire screen from the frame. Defendant grabbed her by the neck from behind and pulled her into a ditch. He displayed a knife and threatened to kill her if she resisted. As another car came by, Vickie screamed for help, but none was forthcoming. Defendant had intercourse with her in a nearby field by force and

against her will. He then forced her back into his automobile and, after driving to the end of a dirt road, again raped her. Defendant finally released her after forcing her to promise to meet him on a following night and threatening to find her later on if she went to the police. Vickie immediately sought refuge at a nearby house and was taken to the hospital.

The State was able to offer other evidence that tended to corroborate almost all of the victim's testimony. The screen door where she first sought help had been recently torn. There were signs of a struggle in the ditch where defendant first threatened her with the knife. There were bruises on her neck. Live sperm was still present when she was examined at the hospital. A resident of the area reported hearing a woman screaming at about the time the attack took place. The victim was able to describe her assailant, the clothing he was wearing and the automobile. She told the officer that the armrest on the passenger door of the automobile was missing. When defendant was arrested a short time later, the engine of his car was still hot and the armrest on the door was missing.

Defendant testified in his own behalf. He said that he saw the girl walking along the highway and stopped to talk with her. She told him that she was going to meet her boyfriend. She then voluntarily got in the car with him. He drove down a side road and parked. She voluntarily had sexual relations with him. He was in her presence no longer than twenty minutes. Although he did not know the girl, he had seen her walking before. She agreed to meet him on the following Tuesday evening.

Defendant was convicted of rape in the second degree, and judgment imposing a prison sentence was entered.

Attorney General Edmisten, by Associate Attorney Rudolph A. Ashton III, for the State.

Carter W. Jones, by Ralph G. Willey III, for defendant appellant.

VAUGHN, Judge.

Defendant contends that the court erred in allowing as evidence certain statements made by defendant without first con-

ducting a *voir dire*. After defendant was arrested, he was fully advised of all of his rights under *Miranda*, and he signed a written waiver. Thereafter, in his own handwriting, he wrote out a series of four statements. In the first two he admitted that he asked the girl if she would like a ride but said that he went home when she declined. In the third and fourth statements, he said that she voluntarily got in the car, rode with him down a dirt road, voluntarily engaged in sexual intercourse and agreed to meet him again. Initially, the State did not attempt to offer the statements into evidence. In fact, the district attorney was careful not to elicit any statements made by defendant to the investigating officers because he obviously knew they were exculpatory in nature. It was defendant's counsel who, on cross-examination, developed evidence to show that defendant had freely made a statement to the officers soon after he was arrested. Among other questions relative to defendant having made a statement, defendant's counsel questioned the officer as follows:

"Q. You also talked to Mr. Lane here?

A. Yes, I did.

Q. You got a statement from Mr. Lane about it?

A. Yes, I did.

Q. You warned him of his rights?

A. Yes, I did.

Q. He freely gave you a statement, didn't he?

A. Yes, sir. He gave me several statements."

Upon redirect examination by the district attorney, the officer was asked to read the statements by defendant about which defendant's counsel had inquired. Before the statements were read, however, the State offered evidence, which remains uncontradicted, tending to show that the statements were voluntarily made after full compliance with *Miranda*. Defendant's counsel voiced a general objection to the introduction of the statements. On appeal, he contends that it was error to allow them in evidence without first conducting a *voir dire*. The argument must fail for any one of a number of reasons. We will discuss only one. Ordinarily, of course, a general objection to the introduction of a

defendant's custodial confession is sufficient to require a *voir dire* to determine its voluntariness. In the case at bar, however, it was defendant's counsel who opened the door to evidence disclosing that defendant had made a statement soon after his arrest. He further elicited testimony that the statement was made only after defendant was warned of his rights. Defendant's counsel then declared in open court, "He freely gave you a statement, didn't he?" Under these circumstances, the trial judge could hardly be expected to consider that defendant's subsequent general objections were based on any contention that the statements were involuntary. In any event, a defendant will not be allowed to develop evidence tending to show that he voluntarily made a statement immediately after the alleged crime, before he knew what the State's evidence might be and with little time for reflective fabrication, and then force the State to rest without informing the jury of what the statement was. It takes little imagination to forecast what defense counsel's argument to the jury would be under those circumstances and the consequent manifest unfairness to the State. All exceptions to the introduction of the statements are overruled.

Defendant brings forward several exceptions taken to cross-examination of him by the district attorney. In each instance defendant was asked if he had not committed a specific criminal offense. The questions were proper. Defendant was not asked about indictments or accusations by others. He was asked about his specific actions or matters within his own knowledge. There is nothing to indicate that the questions were not asked in good faith. The assignments of error are overruled. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971).

All of defendant's assignments of error have been considered. We find no error so prejudicial as to require a new trial.

No error.

Chief Judge BROCK and Judge ERWIN concur.

STATE OF NORTH CAROLINA v. CHARLES HOLMON

No. 7820SC41

(Filed 6 June 1978)

Kidnapping § 1— insufficiency of indictment

An indictment which stated that "on or about the 2nd day of July 1977, in Union County Charles Holmon unlawfully and wilfully did feloniously and forcibly kidnap Lassie Lyons" was insufficient to charge a crime since it did not allege the elements required under G.S. 14-39 which statutorily defines kidnapping and supersedes the common law definition of kidnapping.

APPEAL by defendant from *McConnell, Judge*. Judgment entered 27 October 1977 in Superior Court, UNION County. Heard in the Court of Appeals 4 May 1978.

Defendant was charged in an indictment which stated:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 2nd day of July, 1977, in Union County Charles Holman unlawfully and wilfully did feloniously and forcibly kidnap Lassie Lyons.

Prior to arraignment, defendant moved pursuant to G.S. 15A-954(a)(10), that the charge be dismissed for failure to state an offense, and the trial judge denied the motion. Defendant pled not guilty.

Lassie Lyons, (Lassie), as a witness for the State, testified that on 1 July 1977 he talked via telephone with defendant who lived in Durham; that defendant accused him of taking some marijuana from him; that on 2 July 1977, defendant and his girl friend came to his (Lassie's) brother's apartment in Monroe and asked to talk with Lassie; that he and defendant went for a ride in defendant's car during which time defendant again accused him of taking some marijuana and demanded that he return with him to Durham; that he and defendant returned to his brother's apartment where defendant pulled a gun out of his girl friend's handbag and pointed it at him; that a scuffle followed during which he was hit over the head and then ordered into defendant's car to return to Durham; that he and defendant got in the backseat while defendant's girl friend drove; that after they traveled about five or six blocks Lassie's brother hit the back of the car in which

they were riding with his car and stopped them; and that he then climbed out of the window of defendant's car, ran down the street, stopped a police officer and told him what had happened.

Sergeant James Sutton of the Monroe Police Department, as a witness for the State, testified that he took a statement from Lassie on the date of the incident. The statement was read into the record and corroborated Lassie's testimony. He further testified that he found a loaded pistol approximately 100 feet from the place where defendant's car and the Lyons' car collided, in an area where he observed defendant's girl friend walking.

Defendant, testifying in his own behalf, stated that he called Lassie on 1 July 1977 and requested that he come to Durham to tell some third parties that he had not stolen a quantity of marijuana from them; that Lassie agreed to come to Durham; that on 2 July 1977 he and his girl friend drove to Monroe and that while defendant and Lassie were riding around, Lassie agreed to return with them to Durham; that after they returned to Lyons' apartment, Lassie refused to go and a scuffle occurred; that after the scuffle, Lassie agreed to return to Durham; that he never assaulted Lassie with a gun; that the gun which the officer found had been in the glove compartment until the collision; and that following the collision, he asked his girl friend to hide the gun so that the police would not find it.

On rebuttal, Jesse Lyons, Lassie's brother, testified for the State and corroborated Lassie's testimony. Sergeant Sutton also testified concerning a statement by Jesse Lyons taken on 2 July 1977. The statement was offered into evidence and corroborated the testimony of Jesse Lyons.

The jury returned a verdict of guilty of the offense of kidnapping and from judgment imposing a prison sentence of fifteen years, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Claude W. Harris, for the State.

Harry B. Crow, Jr., for defendant appellant.

BRITT, Judge.

By his first assignment of error, defendant contends that the trial court erred in failing to grant his motion to dismiss the charge contained in the bill of indictment on the grounds that the bill failed to state an offense. We find merit in this contention.

G.S. 15A-924(a) sets forth what a criminal pleading, including an indictment, must contain. The statute provides in pertinent part:

* * *

(5) A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation. . . .

(6) For each count a citation of any applicable statute, rule, regulation, ordinance, or other provision of law alleged therein to have been violated. Error in the citation or its omission is not ground for dismissal of the charges or for reversal of a conviction.

Said statute further provides:

(e) Upon motion of a defendant under G.S. 15A-952(b) the court must dismiss the charges contained in a pleading which fails to charge the defendant with a crime in the manner required by subsection (a), unless the failure is with regard to a matter as to which an amendment is allowable.

In *State v. Perry*, 291 N.C. 586, 592, 231 S.E. 2d 262 (1977), the Supreme Court recognized the following rule with respect to indictments:

> It is well settled that an indictment will not support a conviction for a crime all the elements of which crime are not accurately and clearly alleged in the indictment. *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972); *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970); *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970); *State v. McBane*, 276 N.C. 60, 170 S.E. 2d 913 (1969); *State v. Lackey*, 271 N.C. 171, 155 S.E. 2d 465 (1967); *State v. Smith*, 241 N.C. 301, 84 S.E. 2d

913 (1954); *State v. Miller*, 231 N.C. 419, 57 S.E. 2d 392 (1950); *State v. Morgan*, 226 N.C. 414, 38 S.E. 2d 166 (1946); Strong's N.C. Index 2d, Indictment and Warrant § 9. . . .

Since 1 July 1975 the elements for the crime of kidnapping have been statutorily enumerated in G.S. 14-39 as follows:

> Kidnapping.—(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

In the instant case the indictment states:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 2nd day of July 1977, in Union County Charles Holman unlawfully and wilfully did feloniously and forcibly kidnap Lassie Lyons.

While this indictment would have been sufficient under G.S. 14-39 prior to the 1975 amendment because the term "kidnap" was given the common law definition, *State v. Norwood*, 289 N.C. 424, 222 S.E. 2d 253 (1976), it clearly does not allege the elements required under the new G.S. 14-39 which statutorily defines kidnapping and supersedes the common law definition of kidnapping. *State v. Fulcher*, 34 N.C. App. 233, 237 S.E. 2d 909 (1977), affirmed 294 N.C. 503, 243 S.E. 2d 338 (1978). Since the new statute (G.S. 14-39) supersedes the common law crime of kidnapping, *State v. Fulcher, supra*, common law kidnapping no longer exists in North Carolina. Therefore, the indictment cannot be considered

sufficient even to charge common law kidnapping as a lesser included offense.

In *Fulcher* the Court of Appeals also indicated that the common law crime of false imprisonment had not been superseded by the new kidnapping statute and was a lesser included offense of kidnapping upon which the judge should charge in an appropriate case. However, in the instant case, the record does not include the judge's charge to the jury. Thus, we do not reach the question of whether false imprisonment could have been considered a lesser included offense of kidnapping in the defendant's situation. Since the indictment in the present case is insufficient to charge a crime, the trial court erred in failing to grant defendant's motion to dismiss the indictment.

Because the judgment entered against defendant was not supported by a proper bill of indictment against him, it must be arrested. "Since the indictment was void, jeopardy did not attach and the State may try the defendant again." *State v. Hill*, 31 N.C. App. 248, 250, 229 S.E. 2d 810 (1976). *See also State v. Bagnard*, 24 N.C. App. 566, 211 S.E. 2d 471 (1975).

Having held that the judgment entered against defendant must be arrested because it was not supported by a proper bill of indictment, we find it unnecessary to address defendant's second assignment of error concerning the trial judge's failure to grant his motion for judgment as of involuntary nonsuit at the close of all the evidence.

Judgment arrested.

Judges ARNOLD and ERWIN concur.

RALPHETTA T. COX v. CHARLES R. COX

No. 7726DC528

(Filed 6 June 1978)

Divorce and Alimony § 16.8— alimony—consent judgment adopted by court—absence of finding of dependency

The trial court erred in declaring invalid a consent judgment ordering the payment of permanent alimony, which was adopted by the court and en-

forceable by contempt proceedings, because the consent judgment did not contain a finding that the payee-wife was a dependent spouse as required by former G.S. 50-16.

APPEAL by plaintiff from *Brown, Judge*. Order entered 22 April 1977 in District Court, MECKLENBURG County. Heard in the Court of Appeals 30 March 1978.

Plaintiff-wife sued defendant-husband in 1968 for alimony pendente lite, permanent alimony and child support. Prior to the hearing, set to show cause why he should not be ordered to pay a reasonable subsistence for plaintiff and the minor child, the parties entered into and signed a consent judgment, which the court adopted. The court ordered the defendant to pay into the office of the Domestic Relations Court $175 per month, $75 for child support and $100 for alimony, and also ordered:

> "8. That this Judgment is to have the same effect as if this matter was heard by the Court and this Judgment entered, and either party may be in contempt of this Court for wilful failure to abide by this Judgment; . . ."

Defendant was found in contempt of this order on several occasions. Defendant moved in 1976 for a hearing on the issue of whether the court should modify its order, reducing the amount of alimony. Plaintiff requested a hearing at which defendant would show cause why he should not again be found in contempt. The order found as a fact that defendant was still able to pay the full amount and concluded that he was in contempt. The parties then, on 7 May 1976, entered into another consent judgment adopted by the court, which eliminated defendant's arrearages and which ordered, in part, that defendant pay $3,000 to plaintiff in a lump sum and to pay $100 per month permanent alimony. Defendant paid the $3,000, but by court order of 25 October 1976 was found in contempt for failing to comply with the $100 monthly support provisions.

In December 1976, defendant again moved for a hearing on the issue of modification of the alimony order. At hearing, defendant's evidence tended to show that he made about $100 less a month than he needed to meet expenses, that he had remarried, bought a house and incurred medical expenses, and that a summer teaching job that had brought in an additional $3,000 income

was no longer available. Plaintiff's evidence tended to show that her net income was $824.63, her expenses $700 and that she tried to make a monthly deposit of $100 to her savings account which presently contained $4,000, $3,000 of which defendant had paid to her under the May 1976 consent order.

The court found as fact that the 1968 consent judgment ordered that defendant pay permanent alimony, as did the 1976 order of $100 per month. The court further found that defendant needed approximately $70 more a month than he made to meet expenses, that he had undergone major surgery in 1976 and had outstanding medical bills in excess of $1,099, that plaintiff made more than $100 more a month than she needed to meet her expenses, and that she regularly made $100 monthly savings account deposits. The court then found that there had never been a finding of dependency on behalf of the plaintiff in any of the prior orders and that plaintiff was not now a dependent within the meaning of G.S. 50-16.1. The court concluded that, as the issue of dependency had never been determined, the prior orders granting alimony were invalid, and that, as the dependency of the spouse receiving alimony is a continuing requirement which was not met by plaintiff, defendant's obligation to pay back alimony and future alimony "shall cease until such time as this Order may be modified by a future Order of this Court." The court stated that it did not reach defendant's motion to modify the prior orders due to changed circumstances. From this order, plaintiff appeals.

Sanders, London & Welling by Charles M. Welling for plaintiff appellant.

Calvin L. Brown for defendant appellee.

CLARK, Judge.

The issue raised by this appeal is whether the trial court erred in declaring invalid a consent judgment, which was adopted by the court and enforceable by contempt proceedings, because the consent judgment did not contain a finding that the payee-wife was a dependent spouse as required by G.S. 50-16.

A statutory mandate which contemplates the production of a trial record sufficient to permit proper appellate review should not be held to apply automatically to a consent judgment which

ends litigation, and, by its very nature, contemplates no appellate review. Rather, a consent judgment should be examined more generally to see if it is fair, if it does not contradict statutory or judicial policy. Two cases decided under former G.S. 50-16 contain helpful language, although they are not clear precedent because G.S. 50-16 (repealed in 1967) did not mandate specific findings of fact as does G.S. 50-16.8(f). *Williams v. Williams*, 261 N.C. 48, 134 S.E. 2d 227 (1964); *Caudle v. Caudle*, 206 N.C. 484, 174 S.E. 304 (1934). In both cases a consent judgment was upheld which ordered the payment of alimony even though "[p]laintiff did not allege, nor did the court find, either in terms or in substance, that the separation was caused by defendant's misconduct and not by any fault or misconduct on her part." *Whitesides v. Whitesides*, 271 N.C. 560, 563, 157 S.E. 2d 82, 84 (1967). *Edmundson v. Edmundson*, 222 N.C. 181, 22 S.E. 2d 576 (1942), stated:

> " 'Can alimony against the husband be awarded when there is no allegation, evidence or finding that he was the party at fault?' In an adversary proceeding the answer would be 'No,' but where, as here, the parties acted in agreement and the judgment was entered by consent, the answer is 'Yes.' . . ." 222 N.C. at 186, 22 S.E. 2d at 580.

In the case *sub judice*, the consent judgments were clearly valid as court orders and were properly enforced by the contempt power of the court. 2 Lee, N.C. Family Law, § 152 (1976 Cum. Supp. pp. 88-90). Defendant was in fact found in contempt for wilful failure to comply with the consent judgments. He did not appeal from the orders finding him in contempt. Thus defendant is not in a position to contend, and does not in this appeal contend, that the consent judgments were mere contracts between the parties and not enforceable by contempt.

The statutory policy behind the requirement of G.S. 50-16.2 that only a "dependent spouse" is entitled to alimony is to protect a non-supporting spouse from serious economic harm by making payments to the spouse who does not need support. *Lemons v. Lemons*, 22 N.C. App. 303, 206 S.E. 2d 327 (1974). The fact that the defendant agreed to pay monthly alimony is proof enough that he needed no further protection.

Under G.S. 50-16.9(a) a consent order for alimony or alimony pendente lite "may be modified or vacated at any time, upon mo-

tion in the cause and a showing of changed circumstances. . . ." It is obvious in the case before us that the defendant offered some evidence of changed circumstances, and the evidence may have been sufficient to support a finding by the trial court of changed circumstances within the meaning of G.S. 50-16.9(a) which would justify a modification or vacation of the consent judgments. But the trial court failed to comply with the statutory mandate and erroneously ruled that the prior consent judgments were invalid for failure of the court to make a finding of dependency.

Because of this error in the ruling of the trial court we must remand this cause for a *de novo* hearing. A remand for the limited purpose of determining if the evidence presented at the 12 April 1977 hearing was sufficient to support a finding of changed circumstances would not be appropriate in view of the time lapse since that hearing with possible changes which should be considered by the court in determining the alimony issue. The cause is remanded for hearing and determination consistent with this opinion.

Reversed and remanded.

Judges BRITT and ERWIN concur.

STATE OF NORTH CAROLINA v. JUSTIN THOMAS BURKE, JR.

No. 7726SC904

(Filed 6 June 1978)

1. Narcotics § 4— possession of marijuana—sufficiency of evidence

In a prosecution for felonious possession of marijuana, evidence was sufficient to be submitted to the jury where it tended to show that defendant was seated at a table upon which there were located some 5.5 pounds of marijuana in compressed bricks, and that he had in his hand a bag containing one-half pound of loose marijuana.

2. Criminal Law § 113.7— possession of marijuana—acting in concert—jury instructions—no error

Defendant's assignments of error to the trial judge's instructions as to "acting in concert" and "aiding and abetting" are overruled, since the jury's decision was not clouded by questions of joint participation or common purpose

to commit a crime but was instead a clear-cut issue of whether defendant actually knew and was aware that marijuana was in his presence.

3. Narcotics § 4.6— possession of marijuana—amount in house as indicator of intent—jury instructions—no prejudice

In a prosecution for felonious possession of marijuana and possession of marijuana with intent to sell and deliver, the trial court's error, if any, in instructing the jury that they could consider the amount of marijuana on the premises in question as an indicator of intent was harmless in light of the amount of marijuana which was found in the same room in which defendant was seated; furthermore, that part of the instruction to which defendant objected was given in connection with the judge's charge as to possession with intent to sell and deliver and addressed the element of defendant's intent to sell the marijuana.

4. Narcotics § 4.6— proximity to drug—intent to control—jury instructions proper

In a prosecution for felonious possession of marijuana, the trial judge did not err in that portion of his charge which allowed the jury to infer defendant's power and intent to control the disposition or use of marijuana from his close physical proximity to it, since the evidence showed that defendant was in a house, seated at a table upon which several pounds of marijuana were located, and had a bag in his hand containing a quantity of marijuana.

APPEAL by defendant from *Friday, Judge.* Judgment entered 7 June 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 2 March 1978.

Defendant was tried on charges of felonious possession of marijuana and possession of marijuana with intent to sell and deliver. To each charge, he entered a plea of not guilty.

The evidence presented by the State tended to show that on 24 September 1976, Charlotte City Police Officers Hilderman and Sorrow executed a search warrant at a house in Charlotte; that defendant and another were seated at a kitchen table; that defendant had a white plastic bag in his hand which he dropped on the table directly in front of him when Officer Hilderman entered the kitchen; that there were one compressed brick and three half bricks (the latter weighing one-half kilo or 1.1 pounds each) of marijuana on the kitchen table; that the bag defendant had dropped contained approximately one-half pound of loose marijuana; that the officers also found a large marijuana cigarette on a kitchen shelf, two pipes containing marijuana residue on the kitchen table, two large bags of marijuana in a bedroom closet,

and a clear plastic bag of marijuana in the pocketbook of a woman who resided in the house.

Defendant testified in his own behalf, and his testimony tended to show that he had been visiting at another house in the neighborhood and had accompanied two others to the house in question; that he entered the kitchen and sat down, and observed the bags containing the marijuana; that he did not know that there was any marijuana in the house prior to his arrival; that he had picked up a clear plastic bag containing a brick of marijuana and just looked at it when the police entered the kitchen; that he did not own any of the marijuana and at the time did not know it was marijuana; that he did not exercise any dominion or control over the marijuana, other than to lift the one bag from the table.

The jury returned a verdict of guilty of possession of more than one ounce of marijuana. From judgment imposing a sentence of six months active imprisonment and 4½ years of probation, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Daniel C. Oakley, for the State.

David R. Badger for defendant.

BROCK, Chief Judge.

Defendant brings forward six assignments of error, five of which are presented in four arguments. Defendant does not argue his assignment of error number 1, thus it is deemed abandoned. App. R. 28(a).

[1] Defendant assigns as error the denial of his motions to dismiss, to set aside the verdict as being against the greater weight of the evidence, for a new trial, and in arrest of judgment. By this assignment, defendant challenges the sufficiency of the State's evidence to warrant its submission to the jury and to support the verdict thereon. More specifically, defendant contends that the State failed to prove possession of more than one ounce of marijuana. We disagree.

Upon defendant's motion to dismiss, or for judgment of nonsuit, G.S. 15-173, "the evidence for the State must be taken as true and the question for the court is whether there is substantial

evidence that the offense charged in the bill of indictment, or a lesser offense included therein, has been committed and that the defendant committed it. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679." *State v. Mason*, 279 N.C. 435, 439, 183 S.E. 2d 661, 663 (1971). Applying these principles to the case *sub judice*, we hold that the State's evidence was sufficient as to all essential elements of the offense charged. The evidence for the State, taken as true, establishes that defendant was seated at a table upon which there were located some 5.5 pounds of marijuana in compressed bricks, and that he had in his hand a bag containing one-half pound of loose marijuana. "[E]vidence which places an accused within close juxtaposition to a narcotic drug under circumstances giving rise to a reasonable inference that he knew of its presence may be sufficient to justify the jury in concluding that it was in his possession." *State v. Weems*, 31 N.C. App. 569, 571, 230 S.E. 2d 193, 194 (1976). The State's evidence, therefore, was sufficient to establish an inference of possession and that the possession was felonious, that is, of a quantity greater than one ounce.

The denial of defendant's motion to set aside the verdict as being against the weight of the evidence is a decision within the sole discretion of the trial court and is not reviewable. *State v. Shepherd*, 288 N.C. 346, 218 S.E. 2d 176 (1975). Denial of defendant's motion for a new trial is not reviewable absent abuse of discretion, which has not been shown. *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death sentence vacated* 429 U.S. 912, 50 L.Ed. 2d 278, 97 S.Ct. 301 (1976). Motion for arrest of judgment is proper only when fatal error or defect appears on the face of the record. *Id.* No such error or defect appears on the face of the record in this case.

Defendant's assignment of error number 2 is overruled.

[2] Defendant's third and fourth assignments of error challenge the propriety of the trial judge's instructions as to "acting in concert" and "aiding and abetting." Defendant contends that there is no evidence (1) that defendant, with a common purpose, did some act which forms a part of the offense charged, so as to warrant an instruction on "acting in concert"; or (2) that defendant, though present, committed no act necessary to constitute the crime, yet aided and abetted another in its commission, so as to warrant an

instruction on "aiding and abetting." *See State v. Mitchell*, 24 N.C. App. 484, 211 S.E. 2d 645 (1975).

Because the situation presented by the instant case is similar to that in *State v. Cameron*, 284 N.C. 165, 200 S.E. 2d 186 (1973), *cert. denied* 418 U.S. 905 (1974), we find it unnecessary to review the propriety of the judge's instructions. To convict defendant of the crime of possession, the jury was required to determine that defendant actually knew and was aware that marijuana was in his presence. The State's evidence, admittedly, required the jury to infer culpable knowledge by virtue of defendant's close juxtaposition to the marijuana. Defendant testified that he was merely a chance visitor at the premises and did not know that the substance before him was marijuana. In this case, as in *Cameron, supra*, "[t]he jurors' decision was not clouded by questions of joint participation or common purpose to commit a crime. Thus the jury was given a clear-cut decision: whether to believe the State's evidence and return a verdict of guilty or believe the defendant's evidence [negating intent] and return a verdict of not guilty." 284 N.C. at 171, 200 S.E. 2d at 191. Defendant's assignments of error numbered 3 and 4 are overruled.

[3] In his assignment of error number 5, defendant contends that the trial judge erred in instructing the jury that they could consider the amount of marijuana on the premises in question as an indicator of intent, since there was no evidence that defendant had any knowledge of the marijuana which was found outside of the kitchen. This assignment is likewise without merit. The error, if any, in this charge was harmless in light of the amount of marijuana which was found in defendant's presence in the kitchen. Furthermore, construing the charge contextually, we note that the challenged portion was given in connection with the judge's charge as to possession with intent to sell and deliver and addressed the element of defendant's intent to sell the marijuana. Defendant's assignment of error number 5 is overruled.

[4] In his final assignment of error, defendant contends that based upon the recent case of *State v. Washington*, 33 N.C. App. 614, 235 S.E. 2d 903 (1977), the trial judge erred in that portion of this charge which allowed the jury to infer defendant's power and intent to control the disposition or use of marijuana from his close physical proximity to it. In *Washington*, such a charge was found

to be overbroad and erroneous as to a mere passenger in a vehicle. *Washington* is distinguishable from the instant case. Here the evidence showed that defendant was in a house, seated at a table upon which several pounds of marijuana were located, and had a bag in his hand containing a quantity of marijuana. This assignment of error is overruled.

No error.

Judges VAUGHN and ERWIN concur.

IN THE MATTER OF THE ESTATE OF DANIEL JAMES COX, JR.

No. 7729SC622

(Filed 6 June 1978)

Rules of Civil Procedure § 4— service by registered mail—return receipt not signed by respondent

The trial court erred in concluding that service of process on respondent by registered mail pursuant to G.S. 1A-1, Rule 4(j)(9)(b) was insufficient because the return receipt was not personally signed by respondent where the mail was addressed to respondent "c/o Ms. Valeri Mixon Tellegrini, Box 3904, 403 Allewood Drive, Charlotte, North Carolina," and the return receipt was signed by Vallaree M. Pellegrinni, since it can be inferred that Vallaree M. Pellegrinni received the mail on behalf of the respondent, and it can be assumed that she was a person of reasonable age and discretion authorized to receive mail and sign the receipt for the addressee.

APPEAL by petitioner appellant, Betris Cox Melton, from *Graham, Judge.* Order entered 20 April 1977 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 26 April 1978.

Petitioner (mother) instituted this special proceedings seeking to have it declared that respondent (father) had abandoned decedent (son) and was, therefore, not entitled to administer decedent's estate or to take from the estate by intestate succession. Summons was returned unserved by the Mecklenburg Sheriff and petitioner sought to serve her petition by registered mail. Petitioner filed an affidavit alleging service by registered mail and attached a receipt of delivery. The receipt reveals that the mail was

addressed to Mr. Daniel James Cox, Sr., c/o Mrs. Valeri Mixon Tellegrini, Box 3904, 403 Allewood Drive, Charlotte, North Carolina, and that the mail was received by Vallaree M. Pellegrinni as evidenced by her signature. Respondent moved to dismiss for insufficiency of service. The Clerk of Superior Court denied the motion. Respondent appealed to Superior Court where an order was entered finding facts and concluding that service "was not completed according to law for that the registry receipt attached to the Affidavit did not bear the signature of Daniel James Cox, Sr., the party upon whom service was sought to be served." The judge declared service invalid and remanded the proceedings to the clerk. Petitioner appealed.

George R. Morrow and J. H. Burwell, Jr., for the petitioner appellant.

Frank L. Schrimsher and John W. Beddow, for the respondent appellee.

MARTIN, Judge.

The question presented by this appeal is whether the trial court erred in concluding that service of process by registered or certified mail, pursuant to G.S. 1A-1, Rule 4(j)(9)(b), is invalid if not personally signed by the party upon whom service of process is sought.

G.S. 1A-1, Rule 4(j)(9)(b) provides:

> "(9) Alternative Method of Service on Party That Cannot Otherwise Be Served or Is Not Inhabitant of or Found Within State.—Any party that cannot after due diligence be served within this State in the manner heretofore prescribed in this section (j), or that is not an inhabitant of or found within this State, or is concealing his person or whereabouts to avoid service of process, or is a transient person, or one whose residence is unknown, or is a corporation incorporated under the laws of any other state or foreign country and has no agent authorized by appointment or by law to be served or to accept service of process, service upon the defendant may be made in the following manner:
>
> * * *

> "b. Registered or Certified Mail.—Any party subject to service of process under this subsection (9) may be served by mailng a copy of the summons and complaint, registered or certified mail, return receipt requested, addressed to the party to be served. *Service shall be complete on the day the summons and complaint are delivered to the addressee*, but the court in which the action is pending shall, upon motion of the party served, allow such additional time as may be necessary to afford the defendant reasonable opportunity to defend the action. Before judgment by default may be had on such service, the serving party shall file an affidavit with the court showing the circumstances warranting the use of the service by registered or certified mail and averring (i) that a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested, (ii) that it was in fact received as evidenced by the attached registered or certified receipt or other evidence satisfactory to the court of delivery to the addressee and (iii) that the genuine receipt or other evidence of delivery is attached. This affidavit shall be prima facie evidence that service was made on the date disclosed therein in accordance with the requirements of this paragraph, and shall also constitute the method of proof of service of process when the party appears in the action and challenges such service upon him." (Emphasis added.)

Petitioner contends that the court erred since the aforementioned rule does not require delivery to the "addressee only" and does not specify that the personal signature of the party sought to be served is an absolute requirement. Petitioner further argues that the rule should be construed liberally and that her affidavit of service establishes a prima facie case which was not rebutted by respondent. Respondent takes the position that a registered mail receipt under Rule 4(j)(9)(b) must bear "either the personal signature of the party sought to be served or a signature which on its face purported to be made in an agency capacity." Otherwise, respondent argues, service could be had upon a defendant by sending the mail to anyone.

In the case of *Lewis Clarke Associates v. Tobler*, 32 N.C. App. 435, 232 S.E. 2d 458, *cert. denied* 292 N.C. 641, 235 S.E. 2d 60 (1977), this Court confronted the question of the validity of service by mail where the process was addressed to George P. Tobler, and was received and signed "G.P.T. by E.S." Holding that plaintiff's affidavit and signed returned receipt showed sufficient compliance with Rule 4(j)(9)(b), the Court in *Tobler* relied upon the reasoning expressed by Professor Louis, principal author of Rule 4(j)(9), in 49 N.C.L. Rev. 235 (1971) and stated:

> "[T]he provision in Rule 4(j)(9)(b) providing that service of process will be complete when the copies of the summons and complaint are 'delivered to the addressee,' contemplates merely that the registered or certified mail be delivered to the address of the party to be served and that a person of reasonable age and discretion receive the mail and sign the return receipt on behalf of the addressee."

On the facts of *Tobler*, this Court held that it could be reasonably inferred that "E.S." received the mail on behalf of Tobler. We believe the reasoning of the Court in *Tobler* is equally applicable to the instant case. In the case at bar, it is a reasonable inference from the return receipt that the summons and complaint were delivered to a person, Valeri Mixon Tellegrini, at an address where respondent apparently received correspondence, he being a transient person. Because of this relationship, we think it can further be reasonably inferred that Valeri Mixon Tellegrini received the summons and complaint on behalf of respondent. The fiction of agency, employed by the courts in accepting a receipt signed by another as proof of service by registered mail, is one "assumed from the relationship between the addressee and the person signing rather than proved." 49 N.C.L. Rev. 235, 255, n. 101 (1971). Finally, it can be assumed that Valeri Mixon Tellegrini was a person of reasonable age and discretion authorized to receive mail and sign the receipt for the addressee.

The return receipt and affidavit of petitioner's attorney averring that after due and diligent search personal service could not be made upon respondent in that he is a transient person, and that copies of the petition and summons were deposited in the U.S. Post Office for mailing on 21 December 1976 by registered mail, return receipt requested, together show sufficient com-

pliance with Rule 4(j)(9)(b) to raise a rebuttable presumption of valid service. *See Finance Co. v. Leonard*, 263 N.C. 167, 139 S.E. 2d 356 (1964). Respondent has made no attempt to rebut this presumption by showing that he did not receive copies of the summons and petition.

We hold, therefore, that the court erred in concluding that service of process was insufficient because the return receipt was not personally signed by respondent.

Reversed.

Judges MORRIS and ARNOLD concur.

DONALD FRANK SHAFFNER, JR. v. DONALD FRANK SHAFFNER, SR.

No. 7721DC520

(Filed 6 June 1978)

Divorce and Alimony § 24.10 — separation agreement — duration of child support — modification improper

Defendant's contractual obligation to support plaintiff, his son, until age 21, or beyond his majority, was a provision of a separation agreement between defendant and plaintiff's mother over which the court could exercise no control absent consent of the parties; therefore, a subsequent child support order, inasmuch as it purported to modify the duration of defendant's support obligation, was without force and effect.

APPEAL by plaintiff from *Harrill, Judge*. Judgment entered 16 May 1977 in District Court, FORSYTH County. Heard in the Court of Appeals 29 March 1978.

Plaintiff instituted this civil action against defendant, his father, seeking to enforce the terms of a deed of separation under which defendant had agreed to support plaintiff until he reached the age of twenty-one (21) years.

In his complaint, plaintiff alleged that on 12 November 1958 he was born of the marriage of defendant and plaintiff's mother, Aurelia G. Shaffner (now Aurelia G. Ruffin). On 20 April 1965, defendant and plaintiff's mother entered into a deed of separation

wherein defendant agreed to pay $17.50 per week for the support of each of their two children until each child reached the age of twenty-one (21) years, such *amount* being expressly subject to modification by a court of competent jurisdiction. On 14 September 1973, defendant filed motion and was awarded custody of the two children. Later, plaintiff returned to his mother, and on 18 July 1975, an order was entered awarding custody of plaintiff to his mother and obligating defendant to pay $32.50 per week for plaintiff's support until he reached the age of eighteen (18) years or was otherwise emancipated. A subsequent order dated 28 July 1975 obligated defendant to pay $60.00 per week for the support of both children. From and since 12 November 1976, plaintiff's eighteenth birthday, defendant has failed and refused to make further payments of child support for plaintiff's benefit.

Defendant filed answer denying his liability for further support of plaintiff. Both parties duly filed motions for summary judgment. From an order allowing defendant's motion for summary judgment and denying plaintiff's motion, plaintiff appealed to this Court.

Randolph and Randolph, by Clyde C. Randolph, Jr., for the plaintiff.

William G. Pfefferkorn and David A. Wallace, for the defendant.

MARTIN, Judge.

The sole question presented by this appeal is whether the contractual obligation undertaken by defendant in the separation agreement to make support payments for plaintiff's benefit until he reached the age of twenty-one (21) years was modified by the 18 July 1975 court order obligating defendant to make such payments until plaintiff "reaches the *age of eighteen years or is otherwise emancipated.*" (Emphasis added.)

Plaintiff contends that the trial court in the case at bar erred in concluding that, by reason of Judge Leonard's order of 18 July 1975, "defendant is under no obligation, contractual or otherwise, to provide support to the plaintiff beyond the latter's eighteenth birthday." He argues that, in the absence of the consent of the parties, Judge Leonard was without authority to modify defend-

ant's contractual obligation to provide support for plaintiff until he (plaintiff) reached age twenty-one (21).

Defendant contends that plaintiff's mother sought and obtained, for plaintiff's benefit, the 18 July 1975 order for the specific purpose of having the payments for plaintiff's support increased over the amounts provided in the separation agreement; and that, having accepted the benefits of this order, plaintiff is estopped to deny the modification of defendant's contractual obligation effectuated by the 18 July order.

It is well settled law that while the provisions of a valid separation agreement cannot be set aside or modified by a court without the consent of the parties, no such agreement between husband and wife can deprive a court of its inherent authority to protect the interests and provide for the welfare of minor children. *Church v. Hancock*, 261 N.C. 764, 136 S.E. 2d 81 (1964); *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963); 2 Lee, N.C. Family Law, §§ 189, 199 (1963). However, the authority of the court to affect the custody of and to require reasonable support for minor children continues only as long as the parents' legal obligation to support exists, *Shoaf v. Shoaf*, 282 N.C. 287, 192 S.E. 2d 299 (1973), and thus, is limited in scope to agreements whose terms provide for the maintenance and support of a child *during his minority*. To the extent an agreement makes provision for the maintenance and support of a child *past his majority*, it is beyond the inherent power of the court to modify absent the consent of the parties and is enforceable at law as any other contract. *Church v. Hancock, supra.* Indeed, a parent can by contract assume an obligation to his child greater than the law otherwise imposes, and by contract bind himself to support his child after emancipation and past majority. *Carpenter v. Carpenter*, 25 N.C. App. 235, 212 S.E. 2d 911 (1975). We believe such was the case here.

In the instant case, the separation agreement clearly provided for plaintiff's support until he reached age twenty-one (21). Nowhere did the agreement limit such support to plaintiff's reaching his majority or being emancipated. We are not unmindful of the fact that at the time the separation agreement became effective, 20 April 1965, twenty-one (21) was the age of majority, and that the subsequent enactment of G.S. 48A-2 lowered the age

of majority from twenty-one (21) to eighteen (18) years of age. However, we cannot, by process of interpretation, rewrite the subject agreement where its terms are plain and explicit. *See Goodyear v. Goodyear*, 257 N.C. 374, 126 S.E. 2d 113 (1962). Moreover, we note that more than four years transpired between the effective date of G.S. 48A-2 (5 July 1971) and the 18 July 1975 order purporting to modify defendant's support obligation during which time defendant made no effort, through negotiation with plaintiff's mother or plaintiff, to limit his liability to his legal obligation. Accordingly, we find that the defendant's contractual obligation to support plaintiff until age twenty-one (21), or *beyond his majority*, was a provision of the separation agreement over which the court could exercise no control absent consent of the parties. *See Owens v. Little*, 13 N.C. App. 484, 186 S.E. 2d 182 (1972). Hence, the 18 July 1975 order, inasmuch as it purported to modify the duration of defendant's support obligation, was without force and effect.

In so finding, we do not nullify the portion of the 18 July 1975 order which increased the *amount* of the support payments for plaintiff's benefit. The separation agreement expressly provided for the modificiation of the *amounts* set out therein by a court of competent jurisdiction. Thus, the court was acting within its authority, in both the 18 July 1975 and 28 July 1975 orders, in increasing the amount of defendant's monthly support payments upon the showing of changed conditions.

Finally, we note that the failure of plaintiff's mother to appeal from the 18 July order has no effect on the present right of plaintiff to enforce defendant's contractual obligation to him under the deed of separation. Plaintiff was not a party to the earlier proceeding and cannot be bound by an order, purporting to modify this contractual obligation, which the court had no power to effectuate.

The trial court's entry of summary judgment for defendant was error. Accordingly, we reverse and remand the cause for entry of summary judgment in plaintiff's favor for the reasons indicated in this opinion.

Reversed and remanded.

Judges MORRIS and ARNOLD concur.

WILLIAM HOWARD LAIL II, A MINOR, BY HIS GUARDIAN AD LITEM, WILLIAM HOWARD LAIL v. BILLY WOODS, A MINOR, AND ERNEST RAY WOODS AND WIFE, MARIE B. WOODS

No. 7725SC337

(Filed 6 June 1978)

1. **Assault and Battery § 1— fight between minors—assault and battery**

In an action to recover for injuries sustained by minor plaintiff in a rock throwing incident, the trial court properly submitted an issue as to assault and battery and did not err in failing to submit an issue as to negligence where there was no evidence that defendant did anything other than participate in a rock fight by throwing rocks at other children.

2. **Assault and Battery § 2— rock fight—self-defense**

The trial court erred in submitting an issue of self-defense to the jury in an action to recover for injuries sustained in a rock fight where the evidence showed that defendant left a position of relative safety and drove his mini-bike back to the rock fight and that defendant thus had no apprehension of real or apparent danger.

3. **Assault and Battery § 3— rock fight—assault and battery—provocation—mitigation of damages**

In an action to recover for injuries suffered by the minor plaintiff when he was struck by a rock thrown by defendant during a rock fight, the trial court should have instructed the jury that if plaintiff, by his own conduct in throwing rocks, provoked or helped provoke defendant into joining in the rock fight or throwing the rock which injured plaintiff, such provocation should be considered in mitigation of plaintiff's damages.

APPEAL by plaintiff from *Thornburg, Judge.* Judgment entered 9 December 1976 in Superior Court, BURKE County. Heard in the Court of Appeals 8 February 1978.

Billy Lail, by his guardian ad litem, brought suit against Billy Woods and his parents for injuries sustained in a rock throwing incident that took place on 14 August 1974. The suit against the parents was later dismissed. The plaintiff was six years old at the time of the incident; the defendant was about twelve. Six children testified as to what occurred. Their testimony tended to show that defendant had antagonized several children who, along with him, were members of a club. After they threw him out of the club, he began to ride his mini-bike up and down the road in front of them. The road led to his home and he was on his father's property. Several children threw rocks at defendant and his mini-bike.

After being struck by a rock thrown by Bobby Laxton, defendant threw a piece of gravel back at Bobby. The plaintiff, who had joined the group at some time during the rock throwing, was hit in the eye. There was evidence that he had thrown several rocks himself. His vision was impaired as a result of his injury.

Issues were submitted to the jury which found that defendant injured the plaintiff by committing assault and battery on him. It also found that the defendant acted justifiably in self-defense. It was, therefore, ordered that plaintiff take nothing by the action.

Claude S. Sitton, for plaintiff appellant.

Mitchell, Teele & Blackwell, by W. Harold Mitchell; Byrd, Byrd, Ervin & Blanton, by Robert Byrd, attorneys for defendant appellee.

VAUGHN, Judge.

Plaintiff assigns as error the court's refusal to submit issues of negligence and contributory negligence to the jury either instead of or in addition to the issues of assault and battery. The complaint had been drafted on the theory of negligence, and plaintiff contends that the evidence raised the question of negligence. The court should properly charge the jury on all theories of recovery supported by evidence. *Morris Speizman Co. v. Williamson*, 12 N.C. App. 297, 183 S.E. 2d 248 (1971); *cert. den.*, 279 N.C. 619, 184 S.E. 2d 113. The evidence in this case shows that all the children mutually engaged in a rock fight which grew out of an earlier altercation. The uncontroverted evidence was that defendant threw the rock at one of the children. That he did not mean to hurt anyone is irrelevant; he intended to participate in the rock fight, an intentional act of violence. It has long been held in this State that because fighting is unlawful, the consent of the parties to fight is no bar to an action by one of them. Where two or more persons join in an affray, each is guilty of an assault and battery upon the others, and each may maintain an action against the others. *Bell v. Hansley*, 48 N.C. 131 (1855). Thus the submission of issues of assault and battery was proper.

[1] This evidence does not, however, support the theory of negligence on defendant's part. "[A]n intentional act of violence is

not a negligent act." *Jenkins v. North Carolina Department of Motor Vehicles*, 244 N.C. 560, 563, 94 S.E. 2d 577, 580 (1956). There are situations where the evidence presented raises questions of both assault and battery and negligence. In the case of *Williams v. Dowdy*, 248 N.C. 683, 104 S.E. 2d 884 (1958), there was evidence that defendant had fired his gun into a group of workers, which would have been an assault and battery, and there was other evidence that, frightened by the advancing crowd, he had fired a warning shot into the ground before him. If injury had resulted from a ricocheting bullet, there was a proper ground for finding negligence. Therefore, instructions on both theories were properly given. Here there is no evidence that defendant did anything other than participate in a rock fight by throwing a rock at other children. Thus only issues based on the theory of assault and battery were appropriately submitted to the jury.

[2] The issue of self-defense, however, should not have been submitted to the jury. Again the evidence was uncontroverted. Defendant left a position of relative safety and drove his minibike back to the rock fight. There is no evidence that he had any apprehension of actual danger. Defendant testified that he "got aggravated with them" and then threw the rocks back. Since the right to self-defense depends upon the defendant's reasonable apprehension of real or apparent danger, *State v. Evans*, 19 N.C. App. 731, 200 S.E. 2d 213 (1973), it was error to instruct the jury upon the issue in the absence of any evidence to that effect. *Gunter v. Winders*, 256 N.C. 263, 123 S.E. 2d 475 (1962).

[3] There is, however, some evidence of provocation by the plaintiff. Although provocation is not a defense to an action for assault and battery, it may be considered in mitigation of the plaintiff's damages. *Lewis v. Fountain*, 168 N.C. 277, 84 S.E. 278 (1915); *Frazier v. Glasgow*, 24 N.C. App. 641, 211 S.E. 2d 852 (1975); *cert. den.*, 286 N.C. 722, 213 S.E. 2d 721; *see generally*, 63 A.L.R. 890. In the case of *Lewis v. Fountain, supra*, the court properly refused to give a requested instruction to the effect that if plaintiff and defendant willingly engaged in a mutual assault upon each other with pistols and plaintiff was injured during the mutual assault, then plaintiff is not entitled to recover. The Supreme Court pointed out that such an instruction would legalize fighting by consent. The case concerned a man going to the home of his

sister to intervene between her and her drunken husband. The two quarreled and exchanged pistol shots. The Court obviously did not wish to approve such self-help measures with their attendant dangers. The situation is similar here, even though children are involved. On the other hand, if the provocation is great, the damages may even be reduced to a nominal amount. *Palmer v. Winston-Salem Ry. and Elec. Co.*, 131 N.C. 250, 42 S.E. 604 (1902). When this case is retried, the jury should be instructed that if plaintiff, by his own conduct in throwing rocks, provoked or helped provoke defendant into joining in the rock fight or throwing the rock which injured him, that factor should be considered in mitigation of his damages.

New trial.

Judges MITCHELL and ERWIN concur.

GEORGE WARD THOMPSON, CLARA THOMPSON KNIGHT AND ELIZABETH THOMPSON GAUSS v. JOHN R. WARD AND WIFE, ELIZABETH WARD; AGNES W. BRABBLE, UNMARRIED; ERVIN L. WARD AND WIFE, EDNA WARD; HANNAH ROUNDTREE WARD, WIDOW AND JUNE STEPNOWSKI AND HUSBAND, STANLEY STEPNOWSKI

No. 771SC310

(Filed 6 June 1978)

Wills § 34— devise of "use of" certain property—no fee simple

Where testatrix devised the "use of" certain property "to the heirs of John Hardy Ward as long as they wish to live there," the will gave to the children of John Hardy Ward, a brother of testatrix's husband, the right to live on, farm and otherwise use the land in question, since, in other parts of the will, testatrix made it clear that she recognized her only child, the residuary beneficiary, and his children as the natural and primary objects of her bounty, and since the testatrix's use of the words "use of" property to convey less than a fee simple was the same throughout the will; therefore, subject only to the right of the last surviving child of John Hardy Ward to use the land, fee simple title to the land vested in the heirs of the residuary beneficiary under the will.

APPEAL by defendants from *Tillery, Judge*. Judgment entered 8 February 1977 in Superior Court, PERQUIMANS County. Heard in the Court of Appeals 6 February 1978.

Thompson v. Ward

This is an action for a judgment declaring the interests of the parties in certain real estate that passed under the holographic will of Emma Ward, which was probated in 1924. Emma was the widow of George W. Ward, from whom she acquired the land. George W. Ward had inherited a one-third interest in the land from his father and had purchased the remaining two-thirds from his two brothers. He had allowed one of his brothers, John Hardy Ward, to farm and live on the land.

Emma Ward was survived by her son of an earlier marriage, Charles Everett Thompson. George W. Ward left no descendants. Defendants are the heirs of his brother, John Hardy Ward. John Hardy Ward was dead at the time the will was executed and, at the time of Emma's death, was survived by his widow and four children. Plaintiffs are the heirs of Charles Everett Thompson.

Defendants claim the fee simple title to the land in question by virtue of the following part of the will:

> "I give the use of the Ward Home Place, consisting of 150 or 160 acres called 'Dr. Mitchell or Snow Hill Tract' to the heirs of John Hardy Ward as long as they wish to live there and the sum of Two thousand (2000.00) dollars to be paid by my executor to the four children of the late John Hardy Ward, Ira, Erwin, Carson and Carroll, one fourth each, share and share alike. I also bequeath to Ira Ward Jenkins my solitaire diamond ring Tiffany setting."

Plaintiffs claim by virtue of the residuary clause in the will by which Emma Ward left the remainder of her property to Charles Everett Thompson.

The court concluded that the will gave the children of John Hardy Ward the right to live on, farm and otherwise use the land in question. Only one child, Ervin, of John Hardy Ward is alive. The court ruled that, subject only to Ervin's right to use the farm, fee simple title to the land is vested in the heirs of Charles Everett Thompson, the residuary beneficiary under the will.

Twiford, Trimpi & Thompson, by C. Everett Thompson and John G. Trimpi, for plaintiff appellees.

Leroy, Wells, Shaw, Hornthal, Riley & Shearin, by Dewey W. Wells and Terrence W. Boyle, for defendant appellants.

VAUGHN, Judge.

The search for testamentary intent is the primary task in the interpretation of this or any other will. We must look at the language employed by the testatrix in the light of the circumstances known to her when she drafted her will. Other "rules of construction" so often recited by the courts are, in many cases, merely labels that are placed on the court's conclusions in order to buttress the result reached.

Emma Ward's husband and her son were both lawyers. Even so, she would probably agree that only lawyers would argue that there could be any doubt as to what she meant when she said, "I give the use of the Ward Home Place . . . to the heirs of John Hardy Ward as long as they wish to live there . . . ." At that time John Hardy was dead and survived by a widow and the four children, to whom she also gave a $2000.00 bequest. Emma Ward's late husband, G. W. Ward, had allowed John Hardy Ward to use that property from 1895 until 1918 when G. W. Ward died. Emma continued to allow John Hardy Ward to use the land until he died in 1919. Thereafter, Emma allowed John Hardy Ward's widow and children to use the land. It seems perfectly clear that Emma intended for John Hardy Ward's widow and children (although unrelated to her) to continue to enjoy that privilege for so long as they wanted to live on the land. As a matter of fact, one of John Hardy Ward's children, Carroll, did live on and use the land until his death in 1976. John Hardy Ward's widow, Laura, lived on the land until her death in 1953. Other than Carroll Ward and his immediate family and Laura Ward, the widow, no one else lived on the land.

In other parts of the will the testatrix made it clear that she recognized her only child and his children as the natural and primary objects of her bounty. Except for several rather small bequests she, specifically as well as by the residuary clause, left them the bulk of her estate including several other tracts of land, cash, securities and jewelry. We also note that she did not hesitate to devise "in fee simple" when that was her intention.

In another part of the will, the devise to Mariah Gates, testatrix elected to devise a privilege of "use" rather than a freehold interest in real estate. There she left the "use" of the house on Dunstan Lane for life, "rent free, repairs to be kept up

by my executor." She apparently knew that her executor would have neither the duty nor right to charge rent or make repairs had Mariah Gates taken a life estate. It seems clear that testatrix's meaning of the "use of" property was the same throughout the will. Ordinarily, when words are used in one part of a will in a certain sense, the same meaning will be given to them when repeated in other parts of the will, unless a contrary interest appears. *Anders v. Anderson*, 246 N.C. 53, 97 S.E. 2d 415 (1957).

Defendants rely heavily on G.S. 31-38 which provides that a devise is presumed to be in fee simple unless the will shows an intent to convey an estate of less dignity. That section merely changed the common law rule that a devise without words of perpetuity or limitation conveyed a life estate only. *Morris v. Morris*, 246 N.C. 314, 98 S.E. 2d 298 (1957). Here, where testatrix only devised the "use of" the property so long as the beneficiaries "wish to live there," she "in plain and express words" showed an intent to devise less than the fee. Defendants further, and correctly, argue that our courts have held that the devise of the "use of" property is the equivalent of a devise in fee. *See e.g., Poindexter v. Trust Co.*, 258 N.C. 371, 128 S.E. 2d 867 (1963); *Schwren v. Falls*, 170 N.C. 251, 87 S.E. 49 (1915). The rule has no application, however, when the will shows an intent to pass an interest that is less than a fee. *See Rountree v. Dixon*, 105 N.C. 350, 11 S.E. 158 (1890).

For the reasons stated, the judgment is affirmed.

Affirmed.

Judges HEDRICK and ERWIN concur.

Singletary v. McCormick

BERTHA MITCHELL SINGLETARY, JULIUS THURMAN SINGLETARY, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED v. FRANK McCORMICK, C. E. INMAN, LLOYD PATE, ELBERT FORD, BOBBY MELTON, R. F. FLOYD, A. D. LEWIS, ECIL GRIFFIN, CHARLES TEDDER, PAT PITTMAN, PAUL THOMPSON, JR., ARGUS GRIMSLEY, LENWOOD RICH, JOHN F. FLOYD AND HAROLD HERRING, DEACONS OF THE FIRST BAPTIST CHURCH OF FAIRMONT, NORTH CAROLINA; ROBERT F. FLOYD, C. V. FLOYD AND A. D. LEWIS, TRUSTEES OF THE FIRST BAPTIST CHURCH OF FAIRMONT, NORTH CAROLINA; NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND THE TOWN OF FAIRMONT

No. 7716SC640

(Filed 6 June 1978)

Cemeteries § 2— relocation of graves—means to enlarge church facilities

The phrase "in order to" found in G.S. 65-13(a)(2) which authorizes grave removal "in order to erect a new church" or "in order to expand or enlarge an existing church facility" should be construed as synonymous with the phrase "as the means to"; therefore, though graves proposed to be relocated by defendants are within the area of a relocated street and not within the actual area of the proposed church facility, nevertheless, the street is to be relocated "as the means to" expand or enlarge an existing church facility, and the relocation of the graves is thus permissible under the statute.

APPEAL by plaintiffs from *Preston, Judge*. Order entered 2 June 1977, in Superior Court, ROBESON County. Heard in the Court of Appeals 27 April 1978.

Named plaintiffs bring this class action to enjoin permanently the trustees and deacons of Fairmont Baptist Church from relocating approximately 45 graves in the existing church cemetery and relocating Church Street away from the church building so that the land area consisting now of the existing street and a part of the cemetery can be used to construct a new sanctuary, church parlor and other facilities in a new building. The "relocated" Church Street would be within the confines of the existing cemetery. Plaintiffs joined the North Carolina Department of Transportation and the Town of Fairmont as defendants.

Defendant-deacons and -trustees in their answer allege that many of the next of kin and descendants of those interred within the cemetery and proposed to be relocated have given their consent to the relocation. Said defendants admit the adoption of a resolution authorizing proceedings for removal of the graves

under G.S. 65-13, and pray for declaratory judgment determining that "defendants have the right to relocate the graves referred to in this answer for the purposes herein expressed, free from further hindrance or claim on the part of any person."

The parties agreed to the class action, listing the names of the decedents and their known next of kin, and further stipulated that:

> "21. The Church does not intend to erect its proposed new Sanctuary upon the area known as the 'proposed route of Church Street', on Exhibit 1; it is not probable that any portion of the proposed new Sanctuary building would be located at a point South of the southern margin of Church Street as it now exists; the actual plans for the erection of the proposed new Sanctuary are not completed, but the Church expects to use some substantial portion of the presently existing Church Street right of way as a site for a portion of said proposed new building, and the Church expects to secure title to the land area in Church Street as it now exists from the North Carolina Department of Transportation in exchange for the easement of the proposed new route of said Street.
>
> 22. The Church plans to remove all of the graves located within the right of way of the 'Proposed Route of Church Street' as shown on Exhibit 2, and also all those located Northeast thereof and West of Main Street and South of Church Street; the land area then remaining North of Church Street as relocated would be used as a part of Church grounds surrounding the proposed new sanctuary building, with some part being used as a parking area for the Church Administrative Offices."

It was also stipulated that there were no disputed facts in the case and that procedural due process was not at issue.

The cause was heard by the trial court without a jury upon the facts stipulated of record and as stated to the court during argument. The court found numerous facts, in particular:

> "16. That if Church Street can be relocated, the Church intends to build its new sanctuary, administrative offices, a media center (library), a church parlor, a senior adult area, and other facilities in a new building which would occupy a

substantial portion of the presently existing Church Street right-of-way, *although none of said building would occupy the area of the intended graves removal, such area being used for the relocation of the existing street.*

17. That the removal of graves contemplated by the defendants is to be conducted by the Church authorities of the First Baptist Church of Fairmont *in order to erect a new church building and other facilities owned and operated exclusively by said church, and in order to expand and enlarge the church's existing facilities.*" [Emphasis added.]

The court concluded that the defendant-trustees' and -deacons' relocation of graves:

". . . is for the purpose of erecting a new church and other facilities owned and operated exclusively by said church, and in order to expand and enlarge existing church facilities, within the meaning of Section 65-13(a) of the General Statutes of North Carolina, . . ."

The court ordered plaintiffs' action dismissed. From this order, plaintiffs appeal.

McLean, Stacy, Henry & McLean by Everett L. Henry for plaintiff appellants.

I. Murchison Biggs for defendant appellees.

CLARK, Judge.

The determination of the issue on appeal requires an interpretation of G.S. 65-13(a)(2), which authorizes grave removal

". . . *in order to* erect a new church, parish house, parsonage, or any other facility owned and operated exclusively by such church; *in order to* expand or enlarge an existing church facility; . . ." [Emphasis added.]

The plaintiffs take the position that the statute must be strictly construed in light of the policy of the law that the sanctity of the grave should be maintained. See *Mills v. Cemetery Park Corp.*, 242 N.C. 20, 86 S.E. 2d 893 (1955). They argue that most of the graves which defendants proposed to relocate are within the area of relocated Church Street, and that under G.S. 65-13(a)(2) a

church authority is not empowered to remove graves in order to relocate a street.

We construe the phrase "in order to" in G.S. 65-13(a)(2) to be synonymous with the phrase "as the means to." Webster's Third New International Dictionary (1968). Though the graves proposed to be relocated are within the area of relocated Church Street, the street is to be relocated "as the means to" expand or enlarge an existing church facility. This interpretation of the statute we find to be consistent with legislative intent of empowering a church authority to make changes to meet the present and future needs of the church membership.

The plans for expansion of the present church facility by the defendants appear to have been made after a thorough study with thoughtful consideration to disturbing existing graves by relocation only to the extent necessary to meet the needs of the church.

This construction of G.S. 65-13(a)(2) we find to be consistent with the ruling in *Mayo v. Bragaw*, 191 N.C. 427, 132 S.E. 1 (1926), which involved a construction of the former statute (C.S. 5030) relating to grave removal. That statute empowered a church to remove graves when it became necessary or expedient "in order to" secure necessary room to enlarge a church building. It was held that the church could remove a grave to build a new vestry room. The present statute is much broader than old C.S. 5030, and reflects a recognition of the need for broad authority by church authority to meet the needs of a growing membership in relocating graves which would restrict that growth.

Affirmed.

Judges ARNOLD and ERWIN concur.

BETTY C. STEELE v. DONALD HOWARD STEELE, JR.

No. 7727DC599

(Filed 6 June 1978)

1. Divorce and Alimony § 7— divorce from bed and board—necessary findings and conclusions

In an action for divorce from bed and board under G.S. 50-7, the trial court should make adequate findings of fact (*i.e.* specific acts of misconduct) to support the conclusion of law that the non-injured party has (1) abandoned the family; (2) maliciously turned the other out of doors; (3) endangered the life of the other by cruel or barbarous treatment; (4) offered such indignities to the person of the other to render his or her condition intolerable; or (5) become an excessive user of alcohol or drugs so that the other's life is burdensome.

2. Divorce and Alimony § 16— alimony order—necessary findings and conclusions

An order granting alimony must contain one of the ten grounds for alimony listed in G.S. 50-16.2 as a conclusion of law, and such conclusion must be supported by findings of fact, which findings usually will involve the actions of the supporting spouse.

3. Divorce and Alimony § 18.10— alimony pendente lite—necessary findings and conclusions

In an order granting alimony pendente lite, the court must conclude as a matter of law that the party seeking alimony pendente lite (1) is the dependent spouse, (2) is a party in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce, and (3) from all the evidence presented pursuant to G.S. 50-16.8(f), (a) is entitled to the relief demanded in the action, and (b) is shown to lack sufficient means whereon to subsist during the prosecution or defense of the suit. Hence, findings of fact as to estates and earnings are necessary to conclude that the spouse is dependent and lacks sufficient resources with which to subsist during the litigation, and the court must also find that this spouse is plaintiff or defendant in one of the four listed actions and that the party has been heard orally, upon affidavit, verified pleading or other proof.

4. Divorce and Alimony §§ 16, 18.10— alimony and alimony pendente lite—necessary findings and conclusions

In the case of both alimony and alimony pendente lite, the order concerning amount must be supported by a conclusion of law that such amount is necessary under the circumstances, and this conclusion of law must be supported by specific findings of fact as to estates, earnings, earning capacity, condition, accustomed standard of living of the parties, as well as other relevant factors. G.S. 50-16.5.

5. Divorce and Alimony § 25.11— child custody order—necessary findings and conclusions

An order awarding child custody must contain a conclusion of law that the award of custody to that particular party "will best promote the interest and welfare of the child," G.S. 50-13.2(a), and such conclusion must be supported by

findings of fact as to the characteristics of the competing parties, which findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child.

6. Divorce and Alimony § 24.9— child support order—necessary findings and conclusions

In orders of child support, the court should make findings of specific facts (*e.g.* incomes, estates) to support a conclusion as to the relative abilities of the parties to provide support, G.S. 50-13.4. To determine the amount of support necessary to meet the reasonable needs of the child for health, education and maintenance (which are conclusions of law), the court must make findings of specific facts as to what past expenditures have been.

APPEAL by defendant from *Bulwinkle, Judge.* Judgment entered 27 April 1977, in District Court, LINCOLN County. Heard in the Court of Appeals 24 April 1978.

M. Clark Parker for plaintiff appellee.

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

ARNOLD, Judge.

This is a domestic case in which plaintiff wife sought divorce from bed and board, custody of the minor child, alimony, alimony pendente lite, and child support. Defendant husband excepted to the signing of the order awarding plaintiff custody of the minor child, child support and possession of the parties' dwelling. He argues that the trial court's order is not supported by sufficient findings of fact and conclusions of law and he asks that this case be remanded to trial court for a further hearing. Plaintiff appellee concedes that the order was not supported by sufficient findings of fact and conclusions of law and concurs in defendant's request for remand. We agree that the case should be remanded but, on remand, the trial court is directed to make findings of fact and conclusions of law based upon the 27 April 1977 hearing from which the trial court's original order was drawn.

We are aware of the difficulties experienced by trial courts in drafting orders in domestic cases. Many cases, both in this Court and in our Supreme Court, have dealt with the problem of insufficient findings of fact. These cases, however, are generally not helpful in explaining what is expected from district court

orders. A cursory review of the controlling statutes may aid those attempting to draft such orders.

[1] In an action for divorce from bed and board under G.S. 50-7, the trial court should make adequate findings of facts (*i.e.* specific acts of misconduct) to support the conclusion of law that the non-injured party has (1) abandoned the family; (2) maliciously turned the other out of doors; (3) endangered the life of the other by cruel or barbarous treatment; (4) offered such indignities to the person of the other as to render his or her condition intolerable; or (5) become an excessive user of alcohol or drugs so that the other's life is burdensome.

[2] In suits for alimony, the order granting alimony must contain one of the ten grounds for alimony listed in G.S. 50-16.2 as a conclusion of law. Findings of fact to support that conclusion must, of course, be made, and usually the finding or findings of fact necessary will involve the actions of the supporting spouse. For example, to conclude that the supporting spouse has committed adultery under G.S. 50-16.2(1) requires the court to find as fact that the spouse is the supporting spouse (see G.S. 50-16.1(4)) and that he or she has committed specific adulterous acts with another party.

[3] Similarly, in suits for alimony pendente lite, the grounds listed under G.S. 50-16.3 are conclusions of law necessary to justify an order granting such alimony. The court, therefore, must conclude as a matter of law that the party seeking alimony pendente lite (1) is the dependent spouse, G.S. 50-16.1(3), (2) is a party in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce and, (3) from all the evidence presented pursuant to G. S. 50-16.8(f), (a) is entitled to the relief demanded in the action, and (b) is shown to lack sufficient means whereon to subsist during the prosecution or defense of the suit. Specific facts which support such a conclusion must be found. Hence, findings of fact as to estates and earnings are necessary to conclude that the spouse is dependent and lacks sufficient resources with which to subsist during the litigation. The trial court must also find that this spouse is plaintiff or defendant in one of the four listed actions and that the party has been heard orally, upon affidavit, verified pleading or other proof.

[4] In the case of both alimony and alimony pendente lite, the order concerning amount must be supported by a conclusion of law that such amount is necessary under the circumstances. This conclusion of law, in turn, must be supported by specific findings of fact as to the estates, earnings, earning capacity, condition, and accustomed standard of living of the parties, as well as other relevant factors. See G.S. 50-16.5.

[5] Before awarding custody of a child to a particular party, the trial court must conclude as a matter of law that the award of custody to that particular party "will best promote the interest and welfare of the child." G.S. 50-13.2(a). Findings of fact as to the characteristics of the competing parties must be made to support the necessary conclusion of law. These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child.

[6] Finally, in orders of child support, the court should make findings of specific facts (*e.g.* incomes, estates) to support a conclusion as to the relative abilities of the parties to provide support. G.S. 50-13.4. To determine the amount of support necessary to meet the reasonable needs of the child for health, education and maintenance (which are conclusions of law), the court must make findings of specific facts as to what actual past expenditures have been. Where past expenditures are below subsistence, due regard, of course, must be given to meeting the *reasonable* needs of the child.

The case *sub judice* is remanded in order that findings of fact and conclusions of law necessary to support the order of 9 May 1977 can be made.

Vacated and remanded.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. RONALD LEE HAMLIN

No. 774SC1043

(Filed 6 June 1978)

Searches and Seizures § 23— affidavit supporting search warrant—sufficiency

An officer's affidavit supplied sufficient facts and circumstances from which a magistrate could find probable cause to issue a search warrant where the affidavit stated that officers had received information that phencyclidine was being sold at a certain place; officers set up a controlled purchase from defendant; officers watched their operative go in and come out of the named place; and the officers took possession of the purchased phencyclidine.

APPEAL by the State of North Carolina from *Browning, Judge*. Judgment entered 17 November 1977, in Superior Court, ONSLOW County. Heard in the Court of Appeals 7 April 1978.

Defendant was charged upon a proper bill of indictment with the felonious manufacture of marijuana and the felonious possession with intent to manufacture, sell, and deliver marijuana, a controlled substance. The charges arose as a result of the seizure of marijuana plants found during a search conducted under a search warrant issued to officers of the Jacksonville Police Department. Before trial, the defendant, through his attorney, moved to suppress the fruits of the search on the grounds that the affidavit portion of the search warrant was insufficient to establish probable cause. The court allowed defendant's motion and issued an order suppressing the evidence obtained by the search. The State appealed.

Attorney General Edmisten, by Assistant Attorney General James Wallace, Jr., for the State.

Bailey and Raynor, by Edward G. Bailey, for defendant appellee.

ARNOLD, Judge.

The State contends that the trial court erroneously suppressed 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. We hold that it did.

In reviewing the magistrate's determination of probable cause, we are limited in the scope of our examination by G.S. 15A-245(a). Since we are unable to find in the record other facts recorded contemporaneously with the affidavit, our examination is confined to the affidavit of Officer J. S. Phillips who signed the following statement:

> "The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: The Special Operations Division has received information that Phencyclidine (PCP) is being sold at said place. On September 9, 1977 an operative working under supervision of Special Operations Agents Phillips and Toth, made a controlled purchase of PCP from Ron Hamlin at said place. Said purchase was controlled by Special Operations Agents Phillips and Toth by watching said operative go in and come out of said place. SOD Agent Phillips took custody of the purchased evidence. Said phencyclicine is in the form of pink tablets."

Generally, in an application for a search warrant, the affidavit is deemed sufficient

> "[I]f 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), *cert. denied sub nom Vestal v. North Carolina*, 414 U.S. 874, 38 L.Ed. 2d 114, 94 S.Ct. 157 (1973).

North Carolina cases which deal with the issue of the sufficiency of an affidavit to support a search warrant have been reviewed. *See, e.g. State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972); *State v. Oldfield*, 29 N.C. App. 131, 223 S.E. 2d 569, *cert. denied* 290 N.C. 96, 225 S.E. 2d 325 (1976); *State v. English*, 27 N.C. App. 545, 219 S.E. 2d 549 (1975); *State v. Foye*, 14 N.C. App. 200, 188 S.E. 2d 67 (1972); *State v. Flowers*, 12 N.C. App. 487, 183 S.E. 2d 820, *cert. denied* 279 N.C. 728, 184 S.E. 2d 885 (1971). Most of these cases deal with search warrants which were issued upon affidavits in which information was obtained from confidential informants. Such search warrants are generally attacked on the

ground that there are insufficient statements of underlying circumstances to justify a finding that the informant is reliable and that probable cause exists. In the present case, however, the initial hearsay statement in the affidavit, that the Special Operations Division (SOD) had received information of the sale of PCP, is not the focal point of the sworn statement. Information contained in the officer's affidavit describes a controlled purchase at the premises to be searched. Two SOD officers observed the operative go into the place and come out with PCP of which one of the officers took custody.

Defendant moved to suppress evidence obtained from the search on the grounds that the search warrant was invalid in that the affidavit contained therein was "insufficient for the finding of probable cause for the issuance of . . . [the] search warrant." That is defendant's sole argument on this appeal. We find no significance in defendant's argument that the affiant made two conclusory statements ("On September 9, 1977, an operative . . . made a controlled purchase of PCP from Ron Hamlin at said place." and "Said Phencyclidine is in the form of pink tablets."). Furthermore, although defendant argues that the affiant made an unsupported hearsay statement, he concedes that such affidavits may be based on hearsay information. *Jones v. U.S.*, 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725 (1960). He contends, nevertheless, that, under *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964), the magistrate must be informed of some of the circumstances underlying the hearsay so that he may determine that the source of the hearsay is reliable. But in the instant case the affidavit did not stop with the hearsay statement that "The Special Operations Division has received information that Phencyclidine (PCP) is being sold at said place." The affiant further detailed the controlled purchase which was made on the same day the warrant was issued.

In view of our case law and close analysis of the affidavit with which we are presented, we conclude that the affidavit supplied a "reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . ." *State v. Harris*, 279 N.C. 307, 311, 182 S.E. 2d 364, 367 (1971).

The trial court's order suppressing evidence was error and, the case is

Reversed and remanded.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. BARRY CHAPPEL

No. 789SC30

(Filed 6 June 1978)

1. **Constitutional Law § 30; Bills of Discovery § 6— discovery—criminal record of State's witness**

The trial court's denial of defendant's pretrial motion to require the State to furnish to him the criminal record of a State's witness did not violate defendant's right of confrontation or G.S. 15A-903(d), since defendant was afforded his right of confrontation when the witness testified at the trial, and G.S. 15A-903(d) does not require the production of a proposed witness's criminal record.

2. **Larceny § 7.3— ownership of property—no fatal variance**

In this prosecution for larceny, there was no fatal variance between indictment and proof as to ownership of the stolen property where the indictment alleged the larceny of the property of "Lawrence Denny, D/B/A Denny's Appliance Mart, Inc." and a witness testified that the stolen merchandise was owned by Lawrence Denny, the owner of Denny's Appliance Mart, that he could not answer whether the property was owned by Denny personally or whether it was part of the corporation's inventory, and that Denny was personally responsible for the merchandise under a floor plan arrangement with Borg Warner.

3. **Constitutional Law § 46; Criminal Law § 91.4— discharge of court-appointed counsel—denial of continuance to obtain new counsel—allowing court-appointed counsel to remain nearby**

Where defendant discharged his court-appointed attorney when his case was called for trial, the trial court did not err in refusing to continue the case until defendant could seek out and employ another attorney or prepare to represent himself or in allowing court-appointed counsel to remain nearby and offer such help as defendant might request.

APPEAL by defendant from *Preston, Judge*. Judgment entered 20 October 1977 in Superior Court, PERSON County. Heard in the Court of Appeals 4 May 1978.

Defendant was tried on a bill of indictment charging him with, on 15 September 1976, feloniously breaking and entering a building occupied by "Lawrence Denny, D/B/A Denny's Appliance Mart, Inc.," and with the felonious larceny therefrom of a Sylvania amplifier and two speakers, the property of "Lawrence Denny, D/B/A Denny's Appliance Mart, Inc.," and having a value of $1,029.85.

Defendant waived counsel at his hearing when probable cause was found, but subsequently the attorney who represented him on this appeal was appointed. When the case was called for trial in October, 1977, defendant discharged his court-appointed counsel and, at his own insistence, attempted to represent himself. Court-appointed counsel was directed to make himself available throughout the trial for such assistance as defendant might desire.

The State's evidence tended to show that the amplifier in question was in the store when it was closed about 5:30 p.m. on 15 September 1976. It was missing when the store manager was called to the premises later that night. A hole had been knocked in a back door, and a window had been broken. Some time later the police located a witness, Newman, who testified that he saw defendant beating on the back door of the store around 8:00 or 9:00 p.m. on the date of the theft. Defendant traded the stolen amplifier to Samuel Bullock from whom it was recovered by the police.

Defendant did not testify but offered evidence tending to show that he was elsewhere when the crime took place. He also elicited testimony tending to show that Denny's Appliance Mart, Inc. was a corporation solely owned by Lawrence Denny.

Defendant was found guilty as charged, and judgment imposing consecutive prison sentences was entered.

Attorney General Edmisten, by Associate Attorney Kaye R. Webb, for the State.

Ramsey, Hubbard & Galloway, by Mark Galloway, for defendant appellant.

VAUGHN, Judge.

[1] Prior to trial, defendant's court-appointed counsel filed a motion by which he sought to require the "prosecutor to produce for the Defendant a copy of the computerized print-out of the criminal record of one, Sammy Bullock." The motion was denied. Defendant contends that the denial of the motion violated his "right of confrontation" and also violated the mandate of G.S. 15A-903(d). Neither argument has merit. He was given the "right of confrontation" when the witness Bullock testified against him. Although not material to our decision, we note that when defendant cross-examined Bullock, he did not ask him about his participation in any prior criminal activity. Defendant's reliance on G.S. 15A-903(d) is misplaced. The Legislature has expressly rejected a proposal to require the State to disclose even the names and addresses of the witnesses it intends to call and also rejected a proposal to require the production of a proposed witness's criminal record. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *see* Official Commentary to G.S. 15A-903. The Legislature recognized the obvious danger of witness harassment and intimidation inherent in such a procedure.

[2] Defendant argues that there is a fatal variance between the indictment and the proof as they relate to the ownership of the stolen property. The indictment alleged that the property was the property of "Lawrence Denny D/B/A Denny's Appliance Mart, Inc." A witness for the State, Martin Hall, testified that the stolen merchandise was "owned by Lawrence Denny, the owner of Denny's Appliance Mart." On cross-examination, Hall testified that he could not answer whether the property was owned by Denny personally or whether it was part of the inventory of Denny's Appliance Mart, Inc. He further explained that Denny's Appliance Mart, Inc., a corporation, was a "sole proprietorship" of Lawrence Denny, that Denny did business as Denny's Appliance Mart, Inc., and that Denny was personally responsible for the merchandise under a floor plan arrangement with Borg Warner. We conclude that there was no fatal variance between the allegations in the bill and the proof at trial. The indictment certainly seems to have served the purpose of the rule as to variance. It advised defendant of exactly what and whose property he was alleged to have taken and was sufficient to enable him to prepare his defense and to protect him from a subsequent prosecution for the same offense.

[3] Defendant discharged his court-appointed attorney when the case was called for trial. On appeal, he argues that it was error for the court to refuse to continue the case until he could seek out and employ another attorney or prepare to represent himself. He further argues that it was error for the court to allow court-appointed counsel to remain nearby and offer such help as defendant might request. Those arguments do not merit discussion.

We have reviewed the assignments of error brought forward on appeal and conclude that no prejudicial error has been shown.

No error.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. JAMES QUINN

No. 7715SC933

(Filed 6 June 1978)

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

Evidence was sufficient to support the trial court's finding that an armed robbery victim's in-court identification of defendant was based on observation of defendant's face at the time of the robbery and was not tainted by an identification made thirty minutes to an hour after the robbery at the crime scene while defendant was sitting in the back seat of a sheriff's department vehicle.

APPEAL by defendant from *Albright, Judge.* Judgment entered 7 July 1977 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 10 March 1978.

Defendant was charged with armed robbery in two bills of indictment, to which charges he pled not guilty. The two cases were consolidated for trial. Prior to trial and in the absence of the jury, defendant moved to suppress evidence of out-of-court and in-court eyewitness identifications. A *voir dire* hearing was held, following which the trial court made findings of fact and conclusions of law and ordered the admission of the challenged testimony.

The evidence for the State on *voir dire* and at trial was substantially the same and tended to show the following: On 7 April 1977 at about 1:15 p.m. defendant and James Bigelow entered Campbell's Station and Grocery, a small country store located on U.S. Highway 70 between Haw River and Mebane in Alamance County. At the time, the proprietor Hugh Campbell was alone in the store. Defendant pulled a gun and told Campbell to open the cash register. At this time, Randy Mann and John Stinson arrived in a wrecker driven by Mann, and Stinson entered the store to get an air gauge. Mann remained outside at the air pump. As Stinson entered the store, Bigelow exited, walked past Mann, and got into a purple MG automobile. Stinson walked up and stood beside defendant, at which time defendant grabbed him around the waist, showed him the gun, and ordered both Stinson and Campbell to lie down on the floor. Defendant took money from the cash register and removed Campbell's and Stinson's wallets and took money from them. The total amount of money taken from the cash register and wallets was between $99.00 and $112.00.

During the time that defendant was carrying out the robbery, Mann observed Bigelow walk back to the door of the store and motion with his hand. He glanced at the two robbers as they left but was later unable to identify them. He heard the door shut on the purple MG and saw it leave the premises headed east toward Mebane and Orange County on U.S. Highway 70. After walking to the door of the store and observing Stinson and Campbell lying on the floor, Mann returned to his wrecker and utilized his CB radio to contact the Sheriff's Department.

At approximately 1:30 p.m. Sergeant Sizemore and Trooper Wade of the Highway Patrol were parked in separate cars just off Interstate 85 at the Efland exit. At this time, an ABC officer drove up and informed them of the robbery and that the suspect vehicle was a purple MG occupied by two black males possibly traveling east on U.S. Highway 70 or north on Interstate 85. Shortly thereafter Sergeant Sizemore observed a purple MG traveling north on the interstate. The two patrolmen pursued the vehicle, and after receiving a radio dispatch confirming the ABC officer's report and further ascertaining that there were two black males inside the MG, they stopped the vehicle as it exited

the interstate at the Highway 86 (Hillsborough-Chapel Hill) exit, in the parking lot of a convenience store.

Defendant and Bigelow were then apprehended. Bigelow had been driving the MG. Defendant was searched and a folded quantity of money in the amount of $53.00 was found in his pocket. The MG was searched; a .32-caliber pistol was found under the passenger seat, and a second quantity of money in the amount of $53.00 was found between the driver's seat and the center console.

Some thirty minutes to an hour after the robbery, the witness Stinson was taken by a deputy sheriff to the arrest scene and was asked if he saw anyone he knew. He answered in the affirmative, identifying defendant who was in the back seat of a sheriff's department vehicle. Stinson testified on *voir dire* that no one pointed defendant out to him that he knew defendant the minute he saw him and that his identification of defendant was based upon his observation of defendant inside Campbell's grocery store.

Defendant presented no evidence.

The jury returned verdicts of guilty as charged in both cases. Thereupon the court imposed judgment sentencing defendant to imprisonment for a term of not less than sixty nor more than eighty years, inasmuch as the offenses were committed while defendant was on federal parole from an active sentence for a bank robbery conviction. From the foregoing judgment, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Ben G. Irons II, for the State.

John P. Paisley, Jr. for defendant.

BROCK, Chief Judge.

Defendant assigns error to the in-court identification of him by the witnesses Stinson and Campbell, on the grounds that they were the result of an improper out-of-court confrontation.

As to the identification of defendant by the witness Campbell, defendant's assignment of error obviously lacks merit. Camp-

bell did not participate in the out-of-court identification procedure. Granted, Campbell's identification was not positive. However, lack of positiveness as to identification goes to the weight of the evidence and not its admissibility. *State v. Bridges*, 266 N.C. 354, 146 S.E. 2d 107 (1966).

As to the admissibility of Stinson's testimony, the facts and circumstances of this case are strikingly similar to those of *State v. Westry*, 15 N.C. App. 1, 189 S.E. 2d 618, *cert. denied* 281 N.C. 763 (1972). We see no need to reiterate Chief Judge Mallard's discussion of the law relating to out-of-court identification procedures and in-court identification independent thereof. In the case *sub judice* the trial court admitted the identification testimony after finding that Stinson had ample opportunity to observe defendant's face, that the in-court identification of defendant by Stinson was of independent origin and did not result from any out-of-court confrontation, and that the out-of-court confrontation did not deny defendant due process of law and did not taint and render inadmissible the in-court identification of defendant by Stinson. These findings are supported by the evidence.

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

No error.

Judges HEDRICK and MITCHELL concur.

STATE OF NORTH CAROLINA v. ALFONZO McKINNEY

No. 7718SC966

(Filed 6 June 1978)

1. Narcotics § 6— forfeitures—new trial—redetermination of forfeiture

The judgment entered after defendant's first trial and conviction for possession of heroin, including the disposition of $6,950 found in close proximity to the heroin, was vacated in its entirety when the appellate court ordered a new trial, and the trial court was required, upon defendant's motion in open court after his second trial and conviction that proper disposition be made of the currency, to hear evidence and rule on the motion.

2. Narcotics § 6— forfeiture—money found in close proximity to narcotics

Currency was not subject to forfeiture under G.S. 90-112 solely by virtue of being found in "close proximity" to the controlled substance which the defendant was convicted of possessing.

3. Narcotics § 6— possession of narcotics—ownership of narcotics and money

The jury's determination of defendant's guilt of possession of heroin was not the equivalent of a judicial determination that he was the owner of that heroin or, by implication, of currency found in close proximity to the heroin.

APPEAL by defendant from *Albright, Judge.* Judgment entered 16 September 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 30 March 1978.

The defendant was charged by indictment for felonious possession of the controlled substance heroin. He was originally tried before Judge James M. Long and a jury in Guilford County. Judgment was entered on 1 July 1976 sentencing the defendant and providing for the disposition of various property introduced at trial. That judgment directed that the controlled substance introduced be destroyed and the "money found in close proximity, $6,950.00 be confiscated and forfeited to the Guilford County School Fund." This judgment was appealed, and we ordered a new trial in the case. *State v. McKinney*, 32 N.C. App. 786, 236 S.E. 2d 734 (1977).

A new trial was held before Judge W. Douglas Albright and a jury. The jury returned a verdict of guilty as charged on 12 September 1977. The trial court entered a judgment sentencing the defendant, and the defendant gave notice of appeal. The defendant, acting through counsel in open court, withdrew this notice of appeal on 14 September 1977.

After withdrawing his appeal, the defendant moved in open court that the court order the return to him of $1,100 in United States currency seized pursuant to a search of 3934-A Hahns Lane in Greensboro, North Carolina, and $6,950 seized pursuant to a search of 806-A Granite Street in Greensboro. Both sums had been previously introduced into evidence during the defendant's trial.

After hearing evidence, the trial court entered a further "Judgment or Other Disposition" in the case ordering the $1,100 seized at 3934-A Hahns Lane be turned over to the defendant.

The trial court entered another further "Judgment or Other Disposition" on 16 September 1977 holding that "as the Honorable James M. Long has heretofore entered an Order as to the disposition of the $6,950.00 which is the subject of this motion, said Order being entered by Judge James M. Long on July 1, 1976, the Court declines to rule on the matter." From this Judgment, the defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Charles J. Murray, for the State.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith, for defendant appellant.

MITCHELL, Judge.

[1] This appeal raises the single issue of the proper disposition of $6,950 seized pursuant to a search of a residence at 806-A Granite Street, Greensboro, North Carolina, and introduced in evidence at trial. The defendant contends that the judgment entered after his first trial was vacated in its entirety by our action in ordering a new trial. The defendant further contends that the trial court is now required to rule upon his motion concerning the disposition of this United States currency. These contentions have merit.

The judgment entered after the first trial of the defendant is composed of two parts. One is entitled "Judgment and Commitment." The other is entitled "Judgment and Other Disposition." Both were parts of the same judgment and were vacated by our action in ordering a new trial. Therefore, the trial court was not precluded from conducting a hearing to determine the proper disposition of the currency. *Simpson v. Plyler*, 258 N.C. 390, 398, 128 S.E. 2d 843, 849 (1963).

[2] Additionally, the original judgment of 1 July 1976, which ordered the $6,950 in United States currency confiscated and forfeited to the school fund, apparently was based solely upon the finding that the currency was found in "close proximity" to the controlled substance. The provisions of G.S. 90-112(a) set forth all of the items subject to forfeiture in cases arising under the North Carolina Controlled Substances Act, G.S. 90-86 through 90-113.8. We need not decide here whether currency may ever be properly

subject to forfeiture under the terms of G.S. 90-112. We do find, however, that the currency in question was not subject to forfeiture under G.S. 90-112 solely by virtue of being found in "close proximity" to the controlled substance which the defendant was convicted of possessing.

The trial court was required, upon the defendant's motion in open court after the new trial, to hear the motion and consider evidence tendered with regard to the proper disposition of the currency and to rule upon that motion. The original order having been vacated by us, a ruling by the trial court on the motion would not violate the general rule precluding one judge of the Superior Court Division from reviewing the decisions of another. *Simpson v. Plyler*, 258 N.C. 390, 398, 128 S.E. 2d 843, 849 (1963); *Veazey v. Durham*, 231 N.C. 357, 57 S.E. 2d 377, *reh. den.* 232 N.C. 744, 59 S.E. 2d 429 (1950); 3 Strong, N.C. Index 3d, Courts, § 9.5, p. 592.

[3] We must remand this case in order that the trial court may consider the defendant's motion and hear such evidence concerning the motion as may be offered by the defendant and other parties. We note that the jury's determination of the defendant's guilt of possession of heroin is not the equivalent of a judicial determination that he was the owner of that heroin or, by implication, of currency found in close proximity to the heroin. Possession is not the equivalent of title. On remand the trial court will be required to enter an order providing for the disposition of the currency as provided by law.

For reasons previously stated, this case must be remanded for further proceedings consistent with law and this opinion, and is hereby so

Remanded.

Chief Judge BROCK and Judge HEDRICK concur.

HILDA H. MUSTEN V. FRED H. MUSTEN

No. 7721DC600

(Filed 6 June 1978)

Injunctions § 7; Divorce and Alimony § 18.14— ordering defendant to vacate property—order improper

In an action for divorce from bed and board where plaintiff requested that she be awarded the residence in which the parties had lived, claiming that the property belonged to her, the trial court erred in ordering defendant to vacate the property, since the property could not have been awarded to plaintiff as alimony *pendente lite*, the court not having found that plaintiff was a dependent spouse; an injunction ordering defendant to vacate the premises did more than maintain the status quo; and the awarding of the property to plaintiff prior to establishing title was improper.

APPEAL by defendant from *Harrill, Judge.* Order entered 23 May 1977 in District Court, FORSYTH County. Heard in the Court of Appeals 25 April 1978.

This is an appeal by the defendant-husband from an order requiring him to vacate premises which had been occupied by him and the plaintiff, his wife, as their home. The plaintiff and defendant were married on 30 October 1964.

On 10 March 1977, the plaintiff filed an action against the defendant in which she alleged that the parties had separated, and that the defendant had done certain things which amounted to an abandonment of the plaintiff. She also alleged that she owned the residence in which the parties had lived and the defendant had refused to vacate the premises. In her prayer for relief, the plaintiff asked for a divorce from bed and board and that she be awarded exclusive possession of the property. In his answer, the defendant contended he was entitled to have a constructive trust in the property on account of advances he had made for its purchase.

After a hearing on 18 March 1977, and before the case was tried, the district court ordered the defendant to vacate the property. Defendant has appealed.

W. Warren Sparrow, for plaintiff appellee.

A. Carl Penney, for defendant appellant.

WEBB, Judge.

We hold that the order of the district court be reversed.

At the outset, we hold that the order requiring the defendant to vacate the premises affects a substantial right and is appealable to this Court. G.S. 7A-27(d)(1). *See Peeler v. Peeler*, 7 N.C. App. 456, 172 S.E. 2d 915 (1970).

It appears that in her complaint the plaintiff has stated a claim for divorce from bed and board. It also appears that in the same count she may have stated a claim alleging that she has title to the real property in question and is entitled to possession of it. This would be a suit in ejectment. *Poultry Co. v. Oil Co.*, 272 N.C. 16, 157 S.E. 2d 693 (1967). Rule 10(b) of the Rules of Civil Procedure requires that claims founded upon separate transactions be stated in separate counts. Although the plaintiff has violated this rule, we shall pass on this appeal as if the two separate claims were properly pleaded.

If the order giving the plaintiff possession of the property was entered as an award of alimony *pendente lite* in the claim for divorce from bed and board, this was error. There was not a finding of fact in the order that the plaintiff was a dependent spouse. It is the law that absent this finding of fact, alimony *pendente lite* may not be awarded. *See* G.S. 50-16.3, and *Sprinkle v. Sprinkle*, 17 N.C. App. 175, 193 S.E. 2d 468 (1972); *Little v. Little*, 18 N.C. App. 311, 196 S.E. 2d 562 (1973), and *Hampton v. Hampton*, 29 N.C. App. 342, 224 S.E. 2d 197 (1976).

If the order giving the plaintiff possession of the real property were entered in the suit in ejectment, this is also error. If the court had any power to enter the order requiring the defendant to vacate the premises it would be under G.S. 1-485, which provides:

> "A preliminary injunction may be issued by order in accordance with the provisions of this Article. The order may be made by any judge of the superior court or any judge of the district court authorized to hear in-chambers matters in the following cases, . . .
>
> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or contin-

uance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

(2) When, during the litigation, it appears by affidavit that a party thereto is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual; or,

(3) When, during the pendency of an action, it appears by affidavit of any person that the defendant threatens or is about to remove or dispose of his property, with intent to defraud the plaintiff."

A preliminary injunction issued pursuant to G.S. 1-485 "serves as an equitable policing measure to prevent the parties from harming one another during the litigation; to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began." *Jolliff v. Winslow*, 24 N.C. App. 107, 210 S.E. 2d 221 (1974), *appeal dismissed*, 286 N.C. 545, 212 S.E. 2d 656 (1975). In this case, the order requiring the defendant to vacate the premises does more than maintain the status quo. An injunction does not ordinarily lie in a suit to try the title to land and we hold it was improvidently entered in this case. *See Armstrong v. Armstrong*, 230 N.C. 201, 52 S.E. 2d 362 (1949) and 47 N.C. L. Rev. 359 et seq.

The plaintiff relies on *Taylor v. Taylor*, 112 N.C. 134, 16 S.E. 1019 (1893). In that case, the plaintiff had procured a divorce *a mensa et thoro* against her husband. She then brought an action against him for possession of land which she owned. She was awarded the possession. In this case, the plaintiff is asking for possession before the title to the land is established.

We note that the provisions of G.S. 1-111 and G.S. 1-112 should prevent the plaintiff from suffering irreparable injury during the pendency of a suit in ejectment. We also note that the record does not disclose that the defendant has filed a bond pursuant to G.S. 1-111. It may be that the plaintiff will want to amend her complaint to allege a suit for ejectment in a separate

count. The district court may rule as to whether it is the proper forum to try the suit in ejectment pursuant to G.S. 7A-243(3).

Reversed.

Judges PARKER and VAUGHN concur.

GARNETT FRANK CURTIS, EMPLOYEE, PLAINTIFF v. CAROLINA MECHANICAL SYSTEMS, INC., EMPLOYER; NATIONAL SURETY INSURANCE CO. (FIREMAN'S FUND) CARRIER; DEFENDANTS

No. 7727IC385

(Filed 6 June 1978)

Master and Servant § 65.1— workmen's compensation—hernia—absence of accident

A hernia suffered by an employee when he lifted a heat pump to place it on a hand truck in order to move it to the place it was to be installed did not result from an "accident" within the purview of the Workmen's Compensation Act where the employee received the injury while carrying out his usual and customary duties in the usual way.

APPEAL by plaintiff-employee from the Industrial Commission. Order entered 10 February 1977 by the Full Commission. Heard in the Court of Appeals 27 February 1978.

Claimant was one of a three-man crew engaged in installing heat pumps while on a construction job for his employer, Carolina Mechanical Systems, Inc., at a junior high school. Plaintiff was the foreman. He filed a claim with the Industrial Commission in which he stated that he "hurt my left lower abdomen, while lifting equipment, in order to move with hand trucks." After a hearing and award before a deputy commissioner, the Commission revised that order and entered its opinion and award in which facts were found, in material part, as follows:

"5. On or about May 13 or 14, 1976, plaintiff along with two other men in his supervision, went to Crest Junior High School in Cleveland County to install heating and air conditioning in the new project. One of the men in the crew was a

welder and the other was a pipe fitter and they were working in the boiler room.

6. Plaintiff was working with heat pump units, 61 in number, which were of three different sizes ranging from 200 to 350 pounds. His routine was to pick them up by the end and set them up in order to get a hand truck under the end to get them through the door into each room where they were to be installed. On that particular day plaintiff picked up one of the larger units with an estimated weight of 350 pounds. When he picked it up he felt a pain and later during the same day had a swelling in his lower left side.

7. Plaintiff had, back in February of 1976, felt a very slight pain in that same area. He had had no swelling, however, and the pain had gone away shortly after its occurrence and the problem had entirely cleared up prior to May, 1976.

8. Plaintiff went to Dr. Banks Cates in Charlotte on May 17, 1976. He was examined and referred to a surgeon, Dr. Jett in Charlotte.

He was hospitalized by Dr. Jett on July 1 and had surgery on July 2. This hospitalization for repair of the hernia was delayed because plaintiff was unable to get in the hospital sooner. Plaintiff was discharged from the hospital on July 6 or 7, 1976, and remained under Dr. Jett's care for several weeks.

Dr. Jett recommended no work for eight weeks after surgery.

9. Plaintiff went to the company to resume his employment after eight weeks and was advised that no work was available.

10. Plaintiff did sustain an injury at the time complained of but did not sustain an injury *by accident* arising out of and in the course of his employment."

Based on the facts as found, the Commission concluded that claimant was not entitled to benefits under the Workmen's Compensation Act. Claimant appealed.

Eubanks and Villegas, by Daniel S. Walden, for plaintiff appellant.

Hedrick, Parham, Helms, Kellam & Feerick, by Philip R. Hedrick, for defendant appellees.

VAUGHN, Judge.

In order to recover compensation for the hernia, the claimant-employee must, among other things, prove to the satisfaction of the Industrial Commission that the hernia immediately followed an accident. G.S. 97-2(18)d. An accident has occurred within the meaning of the act only if there has been an interruption of the usual work routine or the introduction of some new circumstance not a part of the usual work routine. A hernia suffered by an employee does not occur by accident if the employee is merely carrying out his usual and customary duties in the usual way. Injury caused by lifting objects in the ordinary course of the employee's duties is not caused by an accident where the lifting is done in the usual manner, free from confusing or otherwise exceptional conditions. *Beamon v. Grocery*, 27 N.C. App. 553, 219 S.E. 2d 508 (1975). The only evidence as to how the injury occurred came from the lips of the claimant who testified:

> "Heat pumps were installed along the wall. There were 61 heat pumps consisting of three different sizes, ranging from 200 to 350 pounds. I had to pick one end up to set it on the other end so a hand truck could be put under that end to move it. I picked one unit up by myself when I felt pain, and later during the day, I had swelling in my left side and I had to lay down and push the swelling back in on my left side where the pain was. The pain and swelling were in the lower left abdomen. No one else in my crew helped me with this. I had never had any swelling on my left side before the date of the accident. I did have pain there before once back in February when we were unloading them off the truck, but that just occurred that day."

The foregoing evidence would not have permitted the Commission to find that the injury occurred as a result of "interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Harding*

v. Thomas & Howard Co., 256 N.C. 427, 429, 124 S.E. 2d 109, 111 (1962). The Commission, consequently, could not have found that the injury was caused by accident. In fact, claimant seems to concede that there is no evidence in the record as to whether the employee was "merely carrying on the usual and customary duties in the usual way." He, without reference to any authority for doing so, requests that we remand the case to the Industrial Commission for "further testimony." There is no suggestion that there might be "newly discovered" evidence.

The opinion and award of the Industrial Commission is affirmed.

Affirmed.

Chief Judge BROCK and Judge ERWIN concur.

STATE OF NORTH CAROLINA v. FATE ELLER

No. 7823SC4

(Filed 6 June 1978)

Searches and Seizures § 24— affidavit supporting search warrant—informant's tip—sufficiency of affidavit

An affidavit was sufficient to support issuance of a search warrant where the affidavit alleged that defendant had a reputation with local law enforcement personnel as a drug user and dealer; within 30 days of issuance of the warrant an informer had told the affiant of drugs at defendant's home; a second informer reported to the affiant that he had seen drugs in defendant's house within the preceding 36 hours; and the informer had cooperated with the affiant in the past by making a supervised drug buy at defendant's residence.

APPEAL by defendant from *Kivett, Judge*. Judgments entered 12 August 1977 in Superior Court, WILKES County. Heard in the Court of Appeals 27 April 1978.

Defendant was indicted for possession of marijuana with intent to sell and for possession of LSD with intent to sell. These cases were consolidated for trial with charges of possession of phencyclidine (PCP) and dextropropoxyphene (Darvon).

The State's evidence tended to show that officers of the Wilkes County Sheriff's Department and of the SBI served a search warrant on defendant at his home on 22 April 1977. After a *voir dire* hearing, the court found that the search conducted pursuant to the warrant was in all respects lawful and that the fruits of the search were admissible in evidence. The State then showed by expert testimony that the contents of an ammunition box found at the Ellers' residence during the search included 150 grams of marijuana, LSD in powder and tablet form, 5 tablets of phencyclidine, and 1 tablet of dextropropoxyphene. The evidence tended to show that defendant admitted ownership of the ammunition box.

Defendant denied ownership of the ammunition box and any contact with drugs. His wife testified that the box and its contents were hers, that she used drugs and owned those put into evidence, including the Darvon pill (dextropropoxyphene) which had been prescribed for her by a dentist.

The jury found defendant guilty of all charges. Judgments including prison sentences were entered on the convictions involving intent to sell. Sentences were suspended on the other charges.

Attorney General Edmisten, by Assistant Attorney General Jo Anne Sanford, for the State.

Franklin Smith, for defendant appellant.

VAUGHN, Judge.

Defendant contends that the court erred in allowing the State to introduce as evidence the material seized pursuant to the search of defendant's home on 22 April 1977. He alleges that the facts presented to the magistrate were not sufficient as a matter of law to support a finding of probable cause for the issuance of the search warrant. To be sufficient, an application must set forth facts and circumstances from which the magistrate can judge the validity of the informant's conclusion that the evidence sought is at the indicated place and facts and circumstances from which the magistrate may conclude that the information passed on is credible. *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969); *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964).

The affidavit attached to this warrant showed first that defendant had a reputation with local law enforcement personnel as a drug user and dealer. Secondly, it showed that within 30 days of the issuing of the warrant an informer had told Officer Combs, the affiant, of drugs at defendant's home. More helpfully, the affidavit shows that a second informer reported to Combs that he had seen drugs in the house within the preceding 36 hours. These allegations, if credible, are sufficient to support the conclusion that probable cause to search exists. *State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976); *State v. Singleton*, 33 N.C. App. 390, 235 S.E. 2d 77 (1977).

The defendant asserts, however, that there are no circumstances shown from which the magistrate could conclude that the second informer's information was credible. In addition to the above circumstances, the affidavit contained a report that this informer had cooperated with Officer Combs in the past by making a supervised drug buy at the defendant's residence. This history of cooperation was sufficient basis from which the magistrate could conclude that this informer was reliable and that his information was credible. *See State v. Hayes* and *State v. Singleton, supra.* The affidavit was sufficient to support the search warrant; therefore, the drugs seized under that warrant were properly admitted into evidence.

Defendant's second major assignment of error deals with the instruction to the jury explaining the legal term, reasonable doubt. "A trial judge is not required to define the phrase 'beyond a reasonable doubt' unless specifically requested to do so. However, when he undertakes to do so the definition should be substantially in accord with definitions approved by this Court." *State v. Mabery*, 283 N.C. 254, 256, 195 S.E. 2d 304, 306 (1973). Judge Kivett's charge on reasonable doubt is substantially in accord with the law of this State. *State v. Mabery, supra; State v. Flippin*, 280 N.C. 682, 186 S.E. 2d 917 (1972); *State v. Brackett*, 218 N.C. 369, 11 S.E. 2d 146 (1940). There was no prejudicial error in the instructions.

No error.

Judges PARKER and WEBB concur.

STATE OF NORTH CAROLINA v. WILLIAM JUNIOR SPENCE

No. 7714SC1046

(Filed 6 June 1978)

Criminal Law § 75.14— confession—mentally retarded defendant—knowing and intelligent waiver of counsel—insufficient findings

The trial court's findings failed to support its conclusion that defendant knowingly and intelligently waived his right to counsel at his in-custody interrogation, and the court erred in admitting defendant's confession in evidence, where the findings were to the effect that defendant was a twenty-year-old mentally retarded male who possessed the general understanding of a child of six to eight years of age; defendant had difficulty understanding the explanations of his rights by the officers; defendant might not have been able to understand the consequences of his right to an attorney or his right to remain silent; and defendant had an extreme desire to please everyone and might have been inclined to state that he understood his rights even when he did not.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 3 August 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 24 April 1978.

Defendant was tried for murder in the second degree. He was found guilty of voluntary manslaughter. From a sentence of imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General William B. Ray, for the State.

Richard N. Watson, for the defendant.

MARTIN, Judge.

The principal question presented by this appeal is whether the trial judge erred in denying the defendant's motion to suppress evidence of in-custody confession made by defendant to police officers.

It is well settled in this jurisdiction that after the trial judge has conducted a *voir dire* hearing, his findings of fact, if supported by competent evidence, are conclusive and binding on the appellate courts. Nevertheless, the conclusions of law drawn from the facts found are reviewable by the appellate division. *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975).

In the instant case, defendant is a twenty-year-old, mentally retarded black male. From the testimony adduced at the *voir dire*, the court found, *inter alia*, that defendant has an I.Q. ranging from 48 to 63 and possesses the general understanding of a child of six (6) to eight (8) years of age. The investigator who initially attempted to obtain a statement from defendant concluded from talking with defendant that he was mentally retarded. Having read defendant his rights under *Miranda* three times, the investigator was still not sure defendant fully understood what was going on, even though defendant stated that he did. Later on, after several hours of interrogation in an interrogation room, defendant signed a written waiver of rights form. He subsequently admitted killing the deceased. Defendant was examined by two psychiatrists. Dr. Royal stated that he found it difficult to believe that defendant fully understood his various rights. In addition, he found that defendant had an extreme desire to please everyone and in particular, viewed himself as an ally of the police. Dr. Sikes was also of the opinion that defendant could not have understood his various rights at the time of the interrogation, including his right to remain silent or to be represented by an attorney; that defendant did not know what an attorney would have been able to accomplish for him at the time of questioning; and that defendant would have signed anything that was put before him.

Based on these findings, the court concluded that the actions of the police were not coercive and that defendant's statement was freely, voluntarily and understandingly made. We are constrained to find error in this conclusion.

It is now fundamental criminal jurisprudence that when the State seeks to offer in evidence a defendant's in-custody statement, made in response to police interrogation and in the absence of counsel, the State must affirmatively show not only that defendant was fully informed of his rights, but also that he *knowingly* and *intelligently* waived his right to counsel. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966); *State v. White*, 288 N.C. 44, 215 S.E. 2d 557 (1975). To assure the effectiveness of these procedural safeguards, the Court in *Miranda* set high standards of proof for the waiver of the constitutional rights at issue. Thus, along with its burden of showing that defendant has been adequately and effectively apprised of his rights, the State carries a heavy burden of demonstrating that defendant

knowingly and intelligently waived these rights. While the fact that a defendant is youthful and mentally retarded does not compel a determination that he did not knowingly and intelligently waive his *Miranda* rights, *State v. Thompson, supra*, it does call into question his *mental capacity* to do so. In such cases, the record must be carefully scrutinized, with particular attention to both the characteristics of the accused and the details of the interrogation. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973).

Guided by the above stated principles, we find that the State's evidence, and the findings drawn therefrom, fail to demonstrate that defendant knowingly and intelligently waived his right to the presence of counsel. These findings tend to indicate, if anything, that defendant might not have been able to understand the consequences of his right to a lawyer or his right to remain silent; that he might have been inclined to state that he understood even when he did not; and that, from the police officers' own admissions, defendant had difficulty understanding even their explanations of his rights. The import of these findings cannot be ignored. Accordingly, we are of the opinion that the trial court erred in admitting the defendant's confession into evidence.

For the court's error in admitting the defendant's confession, the judgment is vacated and defendant is entitled to a new trial.

New trial.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. PAUL BELL, MARCIA GRAY AND ANGELA MILLANDER

No. 774SC1065

(Filed 6 June 1978)

Searches and Seizures § 23— affidavit supporting search warrant—sufficiency

An affidavit was sufficient to support issuance of a search warrant where the affiant described in detail the circumstances involving a box containing a

hypodermic needle and syringe which was hidden in bushes near the premises to be searched, and the affiant stated that he "observed two black females go by the bushes then turn around and as they went back by the bushes one pick up the box and open it and check the contents, then both walk to [the premises to be searched] and went in this residence," the logical inference from this statement being that the two women carried the box containing the hypodermic needle and syringe with them as they entered the house.

APPEAL by the State from *Godwin, Judge*. Order entered 6 October 1977 in Superior Court, ONSLOW County. Heard in the Court of Appeals 26 April 1978.

Defendants Bell and Millander were indicted for possession of heroin and marijuana with intent to manufacture and sell and defendant Gray was indicted for possession of heroin. Prior to trial defendants moved to suppress the fruits of a search conducted pursuant to a search warrant issued on 28 July 1977 by Magistrate Alton Mills for the premises located at 305 Tower Drive in Jacksonville, North Carolina, on the grounds that the affidavit portion of the search warrant was insufficient to establish probable cause.

Following a hearing, the motion was allowed, the court holding that the items discovered as a result of the search pursuant to the search warrant were unlawfully obtained and were not legally competent to be received in evidence at trial.

The State appealed.

Attorney General Edmisten, by Special Deputy Attorney General Jesse C. Brake, for the State.

Billy Sandlin for defendant Millander, Jimmy F. Gaylor for defendant Gray and Richard S. James for defendant Bell.

BRITT, Judge.

The portion of the application for the search warrant which the court held insufficient to establish probable cause stated:

> The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: On this date this officer received a complaint of a hypodermic needle and syringe found in bushes on Knight Place. A check with five neighbors and each advised occupants of 305 Tower

Drive had been seen on several occasions going to these bushes, I place the box with hypodermic needle and syringe in the bushes. I observed a white car pass the bushes twice and then go to 305 Tower Drive, I observed two black females go by the bushes then turn around and as they went back by the bushes one pick up the box and open it and check the contents, then both walk to 305 Tower Drive and went in this residence

Signature of Applicant: s/ JAMES E. HENDERSON

The State argues that the affidavit in the application for the search warrant clearly implies that the box containing the hypodermic needle and syringe was taken into the house at 305 Tower Drive by the two female defendants who removed it from the bushes. We find this argument persuasive.

G. S. 15A-244 provides:

Contents of the application for a search warrant.—Each application for a search warrant must be made in writing upon oath or affirmation. All applications must contain:

(1) The name and title of the applicant; and

(2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and

(3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the *facts and circumstances* establishing *probable cause* to believe that the items are in the places or in the possession of the individuals to be searched; and

(4) A request that the court issue a search warrant directing a search for and the seizure of the items in question. (Emphasis supplied.)

In *State v. Campbell*, 282 N.C. 125, 128-29, 191 S.E. 2d 752 (1972), the court stated:

> Probable cause, as used in the Fourth Amendment and G.S. 15-25(a), [repealed and replaced by G.S. 15A-244], means a reasonable ground to believe the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971).
>
> Probable cause "does not mean actual and positive cause, nor does it import absolute certainty. The determination of the existence of probable cause is not concerned with the question of whether the offense charged has been committed in fact, or whether the accused is guilty or innocent, but only with whether the affiant has reasonable grounds for his belief. If the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is a probable cause justifying the issuance of a search warrant." 47 Am. Jur., Searches and Seizures, § 22.

In the instant case, we think the affidavit contained in the application for the search warrant is sufficient to establish probable cause. Officer Henderson, the applicant, describes in detail the circumstances involving the box containing the hypodermic needle and the syringe and states that he "observed two black females go by the bushes then turn around and as they went back by the bushes one pick up the box and open it and check the contents, then both walk to 305 Tower Drive and went in this residence." The logical inference from this statement of facts that a reasonably discreet and prudent man would find is that the two women carried the box containing the hypodermic needle and syringe with them as they entered the house. Since the applicant had given such a detailed description of the events up to the point that the two women inspected the contents of the box, it is reasonable to assume that if the women had returned the box to the hiding place rather than carry it with them into the house, the affidavit would have included that information. Tested on the principles stated above, we hold that the affidavit is sufficient. It details underlying facts and circumstances from which the issuing officer could find that probable cause existed to search the premises at 305 Tower Drive.

For the reasons stated, we conclude that the trial court erred in granting the motion to suppress the evidence found pursuant to the search warrant.

Reversed and cause remanded.

Judges CLARK and ERWIN concur.

LINDA LEE SHIELDS, EXECUTRIX OF THE ESTATE OF JAMES L. SHIELDS v. CHARLES FITZ-HENRY PRENDERGAST

No. 7726DC461

(Filed 6 June 1978)

Bills and Notes § 17; Uniform Commercial Code § 25— demand note—statute of limitations

A note which stated that it was "due at request with 30 days notice" was a demand note; therefore, the statute of limitations began to run on the day the note was executed and barred an action on the note instituted more than three years after that date. G.S. 25-3-122(1)(b); G.S. 1-15.

APPEAL by plaintiff from *Sentelle, Judge*. Judgment entered 7 March 1977 in District Court, MECKLENBURG County. Heard in the Court of Appeals 8 March 1978.

Plaintiff, as executrix of the estate of James L. Shields, made a demand on 6 October 1975 of defendant for payment of $2,300.00 allegedly due on a note executed by defendant. Payment was not made, and on 28 November 1975, she brought this action on the note to recover the $2,300.00 plus interest from 3 February 1970. The note, not under seal, is as follows:

"$2,300.00 February 3, 1970

--- after date --- promise to pay to the order of James Shields

Two thousand three hundred & No/100 Dollars

Payable at _____

Value received 8%

s/ CHARLES FITZ-HENRY PRENDERGAST

Due at request

with 30 days notice"

Defendant answered and asserted that the complaint failed to state a claim upon which relief could be granted and that the claim was barred by the Statute of Limitations. Later defendant moved for judgment on the pleadings. The motion was allowed and the action was dismissed.

Howard & Bragg, by Carl W. Howard and Mary Jean Hayes, for plaintiff appellant.

Ervin, Kornfeld & MacNeill, by Winfred R. Ervin, Jr., for defendant appellee.

VAUGHN, Judge.

If the note sued on is a demand instrument, a cause of action accrued against the maker on the date of the instrument, and consequently, the period of limitation began to run in favor of the maker on that date, 3 February 1970. G.S. 25-3-122(1)(b); G.S. 1-15; *Ervin v. Brooks*, 111 N.C. 358, 16 S.E. 240 (1892); *Caldwell v. Rodman*, 50 N.C. 139 (1857). In that event, the judge's conclusion that the suit was barred because it was not instituted within three years, would be correct.

By its terms the note is "Due At request" or payable on demand. Plaintiff contends that because of the inclusion of the term "with 30 days notice," it is not a demand instrument. We disagree. "The debt which constitutes the cause of action arises immediately on the loan. It is quite clear that a promissory note, payable on demand, is a *present debt* and is payable without any demand, and the statute begins to run from the date of it." *Caldwell v. Rodman, supra.* "Instruments payable on demand include . . . those in which no time for payment is stated." G.S. 25-3-108. No time for payment is stated in the note in question, and it is, therefore, payable on demand. The provision for 30 days notice did not postpone the date upon which the period of limitation would begin to run. In *Knapp v. Greene*, 79 Hun. 264, 29 N.Y.S. 350 (1894), a New York court held that when a note was payable "on demand after three months' notice" the Statute of Limitations began to run on the day the note was executed. The court said:

"The real object [of the notice provision] was to give the debtor a reasonable time to pay the debt before the creditor would charge him with the costs of a suit . . . . 'If there was any infirmity in the consideration, or any defect in the binding character of the obligation, he might retain it until all testimony was lost, and defeat the defense. This is the mischief which the statute of limitations was intended to remedy.' "

29 N.Y.S. at 351 (quoting *Palmer v. Palmer*, 36 Mich. 488, 490 (1877)).

In a more recent New York case, suit was brought on a note payable "thirty days after demand." The court followed *Knapp* and said, "The note herein, being payable 'thirty days after demand', the holder was free to make his demand immediately. The notice was for the benefit of the debtor. The debtor could at any time waive the notice and tender the debt." *Environics, Inc. v. Pratt*, 50 A.D. 2d 552, 553, 376 N.Y.S. 2d 510, 511 (1975).

We hold that the note in question was payable on demand, that the period of limitation began to run on the date it was executed, and that the suit to collect on the debt was barred by the Statute of Limitations. The judgment is, therefore, affirmed.

Affirmed.

Judges PARKER and WEBB concur.

ROBERT LOUIS TUTTLE v. MARGARET GODFREY TUTTLE

No. 7721DC601

(Filed 6 June 1978)

Divorce and Alimony § 13.1— absolute divorce—year's separation—social contacts—statutory period uninterrupted

In an action for divorce based on a year's separation, the trial court erred in holding that the parties resumed the marital relationship when defendant stayed in plaintiff's home for one night for the purpose of visiting her children who resided with plaintiff, even though the parties did not engage in sexual relations or resume the marital relationship, since, where there is no cohabita-

tion nor any intent to resume the marital relationship, interruption of the statutory period should not be found (absent some other extenuating circumstances) from the mere fact of social contact between the parties.

APPEAL by plaintiff from *Alexander (Abner), Judge.* Judgment entered 23 May 1977 in District Court, FORSYTH County. Heard in the Court of Appeals 25 April 1978.

Plaintiff filed this action for divorce based on separation for more than one year. Defendant did not file answer. Plaintiff testified at the trial that he and defendant were married in Texas and that two children were born of the marriage. On 3 January 1976, he and defendant separated and have lived continuously separate and apart from each other ever since. Plaintiff retained custody of the children but encouraged defendant to visit them periodically. Defendant visited his home during the Christmas holidays of 1976 for the sole purpose of visiting her children. She spent one night in the home with plaintiff. The children and other members of plaintiff's family were present. Defendant slept with one of the children, and plaintiff slept in another room. At no time did they have sexual relations or resume the marital relationship.

The court found that "plaintiff and defendant resumed the marital relationship as a result of the defendant staying in the home of the plaintiff during the Christmas holidays of 1976." Plaintiff's plea for absolute divorce based on a one-year separation was denied.

Graves & Nifong, by Edward M. Ferguson, Jr., for plaintiff appellant.

VAUGHN, Judge.

There is no evidence in this record that would support a finding that the parties to the lawsuit resumed their marital relationship. The evidence shows that almost a year after defendant left the family home, she returned to visit her children and spent one night with them. In no way does this evidence tend to show that the parties held themselves out as living together. Moreover, such behavior could not reasonably induce others to regard the parties as living together. Where there is no cohabitation nor any intent to resume the marital relationship, interruption of the

statutory period should not be found (absent some other extenuating circumstances) from the mere fact of social contact between the parties. Indeed, in this case, plaintiff's attempts to help maintain contact between his children and their mother should be commended.

The situation should be distinguished from those where the physical separation of the parties was not the result of an intention to sever the marital relationship. *E.g. Mason v. Mason*, 226 N.C. 740, 40 S.E. 2d 204 (1946); *Young v. Young*, 225 N.C. 340, 34 S.E. 2d 154 (1945). In those cases it could reasonably be inferred that visits between the parties were associations of a character that could reasonably induce others to regard them as living together. In the cases cited, the husband was serving in the armed forces during World War II. Visits between the parties when the husband was on leave and other circumstances disclosed in the record of the cases were not consistent with separation under the statute. In this case, however, the undisputed testimony of plaintiff was to the effect that the parties have lived separate since 3 January 1976, and that defendant's visit was openly for the purpose of visiting her children.

The term "separate and apart" has been interpreted many times in light of the interest to be protected.

> "Separation, as this word is used in the divorce statutes, implies living apart for the entire period in such manner that those who come in contact with them may see that the husband and wife are not living together. For the purpose of obtaining a divorce under . . . G.S., 50-6, separation may not be predicated upon evidence which shows that during the period the parties have held themselves out as husband and wife living together, nor when the association between them has been of such character as to induce others who observe them to regard them as living together in the ordinary acceptation of that descriptive phrase." *Young v. Young*, 225 N.C. at 344, 34 S.E. 2d at 157.

See also Dudley v. Dudley, 225 N.C. 83, 33 S.E. 2d 489 (1945); *Earles v. Earles*, 29 N.C. App. 348, 224 S.E. 2d 284 (1976).

> " 'Separation means cessation of cohabitation, and cohabitation means living together as man and wife, though

not necessarily implying sexual relations.' " *In re Estate of Adamee*, 291 N.C. 386, 392, 230 S.E. 2d 541, 546 (1976) (quoting *Young v. Young, supra*).

The court's finding appears to have been based on an erroneous concept of what would legally constitute a resumption of the marital relationship. Plaintiff is, therefore, entitled to a new trial.

New trial.

Judges PARKER and WEBB concur.

IN THE MATTER OF: MARVIN A. MACKIE

No. 7827DC102

(Filed 6 June 1978)

Insane Persons § 1— report of absent physician—denial of confrontation—insufficient evidence

In a rehearing for involuntary commitment to a mental health care facility, the admission of a written report prepared by a physician who was not present at the hearing denied respondent his right to confront and cross-examine the physician, G.S. 122-58.7(e), and the court's findings of mental illness and imminent danger were unsupported by competent evidence where the report furnished the only basis for such findings.

APPEAL by respondent from *Edens, Judge*. Order entered 25 August 1977 in District Court, BURKE County. Heard in the Court of Appeals 26 May 1978.

This is a special proceeding initially instituted by petitioner, Pearline Mackie, for the involuntary commitment of her son, Marvin A. Mackie. The respondent was committed pursuant to the original petition for a term to expire on 26 August 1977. On 1 August 1977 Dr. William A. Moody, Chief of Medical Services at Broughton Hospital, requested a rehearing pursuant to G.S. 122-58.11 to determine the need for continued hospitalization of the respondent.

At the hearing conducted on 25 August 1977, the State presented the testimony of the petitioner who stated that she had not seen the respondent since January of 1977, that she was not aware of his recent behavior, but that she thought "he looked better." The State also introduced into evidence the report of Dr. William A. Moody in which he stated that the respondent is mentally ill and is imminently dangerous to himself or others.

At the conclusion of the hearing the trial judge incorporated by reference the medical report prepared by Dr. Moody and found "by clear, cogent and convincing evidence, [that] the respondent is . . . mentally ill . . . , and is imminently dangerous to himself or others, and is in need of continued hospitalization." From the order recommitting the respondent for a period not to exceed six months, the respondent appealed.

Attorney General Edmisten, by Associate Attorney Christopher S. Crosby, for the State.

Gaither and Wood, by J. Michael Gaither; and Rebecca L. Feemster for the respondent.

HEDRICK, Judge.

The respondent's brief reveals that the respondent was discharged from the mental health facility on 9 March 1978. Nevertheless, our courts have made it clear that a prior discharge will not render questions challenging the involuntary commitment proceeding moot. *In re Hatley*, 291 N.C. 693, 231 S.E. 2d 633 (1977).

In order to support the recommitment of a respondent in an involuntary commitment proceeding, the trial court must find, "by clear, cogent, and convincing evidence that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others, . . . and in need of continued hospitalization." G.S. 122-58.11. The two ultimate facts of (1) mental illness or inebriacy, and (2) imminent danger, must be supported by facts which are found from the evidence and recorded by the District Court. *In re Hogan*, 32 N.C. App. 429, 232 S.E. 2d 492 (1977).

In his two assignments of error the respondent contends that the trial court erred in admitting the medical report of Dr. Moody

without his accompanying testimony and that, therefore, there was no competent evidence to support the trial judge's finding of imminent danger. We agree.

The medical report which was prepared by Dr. Moody and admitted by the trial court contains the findings that the respondent "IS Mentally Ill or Inebriate" and "IS Imminently Dangerous to Himself or Others." General Statute 122-58.7(e), which is made applicable to rehearings by G.S. 122-58.11(c), provides that while medical reports are admissible in evidence in an involuntary commitment proceeding "the respondents right to confront and cross-examine witnesses shall not be denied." Assuming without conceding that Dr. Moody's brief statement and conclusion as to the imminent danger of the respondent would support a recommitment order, his failure to appear at the hearing deprived the respondent of his right of confrontation and cross-examination. *In re Hogan*, 32 N.C. App. 429, 232 S.E. 2d 492 (1977); *In re Benton*, 26 N.C. App. 294, 215 S.E. 2d 792 (1975). Thus, the admission of the report into evidence was error.

The only other evidence presented at the hearing was the testimony of the petitioner, the respondent's mother, that she had not seen the respondent in eight months and was unaware of his recent behavior. This evidence obviously furnished no support for the trial judge's findings of mental illness and imminent danger. Thus, we hold that since the findings of the trial court were unsupported by competent evidence, the order appealed from must be reversed.

Reversed.

Judges PARKER and MITCHELL concur.

STATE OF NORTH CAROLINA v. HAROLD O'NEAL HAIRSTON

No. 7721SC919

(Filed 6 June 1978)

1. **Criminal Law § 89.9— witness's prior silence—indirect inconsistency—cross-examination for impeachment proper**

In a prosecution for possession of a firearm by a convicted felon where a defense witness claimed that the gun in question belonged to her rather than to defendant, the trial court properly allowed the State to cross-examine her for impeachment purposes concerning her silence as to ownership of the gun at the time of defendant's arrest, since prior silence can be used to impeach the in-court testimony of a witness as an indirect inconsistency if it would have been natural to mention the substance of the testimony at the previous time.

2. **Criminal Law § 92.3— multiple charges against one defendant—consolidation proper**

Defendant was not prejudiced by consolidation of a charge of possession of heroin with a charge of possession of a firearm by a convicted felon since defendant waived his right to severance by failing to make a motion therefor prior to trial and since the trial court removed from the jury's consideration the charge of possession of heroin.

APPEAL by defendant from *Albright, Judge*. Judgment entered 29 June 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 6 March 1978.

Defendant was charged in proper bills of indictment with possession of a controlled substance, to wit: heroin; and possession of a firearm by a convicted felon. Upon his pleas of not guilty, the State offered evidence tending to show the following:

On 2 January 1977 at approximately 10:00 p.m., several police officers entered a house in Winston-Salem, North Carolina, pursuant to a search warrant. As one of the officers entered a back room, he observed the defendant, who was sitting at a bar with a female companion, turn, remove a gun from his belt and drop it to the floor. The occupants of the house, including the defendant, were detained while the police conducted a search of the premises. The search revealed five tinfoil packets, each containing a powdery substance later determined to be heroin. One year prior to his arrest on the present charges, the defendant was convicted of conspiracy to commit felonious assault.

At the close of the State's evidence, the trial court granted the defendant's motion to dismiss the charge of possession of heroin. The defendant then offered evidence tending to show that the gun found in the house was owned and possessed by another occupant of the house, Joyce Orr.

The jury found the defendant guilty of possession of a firearm by a convicted felon, and judgment was entered imposing a prison sentence of 18-60 months. Defendant appealed.

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

Larry F. Habegger for the defendant appellant.

HEDRICK, Judge.

[1] By his third assignment of error the defendant contends that the trial court erred to his prejudice in allowing the State to cross-examine the defense witness, Joyce Orr, as to her prior silence with respect to the substance of a portion of her testimony at trial. In an effort to impeach her testimony that she had possessed the gun found on the premises and that she had dropped it to the floor when the police officers entered the house, the District Attorney asked her why she had failed to disclose this information when she talked to a police officer on the day of the arrest. Over the objection of the defendant the witness replied, "I don't know. I just didn't tell him about it."

Citing *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972), the defendant argues that the witness' prior failure to exculpate the defendant by claiming the gun at the time of arrest could not be used to impeach her testimony at trial. We do not agree. It is established that prior silence can be used to impeach the in-court testimony of a witness as an indirect inconsistency if " 'it would have been natural to mention' " the substance of the testimony at the previous time. 282 N.C. at 340, 193 S.E. 2d at 75. We are of the opinion that if the gun had belonged to the witness and she had dropped it upon the floor as she claimed at trial it would have been reasonable and natural for her to have mentioned this in her prior conversation with the police officer. Her failure to do so was the proper subject of impeachment by the State. Thus, we think the question excepted to was proper for impeachment purposes.

[2] The defendant also contends that "[t]he consolidation of a charge of possession of heroin with a charge of an unrelated felony stigmatizes the defendant and prevents the jury from fairly considering the charge of the other felony." According to G.S. 15A-926, "[t]wo or more offenses may be joined . . . for trial when the offenses, . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." The determination of whether to consolidate charges against a defendant in a single trial is addressed to the sound discretion of the trial judge. *State v. White*, 256 N.C. 244, 123 S.E. 2d 483 (1962). However, with several exceptions not pertinent to this case, "[a]ny right to severance is waived" if the defendant fails to make a motion therefor prior to trial. G.S. 15A-927(a)(1). The defendant in the present case failed to make a motion for severance at any time before or during trial. Furthermore, the trial judge instructed the jury that "the Court has withdrawn from your consideration [the charge of possession of heroin] and you will not consider that particular charge further." Accordingly, this assignment of error is overruled.

No error.

Chief Judge BROCK and Judge MITCHELL concur.

BARBARA PERRY STALLINGS v. BOBBY RAY STALLINGS

No. 7710DC421

(Filed 6 June 1978)

Divorce and Alimony § 19— sexual misconduct by former wife—effect on alimony

Post-divorce sexual misconduct by defendant's former wife did not constitute a legal basis for terminating or modifying an award of alimony to the former wife. G.S. 50-16.6(a); G.S. 50-16.9(a).

APPEAL by defendant from *Barnette, Judge*. Order entered 12 January 1977 in District Court, WAKE County. Heard in the Court of Appeals 2 March 1978.

This case came before the court for hearing on defendant's motion in the cause to terminate or reduce alimony and reduce

child support payments. These payments were first ordered by the Wake County District Court in 1972 after making full findings of fact and conclusions of law. Grounds for alimony under G.S. 50-16.2 were the defendant's abandonment of plaintiff and her children and defendant's indignities to the person of plaintiff. Some time later the parties were divorced. Defendant has remarried.

After hearing evidence from both parties, the court made findings of fact to which no exceptions are taken. Among those findings are the following.

> "4. For some time prior to the hearing in this matter, plaintiff has permitted a man named Jimmy Riley to stay at her home for approximately five or six nights each month; on said occasions plaintiff and Mr. Riley slept together in the same bedroom in the same bed, and they engaged in sexual intercourse.
>
> 5. The children of the parties were aware that the plaintiff and Mr. Riley were sleeping together, and they were present at those times."

The court concluded that these facts did not constitute a legal basis for terminating or reducing alimony payments to plaintiff.

Brenton D. Adams, for plaintiff appellee.

Tharrington, Smith & Hargrove, by J. Harold Tharrington and Steven L. Evans, for defendant appellant.

VAUGHN, Judge.

In well researched briefs, both parties have directed us to cases from other jurisdictions that have considered what effect a wife's post-divorce sexual misconduct has upon a decree directing her former husband to pay her alimony. We elect not to review these cases because, among other reasons, our decision here must depend upon the General Statutes of this State. Plainly stated, the award of alimony was made pursuant to statute. The court cannot modify or take away that award of alimony except as provided by statute. There is no statute that allows the court to modify an award of alimony solely because of post-marital fornication.

G.S. 50-16.9(a) provides that an award for alimony may be modified upon a showing of changed circumstances. We hold, however, that the "changed circumstances" must bear upon the financial needs of the dependent spouse or the ability of the supporting spouse to pay. The term has no relevance to the post-marital conduct of either party.

Defendant seeks to rely on the statutory proscription against an award of alimony to a spouse against whom an issue of adultery has been found [G.S. 50-16.6(a)] as being an expression of legislative intent that indiscriminate sexual activity by a former wife should bar her right to continue to receive alimony from her former husband. The reliance is misplaced because the statute, plain on its face, does not so provide, and the courts are, quite properly, powerless to so extend the reach of the statutes.

The Legislature has seen fit to provide that if a dependent spouse receiving alimony under an order of a court of the state shall remarry, the right to alimony shall terminate. G.S. 50-16.9(b). If so inclined, the Legislature could have added other conditions under which the award could be terminated. It did not do so.

The order from which defendant appealed is affirmed.

Affirmed.

Chief Judge BROCK and Judge ERWIN concur.

STATE OF NORTH CAROLINA v. LEWIS SINGLETON

No. 7728SC1000

(Filed 6 June 1978)

Criminal Law § 95.2— limiting instruction—time of giving

It was not error for the trial court to fail to instruct the jury immediately at the time evidence of defendant's prior conviction was admitted into evidence that such evidence could be considered solely as bearing upon defendant's credibility and not as substantive evidence of his guilt or innocence of the offense charged, since the court did so instruct the jury during its final instructions.

State v. Singleton

APPEAL by defendant from *Friday, Judge*. Judgment entered 8 September 1977 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 4 April 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. From a verdict finding him guilty as charged and judgment sentencing him to imprisonment for not less than ten years nor more than fifteen years, the defendant appealed.

The State offered evidence tending to show that the defendant, Lewis Singleton, told his fiancee, Janice Boger, that he was going to kill her. He shot her seven times on 20 May 1977. She was wounded in the arm, leg and stomach. The defendant then drove Miss Boger to the hospital where she was admitted. After being advised of his rights and signing a waiver, the defendant confessed the shooting to law enforcement officers. Janice Boger positively identified the defendant as the individual who shot her and caused her injuries.

The defendant testified that he did not shoot Janice Boger. He stated that he had confessed to the police in order to protect the Boger woman's son, and the son had actually done the shooting.

On cross-examination the defendant admitted a prior conviction for bank robbery. In apt time, the defendant objected to the question and requested an instruction by the trial court limiting the jury's consideration of the answer to the issue of the defendant's credibility. The trial court indicated that it would give such an instruction at a later time and did so during its final instructions to the jury.

From the verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury and judgment thereon, the defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Amos Dawson, for the State.

Peter L. Roda, Public Defender for the Twenty-Eighth Judicial District, for defendant appellant.

MITCHELL, Judge.

The defendant assigns as error the trial court's failure to immediately instruct the jury, at the time evidence of his prior conviction was admitted into evidence, that such evidence could be considered solely as bearing upon his credibility and not as substantive evidence of his guilt or innocence of the offense charged. The defendant contends that failure to so instruct the jury until the time of its final instructions constituted prejudicial error by the trial court.

Even when totally inadmissible evidence is admitted, it will ordinarily be regarded as harmless if later excluded or withdrawn and the jury instructed to disregard the evidence. 1 Stansbury, N.C. Evidence (Brandis Rev. 1973), § 28. In some cases, however, cautionary admonitions of the trial court are ineffective to erase from the minds of the jury the effects of prejudicial testimony. *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968). Those cases in which cautionary instructions have been found insufficient to remove prejudice have involved situations in which it appeared from the entire record that the prejudicial effect of the evidence was not or probably could not be removed from the minds of the jurors by the court's instruction. *State v. Aycoth*, 270 N.C. 270, 154 S.E. 2d 59 (1967); 4 Strong, N.C. Index 3d, Criminal Law, § 96, p. 473. No such situation is presented by this case.

In the case *sub judice* the State was entitled to ask questions of the defendant and to have him answer concerning his prior criminal convictions. The defendant was not entitled to have this evidence withdrawn or removed from the minds of the jurors. He was merely entitled to a limiting instruction. We find this was accomplished by the instructions of the trial court to the jury immediately before the jury began consideration of the case. No more was required.

The defendant was afforded a fair trial free from error, and we find

No error.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. JAKE DAVIS

No. 7726SC1052

(Filed 6 June 1978)

Assault and Battery § 14.4— assault with deadly weapon inflicting serious injury— sufficiency of evidence

In a prosecution for assault with a deadly weapon inflicting serious injury, evidence was sufficient to be submitted to the jury where it tended to show that a witness saw defendant shoot the victim, and defendant confessed to the shooting.

APPEAL by defendant from *Martin (Harry C.), Judge*. Judgment entered 26 July 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 25 April 1978.

Defendant was convicted of assault with a deadly weapon inflicting serious injury. Judgment imposing a prison sentence was entered.

Attorney General Edmisten, by Associate Attorney Thomas F. Moffitt, for the State.

Public Defender Michael S. Scofield, by Assistant Public Defender Fritz Y. Mercer, Jr., for defendant appellant.

VAUGHN, Judge.

We first note that the appeal is subject to dismissal for failure to comply with the Rules of Appellate Procedure. The record on appeal was settled by stipulation on 28 September 1977. Instead of causing it to be certified by the clerk within 10 days as required by Rule 11(e), the appellant allowed the case to lie dormant until 20 December 1977, when he caused it to be certified by the clerk. We have elected, however, to afford defendant the appellate review he seeks through publicly paid counsel.

The only assignment of error is one in which defendant contends the evidence was insufficient to take the case to the jury. The argument is, at best, tedious in the light of the following evidence. About 1:00 a.m. on 11 February 1977, defendant was on Belmont Street in Charlotte with a loaded .22 caliber rifle. He had said something about killing someone that night. He attempted to

intervene in a frolic between Reginald Kidd and Vera McAlway. Vera told defendant not to interfere. Annie Cox was looking out of a nearby window and saw defendant shoot Reginald. Reginald was taken to the hospital for gunshot wounds in the stomach. Defendant first claimed that Vera had done the shooting. Then he said, "If it wasn't for you, I wouldn't have never shot him."

No error.

Judges PARKER and WEBB concur.

TIMOTHY DANIEL LINEBERRY v. TONY (NMN) WILSON

No. 7721SC666

(Filed 6 June 1978)

Appeal and Error § 6.7 — denial of motion to add liability insurer as defendant — premature appeal

Purported appeal from the denial of plaintiff's motion to amend his complaint to add defendant's automobile liability insurer as a party defendant in plaintiff's action to recover for injuries suffered when he was struck by defendant's automobile is dismissed as premature. G.S. 1-277(a).

APPEAL by plaintiff from *Albright, Judge*. Order entered 20 June 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 23 May 1978.

Jenkins, Lucas, Babb and Rabil, by Jonathan V. Maxwell, for plaintiff appellant.

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

VAUGHN, Judge.

This is an action to recover damages for injuries allegedly suffered by plaintiff when struck by an automobile operated by defendant. Defendant answered and denied negligence, among other things. Thereafter, plaintiff moved to amend his complaint to "[a]dd Nationwide Mutual Insurance Company to the list of defendants" and, in substance, to allege that defendant had in ef-

fect an automobile liability insurance policy with Nationwide. Plaintiff now attempts to appeal from the denial of his motion. The purported appeal is not from an order "which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial." G.S. 1-277(a). The attempted appeal is, therefore, fragmentary and premature.

We must also note that appellant has attempted to file a "Reply Brief," a practice expressly prohibited by Rule 28(h) of the Rules of Appellate Procedure.

The appeal is dismissed.

Dismissed.

Judges MORRIS and MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 JUNE 1978

BARIN v. DEPT. OF MOTOR VEHICLES No. 7710IC530	Industrial Comm. (TA-5351) (TA-5352) (TA-5353) (TA-5354)	Affirmed
GARRIS v. GARRIS No. 773DC332	Craven (76CVD732)	Affirmed in Part Vacated in Part
IN RE HAROLD No. 7725DC527	Catawba (71CVD1647)	Affirmed
IN RE MACKEY No. 7829DC104	Transylvania (77SP121)	Reversed
IN RE NANCE No. 7820DC101	Union (77SP151)	Reversed
MARTIN v. MILLER No. 778SC644	Wayne (74CVS3568)	Affirmed
MATTHEWS v. POWELL No. 7712SC695	Cumberland (75CVS3053)	Affirmed
POPE v. WRIGHT No. 7714DC653	Durham (76CVD1080)	Affirmed
SINGLETON v. BOYD No. 772DC731	Beaufort (76CVD323)	Affirmed
STATE v. BEAN No. 7812SC26	Cumberland (77CRS5769)	No Error
STATE v. BELLAMY No. 7712SC1050	Cumberland (77CRS6796)	No Error
STATE v. BLACK No. 7818SC17	Guilford (77CRS25352)	No Error
STATE v. COLLINS No. 7810SC131	Wake (77CRS44135) (77CRS44136)	No Error
STATE v. CREECH No. 788SC97	Wayne (77CR2624)	No Error
STATE v. DORTY No. 7814SC115	Durham (77CRS11546) (77CRS11547)	No Error
STATE v. GREEN No. 7830SC69	Cherokee (77CRS557)	No Error

STATE v. HALL No. 7825SC77	Caldwell (77CRS889) (77CRS890)	No Error
STATE v. HARRIS No. 7726SC1021	Mecklenburg (76CR65638)	No Error
STATE v. HILL No. 7820SC76	Stanly (77CRS4689) (77CRS4690)	No Error
STATE v. HOLMAN No. 7715SC971	Alamance (77CRS2916)	No Error
STATE v. HONEYCUTT No. 7829SC33	McDowell (77CR1153)	No Error
STATE v. HUFF No. 779SC999	Vance (73CRS4625)	Appeal Dismissed
STATE v. MANNING No. 772SC1075	Beaufort (77CRS1511)	New Trial
STATE v. MICKENS No. 7826SC64	Mecklenburg (77CR12775)	New Trial
STATE v. MOODY No. 7816SC96	Robeson (77CR7772)	No Error
STATE v. MOORE No. 7825SC74	Burke (77CRS4286)	No Error
STATE v. MURCHISON No. 7820SC23	Moore (77CR2263)	No Error
STATE v. PEARCE No. 7710SC1041	Wake (77CRS13588)	No Error
STATE v. PRYCE No. 7720SC1076	Richmond (76CRS123)	No Error
STATE v. RABB No. 7822SC40	Davidson (76CR14578)	No Error
STOWE v. MOORE No. 7726DC517	Mecklenburg (76CVD4660)	Affirmed
STRICKLAND v. CLARK No. 7719DC627	Randolph (76CVD719)	Affirmed

KENNETH MOORE MURPHY v. EDWARDS AND WARREN, A PROFESSIONAL ASSOCIATION, MARK EDWARDS AND JOE WARREN, III

No. 7726SC551

(Filed 20 June 1978)

1. **Attorneys at Law § 5.1— malpractice—negligence—conflict of interest—proximate cause**

The fact that plaintiff brought an action for attorney malpractice both on grounds of negligence and grounds of improper conduct by the attorneys in representing clients with conflicting interests does not alter or remove the requirement that the actions of the attorneys be shown to have been a proximate cause of the alleged damages. It is not required in either situation, however, that the actions of the attorneys be the sole cause of the client's loss.

2. **Attorneys at Law § 5.1— malpractice—negligence—conflict of interest—insufficient evidence of proximate cause**

In an action for malpractice brought against attorneys by their client based on alleged negligence and conflict of interest in carrying out duties on behalf of the client in regard to investments made by the client in a cattle feeding and selling venture with a Kansas company, plaintiff's evidence was insufficient to show that alleged negligence or unethical conduct by defendant attorneys was a proximate cause of the loss of plaintiff's investments in the cattle venture and was, therefore, insufficient to withstand defendants' motion for a directed verdict where it failed to show whether the Kansas company and the owner of the company were unable to meet their obligations to investors and others at any of the times plaintiff made investments in the cattle venture.

APPEAL by defendants from *Gaines, Judge*. Judgment entered 29 December 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 4 April 1978.

This appeal involves an action for malpractice brought against attorneys by their client for alleged negligence in carrying out duties on behalf of the client arising from the attorney-client relationship and for representing the client while also representing others with conflicting interests. The defendants admitted in their answer to the complaint of the plaintiff that an attorney-client relationship existed between them and the plaintiff at all times pertinent to this appeal.

The plaintiff offered evidence in the form of his own testimony and that of the defendants and others. The plaintiff's evidence tended to show that the plaintiff, Kenneth Moore Mur-

phy, called Mark Edwards, one of the defendants, early in January of 1974 to seek his assistance with regard to a $15,000 investment. Murphy had first thought his investment was in a tomato farm but had discovered subsequently that it had been made in a cattle feeding venture. Murphy expressed displeasure that his investment was in cattle rather than in the tomato farming operation he had hoped to use as a tax shelter. The defendant Edwards told Murphy that he too was involved in a cattle investment which might be better than that in which Murphy had invested.

As a result of the telephone conversation between the plaintiff and the defendant Edwards, a meeting was held on 14 January 1974 in the law office of the defendants. At the meeting the plaintiff was introduced to one Gresham Northcutt. Edwards explained generally the nature of a possible investment in a cattle feeding and selling operation with McKinney Cattle Company [hereinafter the "Company"] of Hutchinson, Kansas. Northcutt was to be the "connection" between the investors and the Company. The plaintiff attended this meeting with the certified public accountant who handled his affairs. The plaintiff testified that during this meeting the defendant Edwards told him that he could expect an annual return on his investment in the neighborhood of 60 percent and that the investment was as safe or safer than government bonds. During the meeting Edwards at no time suggested the plaintiff should invest but stated that he had invested in the venture and felt it to be sound.

The plaintiff had been in communication with members of the trust department of The Northwestern Bank and wished to establish a foreign trust to be managed by the bank's branch in the Cayman Islands in order to avoid taxes. The defendant Edwards researched this prospect and informed the plaintiff that he could not lawfully avoid taxes in this manner.

The plaintiff did not immediately invest in the venture. He testified that, between 14 January 1974 and 8 March 1974 he did "some checking" on Wallace McKinney, the head of the Company, with a friend who was employed by The Northwestern Bank. The plaintiff testified that this friend advised against his investing in a cattle venture. The plaintiff further testified that his banker friend offered to check on McKinney and, after checking, in-

formed the plaintiff that McKinney was highly thought of in the community. The plaintiff also testified that prior to investing any money in the venture he spoke to Mr. Wallace McKinney directly by long distance telephone call on 28 January 1974 and 4 March 1974.

On 3 March 1974 the plaintiff forwarded a contract for 1,200 feeder cattle with the Company and a check in the amount of $180,000 directly to McKinney in Kansas. He had previously gotten the contracts from Gresham Northcutt, although it was conceded by the defendants that the contract form had been prepared for Northcutt by the defendant Warren who had amended a form contract previously used by the Company. Essentially the contracts executed by the plaintiff and other investors provided that the Company was to use the investors' money to purchase cattle for the investors. The Company was then to borrow money for the purchase of feed against the value of the cattle. It would feed the cattle until they were ready for market and sell them at a profit guaranteed by means of presale contracts entered into prior to the purchase of the cattle.

The Company was to segregate the cattle in order that they could be identified as belonging to particular investors. The investment contract executed by the plaintiff provided for a finder's fee of $3.00 per head purchased to be paid by the investor to Northcutt. The contract also provided that it was to be governed by the law of Kansas. Northcutt had numerous financial dealings with McKinney and the Company and had set up BeTex Corporation to receive these finder's fees with McKinney's approval.

At the time the plaintiff forwarded the contract for 1,200 steers and the $180,000 check to McKinney, he did not pay the finder's fee to Northcutt as provided in the contract. Northcutt called the defendant Edwards and informed him that the plaintiff was going to feed 1,200 steers and had not provided the finder's fee required. During April of 1974, the plaintiff forwarded the finder's fee directly to Northcutt. Northcutt then sent one-third of the fee, or $1,200, to the defendants pursuant to an agreement previously entered with them. Both the plaintiff and the defendant testified that the plaintiff did not inform them he had made the investment at this time. The defendant Edwards testified,

however, that he was probably aware of an investment by the plaintiff as a result of receiving $1,200 from Northcutt pursuant to their agreement. The evidence was in conflict as to whether the fee to the defendants was for representing Northcutt, BeTex Corporation, the plaintiff or all of these.

On 4 June 1974 the plaintiff discussed with Edwards the possibility of obtaining more feeder cattle. He did not remember the contents of that conversation but stated that they talked about the Company's cattle operation generally. On 11 June 1974 the plaintiff forwarded a contract for 200 more cattle to McKinney with a check in the amount of $30,000. The plaintiff paid Northcutt a $600 finder's fee at this time, and one-third of the finder's fee was forwarded by Northcutt to the defendants. The plaintiff had no knowledge of whether the defendants knew of this contract.

The contract of March, 1974, provided for payment of the principal and profits to the plaintiff by the Company on 20 September 1974. When this payment was not forthcoming, the plaintiff telephoned the defendant Edwards on several occasions. These calls were made between September and early November. The plaintiff testified that the defendant Edwards informed him that McKinney was having trouble with one of the banks in Kansas. Edwards stated that the examiners had objected to money being used for the benefit of investors outside the trading area, and McKinney had been required to pay off those loans by selling some of his own cattle. Edwards also told him that it wasn't too unusual for the payments not to be forwarded when due under the contracts as the Company's bookkeeping was sloppy. The plaintiff also talked directly to McKinney by long distance telephone call on four occasions between 22 October 1974 and 15 November 1974.

The plaintiff was paid $56,000 profit and $3,900 interest from the March contract on 11 November 1974. He spoke to the defendant Edwards on that date and informed him that he had received the profit on his first investment of $180,000, but that he had not received the principal. The defendant Edwards stated that perhaps McKinney thought the plaintiff wanted to "roll it over" or reinvest the principal in a similar contract.

Edwards wrote a letter to the plaintiff on 12 November 1974 in which he requested the plaintiff inform him if he did not get his investment back. Edwards heard nothing further from the plaintiff during the month of November.

The defendant Warren went to Kansas in November to check on the investments. On 15 November 1974 he learned that McKinney had unlawfully used investors' money to pay a personal note to a Kansas bank. He discussed this matter with McKinney and indicated to him that this action was totally improper and violated his obligations under the investment contracts. Warren testified that knowledge of these facts "raised red flags" concerning the contracts. Numerous other North Carolina investors represented by the defendants, however, received full payment after this meeting. Warren did not learn the amount of the personal note paid by McKinney, which was $489,000, until 26 December 1974.

The plaintiff, having last talked personally with McKinney on 15 November 1974, reinvested his original $180,000 in another contract, or "rolled over" his investment, on 25 November 1974. The plaintiff also invested another $30,000 in an additional feeder cattle contract with the Company at this time. The plaintiff testified that he was not satisfied with the "rollover" but that "it looked like the best thing I could do at the time, hoping that things might work out." The plaintiff did not consult with the defendants with regard to increasing his investment by $30,000, as he did not think it was necessary to inform them of his intention to invest. The defendants received no fee in connection with this investment.

During his visit to Kansas and discussion with McKinney on 25 November 1974, the defendant Warren attempted to obtain full payment for all investors. McKinney promised at that time that payment would be forthcoming. Warren wrote McKinney a letter on 2 December 1974 urging payment and accusing McKinney of possible improper or illegal conduct. Warren testified that he had no additional knowledge at this time but was mad because McKinney hadn't made payment as he had promised. Warren learned from Northcutt on 17 December 1974 that the plaintiff had "rolled over" his $180,000 investment with McKinney. On 17 December 1974, Warren again wrote a letter of complaint to McKinney.

Edwards talked to the plaintiff on 10 December 1974 and told him he felt things were going well as everyone had been paid. He based this statement on the fact that he had received payment on his own investments four days previously. Later during the day of 10 December 1974, however, Edwards and Warren discovered that three investors in Georgia had not been paid. They informed the plaintiff of this fact on the same day.

The defendant Edwards called the plaintiff on 23 December 1974 to tell him that Wallace McKinney was coming to Charlotte later that month and to ask if the plaintiff wished to meet with Edwards concerning the anticipated visit. The plaintiff told Edwards at that time that he had worked out his problems and had "rolled over" his investment.

The defendants met with McKinney and officers of the Hutchinson National Bank on 26 December 1974 for the purpose of having him answer questions about the status of the Company. On the following day, the same individuals, together with a number of the investors, met with McKinney. At this time all were informed that McKinney and the Company did not show enough assets to satisfy the claims of investors who had purchased cattle. The defendant Edwards testified that this was the first occasion to his knowledge on which either McKinney or the Company had not had assets sufficient to satisfy outstanding obligations.

McKinney informed the defendants on 26 December 1974 that he was operating a "ponzi deal" or using new investors' funds to pay principal and interest to former investors. The defendants initiated a suit on behalf of the plaintiff and other investors on 27 December 1974. In January of 1975, however, the defendants informed the investors of a potential conflict of interest which would preclude them from representing the investors in that case.

At the conclusion of the plaintiff's evidence, the defendants moved for a directed verdict in their favor on the stated grounds that the plaintiff's evidence, when considered in the light most favorable to him, failed to present a case of actionable negligence against any of the defendants proximately causing injury to the plaintiff. The court denied the motion and the defendants presented their evidence which will not be summarized here. At the close of the defendants' evidence, they again moved for a

directed verdict on the stated grounds. The trial court denied the motion. The jury returned a verdict against the defendants, and the defendants moved for judgment notwithstanding the verdict. The trial court denied the motion and entered judgment. From verdict and judgment ordering the plaintiff recover $180,682.41 from the defendants, the defendants appealed.

Andrew D. Taylor, Jr., Robert A. Melott and Edwin Marger for plaintiff appellee.

William E. Underwood, Jr. and J. J. Wade, Jr. for defendant appellants.

MITCHELL, Judge.

By their exceptions and assignments of error relating to the trial court's denial of their motions to dismiss and for judgment notwithstanding the verdict, the defendants have presented for decision on appeal the question of whether the trial court erred in denying the defendants' motions for a directed verdict made at the close of the plaintiff's evidence and renewed at the close of all the evidence, in rendering a judgment on the verdict and in denying the defendants' motions for judgment notwithstanding the verdict. In determining whether the evidence was sufficient to withstand the defendants' motions for a directed verdict pursuant to G.S. 1A-1, Rule 50, all of the evidence which tends to support the plaintiff's claim must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which may be legitimately drawn therefrom, with contrasts, contradictions, conflicts and inconsistencies resolved in his favor. *Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 186 S.E. 2d 198 (1972). *See also Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969). We find that, when subjected to these rules, the evidence introduced did not constitute a showing sufficient to withstand the defendants' motions for a directed verdict.

[1] The general rule that negligence is actionable only when it is a proximate cause of the damages claimed applies in actions against attorneys for negligence in representing their clients. Annot., 45 A.L.R. 2d 5 (1956). The fact that the plaintiff brought this action for attorney malpractice both on grounds of negligence and on grounds of improper conduct by the defendants in representing clients with conflicting interests, does not alter or remove

this requirement that the actions of the attorneys be shown to have been a proximate cause of the alleged damages. Annot., 28 A.L.R. 3d 389 (1969). It is not required in either situation, however, that the actions of the attorneys be the sole cause of the client's loss. Annot., 28 A.L.R. 3d 389 (1969); *see also Wise v. Vincent*, 265 N.C. 647, 144 S.E. 2d 877 (1965).

[2] Assuming arguendo that an attorney-client relationship existed between the parties herein, as admitted in the defendants' answer, and that the defendants were negligent in performing their duties as the plaintiff's attorneys and improperly represented clients with conflicting interests, we find the evidence insufficient to support his claim for relief. The evidence, when construed in the light most favorable to the plaintiff, is devoid of any indication that the damages alleged were proximately caused by the negligence or conflict of interest of the defendants. There is no evidence from which it can be inferred that, on any of the occasions the plaintiff invested with the Company, it was unable to meet its obligations. Conversely, there is no evidence tending to show that at any of those times the Company was able to meet those obligations. There is a similar lack of evidence with regard to McKinney's ability to meet his obligations.

The plaintiff did offer evidence tending to show that the defendants had knowledge by 25 November 1974 that McKinney had engaged in certain illegal and improper conduct. This is not equivalent, however, to a showing as to the actual financial condition of McKinney or the Company at any of the times pertinent. The possible motivation of an individual for engaging in illegal or improper conduct with regard to financial dealings are literally limitless. Financial difficulty causing inability to meet one's obligations constitutes only one possible motivation among many. Others, including carelessness, basic dishonesty and incompetence, are equally likely. The evidence of illegal and improper conduct by McKinney in a highly speculative area of financial dealings, therefore, could only have led the jury to speculation and conjecture as to the actual financial status of either McKinney or the Company. As the jury was required to determine the actual financial status of McKinney and the Company at various points in order to find a causal connection between the acts or omissions of the defendants and the loss of the plaintiff, they

were left to base such determinations of actual financial status and resulting loss solely upon speculation and conjecture which will not support a verdict. *See Ingold v. Light Co.*, 11 N.C. App. 253, 181 S.E. 2d 173 (1971).

The plaintiff also offered evidence tending to show that in late December, 1974, McKinney and the Company were unable to meet their financial obligations. This is not evidence, however, tending to show whether they were unable to meet their obligations at any of the times the plaintiff invested. There is, therefore, no evidence tending to show that a more complete initial investigation or later monitoring of the investment by the defendants would have indicated any inability or unwillingness to meet financial obligations on the part of McKinney or the Company which would or should have discouraged the plaintiff from investing. This lack of evidence also represents a failure to make any showing that, had the defendants been engaged in completely ethical and proper conduct, the plaintiff would have been spared loss. As the plaintiff offered no evidence tending to show that either the alleged negligence of the defendants or their alleged improper and unethical conduct was a proximate cause of his loss, his evidence does no more than raise conjecture as to these matters insufficient to withstand the defendants' motion for a directed verdict. *Compare Tillis v. Cotton Mills*, 251 N.C. 359, 111 S.E. 2d 606 (1959) *and Meares v. Construction Co.*, 7 N.C. App. 614, 173 S.E. 2d 593 (1970) *with Ingold v. Light Co.*, 11 N.C. App. 253, 181 S.E. 2d 173 (1971).

The trial court having denied their motion for a directed verdict at the close of the plaintiff's evidence, the defendants elected to offer evidence. In passing upon a motion for directed verdict made at the close of all the evidence, a defendant's evidence that tends to contradict or refute the plaintiff's evidence is not considered, but other evidence presented by a defendant which is not in conflict with that of the plaintiff may be considered in ascertaining whether the evidence is sufficient to raise an issue for the jury. *Blanton v. Frye*, 272 N.C. 231, 158 S.E. 2d 57 (1967); *Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 186 S.E. 2d 198 (1972). Upon review of the evidence offered by the defendants in its entirety and drawing every legitimate inference therefrom in favor of the plaintiff, we find the defendants' evidence added nothing tending to show a causal relationship between the alleged conduct of the

defendants and the plaintiff's damages. The trial court's denial of the defendants' motion for a directed verdict at the close of all the evidence was, therefore, erroneous. The judgment of the trial court must be reversed and the verdict set aside. As the defendants moved in apt time for judgment notwithstanding the verdict, the cause is remanded to the trial court with the direction that judgment be entered in accordance with the defendants' motion for a directed verdict in their favor. *Nichols v. Real Estate, Inc.*, 10 N.C. App. 66, 177 S.E. 2d 750 (1970).

For the reasons stated, the judgment of the trial court is

Reversed and the cause remanded.

Chief Judge BROCK and Judge HEDRICK concur.

GREENSBORO-HIGH POINT AIRPORT AUTHORITY v. PEARL TAYLOR IRVIN, CHARLES WATSON IRVIN, JR. AND WIFE, MARY S. IRVIN, JOHN LAFAYETTE IRVIN AND WIFE, NANCY B. IRVIN, DORIS IRVIN EGERTON AND HUSBAND GEORGE G. EGERTON

No. 7718SC817

(Filed 20 June 1978)

1. **Eminent Domain § 7.7— good faith taking for public purpose—lack of necessity alleged—insufficient allegations**

In a condemnation proceeding where petitioners sought to acquire title to land owned by respondents for the purpose of expanding a regional airport, respondents' contention that petitioner failed to show a necessity for the taking of their land was not before the court on appeal, since petitioner carried its burden of proving that the land in question was being taken in good faith for a public purpose, but respondents made no specific allegations tending to show bad faith, malice, wantonness or oppressive and manifest abuse of discretion by petitioner.

2. **Eminent Domain § 7.3— condemnation proceeding—prior good faith negotiations required**

In a condemnation proceeding instituted by petitioner to acquire title to land owned by respondents, evidence was sufficient to support the trial court's finding that petitioner negotiated in good faith for the purchase of respondents' property prior to instituting condemnation proceedings where such evidence tended to show that petitioner was aware that respondents felt that their land was worth in excess of one million dollars; petitioner offered

respondents an amount equal to the highest of several appraisals secured by petitioner; the offer was rejected by respondents; and petitioner made no counter offer, such offer not being necessary for compliance with G.S. 40-11 and G.S. 40-12 which require a condemnor to "make a bona fide effort to purchase by private negotiation" prior to instituting condemnation proceedings.

3. Eminent Domain § 7— airport authority—statutory authority to institute condemnation proceedings

Respondents' contention that G.S. 40-10 prohibits an airport authority from condemning the land in question because of the presence thereon of one or more dwelling houses is without merit, since G.S. 40-10 applies only to corporations named in Article 1 of G.S. Chapter 40 but not to corporations deriving their power to condemn from some other act of the legislature, and the airport authority derives its power to condemn from Chapter 98, Public-Local Laws of 1941 as amended.

APPEAL by respondents from *Walker (Hal H.), Judge.* Judgment entered 7 July 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 March 1978.

On 1 July 1975, petitioner Greensboro-High Point Airport Authority (Authority) filed its petition instituting condemnation proceedings pursuant to G.S. Chapter 40, seeking to acquire fee simple title to a 90.35 acre tract of land owned by respondents for purposes of the expansion of the Greensboro/High Point/Winston-Salem Regional Airport. Responses were filed on behalf of the respondents challeging, *inter alia,* the necessity of the taking of their land, the sufficiency of the Authority's effort to purchase the land by private negotiations, the constitutionality of the taking of the property, and denying, generally, the allegations of the Authority's petition.

The matter came on for hearing before John F. Yeatts, Jr., Assistant Clerk of Superior Court of Guilford County, on 11 May 1976, at which time the parties presented evidence. On 5 August 1976, an order was entered containing findings of fact and conclusions of law, overruling respondents' defenses, and appointing Commissioners of Appraisal to determine the compensation which the Authority should pay to respondents.

On 27 August 1976, the Commissioners took their oath and conducted a hearing. On 24 November 1976, the Commissioners filed their report with the clerk, assessing respondents' damages at $310,000.

Respondents filed objections and exceptions to the report of the Commissioners and the matter was heard by J. P. Shore, Clerk of Superior Court of Guilford County; on 28 February 1977, a Judgment of Confirmation was filed by the clerk confirming the report of the Commissioners. Respondents gave notice of appeal to superior court.

Upon stipulation of the parties, the superior court determined the appeal based upon the record of the proceedings before the clerk, which consisted essentially of transcripts of testimony and exhibits. Based upon the record and the oral arguments presented on behalf of the parties, the trial court, on 7 July 1977, entered judgment setting out findings of fact and conclusions of law favorable to the Authority, overruling respondents' various exceptions and objections, and affirming the Judgment of Confirmation except insofar as it related to the amount of compensation to be paid to respondents, upon which question respondents are entitled to a trial by jury.

Respondents gave notice of appeal to this Court from the judgment of the superior court.

The factual circumstances which have given rise to this litigation are, to the extent necessary for a determination of this appeal, reflected in the trial court's findings of fact, pertinent paragraphs of which are set out in the opinion which follows.

Cooke & Cooke, by William Owen Cooke, for petitioner.

Armistead W. Sapp, Jr., and Dees, Johnson, Tart, Giles & Tedder, by J. Sam Johnson, Jr., for respondents.

BROCK, Chief Judge.

Respondents' challenge to the Authority's efforts to annex the land in question is brought forward in three assignments of error presented in three arguments. At the outset, we note that the Authority derives its existence and powers from Chapter 98, Public-Local Laws of 1941, as amended. Section 7 of said Chapter 98, as amended by Chapter 601, Session Laws of 1943 and Chapter 793, Session Laws of 1969, authorizes the Authority to acquire needed property by exercise of the power of eminent domain pursuant to Chapter 40 of the North Carolina General Statutes. Section 6 of the aforementioned Chapter 98, Public-

Local Laws of 1941, declares that any lands acquired, owned, etc. by the Authority are so acquired, owned, etc. for a public purpose. *See also* G.S. 63-5. It is also clearly established by judicial decisions that the taking of land for the establishment and maintenance of a municipal airport is for a public purpose. *Vance County v. Royster*, 271 N.C. 53, 155 S.E. 2d 790 (1967).

[1] For their first assignment of error, respondents contend that petitioner has failed to show a necessity for the taking of their land. Respondents present various factual arguments and legal theories in an attempt to raise a defense of lack of necessity, primarily aimed at a failure of the Authority to show precisely when the land will be needed for the specific use envisioned. However, we hold that the allegations of the responses were not adequate to raise the question of necessity in the trial court and the question is thus not before this Court on appeal.

As noted *supra*, the taking of land for airport purposes is a taking for a public purpose. As a general rule, once the public purpose is established, the necessity or expediency of the taking is a legislative, and not a judicial question. *City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E. 2d 179 (1972); *Jeffress v. Greenville*, 154 N.C. 490, 70 S.E. 919 (1911). To the foregoing rule proscribing judicial interference with the condemning body's determination of necessity, there is an exception, to wit: "Upon *specific allegations* tending to show bad faith, malice, wantonness, or oppressive and manifest abuse of discretion by the condemnor, the issue raised becomes the subject of judicial inquiry as a question of fact to be determined by the judge." (Emphasis added.) *City of Charlotte v. McNeely, supra*, 281 N.C. at 690, 190 S.E. 2d at 185, and cases cited therein.

The Authority commenced this action by filing a verified petition wherein the jurisdictional requirements as set out by G.S. 40-12 were fully alleged, including allegations as to necessity. An examination of the responses filed by respondents reveals no allegations as to necessity which rise above a denial of petitioner's allegations; there are no "specific allegations tending to show bad faith, malice, wantonness, or oppressive and manifest abuse of discretion" so as to invoke judicial review of the Authority's determination. *See Redevelopment Commission v. Grimes*, 277 N.C. 634, 178 S.E. 2d 345 (1971).

The sole factual question raised by the Authority's allegations of, and respondent's denial of necessity for condemnation is whether the property is being condemned in good faith to conduct public business. Webster, Real Estate Law in North Carolina § 358, pp. 479-480 (1971). The trial court made the following pertinent findings of fact (parenthetical references to the transcript of hearing before the Clerk of Superior Court and to exhibits are omitted):

"V. Petitioner's Board of Directors, at a meeting held on 19 March 1968, approved a plan for the expansion and enlargement of the facilities of the Greensboro/High Point/Winston-Salem Regional Airport prepared by Paul Stafford Associates-Arnold Thompson Associates, Inc. Said plan was entitled 'Master Plan for the Greensboro/High Point/Winston-Salem Regional Airport'. This plan provided for the construction of a new terminal building, new cargo handling facilities and other facilities connected with the airport. Said plan provided for such new construction in the northwest quadrant for the four quadrants formed by the airport runways entitled '5-23' and '14-32'. The relocation and expansion of facilities shown by said plan was to enable petitioner to provide adequate facilities for the rapid increase in the use of the airport by members of the public and to meet the increased demands of the public for airport services. The plan included the property owned by respondents which is described in Paragraph VI of the petition as part of the property which it would be necessary for petitioner to acquire in order to carry out the expansion plan."

* * *

"VII. In 1970, new federal regulations required the construction of a new taxiway parallel to Runway 5-23 at a location other than the location shown in the 1968 Master Plan. As a result, the cargo area shown on the 1968 Master Plan had to be relocated, and, to that end, a layout plan was prepared by Southern Mapping and Engineering Company changing the 1968 Master Plan by moving the proposed new location of the cargo area for the expanded airport facilities onto said tract of land owned by respondents. This new

layout plan which changed the 1968 Master Plan was approved by the Board of Directors of petitioner at a meeting held on 24 May 1971."

* * *

"X. The Board of Directors of petitioner, at a meeting held on 29 August 1974, approved a 1973 update of the 1968 Master Plan which incorporated the amendment to the 1968 Master Plan effected by the layout plan prepared by Southern Mapping and Engineering Company which had been approved by the Board of Directors at a meeting held on 24 May 1971. The update of the 1968 Master Plan is entitled 'Master Plan for the Greensboro/High Point/Winston-Salem Regional Airport' and it was prepared by Arnold Thompson Associates, Inc. This 1973 Master Plan included respondents' property as a part of the expanded airport and also designated its use for cargo area."

* * *

"XII. Respondents' property is located in the northwest quadrant of the airport which is the area in which the projected expansion is to be located. Petitioner has already carried out many of the proposals for expansion set forth in the 1968 Master Plan. Two Fixed Base Operations are now located in the northwest quadrant of the airport as well as a new Control Tower and a new Weather Bureau. Petitioner has employed an architect to design a new terminal building to be constructed in the northwest quadrant as contemplated by the Master Plan. The architect has also been retained to design cargo facilities, but is not presently working on this project."

* * *

"XIV. Public interest and public necessity require petitioner to take and acquire for the use and benefit of petitioner and the public the fee simple title to the tract of land located near the Greensboro/High Point/Winston-Salem Regional Airport in Friendship Township, Guilford County, North Carolina, which is described in Paragraph VI of the petition. Petitioner in good faith has found that it requires said tract of land described in Paragraph VI of the petition

> for the purpose of carrying on and conducting public business which petitioner is authorized to conduct and carry on. Said tract of land is needed and required in order that petitioner may use the same for cargo handling activities in connection with the planned expansion of the Greensboro/High Point/Winston-Salem Regional Airport, including the construction of a cargo building thereon, and also in order to facilitate the use by petitioner of its other properties for airport purposes and, in addition, said property is required in connection with the general development and expansion by petitioner of the Greensboro/High Point/Winston-Salem Regional Airport. Said acquisition of said property by petitioner in fee simple is necessary for the proper maintenance, improvement and development of the airport."

These findings of fact, which establish that the Authority carried its burden of proof to show that the land in question is being taken in good faith for a public purpose, are supported by evidence which was before the trial court and are thus conclusive on appeal. *Blackwell v. Butts*, 278 N.C. 615, 180 S.E. 2d 835 (1971). Respondents' first assignment of error is overruled.

[2] For their second assignment of error, respondents contend that the evidence does not support the trial court's finding that the Authority negotiated in good faith for the purchase of respondents' property prior to instituting condemnation proceedings. We disagree.

The condemnation proceedings set out in Article 2 of G.S. Chapter 40 can be invoked by a corporation possessing the power of eminent domain if the condemnor "is unable to agree for the purchase of any real estate required" for its purposes. G.S. 40-11. A petition filed to institute condemnation proceedings must allege "that the corporation has not been able to acquire title [to the real estate], and the reason of such inability." G.S. 40-12. In the present case, the Authority alleged that it made a good faith effort to purchase the land in question but that it was unable to agree on a price with respondents. This allegation was denied by respondents, thus raising an issue of fact for the trial judge, upon which the Authority bore the burden of establishing the facts as alleged. Webster, *supra*, § 358, pp. 479-480.

As to the question of the Authority's attempts to acquire the property by purchase, the trial court made the following findings

of fact (parenthetical references to the transcript and exhibits are, once again, omitted):

"VIII. As a result of a request by petitioner's staff personnel, appraisals of the property of respondents described in Paragraph VI of the petition were made by Wayne Sudderth and Calvin Reynolds, both competent real estate appraisers. On 19 February 1973, Wayne Sudderth reported an appraisal of $225,000.00 for respondents' property, and on 20 March 1973 Calvin Reynolds report an appraisal of $244,375.00 for respondents' property. Calvin Reynolds was also employed by petitioner to conduct negotiations for the purchase of properties needed by the Authority in its expansion program. One of the employees of Mr. Reynolds in the performance of these duties was R. J. Leftwich. In April, 1973, Mr. Leftwich endeavored to determine on behalf of petitioner, if respondents might be interested in selling this property to petitioner for the sum of $225,500.00. Mr. Leftwich met with respondents and conveyed to respondents an offer by petitioner to purchase respondents' property for $225,500.00. Respondents indicated such amount was totally insufficient and respondent Charles W. Irvin, Jr., stated that he thought the property was worth at least $10,000.00 to $12,000.00 an acre plus the replacement cost of all improvements, a sum in excess of $1,000,000.00 The results of this conference were conveyed to petitioner on 14 May 1973.

IX. The Board of Directors of petitioner, at a meeting held on 6 August 1973, adopted a resolution authorizing the Executive Director of petitioner to offer to pay the appraised value of respondents' property as determined by competent appraisers, subject to any agreement to accept such appraised value being approved by the land subcommittee of the Board of Directors and by the Authority. Said resolution further provided that if respondents' property could not be purchased at its appraised value as so determined, petitioner should institute condemnation proceedings therefor. At the time this resolution was adopted, the 1968 Master Plan approved by the Board of Directors of petitioner on 19 March 1968 had been amended by the layout plan prepared by Southern Mapping and Engineering Company approved by the Board of Directors of petitioner on 24 May 1971 so as to show that the plan for the use of respondents' property was for a cargo area."

* * *

"XI. Petitioner's Executive Director obtained new appraisals of respondents' property from Wayne Sudderth and Calvin Reynolds, both competent appraisers. On 20 June 1975, Wayne Sudderth appraised respondents' property at $225,000.00, and Calvin Reynolds on 11 July 1975 appraised respondents' property at $254,000.00. On 12 July 1974, petitioner's Executive Director, on behalf of petitioner, offered to purchase respondents' property for $254,000.00, and requested a response within 30 days. Such offer was made by letter to C. W. Irvin, Jr., Doris Irvin Egerton, John L. Irvin and Pearl T. Irvin. There was no response to said offer by Charles Watson Irvin, Jr. John L. Irvin responded by letter dated 1 August 1974, in which he rejected petitioner's offer of $254,000.00. At the time said letter was written by petitioner's Executive Director, respondent Charles W. Irvin, Jr., valued respondents' property in excess of One Million Dollars ($1,000,000.00), and would not accept any amount less than Twelve Thousand to Thirteen Thousand Dollars per acre for respondents' property or a total sum of over One Million Dollars plus the replacement cost of the clubhouse and all other buildings."

* * *

"XVII. Petitioner, acting through its officer, agents and representatives, has made an effort in good faith to purchase and acquire title to the real property described in Paragraph VI hereof, from the owners thereof, to wit: respondents named herein, but petitioner and said respondents have been unable to agree on a price or compensation for said tract of land."

In our opinion, the preliminary facts are found in VIII, IX and XI, *supra*, are supported by the evidence and are thus conclusive on appeal, and support the ultimate finding of fact XVII, *supra*.

G.S. 40-11 and 40-12 require a condemnor to "make a bona fide effort to purchase by private negotiation" prior to instituting condemnation proceedings. *Power Co. v. King*, 259 N.C. 219, 220-221, 130 S.E. 2d 318, 320 (1963). The Authority was aware that

resondents felt that their land was worth in excess of $1,000,000.00. The Authority's resolution of 6 August 1973 authorized an offer to purchase respondents' land at its appraised value; an offer was conveyed to respondents by letter of 12 July 1974, offering the highest of several appraisals secured by the Authority. No higher offer was authorized by the Authority. The offer was rejected by letter by respondent John L. Irvin, although he indicated his willingness to sell at a reasonable and just price. However, we do not feel upon the facts of this case, that the Authority was required to explore the matter further since earlier negotiations had revealed that respondents would sell only at a price far in excess of that which the Authority was willing to offer. *See Power Co. v. Moses*, 191 N.C. 744, 133 S.E. 5 (1926). In many respects, the facts of the instant case are similar to those in *Murray v. City of Richmond*, 257 Ind. 548, 276 N.E. 2d 519 (1971), wherein the condemnor offered to purchase property at its appraised value of $40,000 and the condemnees counter-offered in the amount of $500,000 (later reduced to $100,000). The condemnor refused the counter-offers and instituted condemnation proceedings. On appeal, the condemnees argued that the trial court erred in finding that there had been a bona fide effort to purchase in that the condemnor had refused to negotiate upward from the $40,000 figure. The following language in the *Murray* opinion is pertinent to the case at bar:

> "We do not agree with appellants' contention in this regard. We do not construe the language [of the statute pertaining to negotiations] to mean that the condemning authorities must first make an offer of a figure below that which they believe to be the maximum they could justify paying for the property, then through a series of negotiations bargain with the property owner until some figure within what the Commission might consider to be reasonable was agreed upon. In fact, it appears to be much more honest and forthright on the part of the condemning authority to come forth in their initial offer with the highest price they feel they could reasonably justify paying for the property. The fact that a property owner might place a higher value on his real estate and attempt to induce the condemning authority to pay a higher price does not bind the condemning authority to raise its figure.

> We do not interpret the word 'negotiations' in the statute to mandate a series of encounters of offers and counter-offers in an attempt to arrive at a price. Where as here, the condemning authority has employed professional appraisers and has based its firm offer to purchase on figures presented to it by its appraisers, we hold that such an offer to purchase meets the requirement to negotiate as set out in the statute." 276 N.E. 2d at 522.

We hold that the evidence in the case *sub judice* indicates that the Authority made the requisite bona fide, good faith effort to acquire respondents' property by purchase, and supports the trial court's finding to that effect.

[3] Under their second assignment of error, respondents have attempted to present several distinct questions of law, in violation of App. Rule 10(c); the assignment is a broadside assignment and is subject to being overruled for that reason. However, we elected to deal with respondents' contention relating to the sufficiency of the Authority's attempt to purchase the land; we have also elected to deal with respondents' contention that G.S. 40-10 prohibits the Authority from condemning the land in question because of the presence thereon of one or more dwelling houses.

We reject this latter contention, based upon the reasoning of *Mount Olive v. Cowan*, 235 N.C. 259, 69 S.E. 2d 525 (1952), which held that the limitation of G.S. 40-10 applied only to corporations named in Article 1 of G.S. Chapter 40 and not to a corporation deriving its power to condemn from some other act of the legislature. The Authority derives its power to condemn, as noted at the outset of this opinion, from Chapter 98, Public-Local Laws of 1941 as amended, and is not one of the corporations named in the sections preceding G.S. 40-10.

Respondents' second assignment of error is overruled.

For their third assignment of error, respondents contend that they have been deprived of rights guaranteed them by the United States and North Carolina Constitutions. Respondents attempt to raise, once again, the question of necessity of the taking of their land; having dealt with the question, *supra*, we decline to do so again.

Respondents' contention that the Authority's petition did not comply with the requirements of G.S. 40-12 by stating in detail

the nature of the public business and the specific use for which the land is sought is without merit and warrants no discussion. In our opinion, respondents' third assignment of error fails to raise any questions which require further discussion by this Court.

The decision of the trial court is

Affirmed.

Judges HEDRICK and MITCHELL concur.

GRO-MAR PUBLIC RELATIONS, INC., A CORPORATION v. BILLY JACK ENTERPRISES, INC., A CORPORATION

No. 7726SC451

(Filed 20 June 1978)

1. **Process § 14; Rules of Civil Procedure § 4— summons directed to Secretary of State as agent for foreign corporation**

A summons was not insufficient because it was directed to the Secretary of State as statutory agent for service of process on the corporate defendant rather than to the corporate defendant where the caption of the summons and the complaint made it abundantly clear that the corporation was the entity being sued.

2. **Constitutional Law § 24.7— personal jurisdiction over nonresident—insufficient showing**

Plaintiff failed to establish a ground for the exercise of personal jurisdiction over defendant foreign corporation where plaintiff's complaint alleged only that defendant was indebted to it on an account, but there was no showing as to the basis of the alleged account.

3. **Pleadings § 33.3; Process § 14.4; Rules of Civil Procedure § 15.1— motion to amend complaint to show jurisdiction—denial as abuse of discretion**

The trial court abused its discretion in the denial of plaintiff's motion to amend its complaint to show that the court had jurisdiction over defendant foreign corporation under G.S. 55-145 by alleging that defendant's indebtedness to plaintiff arose out of a contract to be performed in North Carolina where the court failed to state a reason for refusing to allow the amendment, and there were no apparent reasons for denial of leave to amend. G.S. 1A-1, Rule 15(a).

4. Constitutional Law § 24.7; Process § 9.1— nonresident—minimum contacts test—actions in rem and quasi in rem

The "minimum contacts" test of *International Shoe Co. v. Washington*, 326 U.S. 310, for determining a state court's jurisdiction over a nonresident is to be applied in actions *in rem* and *quasi in rem* as well as in actions *in personam*.

5. Process § 14.3; Constitutional Law § 24.7— attachment of debts in N. C.—insufficiency to give quasi in rem jurisdiction over foreign corporation

Plaintiff's attachment of certain debts owed to defendant foreign corporation by three North Carolina theatres would not, in itself, give the courts of this State *quasi in rem* jurisdiction of plaintiff's action against defendant to recover on an account where plaintiff's claim to the debts is not the source of the underlying controversy between the parties. The debts may, however, suggest the existence of other ties among the defendant, the State, and the litigation which would give jurisdiction to the courts of this State.

APPEAL by plaintiff from *Graham, Judge*. Judgment entered 13 January 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 March 1978.

Plaintiff, a North Carolina corporation, filed complaint on 6 August 1976 against defendant, a foreign corporation, on an account, seeking judgment for $17,140. Pertinent portions of the civil summons issued are as follows:

"GRO-MAR PUBLIC RELATIONS, INC.
a corporation
against
BILLY JACK ENTERPRISES, INC.,
a corporation

STATE OF NORTH CAROLINA

To each of the defendants named below at the indicated addresses —GREETING:

Secretary of State of North Carolina, as Statutory Agent for service of process under N.C. G.S. § 55-145, for Billy Jack Enterprises, Inc., defendant, 12301 Wilshire Boulevard, Los Angeles, California 90025"

Summons was served on the Secretary of State, who mailed summons and complaint to defendant. Plaintiff also obtained an order of attachment and thereafter levied upon certain property of defendant held by three North Carolina theatre corporations.

The theatre corporations answered, praying that the court determine ownership of the funds held by them.

On 10 November 1976, defendant obtained an extension of time to answer or otherwise plead, and on 30 November, defendant moved to dismiss for lack of jurisdiction over the person of defendant, for insufficiency of process, and for insufficiency of service of process. A hearing on defendant's motion was held on 12 January 1977 on which day defendant filed the affidavit of one Thomas R. Laughlin to the effect that he had knowledge of certain facts concerning defendant corporation, that defendant had never had any employees in North Carolina or had any contracts with North Carolina residents, and that defendant had never performed any services in North Carolina and no services had ever been performed for it in North Carolina.

At the conclusion of the hearing, Judge Graham allowed the motion to dismiss for lack of jurisdiction over the person and denied the motions to dismiss for insufficiency of process and service of process. The judge instructed defendant's attorney to prepare an order, and the clerk noted in the minutes for 12 January "For Order." On the following day, plaintiff delivered to Judge Graham a motion to amend its complaint, an amendment, and an order allowing same. The judge refused to sign the order and instead signed an order submitted by defendant allowing the motion to dismiss for lack of jurisdiction over the person of defendant.

Plaintiff appeals; defendant has cross-assigned as error the judge's denial of its motion to dismiss for insufficiency of process and service of process.

Herbert & Taylor, by Samuel S. Williams and E. Allen Prichard, for plaintiff appellant.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Sydnor Thompson and Fred T. Lowrance, for defendant appellee.

ERWIN, Judge.

[1] One of the questions presented by this appeal pertains to the sufficiency of the summons. Our Supreme Court, in *Wiles v. Construction Co.*, 295 N.C. 81, 243 S.E. 2d 756 (1978), upheld a sum-

mons containing the alleged infirmity with which we are here confronted, *i.e.*, that the summons is not "directed to the defendant" as required by G.S. 1A-1, Rule 4(b). In holding that the summons there in question achieved service on the corporate defendant, Justice Copeland, speaking for the Court, held as follows:

> "In the case *sub judice*, any confusion arising from the ambiguity in the directory paragraph of the summons was eliminated by the complaint and the caption of the summons which clearly indicate that the corporation and not the registered agent was the actual defendant in this action. . . . Under the circumstances, the spirit certainly, if not the letter, of N.C.R. Civ. P. 4(b) has been met. In view of this conclusion, we feel that the better rule in cases such as this is that when the name of the defendant is sufficiently stated in the caption of the summons and in the complaint, such that it is clear that the corporation, rather than the officer or agent receiving service, is the entity being sued, the summons, when properly served upon an officer, director, or agent specified in N.C.R. Civ. P. 4(j)(6), is adequate to bring the corporate defendant within the trial court's jurisdiction." 295 N.C. at 85, 243 S.E. 2d at 758.

Here it is abundantly clear from the summons caption and the complaint that the entity being sued is Billy Jack Enterprises, Inc. and that proper service was had in compliance with G.S. 1A-1, Rule 4(j)(6). *See also* G.S. 55-145(c) and 55-146.

However, we have thus far addressed only the *manner* of exercising personal jurisdiction over the defendant. G.S. 1-75.3(b) states in part:

> "(b) *Personal Jurisdiction.*—A court of this State having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the *jurisdictional grounds* set forth in § 1-75.4 or § 1-75.7 and in addition either:
>
> (1) Personal service or substituted personal service of summons or service of publication of a notice of service of process is made upon the defendant pursuant to Rule 4(j) of the Rules of Civil Procedure. . ." (Emphasis added.)

Plaintiff's complaint alleges that defendant is indebted to it by virtue of an account. The complaint had two exhibits annexed to it, the first purporting to be an invoice and the second a letter from the vice president—finance of Billy Jack which apparently acknowledges the debt. As G.S. 1-75.3(b) states, jurisdictional grounds must exist before our courts can render judgment against a party personally. It would appear that a possible ground or grounds for personal jurisdiction herein would be one or more of those enumerated in G.S. 1-75.4(5), "Local Services, Goods or Contracts." G.S. 1-75.4(2), however, makes clear that special statutes conferring grounds for personal jurisdiction retain their vitality. G.S. 55-145(a) provides in pertinent part:

> "(a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:
>
> (1) Out of any contract made in this State or to be performed in this State. . ."

[2] The burden is on plaintiff to establish itself within some ground for the exercise of personal jurisdiction over defendant. *Bryson v. Northlake Hilton*, 407 F. Supp. 73 (M.D. N.C., 1976); *Munchak Corp. v. Riko Enterprises, Inc.*, 368 F. Supp. 1366 (M.D. N.C., 1973). Plaintiff has not met its burden. There is simply an insufficient showing as to the basis of the alleged account, be it for services rendered by plaintiff for defendant in this state, out of a contract made or to be performed in this state, or otherwise, to sustain an assumption by our courts of personal jurisdiction over this foreign defendant.

[3] Plaintiff, on the day following the hearing on defendant's motion to dismiss, realizing the above deficiency of its complaint, sought leave to amend pursuant to G.S. 1A-1, Rule 15(a). The proposed amendment alleged the jurisdictional grounds of G.S. 55-145 and that there was a contract between the parties to be performed in North Carolina. Plaintiff further sought, by the amendment, to annex an additional exhibit to the complaint, a television and radio budget for advertisements. Plaintiff tendered an order allowing such amendment and conditionally allowing defendant's

12(b)(2) motion to dismiss, "subject, however, to the filing of an amendment to the plaintiff's complaint so as to properly allege jurisdiction of the court over the person of the defendant within five (5) days of the date of this Order." The trial court refused to sign the order. We conclude that the trial court should have allowed plaintiff to amend its complaint.

Rule 15(a) states in pertinent part: ". . . 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. . . ." Plaintiff did file "motion for leave to amend." Except for differences in time allotments not material here, Rule 15(a) of the North Carolina Rules is identical to its federal counterpart. *See* Shuford, N.C. Civil Practice and Procedure, § 15-1. The Supreme Court of the United States stated as follows regarding amendments with leave of court in *Foman v. Davis*, 371 U.S. 178, 182, 9 L.Ed. 2d 222, 226, 83 S.Ct. 227, 230 (1962):

> "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. . . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

Our Supreme Court has noted in *Vernon v. Crist*, 291 N.C. 646, 654, 231 S.E. 2d 591, 596 (1977), that ". . . leave to amend should be 'freely given when justice so requires' and that the burden is on the party objecting to the amendment to show that he would be prejudiced thereby. . . ." *See also United Steelworkers of*

America v. Mesker Bros. Industries, Inc., 457 F. 2d 91 (8th Cir., 1972); *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F. 2d 69 (5th Cir., 1961).

Here it is clear that the trial court failed to state a reason for refusing to sign the order tendered by plaintiff, nor do we perceive that there are any "apparent" reasons for denial of leave to amend, examples of such reasons being listed by the Court in the above quotation from *Foman v. Davis*.

Defendant contends that, in any event, the proposed amendment would not have cured the deficiencies of the complaint pertaining to grounds for exercising personal jurisdiction over it and that the allowance of the amendment would, therefore, have been a futile act. It is true that the trial court may, once such amendment is made, still find that plaintiff has not met its burden in this regard, but we cannot conclude that the allowance of the amendment would be futile. Plaintiff sought to amend its complaint to bring itself within the requirements of G.S. 55-145 and to allege that defendant's indebtedness arose out of a contract to be performed in North Carolina. As stated, the pertinent portion of that statute appears to be G.S. 55-145(a)(1).

The U.S. Supreme Court established a trend to broaden a state's jurisdiction over non-residents in the famous case of *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), where the Court stated the appropriate test as follows:

> ". . . due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " 326 U.S. at 316, 90 L.Ed. at 102, 66 S.Ct. at 158.

Another leading case, *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957), upheld jurisdiction over a foreign corporation on the basis of a single insurance contract. In interpreting this case, our Supreme Court stated in *Goldman v. Parkland*, 277 N.C. 223, 229, 176 S.E. 2d 784, 788 (1970):

"In *McGee* the United States Supreme Court held it was 'fair' to subject a foreign corporation to jurisdiction when the only contact with the state of the forum (California) was a single life insurance policy mailed to the forum state and on which premiums had been mailed from the forum state to the foreign corporation in Texas, holding that such insurance contract had a 'substantial connection' with the forum state."

Further, in another case dealing with G.S. 55-145(a)(1), *Byham v. House Corp.*, 265 N.C. 50, 57, 143 S.E. 2d 225, 232 (1965), our Supreme Court held, citing *McGee, supra*: "It is sufficient for the purposes of due process if the suit is based on a contract which has substantial connection with the forum state." *See also Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E. 2d 676 (1974); *Goldman v. Parkland, supra; Byrum v. Truck & Equipment Co.*, 32 N.C. App. 135, 231 S.E. 2d 39 (1977); *Equity Associates v. Society for Savings*, 31 N.C. App. 182, 228 S.E. 2d 761 (1976), *cert. denied*, 291 N.C. 711, 232 S.E. 2d 203 (1977); *Munchak Corp. v. Caldwell*, 25 N.C. App. 652, 214 S.E. 2d 194 (1975), *cert. denied*, 287 N.C. 664, 216 S.E. 2d 907 (1975); *Trust Co. v. McDaniel*, 18 N.C. App. 644, 197 S.E. 2d 556 (1973).

This appeal presents the further question of *quasi in rem* jurisdiction. Plaintiff sought to attach certain debts allegedly owed to defendant by three North Carolina theatres and contends that the trial court obtained *quasi in rem* jurisdiction pursuant to G.S. 1-75.8, which provides in pertinent part:

". . . Jurisdiction in rem or quasi in rem may be invoked in any of the following cases:

* * *

(4) When the defendant has property within this State which has been attached or has a debtor within this State who has been garnished. . . .

(5) In any other action in which in rem or quasi in rem jurisdiction may be constitutionally exercised."

The United States Supreme Court, in the recent case of *Shaffer v. Heitner*, 433 U.S. 186, 53 L.Ed. 2d 683, 97 S.Ct. 2569 (1977), held that the *International Shoe* test is to be applied in actions *in rem* and *quasi in rem* as well as actions *in personam*: ". . . all

assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." 433 U.S. at 212, 53 L.Ed. 2d at 703, 97 S.Ct. at 2584-5.

The Court observed that an important inquiry is whether or not the property serving as a basis for state-court jurisdiction is related to a plaintiff's cause of action:

> ". . . the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. . . .
>
> It appears, therefore, that jurisdiction over many types of actions which now are or might be brought *in rem* would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the *International Shoe* standard. For the type of *quasi in rem* action typified by *Harris v. Balk* and the present case, however, accepting the proposed analysis would result in significant change. These are cases where the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action. Thus, although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum." 433 U.S. at 208-9, 53 L.Ed. 2d at 700-1, 97 S.Ct. at 2582-3.

Our Court has recently had the opportunity to interpret *Shaffer* in *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E. 2d 164 (1978). There, in reliance on *Shaffer*, G.S. 1-75.8(4) was held to be unconstitutional. But the Court observed that G.S. 1-75.8(5) ". . . supports such jurisdiction over the property within the state of a

nonresident if due process standards are met." 36 N.C. App. at 327, 244 S.E. 2d at 167.

[4, 5] Here, we conclude that under *Shaffer*, the same "minimum contacts" test of *International Shoe* is to be applied regarding *quasi in rem* jurisdiction. This does not appear to be a case, under the *Shaffer* analysis, in which plaintiff's claims to the debts themselves are the source of the underlying controversy between the parties, and, therefore, the debts by themselves would not support *quasi in rem* jurisdiction; they may, however, "suggest the existence of other ties among the defendant, the State, and the litigation." *Shaffer v. Heitner, supra.*

In conclusion, the resolution of the issue of *in personam* jurisdiction involves a two-stage inquiry: First, do the "long-arm" statutes allow our courts to assume jurisdiction over defendant? Assuming they do, does the exercise of such jurisdiction comport with due process? *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). Under *Shaffer, supra,* and *Balcon, supra,* it appears that a similar inquiry is to be used regarding jurisdiction *in rem* and *quasi in rem.*

Based on the foregoing, the trial court must be reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges BRITT and CLARK concur.

C. WAYNE GODSEY AND RON DEPAOLIS v. WILLIAM E. POE, CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL

No. 7726SC641

(Filed 20 June 1978)

Schools § 4— open meetings law—board of education—filling superintendent vacancy—procedure for holding closed meetings

Defendant board of education did not violate G.S. 143-318.3(b), the Open Meetings Law, in holding closed meetings in March 1977, in the absence of a prior public resolution, for the purpose of interviewing applicants for the posi-

tion of school superintendent, since the requirement of public resolution set forth in G.S. 143-318.3(a), providing for *executive* sessions, is not applicable to subsection (b) providing for *closed* sessions.

APPEAL by defendants from *Snepp, Judge.* Order entered 21 April 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 3 May 1978.

This action was originally instituted by a complaint filed on 7 May 1973 in which the plaintiffs alleged that the defendants, members of the Charlotte-Mecklenburg Board of Education, violated the Open Meetings Law, Article 33B of Chapter 143 of the North Carolina General Statutes, by holding closed meetings without first voting to do so in regular session. The plaintiffs sought an injunction to prevent any further contravention of the law. On 19 July 1973 an order was entered to which all parties consented in which the trial court found that by its past actions the defendants had violated G.S. 143-318.1, *et seq.* and ordered that the defendants be

> restrained and enjoined from holding any closed or executive meeting, . . . for the purpose of conducting hearings, participating in deliberations or voting upon, or otherwise transacting, public business of the defendant Charlotte-Mecklenburg Board of Education, except as to those matters specified in N.C. G.S. 143-318.3, and then only after having followed the procedure prescribed therein for holding an executive or closed session.

On 4 June 1976 the plaintiffs filed a motion that the defendants be held in contempt for their wilful failure to act in accordance with the order of 19 July 1973. At the conclusion of a hearing on the plaintiffs' motion on 7 July 1976, the trial court ordered the parties to establish guidelines to aid the defendant Board of Education in its efforts to comply with the General Statutes of North Carolina. By order dated 12 April 1977 the trial court found that the school board had met in executive session on several occasions in 1975 and 1976; concluded that such meetings constituted violations of the court's order of 19 July 1973 and criminal contempt under G.S. 5-8(1); modified the order of 19 July 1973 to incorporate the guidelines agreed upon by the parties; and ordered that the defendants be restrained from conducting

meetings except as provided by the guidelines and "that the defendants . . . are hereby purged of contempt."

On 15 April 1977 a hearing was conducted pursuant to the plaintiffs' motion of 25 March 1977 that the defendants be found in contempt for further violation of the order of 19 July 1973. In this motion the plaintiffs alleged that the defendants conducted several closed meetings in March of 1977 in violation of G.S. 143-318.1, *et seq.* The trial court entered an order on 21 April 1977 in which it found the following facts:

> 4. On March 7, 1977 the defendant Robert D. Culbertson, who was Chairman of a committee to seek a new superintendent for the Charlotte-Mecklenburg school system reported to the members of the Board at a regularly called open meeting that executive or closed sessions of the Board should be held to interview candidates for the position. Enquiry was made of one of the Board's attorneys who was present whether such sessions could be scheduled and then continued from time to time without an additional resolution of the Board. The defendant Culbertson moved and the defendant Huff seconded a motion that the Board meet in executive or closed session to consider candidates for the position of superintendent, subject to further instructions to be given at a later date by counsel for the defendants. No date or time for such meetings were stated in the resolution.
>
> 5. Thereafter, the defendant Berry, Chairman of the Board, advised the defendant Culbertson that he had conferred with the Board's counsel, and that it would be proper to hold the meetings if the members did not discuss therein the merits of any candidate.
>
> 6. On or about March 14 and on two occasions thereafter the defendants, without adopting any resolution in open session, met in closed sessions at undisclosed locations, and interviewed candidates. Defendants questioned each candidate as to his educational philosophy, the operation of the system in which he was presently employed, and as to other matters having to do with his qualifications for superintendent of the Charlotte-Mecklenburg school system.

7. The said meetings were not held pursuant to the votes of a majority of the members of the Board during a regular or special meeting when a quorum was present.

8. The individual defendants willfully attended such closed and secret sessions and participated in the questioning of various candidates for the position of superintendent.

On the basis of these findings the trial court concluded that:

2. The closed meetings held by the defendants on and after March 14, 1977 were official meetings of the Charlotte-Mecklenburg Board of Education as defined in N.C. G.S. 143-318.2, held for the purpose of conducting and otherwise transacting public business within the jurisdiction of said Board.

3. Said meetings were not held pursuant to a vote of the majority of the members of the Board during a regular or special meeting when a quorum was present, in violation of N.C. G.S. 143-318.3.

4. The actions of the defendants were willful and constitute indirect criminal contempt of the order of this Court entered April 15, [sic] 1977.

From the order imposing a $50 fine on each of the individual defendants, the defendants appealed.

Paul L. Whitfield for the plaintiff appellees.

Weinstein, Sturges, Odom, Bigger & Jonas, by William W. Sturges, for the defendant appellants.

Fleming, Robinson & Bradshaw, by Russell M. Robinson II, for defendant appellant, A. Ward McKeithen.

HEDRICK, Judge.

The order of 19 July 1973 which the defendants allegedly violated was not appealed. Therefore, since the trial court was empowered to issue such an order, the parties were bound thereby even if it is later found to be based on a misinterpretation of the law. Dissatisfaction with an order should be expressed through appeal, not by open defiance. *Massengill v. Lee*, 228 N.C.

35, 44 S.E. 2d 356 (1947); *Elder v. Barnes*, 219 N.C. 411, 14 S.E. 2d 249 (1941); Annot., 12 A.L.R. 2d 1059 (1950). Accordingly, the question of whether the Open Meetings Law, G.S. 143-318.1, *et seq.* is applicable to local school boards is not before us at this time. In this connection *see Student Bar Association v. Byrd*, 293 N.C. 594, 239 S.E. 2d 415 (1977).

The defendants concede that they were bound by the order of 19 July 1973. They deny, however, that they willfully violated the order by conducting the closed sessions during March, 1977. By that order the defendants were restrained from holding executive or closed sessions except in accordance with G.S. 143-318.3. Thus, for the purpose of this appeal we must assume that G.S. 143-318.2 governs the defendants in the performance of their duties and determine whether they acted within the exceptions of G.S. 143-318.3 in holding the closed sessions.

The controlling statute, G.S. 143-318.3, reads in pertinent part as follows:

> *Executive, closed and private sessions.*—(a) Any of the bodies specified in G.S. 143-318.1, by the votes of a majority of its members present, may, during any regular or special meeting when a quorum is present, hold an executive session and exclude the public while considering:
>
> . . . .
>
> (b) This Article shall not be construed to prevent any governing or governmental body specified in G.S. 143-318.1 from holding closed sessions to consider information regarding the appointment, employment, discipline, termination or dismissal of an employee or officer under the jurisdiction of such body . . . .

As an initial observation we feel compelled to express our agreement with the trial judge in his opinion that "the provisions of Article 33B of Chapter 143 of the General Statutes, and especially the provisions of G.S. 318.3(b) [sic] are not paragons of legislative draftsmanship." Nevertheless, we must attempt to discern from the terms of these statutes and from the avowed policy of the Open Meetings Law, G.S. 143-318.1, the intent of the legislature in its enactment thereof. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972).

The defendants argue that in March, 1977, they were interviewing candidates for the office of school superintendent, that they were authorized to do so in closed sessions by Subsection (b) of the foregoing statute, and that it was not necessary to conduct the closed sessions pursuant to a vote by a majority of the members in regular session. The plaintiffs apparently do not challenge the defendants' contention that their deliberations were excepted from general coverage of the Open Meetings Law by the operation of Subsection (b). They argue instead that "Judge Snepp and the parties intended for the terms 'executive' and 'closed' to be interchangeable and for the procedures of the Statute to apply equally to either type of meeting."

It is true that in his order of 21 April 1977 the trial judge used the terms interchangeably and failed to recognize any distinctions between the several subsections of G.S. 143-318.3. Furthermore, in support of his conclusion that the defendants had violated G.S. 143-318.3(b) the trial judge seemed to impute the procedural requirements of Subsection (a) to Subsection (b). That portion of his order reads as follows:

> The selection of a superintendent for the Charlotte-Mecklenburg school system is a part of the public's business within the jurisdiction of the defendant Board and its members. The individual defendants attended the meetings and asked questions of the candidates in furtherance of that public business. The Board members, as evidenced by the minutes of the meeting and the testimony of Mr. Culbertson, themselves realized that interviews with potential employees were matters within the exception of 143-318.3(b) permitting closed sessions to be held to consider information regarding the appointment of any employee under the jurisdiction of the Board. Because, according to the testimony, they felt that the candidates for the position would not want it known that they were being considered, they withheld notice of the time and place of the interviews from the public. This is in clear violation of the policy of the State of North Carolina as stated in G.S. 143-318.1, and of the prohibition of closed meetings contained in G.S. 143-318.2.

However, the order which the defendants were held to have violated does not reflect any such understanding between the

trial judge and the parties. As previously quoted, that order simply enjoins the defendants from holding closed or executive meetings "except as to those matters specified in N.C. G.S. 143-318.3, and then only after having followed the procedure prescribed therein for holding an executive or closed session."

We are also aware that the guidelines which were drafted by the parties and incorporated into the order of 19 July 1973 tend to support the plaintiffs' argument that the parties understood the procedural requirements to be identical with regard to executive or closed sessions. While these guidelines blur any distinction between the types of meetings from which the public can be excluded, they were not made a part of the order until after the meetings of March, 1977, which formed the basis of the contempt adjudication. We will not give the guidelines retroactive effect; nor will we impute notice to the defendants that they were acting in violation of the spirit of the 19 July 1973 order. The record discloses that the defendants were unclear as to their statutory obligations and thus, sought the advice of the school board counsel as to the procedural prerequisites to conducting closed meetings for the purpose of interviewing candidates for school superintendent. The counsel advised the defendants that they could hold closed meetings to interview candidates without a public resolution but admonished them against discussing among themselves the relative merits of the interviewees. This evidence indicates only that the defendants were attempting to carry out their duties in accordance with the Open Meetings Law and thus, in accordance with the order of 19 July 1973.

Accordingly, the narrow question presented in this case is whether the defendants actually violated G.S. 143-318.3(b) in holding the closed meetings of March, 1977, in the absence of a prior public resolution. In our opinion the legislature drew a clear distinction between "executive sessions" and "closed sessions." And this distinction gives rise to different procedural requirements.

The pertinent section of our General Statutes which is entitled "Executive, closed and private sessions," suggests three distinct subsections, each complete in itself and not to be integrated with any other. Subsection (a) enumerates the topics for deliberation in executive sessions and sets out the procedural

prerequisites to holding such meetings. Subsection (b) authorizes closed sessions for the specified purposes but omits the procedural requirements applicable to Subsection (a).

It is an axiom of statutory construction that when the language of a statute is understandable on its face " 'there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions, and limitations not contained therein.' " *State v. Camp*, 286 N.C. 148, 209 S.E. 2d 754 (1974). Therefore, we are without power to graft the procedural requisites of Subsection (a) on Subsection (b) even if we had an inclination to do so. However, we think the omission of these requirements in Subsection (b) can be explained by reference to the nature of the subjects to be discussed in executive and closed sessions. Closed sessions in Subsection (b) are authorized for the consideration of delicate matters of employment, discipline and dismissal which if subject to the procedural requirements of Subsection (a) could unfairly infringe upon the privacy of the individuals concerned. Significantly, the evidence in this case reflects the concern on the part of the defendants that a resolution passed in regular session giving notice to the public of the time and place that candidates for school superintendent would be interviewed, would deter prospective candidates from applying for the job for fear of jeopardizing relations with their present employers.

While the rather curious wording of Subsection (b) obscures the legislative intent with respect to the meaning and scope of that provision, *see* Lawrence, D. M., Interpreting North Carolina's Open-Meetings Law, 54 N.C. L. Rev. 777, 797 (1976), the statute is quite clear in its differentiation of executive and closed sessions. Since the procedural prerequisites to holding an executive session pursuant to Subsection (a) do not appear in Subsection (b), we hold that it was not necessary for the defendants to adopt a resolution prior to conducting the closed sessions in March, 1977. Thus, the trial court's conclusion that the defendants' conduct violated the terms of G.S. 143-318.3 was not supported by the facts found. The order appealed from is reversed.

Reversed.

Judges PARKER and MITCHELL concur.

STANISLAW A. G. SIEDLECKI v. R. D. POWELL AND PRODUCTS INTERNATIONAL, LTD.

No. 7710SC386

(Filed 20 June 1978)

1. **Contracts § 29.2— breach of contract—damages—value of stock at time subsequent to breach**

In an action for breach of a contract providing that plaintiff would receive 15% of the stock of a corporation being formed by the individual defendant, the trial court did not err in determining the value of the stock plaintiff was to receive based upon the consideration defendants received subsequent to the breach from the sale of the assets of a second corporation into which the original corporation had been merged, rather than basing plaintiff's damages on the value of the stock on the date of the breach, where the court found that the ascertainment of the value of the stock on the date of defendants' breach of the contract was rendered impossible by accounting procedures used by defendants.

2. **Contracts § 29.2— breach of contract to provide stock—value of stock—findings by court**

In an action for breach of a contract provision that plaintiff would receive 15% of the stock of a corporation formed by the individual defendant and later merged into another corporation, the evidence supported the trial court's finding of fact allocating the assets of the corporation formed by the merger between its pre-merger predecessors, the corporation whose stock plaintiff was to receive and another company.

3. **Contracts § 26.3; Witnesses § 6— evidence of insurance—competency**

In an action for breach of a contract provision that plaintiff would receive 15% of the stock of a corporation being formed by the individual defendant, evidence of an agreement between defendant corporation and some of its stockholders creating an escrow fund for payment of any damages awarded to plaintiff and funded by part of the purchase price of each share of stock purchased by the corporation from its stockholders, even if constituting evidence of insurance coverage, was admissible to show the value of the corporation's stock and to show the bias of a witness who was a party to the agreement.

4. **Costs § 4.1— expert witness fee— necessity that witness be subpoenaed**

The trial court erred in setting an expert witness fee for plaintiff's witness to be taxed as part of the costs in the action where the witness did not testify in obedience to a subpoena.

APPEAL by defendants from *Bailey, Judge*. Judgment entered 22 December 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 27 February 1978.

The circumstances giving rise to this breach of contract action can be summarized as follows: Plaintiff, a naturalized U.S. citizen and native of Poland, had developed contacts with manufacturers and officials in Poland. Plaintiff had done research into the idea of importing golf carts to be manufactured by a Polish company, Elektrim. By early 1970, plaintiff had arranged with a Mr. Jennings to provide the financing for the import undertaking, and had contacted and begun negotiations with Polish authorities. At some point during the negotiation stage, plaintiff discovered that Jennings was not capable of financing the undertaking, and severed his relationship with him.

Plaintiff next contacted Mr. Troy Cotton, and through him, defendant Powell, about financing the undertaking. On 4 June 1970, plaintiff came to North Carolina and met with defendant Powell and his associates. As a result of negotiations, plaintiff and defendant Powell executed a contract on 5 June 1970 whereby plaintiff agreed to become employed by a company to be formed by defendant Powell for a salary of $12,000 per year, moving expenses from Alabama to the Fuquay-Varina area, and 15% of the stock of the proposed new company. Plaintiff agreed to assign all his contracts, agreements, options and contacts to the proposed new company, at which time the aforementioned stock was to be issued to him. Defendant Powell agreed to form the proposed company "for the purpose of establishing a business involved in importing and distributing products from various countries outside the United States" and "to make all necessary arrangements for adequate capitalization and lines of credit to enable the proposed new company to function in a satisfactory and efficient manner at such time and place as all preliminary investigations, considerations, negotiations and preparations have been completed to his satisfaction."

On 23 June 1970, the proposed company was incorporated, under the name of Products International, Ltd. (hereinafter "old" Products International), and 500 shares of stock were issued to Golf Carts, Inc. (hereinafter Golf Carts); defendant Powell owned 51% of the stock of Golf Carts.

The parties subsequently journeyed to Poland where negotiations transpired. A contract was secured in July 1970, which plaintiff forwarded to defendant Powell, who had returned home. This original contract was never executed.

On 15 August 1970, after his return to the United States, plaintiff met with defendant Powell and two associates, at which meeting defendant Powell expressed dissatisfaction with the contract that had been sent from Poland, especially with the requirement of two irrevocable letters of credit in the amount of $380,000 each. Defendant Powell told plaintiff that if he did not agree to reduce his equity participation in "old" Products International to 5%, then defendant could not go through with the contract. The evidence is conflicting as to whether plaintiff agreed to the reduction or merely agreed to consider it.

A contract dated 18 September 1970 between Elektrim and "old" Products International was executed calling for the manufacture by Elektrim of 25,008 golf carts over a four-year period. The aforementioned letters of credit were issued.

Plaintiff received compensation of $1,000 per month while employed with "old" Products International. At a meeting between plaintiff and defendant Powell on 24 February 1971, according to plaintiff's testimony a proposed contract dated 1 December 1970 was handed to him which was not completely what he expected (it provided for a 1 year term of employment with $12,000 salary and a bonus in the amount of 5% of the net after tax profits of "old" Products International). Plaintiff explained that he would like to take the document to an attorney, whereupon defendant Powell became angry and accused plaintiff of disloyalty, at which time plaintiff tendered his resignation. According to defendant Powell's testimony, the proposed agreement had been given to plaintiff in December 1970, and at the 24 February 1971 meeting, he merely confronted plaintiff with acts of disloyalty.

On 16 August 1971, "old" Products International was merged into Golf Carts, Inc., and the name of the surviving corporation was changed to Products International, Inc. (hereinafter "new" Products International). Plaintiff never received shares of stock in either "old" Products International or "new" Products International.

In 1973, the assets of "new" Products International were sold in separate transactions to Pezetel, a Polish company, and Eddietron Leasing Corporation of the Piedmont Triad.

The trial court, sitting without a jury, found facts and concluded that plaintiff was entitled to recover an amount equal to the value of 15% of the stock of "old" Products International, and awarded judgment in favor of plaintiff in the amount of $52,511.25. From this judgment defendants have appealed.

Bailey, Dixon, Wooten, McDonald & Fountain, by Wright T. Dixon, Jr., John N. Fountain and Richard G. Cheney, for plaintiff.

Poyner, Geraghty, Hartsfield & Townsend, by Marvin D. Musselwhite, Jr. and Cecil W. Harrison, Jr., for defendants.

BROCK, Chief Judge.

Defendants bring forward 28 assignments of error on appeal, six of which are argued in their brief in four arguments. The rest are deemed abandoned. App. R. 28(a).

[1] We first discuss defendants' second argument based upon assignments of error numbers 26 and 27, by which defendants contend that the trial court erred in awarding damages to plaintiff based upon the value of a share of stock of "new" Products International as of 30 November 1973. Defendants contend that damages, if any, should be measured as of 17 March 1971, which is the date plaintiff tendered demand for 15% of the stock of "old" Products International. We disagree.

This is an action for damages for breach of contract. "As a general rule, the damages upon breach of contract are to be measured as of the date of the breach." 22 Am. Jur. 2d, Damages, § 52, p. 81. The trial court departed from the general rule for the reasons set out in the following findings of fact:

> "30. No books were kept after November 30, 1970, which accurately reflect the separate operations of the merging corporations and none were kept after the merger from which the separate activity of the original Products International, Ltd. and the original Golf Carts Incorporated can be identified."
>
> * * *
>
> "40. From the books and records of the Corporation it is not possible to determine the relative value of a share of

stock of Products International, Ltd. compared with a share of Golf Carts Incorporated as of 17 March 1971 (the date of demand) this is in no way due to any act or omission of the plaintiff but, is on the other hand, entirely due to the acts of the defendant Powell in causing all records to be consolidated and no value to be placed on the import contract of September 1970. R. D. Powell was fully aware of the claim of the plaintiff at the time of merger and was well aware that the exclusive import contract had a substantial value."

(Defendants are deemed to have abandoned their assignments of error based upon exceptions to these findings of fact, as noted *supra.*) In light of these findings, defendants will not be heard to complain of the trial court's action determining the value of the stock at issue based upon the consideration received by defendants from a sale of the assets of the merged corporation subsequent to their breach of the contract with plaintiff. We think it would be unconscionable to apply the rule for measurement of damages urged upon us by defendant. To do so would impose upon plaintiff a burden of proof made impossible by defendants' deliberate conduct relating to their accounting procedures. There is considerable authority, in cases dealing with breach of contract to deliver stocks or bonds or for conversion of stocks or bonds, for measuring damages based on valuation at a time subsequent to the commission of the wrongful act. *See* Annot. 161 A.L.R. 316, *et seq.* (1946). Furthermore, in at least one jurisdiction in cases involving conversion of stock, damages have been measured by the consideration paid to the wrongdoer by a subsequent purchaser of the converted stock. *See Topzant v. Koshe*, 242 Wis. 585, 9 N.W. 2d 136 (1943); *Price v. Ross*, 62 Wis. 2d 335, 214 N.W. 2d 770 (1974) (failure to assign franchise agreement); *see also Frey v. Frankel*, 443 F. 2d 1240 (10th Cir. 1971). That the instant action was for breach of contract rather than conversion is an insignificant distinction for purposes of this discussion. The subject of the action in either case is the failure to deliver stock. In the case *sub judice*, the ascertainment of damages at the time of defendants' wrongful conduct was rendered impossible by defendants, through no fault of the plaintiff; this, in our opinion, warranted the damage measurement adopted by the trial court. Defendants' assignments of error numbers 26 and 27 are overruled.

[2] In their first argument, covering assignments of error numbers 19 and 27, defendants challenge the trial court's finding of fact number 34 and the conclusion of law based thereon.

In finding of fact number 33, the validity of which is not challenged by this appeal, the court found that the 1973 liquidation of "new" Products International was for a total sum of $1,187,095.00. In the challenged finding of fact number 34, the court found as follows:

> "34. $386,116.00 of the above amount represented physical assets owned and Golf Carts leases and sales originally belonging to Golf Carts, Inc. prior to the merger. $800,979.00 represented carts in inventory and the import contract and exclusive sales agreement originally held by Products International before the merger."

Based upon findings of fact numbers 33 and 34, the trial court concluded as a matter of law that 67% of the total sales price ($800,979 out of $1,187,095) was derived from the sale of assets of "old" Products International. Defendants contend that finding of fact number 34 is not supported by any evidence which was before the trial court, and thus does not support the court's conclusion of law.

Finding of fact number 34 essentially concerned an allocation of the assets of "new" Products International between its premerger predecessors, Golf Carts and "old" Products International, as a means of ascertaining the component value of "old" Products International in "new" Products International since, as further found by the court, plaintiff was entitled to recover 15% of the value of the stock in "old" Products International by virtue of his contract with the defendant Powell. The $800,979 figure represented the gross price paid by Pezetel for assets purchased from "new" Products International.

Plaintiff's expert witness, Dr. Thomas F. Keller, testified as to several methods of apportioning the assets between the two corporations, one of which used the gross sale figure, which was the method adopted by the trial court. Dr. Keller testified in part as follows:

> "Based on [financial records and information such as tax returns, financial statements, accountant's working papers,

etc.], I made a study as to the value of Golf Carts, Inc., Products International, and the two components of the merged corporation, Products International, Ltd. The data is comingled and it becomes very difficult to separate the two corporations after November 30, 1970, but using some of Mr. Phillips' [defendants' accountant] working papers and data supplied by the defendant, I have indeed made some studies attempting to show a breakdown, at least a feasible breakdown of the assets of the corporation. The date I have used, the terminal date, when we have a value of the corporation, is shown on a balance sheet on a tax return of November 30, 1973, which is the date the corporation held its assets, cash and accounts receivable, and some liability.

I have also made studies as to the portion between Golf Carts and Products International in the merged corporation. I have attempted to divide the consolidated or combined corporation into two parts, again using the data provided essentially by Mr. Phillips. I have attempted to allocate the corporation, the two parts, using two methods. I have also attempted to use stock values for some of the trades that have taken place between the corporation and certain stockholders as evidence of value at particular dates, in an attempt to arrive at a value number in addition to a book value number."

* * *

"Going back to my two methods of apportioning the assets between the two corporations, in one case we had the sale of certain assets of the combined corporation to Eddietron. Some other assets were sold to Pezetel. My recollection is that the sale to Eddietron was during the year 1972 and constituted a sale of a building, some rental carts, or contracts which were for rental carts with certain customers of Golf Carts, Inc. I have seen the sale to Pezetel, which was apparently an inventory of the new golf carts on hand at the date of the sale, plus certain parts and other miscellaneous assets. I have used these two sales prices as an estimate of the value—let me change the word 'value'—of the part of the assets that were attributable to Golf Carts on one hand and the part of the assets that were attributed to Products International on the other hand. I have asserted that if, in

> fact, these two values did reflect the assets as of the date of their respective sales, that we could then divide the total remaining assets composed of cash and accounts receivable on a proportionate basis between these two component parts. The sale to Pezetel was in the approximate dollar value of $800,000. That would be a gross sale figure as far as I could tell."

Defendants contend that Dr. Keller erroneously assumed that the assets sold to Pezetel were exclusively attributable to "old" Products International. In this regard, we note the witness' observation relating to the co-mingled financial data which rendered separation of the merged corporation very difficult; furthermore, we note once again the trial court's findings of fact relative to the deficiencies in defendants' bookkeeping, especially finding of fact number 30, *supra*. Dr. Keller's allocation of assets between the two pre-merger corporations was an estimate based upon his examination of defendants' financial records. Based upon the circumstances, we hold that this evidence supports the trial court's finding of fact number 34. The challenged finding of fact, supported as it is by evidence in the record, is conclusive on appeal. *Blackwell v. Butts*, 278 N.C. 615, 180 S.E. 2d 835 (1971). Defendants' assignment of error numbers 19 and 27 are overruled.

[3] Defendants next assign as error the introduction into evidence of a 1974 escrow agreement between the defendant corporation and several of its stockholders which established a fund for payment of the damages, if any, which might arise from the instant litigation. By its terms, the escrow was established pursuant to a purchase of stock by the defendant corporation from its stockholders and was funded by part of the purchase price of each share. Defendants contend that the agreement was an insurance fund, evidence of which was inadmissible. We disagree.

Evidence of insurance coverage is admissible if it has some probative value other than to show the mere fact of its existence. 1 Stansbury's N.C. Evidence (Brandis Rev. 1973) § 88, p. 274. The escrow agreement was admissible as evidence of the value of the defendant corporation's stock. Furthermore, as argued by the plaintiff, it was admissible to show the bias of defendants' witness Clem Sharek, a party to the agreement. *Id.* This assignment of error is overruled.

[4] In their final argument, defendants assign error to the trial court's order setting an expert witness fee for plaintiff's witness, Dr. Keller, to be taxed as part of the costs in the action. This assignment of error has merit.

G.S. 7A-314(a) and (d) allow the court to set an expert witness fee. As interpreted by our Supreme Court in *State v. Johnson*, 282 N.C. 1, 191 S.E. 2d 641 (1972), the statute requires that a witness must be under subpoena before he or she is entitled to compensation. Under this interpretation, the trial court had no authority to order the fee on behalf of Dr. Keller, who admittedly did not testify in obedience to a subpoena. Plaintiff's argument that the provisions of G.S. 7A-314(a), allowing fees for a witness "under subpoena, bound over, or recognized" should be read in the alternative, is persuasive; however, we are bound by the decision of the Supreme Court. We hold, therefore, that the order allowing the expert witness fee must be reversed.

The judgment of the trial court awarding damages to plaintiff for breach of contract is affirmed. The order as to expert witness fees for plaintiff's expert is reversed.

Affirmed in part, reversed in part.

Judges VAUGHN and ERWIN concur.

FRANCIS EDWARD PRICE, JR. v. NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES

No. 7726SC295

(Filed 20 June 1978)

1. **Automobiles § 126.3— breathalyzer test—reasonable time to confer with attorney—thirty minutes to obtain witness**

G.S. 15A-501(5) and G.S. 20-16.2(a)(4) give an accused a reasonable time to call an attorney and communicate with him, but G.S. 20-16.2(a)(4) gives an accused only thirty minutes to select a witness, whether an attorney or otherwise, and secure his attendance at the breathalyzer test.

2. **Automobiles § 126.3— breathalyzer test—refusal to take willful**

Evidence was sufficient to support the trial court's determination that petitioner willfully refused to submit to a breathalyzer test, G.S. 20-16.2,

where petitioner was allowed to call his attorney and talk with him a few minutes after he was asked to submit to a breathalyzer test; after the conversation, petitioner told the officers that his attorney would be there in a few minutes; after three or four minutes petitioner called his attorney again and was told that the attorney would be there in ten minutes; petitioner conveyed this message to the officers; petitioner told the breathalyzer operator that he did not want to take the test until he could speak with his attorney; forty minutes after petitioner arrived at the station he was told that his time was up; ten minutes later, after conferring with his attorney who had arrived at the station, petitioner stated that he wanted to take the test; and the operator refused to give it.

APPEAL by petitioner from *Walker (Ralph A.), Judge*. Judgment entered 24 March 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 2 February 1978.

On 28 February 1976, petitioner was stopped while operating a motor vehicle on a public highway. He was arrested for driving while under the influence of intoxicating liquor. The arresting officer transported him to the Mecklenburg County jail, arriving there at approximately 2:30 a.m.

At the jail, the officer, in the presence of one qualified to administer the breathalyzer test, requested petitioner to submit to the breathalyzer test. The breathalyzer operator read petitioner G.S. 20-16.2(a)(1), (2), (3) and (4) at 2:39 a.m. At 2:44 a.m. petitioner telephoned his attorney who told him he would get dressed immediately and come to the jail. This telephone conversation lasted for two or three minutes, and at its conclusion, petitioner told the officers that his attorney would be there in just a few minutes. Three or four minutes later the arresting officer told petitioner that his "time was running". Petitioner again telephoned his attorney who told him that he was almost dressed and that he would be there in approximately ten minutes and that he should convey this message to the officers. Petitioner did convey the message he was coming. At 3:10 a.m. the breathalyzer operator told petitioner his time was up. Petitioner told the operator that his attorney was on the way and that he did not want to take the test until he could speak with his attorney. The attorney arrived at 3:15 a.m. and conferred briefly with petitioner. At 3:20 a.m. both petitioner and his attorney requested that the operator administer the test. The operator refused. The court found as a fact that "petitioner was no less intoxicated at 3:20 a.m. when he of-

fered to submit himself to the test than he was at 2:39 a.m. when the G.S. 20-16.2(a)(1), (2), (3) and (4) language was read to him."

Petitioner plead guilty to the charge of operating a motor vehicle on a highway while under the influence of intoxicating liquor on 28 February 1976 and was granted a limited driving privilege. The Division of Motor Vehicles revoked that privilege 21 March 1976 for refusal to submit to the breathalyzer test pursuant to G.S. 20-16.2. On 21 April 1976 an administrative hearing officer upheld that revocation. The revocation order was affirmed by the Superior Court of Mecklenburg County 24 March 1977. From that judgment petitioner appealed.

Attorney General Edmisten, by Deputy Attorney General Jean A. Benoy, for the respondent appellee.

Ruff, Bond, Cobb, Wade and McNair, by James O. Cobb, for the petitioner appellant.

MORRIS, Judge.

In his brief petitioner raises the question of whether the refusal to submit to a breathalyzer test until one's attorney arrives in person at the site of the test when that refusal delays the test more than 30 minutes amounts to a "willful refusal" under G.S. 20-16.2. Obviously, if one has either a statutory or a constitutional right to await the arrival in person of the attorney, then the facts of this case would not constitute a "willful refusal" under G.S. 20-16.2, and petitioner's driving privilege could not be revoked.

Petitioner advances both statutory arguments and constitutional arguments. Obviously, petitioner's rights under the Constitution of the United States have not been violated. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966). Our Supreme Court has upheld the admissibility of evidence obtained under G.S. 20-16.2 against constitutional challenges. *State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849 (1974).

Petitioner advances two statutory arguments. First, he argues that he substantially complied with G.S. 20-16.2. Next, he argues that if he has not complied with G.S. 20-16.2, then G.S. 20-16.2 and G.S. 15A-501(5) are in conflict and that G.S. 15A-501(5) controls. We will address these arguments in order.

The relevant portions of G.S. 20-16.2 provide that "he [the accused] has the right to call an attorney and select a witness to view for him the testing procedures; but that the test shall not be delayed *for this purpose* for a period in excess of 30 minutes from the time he is notified of his rights." (Emphasis supplied.) G.S. 20-16.2(a)(4). Obviously, there is an ambiguity. The first clause sets out two rights which the petitioner has: (1) the right to call an attorney and (2) the right to select a witness. The second clause says that the test shall not be delayed for more than 30 minutes "*for this purpose*". "This purpose" is clearly *singular*. However, the preceding clause sets out *two rights*. Thus, there is an ambiguity.

Petitioner argues that "this purpose" refers to the right "to call an attorney". Petitioner asserts that one must call an attorney within the 30-minute limit, but that one has a reasonable time of not less than 41 minutes (in this case) within which to select a witness and secure his attendance. We disagree for reasons that will be subsequently set out.

Next, petitioner argues that G.S. 15A-501(5) gives him the right to confer in person with his attorney prior to taking the breathalyzer test and that G.S. 20-16.2 impermissibly restricts that right. G.S. 15A-501 provides in pertinent part that "[u]pon the arrest of a person, . . . a law enforcement officer . . . [m]ust without unnecessary delay advise the person arrested of his right to communicate with counsel . . . and must allow him reasonable time and reasonable opportunity to do so." Petitioner argues that he has a reasonable time to confer in person with counsel prior to the test and that, in this case, 41 minutes was a reasonable time. Again, we must disagree with petitioner's construction.

We acknowledge the ambiguity in G.S. 20-16.2(a)(4) and the potential conflict between G.S. 20-16.2(a)(4) and G.S. 15A-501(5). Because of its ambiguity, G.S. 20-16.2(a)(4) can be interpreted in three ways: (1) We could assume that the legislature chose the wrong language and that the legislature really meant to say "these purposes". Thus, the statute should read "he has the right to call an attorney and select a witness to view for him the testing procedures; but that the test shall not be delayed for *these* purposes for a period in excess of 30 minutes." This interpretation requires rewriting the statute. (2) We might assume, as

the defendant does, that the legislature used the singular (i.e., "this purpose") intentionally and that "this purpose" refers to the right to "call an attorney" and not the right to "select a witness". Thus, an accused would have only 30 minutes to call an attorney. However, an accused would have some other length of time to select a witness. (It is unclear how long.) (3) We might assume that the legislature used the singular (*i.e.*, "this purpose") intentionally and that "this purpose" refers to the right to "select a witness", the phrase closest to it, and not to the right to "call an attorney". Thus, an accused would have a reasonable time (as limited by G.S. 15A-501(5)) to "call an attorney", but would have only 30 minutes to "select a witness". If we use either of the first two possible interpretations, a conflict would exist between G.S. 15A-501(5) and G.S. 20-16.2(a)(4). G.S. 15A-501(5) gives the defendant a "reasonable time" "to communicate with counsel". G.S. 20-16.2(a)(4), under either of the first two interpretations gives the accused only 30 minutes to communicate *regardless* of the circumstances. However, if we adopt the third interpretation of G.S. 20-16.2(a)(4) (*i.e.*, that "this purpose" refers only to the right to "select a witness"), there is no conflict between G.S. 20-16.2(a)(4) and G.S. 15A-501(5).

[1] We believe that these problems can be easily resolved through the application of two rules of statutory construction. (1) When a statute imposes a penalty, it must be strictly construed. *Jones v. Georgia-Pacific Corp.*, 15 N.C. App. 515, 190 S.E. 2d 422 (1972). (2) "[S]tatutes, and all parts thereof, in pari materia should be construed together", and harmonized if possible, and if there be irreconcilable ambiguity, it should be so resolved as to effectuate the intent of the legislature. *Com'r. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 202, 214 S.E. 2d 98, 104 (1975). G.S. 20-16.2 clearly imposes a penalty. Because it does so, we must strictly construe the statute. Thus, we interpret the 30-minute time limitation to refer only to the right to "select a witness", leaving G.S. 15A-501(5) to control the time limitation on the right to "call an attorney" (*i.e.*, a reasonable time). The interpretation compelled by the rules of statutory construction, and the interpretation we now adopt, is that G.S. 15A-501(5) and G.S. 20-16.2(a)(4) give an accused a reasonable time to call an attorney and communicate with him but that G.S. 20-16.2(a)(4) gives an accused only 30 minutes to select a witness and secure his attend-

ance at the breathalyzer test. *See State v. Lloyd*, 33 N.C. App. 370, 235 S.E. 2d 281 (1977).

[2] We believe that this interpretation of the statutes is supported by common sense and sound policy. Whether the procedure is deemed civil or criminal, most, if not all, persons in the petitioner's situation will desire to speak with their attorney. Indeed, G.S. 20-16.2(a)(4) acknowledges this desire and confers the right to do so. Generally, both the need and the right will be satisfied by a telephone call. G.S. 15A-501(5) speaks in terms of a "right to communicate". Usually, in deciding whether to submit to a breathalyzer test, that right to communicate will be fully accorded to the accused by allowing him to call an attorney on the telephone. Because telephonic communication will generally require only a few minutes, there is no great need for a time limitation. On the other hand, there is a genuine need for a time limit in selecting a witness because a lengthy delay will render the test ineffective. Under all ordinary circumstances, the accused can telephone his attorney and fully communicate with him in a matter of minutes. However, it might frequently take a longer time for the witness, whether it be the lawyer, a doctor, or a friend, to travel to the jail to observe the test. Especially would this be true when the defendant is arrested late at night or in a strange town. Furthermore, to obtain legal advice, the accused needs to talk with an attorney, but anyone (a friend, a companion, or even another person in custody) can function quite well as a witness. If an accused, in addition to communicating with his lawyer, also desires that his lawyer function as a witness at the administration of the breathalyzer test, then the accused must bear the risk that the attorney/witness will not arrive within the 30-minute time limit. In this case, the petitioner took that chance and lost.

The position we take in this case also aligns us with the better reasoned decisions in our sister states. In light of the *Schmerber* decision, courts generally agree, as do we, that there is no right to the presence of counsel at the administration of breathalyzer tests or other similar tests. *See e.g. McDonnell v. Department of Motor Vehicles*, 119 Cal. Reptr. 804, 45 C.A. 3d 653 (1975); *Cogdill v. Department of Public Safety*, 135 Ga. App. 339, 217 S.E. 2d 502 (1975); *Newman v. Hacker*, 530 S.W. 2d 376 (Ky. 1975). In spite of this general rule based upon constitutional

rights, a growing number of states are according the accused a statutory right to a reasonable time in which to call an attorney prior to submitting to the tests. Generally, these decisions rely on statutes or court rules analogous to our G.S. 15A-501(5). This right to counsel has been imposed upon the implied consent statute even where the implied consent statute, unlike the North Carolina statute, has no express right to counsel. *See Prideaux v. Department of Public Safety*, 247 N.W. 2d 385 (Minn. 1976); *Raine v. Curry*, 45 Ohio App. 2d 155, 341 N.E. 2d 606 (1975); *Hunter v. Dorius*, 23 Utah 2d 122, 458 P. 2d 877 (1969). We note, however, that these decisions do not grant the right to have counsel physically present to function as a witness at the administration of the test.

For sound policy reasons as well as because of our rules governing statutory construction, we hold that although an accused has a reasonable time to communicate with counsel, he cannot delay the breathalyzer test for more than 30 minutes in waiting for his witness to arrive. The record in this case contains nothing which indicates that defendant did not have ample opportunity to communicate with counsel while he was on the telephone with him. Thus, petitioner's right to "call an attorney" was satisfied. Petitioner, in this case, had no right to delay the test in excess of 30 minutes while awaiting the arrival of his attorney. His declination to submit to the test was, therefore, a willful refusal under G.S. 20-16.2. *Creech v. Alexander*, 32 N.C. App. 139, 231 S.E. 2d 36, *cert. denied* 293 N.C. 589, 239 S.E. 2d 263 (1977).

For these reasons, the decision of the trial court in upholding the revocation of petitioner's driving privilege is

Affirmed.

Judges CLARK and MITCHELL concur.

HENRY M. BRITT, JR. v. SHIRLEY B. BRITT

No. 777DC658

(Filed 20 June 1978)

1. **Divorce and Alimony § 19.5— separation agreement—consent judgment—modification of alimony**

Where a consent judgment ordered plaintiff to pay alimony to defendant as provided by a separation agreement attached thereto and provided that the court could enforce the separation agreement by contempt proceedings, the judgment was an adjudication by the court which was enforceable by contempt and subject to modification upon a change of conditions rather than a contract merely approved by the court which could not be modified absent consent of the parties.

2. **Divorce and Alimony § 19.5— separation agreement—consent judgment—property settlement and support provisions—modification of support**

Support provisions and property settlement provisions of a separation agreement adopted by the court were not reciprocal considerations which would prohibit the court from modifying the support provisions on a showing of changed circumstances where the separation agreement provided that the support provisions were independent of the property settlement provisions.

APPEAL by plaintiff from *Neville, Judge*. Order entered 11 July 1977 in District Court, EDGECOMBE County. Heard in the Court of Appeals 4 May 1978.

On 19 December 1972 plaintiff husband instituted this action against defendant wife seeking a judgment granting him a divorce from bed and board and adjudging that defendant is not entitled to alimony. Defendant filed answer in which she denied the material allegations of the complaint and counterclaimed for a divorce from bed and board, alimony, alimony *pendente lite*, reasonable attorney's fees, use of the home and possession of an automobile.

On 28 February 1973, the parties consented to a judgment which provided in part:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That the plaintiff fully perform and comply with all of the terms and provisions of the Separation Agreement attached hereto as Exhibit A, including the payment of alimony

to the defendant in the amount of Three Hundred Sixty-seven and 50/100 per month, commencing March 1, 1973, as set forth in paragraph 9 of the agreement.

* * *

3. That this cause is retained by the court, and that should either party wilfully fail to comply with and perform the terms and conditions of the Separation Agreement attached hereto as Exhibit A, this court may, by appropriate Order, enforce the said Agreement through holding the breaching party in contempt of this court and to punish said party as law provides.

On 30 November 1973 plaintiff instituted an action for absolute divorce and requested that the consent judgment of 28 February 1973 be incorporated into the divorce decree. Defendant answered and also requested that the consent judgment be incorporated into the divorce judgment. On 31 December 1973 judgment was entered as follows:

It is now, therefore, upon motion of the attorney for the plaintiff, ORDERED, ADJUDGED AND DECREED that the bonds of matrimony heretofore existing between the plaintiff and the defendant be, and the same are hereby dissolved; that the Consent Judgment dated February 28, 1973, and entered by this court between plaintiff and defendant approved thereby shall remain in effect according to their respective terms and conditions and applicable law; and that the costs of this action be paid by the plaintiff.

On 10 November 1976 plaintiff filed a motion requesting a decrease in the amount of alimony which he was required to pay on the grounds that there had been a substantial change of circumstances in that the income of defendant had increased and his income had decreased. Defendant responded, admitting certain allegations of the motion; she also filed a counter-motion asking that plaintiff's motion be dismissed, that plaintiff be required to restore legal title to himself in all property which he had disposed of in the interim since the previous consent order, that plaintiff be enjoined from further divestures of property at less than arm's length transactions which reduced the net worth of his estate, and that he be required to pay defendant's attorney fees.

The motions were heard on 10 January 1977 and on 11 July 1977 judgment was entered denying plaintiff's motion and defendant's counter-motion. Plaintiff appealed.

Moore, Diedrick & Whitaker, by J. Edgar Moore, for the plaintiff.

Grover Prevatte Hopkins for the defendant.

BRITT, Judge.

[1] Plaintiff contends that the trial court erred in concluding that the judgments of 28 February 1973 and 31 December 1973, are contracts which cannot be modified by the court. We think this contention has merit.

In *Mitchell v. Mitchell*, 270 N.C. 253, 256, 154 S.E. 2d 71 (1967), a case decided after the landmark decision in *Bunn v. Bunn, infra*, we find language that is instructive. Justice Sharp (now Chief Justice) speaking for the court stated:

> A contract between husband and wife whereby he agrees to pay specified sums for her support may not be enforced by contempt proceedings even though the agreement has the sanction and approval of the court. *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118; *Stanley v. Stanley*, 226 N.C. 129, 37 S.E. 2d 118; *Brown v. Brown*, 224 N.C. 556, 31 S.E. 2d 529. When, however, a court having jurisdiction of the parties and the cause of action adjudges and orders the husband to make specified payments to his wife for her support, his wilful failure to comply with the court's judgment will subject him to attachment for contempt notwithstanding the judgment was based upon the parties, agreement and entered by consent. *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240; *Stancil v. Stancil*, 255 N.C. 507, 121 S.E. 2d 882; *Edmundson v. Edmundson*, 222 N.C. 181, 22 S.E. 2d 576; *Davis v. Davis*, 213 N.C. 537, 196 S.E. 819. *See Smith v. Smith*, 247 N.C. 223, 100 S.E. 2d 370. This is true, "not because the parties have agreed to it, but because the judgment requires the payment." *Sessions v. Sessions*, 178 Minn. 75, 226 N.W. 701. When the parties' agreement with reference to the wife's support is incorporated in the judgment, their contract is superseded by the court's decree. The obligations imposed

are those of the judgment, which is enforceable as such. *Adkins v. Staker*, 130 Ohio State 198, 198 N.E. 575; *accord, Gloth v. Gloth*, 154 Va. 511, 153 S.E. 879. In such a case the wife has the option of enforcing the judgment by a rule of contempt or by execution, or both.

In the instant case, the trial court held that the alimony provision in the contract-judgment was based only on the contract of the parties and, therefore, was not subject to modification by the court. An examination of the two types of contract judgments discussed in *Bunn v. Bunn, supra*, and further defined in the recent case of *Levitch v. Levitch*, 294 N.C. 437, 241 S.E. 2d 506 (1978), impels us to conclude that the court's decree in the contract judgment in the instant case superseded the parties' agreement.

In *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E. 2d 240 (1964), the court stated:

> . . . Consent judgments for the payment of subsistence to the wife are of two kinds. In one, the court merely approves or sanctions the payments which the husband has agreed to make for the wife's support and sets them out in a judgment against him. Such a judgment constitutes nothing more than a contract between the parties made with the approval of the court. Since the court itself does not in such case order the payments, the amount specified therein is not technically alimony. In the other, the court adopts the agreement of the parties as its own determination of their respective rights and obligations and orders the husband to pay the specified amounts as alimony.
>
> A contract-judgment of the first type is enforceable only as an ordinary contract. It may not be enforced by contempt proceedings and, insofar as it fixes the amount of support for the wife, it cannot be changed or set aside except with the consent of both parties in the absence of a finding that the agreement was unfair to the wife or that her consent was obtained by fraud or mutual mistake. . . .
>
> A judgment of the second type, being an order of the court, may be modified by the court at any time changed conditions make a modification right and proper. The fact that

the parties have agreed and consented to the amount of the alimony decreed by the court does not take away its power to modify the award or to enforce it by attachment for contempt should the husband wilfully fail to pay it. (Citations.) *Alimony* is subject to modification and to enforcement by contempt proceedings if the situation so requires.

When called upon to alter the terms of a consent judgment, or to enforce its provisions by contempt proceedings, the question for the court in each case is whether the provision for the wife contained therein rests only upon contract or is an adjudication of the court. If it rests on both, it is no less a decree of the court. As pointed out in a note in 35 N.C.L. Rev. 405, "the subleties (sic) in the form" of a consent judgment for support payments to the wife "play a major role in determining the subsequent rights of the parties" and, if the judgment is to be of "practical value to the wife other than as a judicial affirmation of the contract existing between the parties, . . . it is advisable that the attorney carefully word the form of the judgment so as to preserve in the court further rights in the cause. . . ."

* * *

Since the decision of this Court in *Stancil v. Stancil, supra*, it has been clear that, absent special circumstances, any judgment which awards alimony, notwithstanding it was entered by the consent of the parties, is enforceable by contempt proceedings should the husband wilfully fail to comply with its terms. *If the judgment can be enforced by contempt, it may be modified and vice versa. This is only just. If man in prosperous days consents that a judgment be entered against him for generous alimony and thereafter is unable to pay it because of financial reverses, the order should be altered to conform to his ability to pay.* (Emphasis added.)

In the recent case of *Levitch v. Levitch, supra*, the Supreme Court in reversing a decision of the Court of Appeals held that the language in a divorce judgment that the agreement ". . . shall survive this action and should be incorporated by reference herein . . ." and the specific order that the agreement be incorporated by reference showed an express intent by the court to

adopt the alimony provisions in the order and make them enforceable by contempt even though the court did not order a specific amount of alimony to be paid or state that failure to comply with the provisions of the separation agreement would subject the parties to contempt.

In the case *sub judice*, the consent judgment ordered that the plaintiff pay alimony in the amount of $367.50 per month and that if either party wilfully failed to comply with and perform the terms and conditions of the separation agreement, the court could hold the breaching party in contempt of court. The divorce decree ordered that the consent judgment dated 28 February 1973 should remain in effect according to the respective terms and conditions and applicable law. As a result the judgment in question is actually an adjudication by the court which is enforceable by contempt and subject to modification upon a change of conditions rather than a contract approved by the court which cannot be modified absent a consent of the parties. *Bunn v. Bunn, supra.*

[2] Plaintiff also contends that the trial court erred in concluding that the support provision and the property provision of the separation agreement that was adopted by the court in the judgments of 28 February 1973 and 31 December 1973 were reciprocal considerations so that the court was without power to modify them if there is a change of circumstances. We agree with this contention.

In *Bunn v. Bunn, supra*, the court recognized this problem and set forth the following guidelines: (pp. 67, 70)

> Needless to say, a judgment which purports to be a complete settlement of all property and marital rights between the parties and which does not award alimony within the accepted definition of that term is not subject to modification even though it adjudges that the wife recover a specific money judgment. This is a consent judgment in its technical sense. *Armstrong v. Insurance Co.*, 249 N.C. 352, 106 S.E. 2d 515; *Keen v. Parker*, 217 N.C. 378, 8 S.E. 2d 209. However, an agreement for the division of property rights and an order for the payment of alimony may be included as separable provisions in a consent judgment. In such event the division of property would be beyond the power of the court to change, but the order for future installments of alimony

would be subject to modification in a proper case. *Briggs v. Briggs*, 178 Or. 193, 165 P. 2d 772, 166 A.L.R. 666. However, if the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties. 2 A. Nelson on Divorce and Alimony (2d ed. rev.) § 17.03; Annot., 166 A.L.R. 693-701.

In the case at hand the separation agreement states:

> The provisions for the support, maintenance and alimony of wife are independent of any division or agreement for division of property between the parties, and shall not for any purpose be deemed to be a part of or merged in or integrated with a property settlement of the parties.

In view of this language, it is clear that the support provisions and the property provisions of the separation agreement were not reciprocal considerations which would prevent the court from modifying the support provisions on a showing of change of circumstances. *See also Holsomback v. Holsomback*, 273 N.C. 728, 161 S.E. 2d 99 (1968).

Finally, plaintiff contends that the trial court erred in finding that there had been no substantial change of circumstances in his employment, earnings, health or capacities and by concluding that the change of circumstances on the part of the wife did not justify a modification of the alimony award as a matter of law.

In *Sayland v. Sayland*, 267 N.C. 378, 382, 148 S.E. 2d 218 (1966), the court set forth the following guidelines for determining when a change of circumstances had occurred which would warrant a modification in an alimony award:

> The alimony which a husband is required to pay in proceedings instituted under G.S. 50-16 is a "reasonable subsistence," the amount of which the judge determines in the exercise of a sound judicial discretion. His order determining that amount will not be disturbed unless there has been an abuse of discretion. *Hall v. Hall*, 250 N.C. 275, 108 S.E. 2d 487. Reasonable subsistence is measured by the needs of the wife and by the ability of the husband to pay. Ordinarily, it is primarily to be determined by the "condition and cir-

cumstances" of the husband. *Martin v. Martin*, 263 N.C. 86, 138 S.E. 2d 801; *Coggins v. Coggins*, 260 N.C. 765, 133 S.E. 2d 700. *See* Note, 39 N.C.L. Rev. 189 (1961). The fact that the wife has property or means of her own does not relieve the husband of his duty to furnish her reasonable support according to his ability. *Mercer v. Mercer*, 253 N.C. 164, 116 S.E. 2d 443; *Bowling v. Bowling*, 252 N.C. 527, 114 S.E. 2d 228; *Coggins v. Coggins, supra.* Nevertheless, "the earnings and means of the wife are matters to be considered by the judge in determining the amount of alimony. G.S. 50-16." *Bowling v. Bowling, supra* at 533, 114 S.E. 2d at 232. The court must consider the estate and earnings of both in arriving at the sum which is just and proper for the husband to pay the wife, either as temporary or permanent alimony; it is a question of fairness and justice to both. *Bowling v. Bowling, supra*; 2 Lee, op. cit. *supra* § 145; 24 Am. Jur. 2d, Divorce and Separation § 620, 631 (1966); 27A C.J.S., Divorce § 233(1) (1959).

Payment of alimony may not be avoided merely because it has become burdensome, or because the husband has remarried and voluntarily assumed additional obligations. 24 Am. Jur. 2d, Divorce and Separation § 649 (1966); Annot., Alimony as Affected by Remarriage, 30 A.L.R. 79 (1924). However, any considerable change in the health or financial conditions of the parties will warrant an application for change or modification of an alimony decree, and "the power to modify includes, in a proper case, power to terminate the award absolutely," 2A Nelson, Divorce and Annulment § 17.01 (2d Ed. 1961). *Accord* 27A C.J.S. Divorce § 240 (1959). "The fact that the wife has acquired a substantial amount of property, or that her property has increased in value, after entry of a decree for alimony or maintenance is an important consideration in determining whether and to what extent the decree should be modified. Annot., Modification of Alimony Decree, 18 A.L.R. 2d 10, 74 (1951); 24 Am. Jur. 2d, Divorce and Separation § 681 (1966). A decrease in the wife's needs is a change in condition which may also be properly considered in passing upon a husband's motion to reduce her allowance. 27A C.J.S., Divorce § 239 (1959). By the same token an increase in the wife's needs, or a decrease in her separate estate, may warrant an increase in alimony.

While there was evidence presented in the case at hand tending to show a change of circumstances, we cannot determine from the record whether the trial judge exercised his discretion in denying plaintiff's motion or if his denial was based on the erroneous concept that he could not modify the consent judgment.

Since the denial might have been based on said erroneous concept, we feel that the findings of fact, conclusions of law and order appealed from should be vacated and the cause remanded for further proceedings consistent with this opinion. It is so ordered. We hasten to add that we express or imply no opinion as to what the trial court's findings and conclusions should be upon a showing similar to that appearing in the present record.

Order vacated and cause remanded.

Judges ARNOLD and ERWIN concur.

TELERENT LEASING CORPORATION v. EQUITY ASSOCIATES, INC., TED F. KARAM, PASO DEL NORTE HOTEL CORPORATION, EDUARD VASQUEZ, AND UNIWORLD MANAGEMENT CORPORATION

No. 7710SC509

(Filed 20 June 1978)

1. **Constitutional Law § 24.7; Process § 14.4— foreign corporations—in personam jurisdiction—contracts made in N. C.**

The trial court had *in personam* jurisdiction of the nonresident defendants pursuant to G.S. 1-75.4 and G.S. 55-145 where the uncontradicted evidence showed that both a lease, executed by defendant Equity in Texas, and an assumption agreement, executed by defendant Hotel Corporation in Texas, were "brought" to N. C. where they were accepted and executed by plaintiff, a Delaware corporation with its principal office and place of business in N. C.; the final act necessary to make the lease and assumption binding obligations was their execution by plaintiff in N. C.; and the lease and assumption were therefore contracts made in N. C.

2. **Constitutional Law § 24.7— nonresident individual—in personam jurisdiction—promise to pay for services performed in N. C.**

Pursuant to G.S. 1-75.4(5), the trial court had jurisdiction over the person of the individual defendant Karam, a Texas resident who personally guaranteed payment or performance of a lease from plaintiff in the event of default by defendant Equity, since, by executing the personal guaranty, defendant

Karam promised to pay for services to be performed in N. C. by plaintiff, to wit: the execution of the lease in question, ordering of televisions, and causing them to be shipped to Texas, and the shipment of related equipment from Raleigh, N. C. to Texas.

3. **Constitutional Law § 24.6— nonresident defendant—in personam jurisdiction—requirements of due process**

For the exercise of *in personam* jurisdiction over a nonresident defendant, due process requires that defendant have certain minimum contacts with the forum state such that maintenance of suit therein does not offend traditional notions of fair play and substantial justice.

4. **Constitutional Law § 24.7; Process § 14.3— nonresident defendants—in personam jurisdiction—sufficient minimum contacts—due process**

The exercise of personal jurisdiction over nonresidents by the courts of this State did not violate due process of law and the defendants had sufficient minimum contacts with N. C. so as to satisfy the requirements of due process where the lease and assumption agreement giving rise to this action were both contracts made in this State; to carry out its initial obligations under the lease, plaintiff placed orders for televisions in this State and shipped equipment from its warehouse in this State; monthly payments of rentals due under the lease were mailed to plaintiff's offices in this State; and the lease itself expressly provided that N. C. law would govern should there arise any dispute regarding the lease. The individual defendant Karam's contract to pay the debt of defendant Equity, which debt was and is owed to plaintiff, a North Carolina creditor, constituted sufficient minimum contact to withstand the due process challenge to the exercise of *in personam* jurisdiction.

APPEAL by defendants Equity Associates, Inc. (Equity), Ted F. Karam, and Paso Del Norte Hotel Corporation (Hotel Corporation) from *Godwin, Judge*. Order entered 25 March 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 28 March 1978.

For purposes of this appeal, the uncontradicted allegations of plaintiff's complaint establish the following facts: Plaintiff is a Delaware corporation with its principal office and place of business in Raleigh. The individual defendants are residents of Texas and the corporate defendants are Texas corporations. By a lease No. 1110, plaintiff leased to defendant Equity 135 televisions and related equipment for a term of 60 months at a monthly rental price of $1,254.67. On 11 August 1971, plaintiff accepted a personal guaranty executed by defendant Karam guaranteeing payment or performance of the lease in the event of default by defendant Equity. The leased equipment was subsequently installed in the Hotel Paso Del Norte in El Paso, Texas.

In April 1975, plaintiff and defendant Hotel Corporation entered into an agreement whereby the latter, as successor lessee, assumed all of the obligations of the lease and agreed to make 28 monthly rental payments at $1,194.92 per month. Also under the assumption agreement, defendant Equity agreed to remain unconditionally bound by all terms and conditions of the lease.

Effective 1 July 1976, defendant Hotel Corporation sold the Hotel Paso Del Norte either to defendant Eduard Vasquez or defendant Uniworld Management Corporation, in which defendant Vasquez had an interest. By letter dated 6 August 1976, defendant Hotel Corporation notified plaintiff of the sale and stated that defendant Vasquez acknowledged and assumed the debt owed plaintiff by defendant Hotel Corporation.

Plaintiff alleged nonpayment of rentals from and after April 1976, and demanded possession of the leased equipment and damages from the defendants.

Service of process was had pursuant to Rule 4(j), North Carolina Rules of Civil Procedure. On 18 January 1977, pursuant to Rule 12(b)(2), defendants Equity, Karam, and Hotel Corporation moved to dismiss the action as to them, or in lieu thereof, to quash the return of service of process, on the grounds that the court lacked jurisdiction over the person of the moving defendants, and that any exercise of jurisdiction over the moving defendants would violate due process.

Affidavits were filed by the moving defendants in support of their motion to dismiss which indicated that the movants had never engaged in business in North Carolina, nor had any employees or agents conducted business in North Carolina in their behalf.

An affidavit filed on behalf of plaintiff outlined the circumstances surrounding the execution and performance of the lease which is the subject of this lawsuit. These circumstances are summarized as follows: The various agreements which were executed by the parties, *i.e.*, the lease, guaranty, and assumption agreement, were each executed by the appropriate defendant (or officer) in Texas and then "brought" to Raleigh where each was then reviewed, approved and executed by an officer of plaintiff.

The television units which were the subject of the lease were acquired by plaintiff by means of purchase order placed with the Charlotte district office of General Electric Company. General Electric Company had the televisions delivered in Texas and documents of title were sent to plaintiff in Raleigh. Related equipment, including an antenna distribution system, 135 engraved channel designation plates, a theft alarm system, and 84 pedestal stands, was shipped by plaintiff from its warehouse in Raleigh. Two technicians from plaintiff's Raleigh offices were sent to Texas to install the equipment. In accordance with the terms of the lease, defendant Equity sent monthly payments to plaintiff's Raleigh office from June 1972 through January 1975. Defendant Hotel Corporation made such payments from February 1975 through March 1976.

The trial court considered the pleadings, affidavits, and arguments of counsel, and entered an order denying the motion to dismiss. Defendants appealed.

Broughton, Broughton & Boxley, by William G. Ross, Jr., for plaintiff.

Poyner, Geraghty, Hartsfield & Townsend, by Marvin D. Musselwhite, Jr., and Cecil W. Harrison, Jr., for defendant appellants.

BROCK, Chief Judge.

Eduard Vasquez and Uniworld Management Corporation were not parties to the motion to dismiss and are not parties to this appeal. All references to defendants in this opinion are to defendants Equity, Karam, and Hotel Corporation.

The sole question posed by this appeal is whether the trial court acquired *in personam* jurisdiction over defendants. The resolution of this question involves a two-fold determination: (1) is there a statutory basis for the exercise of jurisdiction by the courts of this State over these defendants in this action, and (2) if so, does the exercise of this power violate due process of law? *See Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977).

The order of the trial court contained no findings of fact or conclusions of law. The trial court was under no duty to make findings of fact and conclusions of law on this motion absent re-

quest by a party. G.S. 1A-1, Rule 52(a)(2). No such request appearing in the record, we presume "that the court on proper evidence found facts to support its judgment." *Sherwood v. Sherwood*, 29 N.C. App. 112, 113-114, 223 S.E. 2d 509, 510-511 (1976).

[1] We must first determine if there is any statutory basis for the exercise of *in personam* jurisdiction over these defendants. As to the corporate defendants, our inquiry begins with G.S. 1-75.4, which reads in pertinent part as follows:

> "A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:"
>
> * * *
>
> "(2) Special Jurisdiction Statutes.—In any action which may be brought under statutes of this State that specifically confer grounds for personal jurisdiction."

G.S. 55-145 is just such a special jurisdictional statute; it reads in pertinent part as follows:

> "(a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:
>
> (1) Out of any contract made in this State or to be performed in this State; or"

Thus, a foreign corporation may be subject to the jurisdiction of the courts of North Carolina by virtue of a contract made or to be performed in this State. In the case *sub judice*, the uncontradicted evidence in the record shows that both the lease, executed by defendant Equity in Texas, and the assumption agreement, executed by defendant Hotel Corporation in Texas, were "brought" to North Carolina where they were accepted and executed by plaintiff.

"For a contract to be made in North Carolina, it must be executed in North Carolina, that is, 'the final act necessary to make

it a binding obligation must be done in the forum state.' (citations omitted)." *Goldman v. Parkland*, 7 N.C. App. 400, 407-408, 173 S.E. 2d 15, 21, *aff'd*, 277 N.C. 223, 176 S.E. 2d 784 (1970). Paragraph 18 of the lease provides in part:

> "This agreement and any amendment hereto shall become binding upon the parties hereto when executed by the President or Vice President of Telerent Leasing Corporation, attested by its Secretary or Assistant Secretary, with corporate seal affixed thereto, and when executed by a duly authorized officer or agent of Lessee."

On the facts of the case *sub judice*, the final act necessary to make the lease a binding obligation was its execution by plaintiff in North Carolina. Thus the evidence establishes that the lease was a contract made in this State and we presume that the trial court so found.

Likewise, the assumption agreement between plaintiff and defendant Hotel Corporation was a contract made in North Carolina. Paragraph 3 of the lease prohibited transfer, delivery or sublease of the leased equipment or assignment of the lease without prior consent of plaintiff. The assumption agreement, which provided for a transfer to defendant Hotel Corporation of the rights under the lease, was accepted by plaintiff in Raleigh and became binding at that time. *A fortiori*, the assumption agreement was a contract made in North Carolina; once again, we presume the trial court so found.

We therefore have found a statutory basis for the exercise of *in personam* jurisdiction by the courts of this State over the corporate defendants. A single contract made in North Carolina is sufficient to subject a non-resident defendant to suit in this State. *Goldman v. Parkland, supra.* In light of the preceding discussion, we need not consider the additional statutory grounds for assertion of jurisdiction over the corporate defendants set out by plaintiff.

[2] We next must determine whether any statute confers jurisdiction over the person of the individual defendant, Karam. If so, it must arise from the guaranty contract executed by Karam by which he guaranteed performance and payment in the event that defendant Equity should default on the lease.

G.S. 1-75.4(5) confers jurisdiction over a non-resident defendant 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"

It is well established "that North Carolina's long-arm statute (G.S. 1-75.4) should be liberally construed in favor of finding personal jurisdiction, subject of course to due process limitations." *Dillon v. Funding Corp.*, 29 N.C. App. 513, 516, 225 S.E. 2d 137, 140 (1976), *rev'd on other grounds*, 291 N.C. 674, 231 S.E. 2d 629 (1977). Under a liberal construction of G.S. 1-75.4(5)(a), it is our opinion that by executing the personal guaranty, defendant Karam promised to pay for services to be performed in this State by plaintiff, to wit: the execution of the lease, ordering of televisions and causing them to be shipped to Texas, and the shipment of related equipment from Raleigh to Texas.

Having found statutory authorization for subjecting these defendants to the jurisdiction of the courts of this State, we now must determine if the exercise of jurisdiction over defendants violates due process of law.

[3, 4] We will not discuss in detail the due process requirements for the exercise of *in personam* jurisdiction over a non-resident defendant. This topic has been fully explored in numerous appellate decisions in this State. *See, e.g., Byham v. House Corp.*, 265 N.C. 50, 143 S.E. 2d 225, 23 A.L.R. 3d 537 (1965); *Goldman v. Parkland*, 277 N.C. 223, 176 S.E. 2d 784 (1970); *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977); *Trust Co. v. McDaniel*, 18 N.C. App. 644, 197 S.E. 2d 556 (1973). Briefly summarized, due process requires that defendant have certain minimum contacts with the forum state such that maintenance of suit therein not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945). A single contract can provide the basis for the exercise of jurisdiction over a non-resident defendant. *See McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957). In our opinion, the ongoing contractual relations, and obligations arising therefrom between plaintiff and defendant Equity, as later assumed by defendant Hotel Corporation, provid-

ed sufficient minimum contacts with this State so as to satisfy the requirements of due process. As noted in *Byham v. House Corp., supra*, "[i]t is sufficient for the purposes of due process if the suit is based on a contract which has substantial connection with the forum state." 265 N.C. at 57, 143 S.E. 2d at 232. The lease and assumption agreement were both contracts made in this State. To carry out its initial obligations under the lease, plaintiff placed orders for televisions in this State, and shipped equipment from its warehouse in this State. Monthly payments of rentals due under the lease were mailed to plaintiff's offices in this State. Furthermore, the lease itself expressly provided that North Carolina law would govern should there arise any dispute regarding the lease. In our opinion, taking all of these factors into consideration, the lease and assumption agreement were contracts having a substantial connection with this State based upon which (consistent with due process) the corporate defendants can be subjected to the jurisdiction of the courts of North Carolina. As for the defendant Karam, his contract to pay the debt of defendant Equity, which debt was and is owed to plaintiff, a North Carolina creditor, constitutes sufficient minimum contact to withstand the due process challenge to the exercise of *in personam* jurisdiction. *See Trust Co. v. McDaniel, supra.*

The order of the trial court denying these defendants' motion to dismiss is

Affirmed.

Judges HEDRICK and MITCHELL concur.

IN THE MATTER OF KIMBERLY DINSMORE

No. 7718DC413

(Filed 20 June 1978)

1. Parent and Child § 1— termination of parental rights—willful failure to support—insufficiency evidence

Even if the evidence in an action to terminate parental rights was sufficient to support the court's finding that respondent mother had not been continuously sick and disabled as she claimed, the evidence was insufficient to

support the court's finding that the mother's failure to contribute adequate financial support for the child for over six months while the child was in the custody of the county department of social services was "willful" within the purview of former G.S. 7A-288(3) where the court made no inquiry into the mother's ability to comply with a court order that she pay $10.00 per week for support of the child, and the evidence showed that the mother was an alcoholic, she had lost her job as a maid for excessive absenteeism, and she lived with her boyfriend.

2. Parent and Child § 1— termination of parental rights—"intent" to constructively abandon

The trial court's finding that a mother had shown an "intent to constructively abandon" her child for a period in excess of six consecutive months prior to the hearing was insufficient to support an order terminating the mother's parental rights under the provisions of former G.S. 7A-288(1) allowing such termination upon a finding that the parent had abandoned the child for six consecutive months prior to the hearing or that the child was an abandoned child as defined by G.S. Ch. 48.

Judge VAUGHN dissents.

APPEAL by respondent from *Haworth, Judge.* Judgment entered 26 January 1977 in District Court, GUILFORD County. Heard in the Court of Appeals 2 March 1978.

On 19 November 1976, Sonia Willinger, social worker with the Guilford County Department of Social Services, filed a juvenile petition alleging that Kimberly Dinsmore, born 23 June 1972,

> ". . . has been in custody of the Guilford County Department of Social Services since December 27, 1973, on which date the child was found to be a neglected child: That in the time the child has been in the custody of the Department of Social Services, neither the mother nor the father has ever initiated plans or responded to attempts by the Department of Social Services to plan for a return of said child; neither has ever initiated plans or responded to attempts by the Department of Social Services to plan for the return of the child, or for making a home for the child; the mother has not refrained from the use of alcohol as ordered by the court, has wilfully not contributed financial or any other support for the child as ordered by the Court since April, 1976; that she is now living with a boyfriend; that these and other facts show that the mother and father of said child have abandoned said child

for more than six consecutive months prior to this special hearing; wherefore

Petitioner prays the court to hear the case to determine whether the allegations are true and whether the child is in need of the care, protection or discipline of the State, and to terminate parental rights of the father and mother."

The record reveals that respondents were properly before the court, and there is no question with reference to the court's having jurisdiction of the parties and the subject matter. The respondent, Calvin Amburgey, father of Kimberly Dinsmore, did not appeal.

Petitioner's evidence tended to show that in July 1973, respondent requested services from the Guilford County Department of Social Services, in that she was going to the hospital in the fall for surgery and requested foster care for her children. At that time, respondent discussed with her caseworker other problems, including undisciplined behavior of her children, financial difficulties, and housing needs.

In October 1973, a homemaker from the Department of Social Services and respondent's father provided supervision for the children in their home to avoid foster care placement during respondent's hospitalization and the week thereafter. During this month, the Department of Social Services received numerous complaints from the city schools regarding truancy of respondent's children. The caseworker visited the home and found respondent very drunk. Between 1973 and 1976, several hearings were held to reevaluate the home situation of respondent and her children, but none resulted in the return of Kimberly to respondent's custody due to her continued alcoholism. Respondent has been hospitalized on several occasions since 1973 for alcoholism and has been found drunk by the social workers on several occasions, the latest occurrence being in January 1976.

Each social worker counseled with respondent on the actions which the courts had ordered her to take in order to regain custody of her child, including remaining sober and submitting to counseling and rehabilitative training so that she could establish a home for Kimberly; weekly counseling sessions were scheduled, but respondent was often drunk and unable to attend.

In 1975, respondent was ordered by the court to pay $10.00 per week toward the support of Kimberly. In response to this order, a sum of approximately $200.00 was paid between August 1975 and April 1976. Respondent was fired from her job as a maid in May 1976 due to excessive absenteeism. The caseworker was advised that the absenteeism was caused by a medical problem of respondent's hip. Respondent became employed in January 1977 as a maid. To the knowledge of the social worker, respondent was not disabled the entire period of time between April 1976 and January 1977.

Kimberly is not able to visit her mother when her mother's boyfriend is present, because he beats her mother and dislikes her; but nevertheless, the respondent continues to live with him. Respondent has expressed the knowledge that in order to regain custody of Kimberly, she must stop drinking, get a job, and move out of her boyfriend's house, but has expressed doubt in her moral strength to do so. Respondent has not abstained from alcohol nor has she responded to any of the rehabilitative services offered by the Department of Social Services, and the respondent visited Kimberly a total of 21 times between August 1975 and January 1977.

Rev. Harry Thomas, a counselor at the Alcohol Education Center, testified to his efforts to treat respondent for alcoholism, her failure to respond to such treatment despite promises to do better, her deterioration due to alcohol since 1973, and his belief that respondent will not be more responsive or improve in the future due to her chronic alcoholism.

Respondent testified that: in the past, she has had a severe problem with abuse of alcohol, but that her problem is now under control; she drinks beer and wine on occasion and had not been drunk in over nine months and hoped to be able to keep her problem under control; in May 1976, she began to suffer from a problem with her hip which was very painful and prevented her from working at her job as a maid; this pain continued until December 1976, and she did not have any money to pay for a visit to the doctor's office; she realized that to get her child back, she would have to move out of Mr. Marsh's home, and she planned to do so as soon as she became self-supporting; for the last eight months, Mr. Marsh's house was the only place she had to stay.

The court made its findings of facts and conclusions of law and entered the following order:

> "IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the parental rights to Kimberly Dinsmore of her mother, Nancy Dinsmore, and her father, Calvin Amburgey, be and the same are hereby terminated. Further, that said child is to remain in the custody of the Guilford County Department of Social Services until such time as she can be placed for adoption. EXCEPTION #8."

Respondent, Nancy Dinsmore, appealed.

Thomas G. Foster, Jr., for petitioner appellee.

Diane Brady and Rion Brady, for respondent appellant.

ERWIN, Judge.

G.S. § 7A-288, "Termination of parental rights," provided in pertinent part at the time controlling on this appeal:

> "In cases where the court has adjudicated a child to be neglected or dependent, the court shall have authority to enter an order which terminates the parental rights with respect to such child if the court finds any one of the following:
>
> (1) That the parent has abandoned the child for six consecutive months prior to the special hearing in which termination of parental rights is considered or that a child is an abandoned child as defined by chapter 48 of the General Statutes entitled 'Adoption of Minors.'
>
> * * *
>
> (3) That the parent has willfully failed to contribute adequate financial support to a child placed in the custody of an agency or child-care institution, or living in a foster home or with a relative, for a period of six months . . ."

[1] Respondent's first two assignments of error pertain to the trial court's finding that respondent ". . . has not been continuously sick since May, 1976, despite being continuously unemployed

since that time . . ." and to its conclusion that she ". . . has willfully failed to contribute financial or any other support to Kimberly since April, 1976 . . ." In essence, respondent contends that there was insufficient evidence to support the finding that respondent had not been continuously sick and that she had willfully failed to contribute adequate financial support.

Respondent seeks to negate the element of willfullness contained in G.S. 7A-288(3) by arguing that respondent was disabled during the period in question and unable to work at her usual occupation. The record shows: that respondent was fired from her job in May 1976 for excessive absenteeism; that her social worker from September 1976 was not aware of any disability on respondent's part; and that there was no medical evidence as to any disability. Even if the record shows sufficient evidence to support the finding that respondent had not been continuously sick since May 1976, it does not necessarily follow that respondent's failure to contribute adequate support was willful, as the statute requires. There are no decided cases under G.S. 7A-288(3), and we, therefore, must look to authority under other statutes.

In re Adoption of Hoose, 243 N.C. 589, 91 S.E. 2d 555 (1956), dealt with Chapter 48 of our Statutes, "Adoptions." There, our Supreme Court considered the willful abandonment contemplated by G.S. 48-2 and stated: "Wilfulness is as much an element of abandonment within the meaning of G.S. 48-2, as it is of the crime of abandonment. G.S. 14-322 and G.S. 14-326." 243 N.C. at 594. The Court went on to quote with approval from *State v. Whitener*, 93 N.C. 590 (1885):

> "The word willful, used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent without which one cannot be brought within the meaning of a criminal statute." 93 N.C. at 592.

We feel the analogy of G.S. 7A-288 to Chapter 48 is an apt one. Indeed, both reference the other, and consistency requires us to consider these provisions together. We perceive no reason to define "willfulness" as applied to support under G.S. 7A-288 any

differently from the definition of "willfulness" as applied to abandonment under Chapter 48.

In *Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966), our Supreme Court considered the issue of what sort of failure to comply with a court order to pay alimony *pendente lite* would support punishment by contempt proceedings:

> "A failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is wilful, which imports knowledge and a stubborn resistance. 'Manifestly, one does not act wilfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered.' *Lamm v. Lamm*, 229 N.C. 248, 49 S.E. 2d 403.
>
> Hence, this Court has required the trial courts to find as a fact that the defendant possessed the means to comply with orders of the court during the period when he was in default." 268 N.C. at 257.

See also Gorrell v. Gorrell, 264 N.C. 403, 141 S.E. 2d 794 (1965); *Ingle v. Ingle*, 18 N.C. App. 455, 197 S.E. 2d 61 (1973); *Cox v. Cox*, 10 N.C. App. 476, 179 S.E. 2d 194 (1971).

It is not clear from the record whether the trial court based its finding that respondent had "willfully failed to contribute financial or any other support" to her daughter for the requisite statutory period upon her failure to pay $10.00 per week support pursuant to the 1975 order, upon her failure to fulfill her support duty, or both. (The record does show that respondent paid $200.00 under the order between September 1975 and April 1976.) In any event, we feel the record is insufficient to support a finding of willfulness in that we do not see here a respondent guilty of purposeful and deliberate acts (*Whitener, supra*) or guilty of knowledge and stubborn resistance (*Mauney, supra*). Nor did the trial court make any inquiry into the ability of respondent to comply with the 1975 order.

Manifestly, the termination of parental rights is a grave and drastic step. The Legislature recognized this, in part, by requiring that the failure to provide adequate financial support must be willful under G.S. 7A-288(3) to give the court authority to terminate parental rights. A holding that the record before us con-

tains sufficient evidence of willfulness to support a finding under 7A-288(3) would be inconsistent with the severe nature of the termination of parental rights. Parental rights are to be protected regardless of the economic situation of the individual parent. We hold that the trial court erred in finding a willful failure by respondent to contribute adequate financial support to her daughter.

G.S. 7A-288 contemplated that any one of the findings contained in its four subsections will give a court authority to enter an order terminating parental rights. We will now consider G.S. 7A-288(1), the other basis for the trial court's order. Again, there are no decided cases under G.S. 7A-288(1).

[2] The trial court found that respondent had shown "an intent to constructively abandon her child for a period much in excess of six consecutive months prior to the hearing." We agree with respondent that such finding is not based on the grounds formerly enumerated in G.S. 7A-288(1).

As quoted, a court's authority to terminate parental rights under G.S. 7A-288 rests upon a finding of one or more of the grounds listed therein. The trial court's finding of "an intent to constructively abandon" does not comport with G.S. 7A-288(1), which required either an abandonment for six consecutive months prior to the hearing or that the child is an "abandoned child" within the meaning of Chapter 48. The termination of parental rights under G.S. 7A-288(1) cannot be predicated upon mere intent.

The order of the trial court as to the termination of parental rights of respondent, Nancy Dinsmore, is reversed, and the cause is remanded.

Reversed and remanded.

Chief Judge BROCK concurs.

Judge VAUGHN dissents.

STATE OF NORTH CAROLINA v. ED BAILEY

No. 7815SC80

(Filed 20 June 1978)

1. **Criminal Law § 45.1— noises at crime scene—experimental evidence properly excluded**

In a prosecution for second degree rape where the alleged crime occurred in a motel room in which the victim was staying, the trial court did not err in excluding experimental evidence designed to show the extent to which occupants of adjoining rooms could have heard any loud noises coming from the room occupied by the prosecuting witness on the night of the alleged rape, since there was no showing that the circumstances of the experiment were substantially similar to the actual occurrence.

2. **Rape § 5— uncorroborated testimony of prosecutrix—sufficiency of evidence**

Where the only issue in a second degree rape prosecution was the victim's consent, her unsupported testimony was sufficient to require submission of the case to the jury.

3. **Criminal Law § 86.4— prior accusation of rape—improper cross-examination—no prejudice**

In a prosecution for second degree rape, the prosecuting attorney's reference to a previous rape charge lodged against defendant was not prejudicial and did not require a new trial since defendant explained the circumstances surrounding the nature and disposition of the charge, and the court promptly instructed the jury to disregard any reference the prosecuting attorney made to the earlier charge against defendant.

4. **Rape § 6— force reasonably inducing fear of bodily harm—instruction not required**

The trial court is not required in every prosecution for rape to instruct the jury that before they can return a verdict of guilty they must find beyond a reasonable doubt that the defendant used or threatened to use such force as reasonably induced fear of serious bodily harm.

APPEAL by defendant from *McKinnon, Judge*. Judgment entered 2 September 1977 in Superior Court, ORANGE County. Heard in the Court of Appeals 24 May 1978.

Defendant was tried upon his plea of not guilty to an indictment charging him with second-degree rape.

The prosecuting witness, who was eighteen years old at the time, testified that on 30 May 1977 she was driving alone on Interstate Highway 85 from Charlotte, N.C., to her next duty station with the United States Army in Virginia. Late in the after-

noon, when she was near Hillsborough, N.C., she experienced motor trouble. Defendant offered assistance, telling her he was part owner of a service station where her car could be repaired on the following day. She left her car on the side of the road and rode with defendant in his car to a nearby motel. After she checked in at the motel, defendant left. About 4:00 a.m. she was awakened by someone pounding on her door. She opened the door, and defendant came into her room uninvited. He made sexual advances which she resisted. He became angry and forceful, at one point strangling her with both hands and telling her he was quite strong and could kill her. When she saw that resistance was futile, she stopped struggling. He then had sexual intercourse with her against her will. As soon as defendant left, she reported the matter to the police.

Defendant testified and admitted that he had sexual intercourse with the prosecuting witness, but testified that she consented and that no force was involved.

The jury found defendant guilty as charged. From judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Associate Attorney Tiare Smiley Farris for the State.

Winston, Coleman & Bernholz by Barry T. Winston for defendant appellant.

PARKER, Judge.

[1] The State presented the testimony of a police officer who had investigated the matter. On cross-examination, this witness testified that during the week prior to the trial he had been back to the motel room, No. 104, which the prosecuting witness had occupied and had also gone into some of the adjoining rooms. Defense counsel asked the witness, "While you were in the adjoining rooms, did you hear any hollering from Room 104?" The court sustained the State's objection to this question. Had the witness been permitted to answer, he would have answered, "Yes." The exclusion of this answer is the subject of defendant's first assignment of error.

The purpose of the question was to determine the extent to which occupants of adjoining rooms could have heard any loud

noises coming from the room occupied by the prosecuting witness on the night of the alleged rape. This evidence involved a partial reenactment of the original occurrence, and it was therefore experimental evidence. Experimental evidence is admissible, but only if it is shown that the experiment was conducted under circumstances substantially similar to those of the actual occurrence. *State v. Jones*, 287 N.C. 84, 214 S.E. 2d 24 (1975); *State v. Phillips*, 228 N.C. 595, 46 S.E. 2d 720 (1948). In the present case there was no showing that the circumstances of the experiment were substantially similar to the actual occurrence. No evidence was offered to show who did the "hollering" in the experiment or how loud they "hollered" as compared with the volume of the "hollering" on the night of the actual occurrence. Defendant had a right to present competent evidence to show similarity of condition, *Service Co. v. Sales Co.*, 259 N.C. 400, 131 S.E. 2d 9 (1963), but he did not do so. In the absence of such evidence the trial court correctly excluded the experimental evidence, and defendant's first assignment of error is overruled.

Defendant does not present and discuss in his brief the question sought to be raised in his second assignment of error. Accordingly, his second assignment of error is deemed abandoned. Rule 28(a), N.C. Rules of Appellate Procedure.

[2] Defendant's third assignment of error is directed to the trial court's denial of his motion for nonsuit. Both the prosecutrix and the defendant agreed that they engaged in sexual intercourse, and the only issue between them was whether the prosecutrix had given her consent. Defendant contends that the case thus became a "swearing contest" between him and the prosecutrix and that the unsupported testimony of the prosecutrix should be held insufficient as a matter of law to support a rape conviction in this case. Such is not the rule in this State. The unsupported testimony of the prosecutrix in a prosecution for rape has been held in many cases sufficient to require submission of the case to the jury. *E.g., State v. Hines*, 286 N.C. 377, 211 S.E. 2d 201 (1975); *State v. Shaw*, 284 N.C. 366, 200 S.E. 2d 585 (1973); *State v. Carthens*, 284 N.C. 111, 199 S.E. 2d 456 (1973); *State v. Miller*, 268 N.C. 532, 151 S.E. 2d 47 (1966); *State v. Williams*, 31 N.C. App. 588, 229 S.E. 2d 839 (1976). Defendant's third assignment of error is overruled.

[3] Defendant next assigns error to the trial judge's denial of his motion for a mistrial based upon a question asked of the defendant on cross-examination. The prosecuting attorney asked defendant if, "back about 1962, you were charged with raping Mary Smith and you pleaded guilty to carnal knowledge with her being a minor." The portion of the question regarding the rape charge was clearly improper. For purposes of impeachment, a witness, including the defendant in a criminal case, may not be cross-examined as to whether he has been *charged* with a criminal offense other than the one for which he is on trial. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). However, Chief Justice Bobbitt, speaking for the Court in *Williams*, went on to point out that "[w]hether a violation of the rule will constitute sufficient ground for a new trial will depend upon the circumstances of the particular case." 279 N.C. at 674, 185 S.E. 2d at 181. In *Williams*, the Supreme Court concluded that a new trial was necessary where the defendant was cross-examined regarding indictments which were pending at the time of trial. In the present case, there had been a final disposition prior to the trial of this case on the charge to which the prosecuting attorney referred, and defendant described the disposition and nature of the charge. He never admitted that he was initially charged with rape, but he testified:

> When I was 23 years old, I was going with a girl 19 years old. Come to find out she was 15, and I was convicted of carnal knowledge. I plead [sic] guilty to it.

In addition, the trial court, in response to a request by defendant, instructed the jury to disregard any reference the prosecuting attorney made to the earlier charge against defendant. Therefore, in view of defendant's explanation and the court's prompt curative instruction, the prosecuting attorney's reference to the previous rape charge was not prejudicial to defendant and no justification for a new trial has been shown. *See State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975). This assignment of error is overruled.

[4] For his fifth and final assignment of error, defendant assigns error to the following portions of the court's charge to the jury:

> The force necessary to constitute rape is the use of force or display of force sufficient to overcome the will of the pros-

ecuting witness and overcome any resistance that she may make.

* * * * *

I do finally instruct you that if you find from the evidence beyond a reasonable doubt that on or about the 31st of May, 1977, the defendant, Ed Bailey, did by the use of force or threat of force sufficient to overcome the will of [the prosecuting witness] have sexual intercourse with her without her consent and against her will, it would be your duty to return a verdict of guilty of second degree rape.

Citing *State v. Burns*, 287 N.C. 102, 214 S.E. 2d 56 (1975), defendant contends that "[t]he force necessary to constitute rape must be force that 'reasonably' induces fear of serious bodily harm," and he contends that the quoted instructions given by the trial court in the present case do not "comport with the objective standard of reasonableness set out in *Burns*." We find no error. We do not find that our Supreme Court in *State v. Burns, supra*, adopted any such "objective standard of reasonableness" as that for which defendant contends. The opinion in that case contains the following:

> Rape is sexual intercourse with a female person by force and without her consent. *State v. Henderson, supra; State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225; *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190; *State v. Overman*, 269 N.C. 453, 469, 153 S.E. 2d 44; *State v. Carter*, 265 N.C. 626, 144 S.E. 2d 826. A threat of serious bodily harm which reasonably induces fear thereof constitutes the requisite force and negates consent. *State v. Henderson, supra; State v. Bryant*, 280 N.C. 551, 557, 187 S.E. 2d 111; *State v. Primes, supra; State v. Overman, supra; State v. Carter, supra.*

287 N.C. at 116, 214 S.E. 2d at 65.

Defendant's contention that our Supreme Court in *State v. Burns, supra*, adopted an "objective standard of reasonableness" to determine the degree of force necessary to constitute one of the elements of the crime of rape appears to be based on the single sentence from the above quoted portion of the opinion in that case which states that "[a] threat of serious bodily harm which reasonably induces fear thereof constitutes the requisite

force and negates consent." We do not interpret that sentence as requiring the trial court in every prosecution for rape to instruct the jury that before they can return a verdict of guilty they must find beyond a reasonable doubt that the defendant used or threatened to use such force as reasonably induced fear of serious bodily harm. Certainly that was not the holding in *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death penalty vacated*, 428 U.S. 902, 96 S.Ct. 3202, 49 L.Ed. 2d 1205 (1976), which was cited with approval in *State v. Burns, supra.* In *Henderson* our Supreme Court found no error in an instruction which was substantially the same as that to which defendant in the present case assigns error. We also find no error in the present case.

No error.

Judges HEDRICK and MITCHELL concur.

MILDRED MONTFORD v. H. G. GROHMAN, IN HIS OFFICIAL CAPACITY AS SHERIFF OF NEW HANOVER COUNTY, AND BENEFICIAL FINANCE COMPANY OF WILMINGTON

No. 775SC583

(Filed 20 June 1978)

Homestead and Personal Property Exemptions § 6; Uniform Commercial Code § 45— personal property exemption—inapplicability to secured property

A provision of a consumer loan security agreement by which the debtor purported to waive her right to the $500.00 personal property exemption granted by Art. X, § 1 of the N. C. Constitution and G.S. 1-369 was inoperable since the debtor could not waive her exemption in case of levy upon her property. However, the personal property exemption did not prevent the lender from enforcing its right to possession of the debtor's household goods in which it had a security interest, although all of the debtor's assets consisted of household goods worth less than $500.00. G.S. 25-9-503.

APPEAL by defendant, Beneficial Finance Company of Wilmington, from *Rouse, Judge*. Judgment entered 21 February 1977 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 6 April 1978.

Plaintiff seeks by this action to prevent the execution of a Writ of Possession for her household furnishings. On 4 December 1975, plaintiff and defendant, Beneficial Finance Company of Wilmington, entered into a consumer loan transaction by which Beneficial obtained a security interest in all of the plaintiff's personal property, including her household furnishings. By the terms of the security agreement she waived all rights of exemption under the laws of the State. On 27 July 1976, the loan was in default. Beneficial obtained a Judgment of Possession in Magistrate's Court, alleging that all of plaintiff's household goods and furnishings were worth no more than five hundred dollars. No appeal was taken from the magistrate's order. Plaintiff did, however, promptly petition the Clerk of Court to set apart her personal property which was exempt from execution. When the sheriff of New Hanover County gave plaintiff notice that he intended to enforce the Writ of Possession without reference to the exemption, plaintiff brought this action to enjoin him from executing the Writ of Possession until her exempt property was determined and for a Declaratory Judgment that she is entitled to have up to $500.00 of her personal property set apart as exempt from enforcement of the Writ of Possession.

The court made appropriate findings of fact and concluded that plaintiff had made a timely claim for her exemption, that her personal property exemption was a right guaranteed to her by the North Carolina Constitution, and that she did not give up that right when she created a security interest in that property by agreement with Beneficial.

James B. Gillespie, Jr., New Hanover Legal Services; Donald S. Gillespie, Jr., and Robert H. Gage, Legal Aid Society of Mecklenburg County, attorneys for plaintiff appellee.

Poisson, Barnhill, Butler & Britt, by Donald E. Britt, Jr., for defendant appellant, Beneficial Finance Company of Wilmington.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Alan S. Hirsch, amicus curiae, State of North Carolina.

Jordan, Morris and Hoke, by John R. Jordan, Jr., Joseph E. Wall and Robert R. Price, amicus curiae, North Carolina Consumer Finance Association, Inc.

VAUGHN, Judge.

It is helpful in viewing this matter to differentiate carefully between the issue actually before us and those which were decided by the magistrate on 27 July 1976. No appeal was taken from that judgment, and the parties may not now attack it or attempt to review the matters decided there. That judgment established the validity of Beneficial's security interest and the fact of plaintiff's default on her obligation. It also established the extent of the security interest which included "[a]ll of the household furniture and furnishings, electrical and gas appliances, including television sets, phonographs and record players, refrigerators, etc. and other personal property owned and located at the residence of the [plaintiff]." And finally it established that all of plaintiff's personal property is worth no more than $500.00. By not appealing the magistrate's order, plaintiff conceded that in her case the provision quoted above was not overly broad nor in any other way unconscionable and that she had no defense against an action on the security agreement. The magistrate's order thus confirmed Beneficial's right to possession of the personal property. G.S. 25-9-503.

The question remaining for our consideration is whether the personal property exemption found in Article X of the North Carolina Constitution and G.S. 1-378 in any way prevents Beneficial from enforcing its right to possession of the articles in which it has a security interest. While the parties have made much of the fact that this security interest pertained to a high risk loan and of the fact that all plaintiff's assets are household goods and are worth less than $500.00, these matters are immaterial to the question. We also note that most of plaintiff's argument concerns itself with what she says the law should be rather than what it is. That argument should be directed to the legislative branch of government. The exemption provisions in the Constitution do not make special allowances for a resident's sole remaining assets. In *Scott v. Kenan*, 94 N.C. 296 (1886), the Court held that it was immaterial how much personal property a debtor possessed, for he had the right to select any of it up to the value of his exemption and leave any remainder for his creditors. Moreover, the laws of this State pertaining to security interests do not provide special protection for those creditors who make high risk loans. *See* G.S. 25, Article 9, North Carolina Comment

and G.S. 25-9-102. We must, therefore, consider more generally the interaction of the U.C.C. and the personal property exemption.

Under Article X of the Constitution and G.S. 1-369, personal property belonging to any resident of the State up to a value of $500.00 is "exempted from *sale under execution* or other final process of any court, issued for the collection of any debt." N.C. Const. art. X, § 1 (emphasis added). The procedure to be followed is set out in G.S. 1-378. After levy upon his personal property by virtue of final process for the collection of a debt, the owner may demand that the sheriff summon appraisers who will lay off to him such articles as he selects of a value up to $500.00. The creditors may then take possession of the remainder. All the parties concede that plaintiff has a clear right to convey any of her property, either before or after her exemption is allotted. The law protects her not from destitution but only from loss of the property due to sale under final process for the collection of any debt. It does no more. Indeed, if she wished she could give away her last possessions. *Cf. New Amsterdam Casualty Co. v. Waller*, 323 F. 2d 20 (4th Cir. 1963), where the Court found that under North Carolina law the first five hundred dollars of a gift in fraud of creditors might be exempt from recovery by the creditors on the theory that the debtor had a right to dispose of his exempt property and to that extent the gift was not in fraud of the creditors. Before the enactment of the U.C.C., a debtor could subject his personal property to a chattel mortgage, and if he did so, the property was liable for the mortgage debt first and the debtor's exemption was allotted only in the amount of the surplus. *Gaster v. Hardie*, 75 N.C. 460 (1876). The Court based its decision in part on the concept that by mortgaging his property the mortgagor conveyed a special interest in it to his mortgagee. Although the case concerned the relative rights of the mortgagee and a judgment creditor in certain property, the Court made it clear that while the debtor's right to exemption operates against the creditor, it does not protect him from foreclosure by the mortgagee. In part, this is due to application of the concept of transfer of title; by mortgaging his property the mortgagor conveyed it to the mortgagee reserving, among other rights, the right to possession, and the judgment creditor may reach only those assets which the debtor owns.

An Article 9 security interest by the terms of the U.C.C. replaces the older chattel mortgage as a method of protecting the creditor. G.S. 25-9-102(2). Title is no longer the determinative concept. G.S. 25-9-202. Nevertheless, the result is the same. The change in method of creating a creditor's interest in property does not affect the debtor's right to encumber his property at will. Having chosen to do so, he may be held to the consequences of his decision. Thus, if the plaintiff had owned, in addition to the personal property covered by this security interest, other property worth $500.00, which was not at her residence, she could not have selected the property in which she had granted Beneficial a security interest to be exempt and forced it to take her other property in satisfaction of her debt, despite the fact that she had more immediate need of the household furnishings. The first action established conclusively the terms of this security interest as transferred by plaintiff to Beneficial. She may not deny it now. *Compare Hernandez v. S.I.C. Finance Co.*, 79 N.M. 673, 448 P. 2d 474 (1968), where the Court found that when a debtor subjects property which would otherwise be exempt from levy to a security interest, he thereby waives his right to the exemption.

We thus hold that plaintiff divested herself of her right to possession of this property by the terms of her own contract with Beneficial which was made pursuant to the provisions of Article 9 of the U.C.C. When she defaulted on her obligation to Beneficial, Beneficial had an immediate right to possess the articles in which she had given it a security interest. G.S. 25-9-503. This right should be distinguished from any interest which a creditor might seek under an executory waiver of the right to exemption. It has long been held that a debtor cannot be bound by an agreement to waive his exemption in case of levy upon his property. *Branch v. Tomlinson*, 77 N.C. 388 (1877). The waiver provision in the security agreement is thus inoperable. In the cases of foreclosure of mortgages or of taking possession of collateral after default, however, no right to possession remains in the debtor who has voluntarily bargained it away. Our Legislature has seen fit "to surround the family home with certain protection against the demands of urgent creditors . . . [to put it] beyond the reach of those financial misfortunes which even the most prudent and sagacious cannot always avoid." *Williams v. Johnson*, 230 N.C. 338, 343, 53 S.E. 2d 277, 281 (1949). It has not seen fit to prevent a

debtor from "selling" or otherwise transferring an interest in that property to another, thereby giving the other priority of right to possession of the collateral. The constitutional exemption operates against general creditors so as to allow the debtor to retain his most valued $500.00 of property in the face of their executions. It does not operate so as to hinder secured creditors from realizing on the terms of their bargain.

We point out that the Legislature could, by appropriate action, prevent security interests in household goods from being effective and, thereby, guarantee that a debtor could not strip himself of his final assets except by sale or gift. *See First Nat. Bank v. LaJoie*, 537 P. 2d 1207 (Okla. 1975). No such legislation is in effect, however. The judgment giving plaintiff the right to retain $500.00 of personal property in preference to Beneficial is reversed as is the order enjoining defendant Grohman from enforcing the Writ of Possession filed 13 August 1976.

Reversed.

Judges PARKER and WEBB concur.

FLORA J. BROOKS v. KARL M. BROWN AND WIFE, EARLENE B. BROWN

No. 7729SC740

(Filed 20 June 1978)

1. Cancellation and Rescission of Instruments § 10— forgery of provisions of deed—sufficiency of evidence

In an action to have portions of a deed conveying an undivided half interest in two tracts of land declared void because they had been forged, the trial court properly denied defendants' motion to dismiss where plaintiff offered ample and competent evidence to show that the deed had been altered; plaintiff showed fraudulent intent by offering evidence that defendants did not list the tracts in the county tax records until thirteen years after they claimed they acquired title, that one-half interest in one parcel of land was first listed by defendants in 1962, thus corroborating plaintiff's testimony that in 1962 she sold one-half interest in that parcel to defendants, that defendants did not claim any of the tracts in five financial statements filed in five separate years between 1970 and 1976, and that at trial defendants claimed title dating back to 1958 or 1959; and plaintiff offered evidence that the disputed deed was recorded at the Register of Deeds' office, thereby tending to show that the instrument was apparently capable of defrauding.

2. Cancellation and Rescission of Instruments § 10— forgery of portions of deed—sufficiency of evidence

In an action to have portions of a deed declared void because they had allegedly been forged, evidence was sufficient to support the trial court's findings that plaintiff executed and delivered the deed to defendants in 1950; that plaintiff never executed or acknowledged the same in its altered form; that the defendants had possessed the deed since 1950; and that the alterations to the deed were made by defendants or by someone with their knowledge and under their direction.

3. Cancellation and Rescission of Instruments § 9.1— forgery of portions of deed—relevancy of evidence

In an action to have portions of a deed declared void because they had allegedly been forged, the trial court did not err in finding that the evidence presented by defendants concerning the manner in which the deed was altered was indefinite and not clearly relevant, since such evidence consisted of testimony by a justice of the peace who never actually read the provisions of the deed and testimony of a secretary from the office of the justice of the peace who had no recollection of ever having anything to do with the disputed instrument.

APPEAL by defendants from *Martin (Harry C.), Judge*. Judgment entered 12 March 1977, in Superior Court, MCDOWELL County. Heard in the Court of Appeals 1 June 1978.

In April 1976, plaintiff instituted this action and alleged that a portion of a deed from plaintiff (and her late husband) to defendants, conveying an undivided half interest in two tracts of land, had been forged and was not the deed of plaintiff. The deed was allegedly delivered in 1950 but not recorded by defendants until 16 January 1976. Plaintiff further alleged that this deed constituted a cloud upon her title.

At trial without a jury, plaintiff offered evidence which tended to show that the disputed deed was delivered in 1950, and that it was thereafter altered without authority before it was recorded. Plaintiff testified that certain words had been added in the printed portion of the form deed and that descriptions of ten other tracts of land had been added, which lands, according to plaintiff, had not been conveyed in the deed which was delivered to defendants.

Defendant Karl Brown testified that the deed was delivered to him by Fred Brooks, plaintiff's late husband, on 29 June 1959, and that he placed the deed in a safe; that the deed later was lost,

but on or about 16 January 1976, defendants found the deed and had it recorded in the office of the McDowell County Register of Deeds in Deed Book 251 at Page 212.

The trial court made findings of fact and concluded that the disputed instrument was void insofar as the third through twelfth tracts of land were concerned. In addition to declaring the deed void as to said lands, the court ordered defendants to pay plaintiff ten dollars as actual damages and three thousand dollars as punitive damages. Defendants appeal from this judgment.

Everette C. Carnes for plaintiff appellee.

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

ARNOLD, Judge.

[1] Defendants' first contention is that the trial court erred in denying their motion to dismiss made at the close of plaintiff's evidence. G.S. 1A-1, Rule 41(b) in pertinent part reads:

> "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and law the plaintiff has shown no right to relief."

Defendants argue that plaintiff failed to introduce sufficient evidence to make out a case for recovery. We do not agree. Plaintiff, at the very least, established the three elements of forgery: (1) a false making or alteration of a written instrument; (2) fraudulent intent on the part of defendant; (3) an apparent capability of the written instrument to defraud. *See, e.g., State v. McAllister*, 287 N.C. 178, 214 S.E. 2d 75 (1975). As to the first element, plaintiff put on ample and competent evidence to show that the deed had been altered. She testified that "the typewritten inserts and additions to the printed portion . . . were not a part of the Deed that I've testified about." She also stated that she and her husband never owned most of the tracts of lands described in the inserted portions. Furthermore, she pointed out further inaccuracies in the portions which she had acknowledged.

As to the second element—fraudulent intent—we believe this may be inferred from circumstantial evidence. Plaintiff introduced evidence tending to show that defendants did not list these tracts in the McDowell County tax records until 1976—well beyond 1959 when Brown claimed he acquired title. One-half interest in one parcel of land, part of that described in the ninth tract, was first listed by defendant Karl Brown in 1962; this corroborates plaintiff's testimony that in 1962 she sold one-half interest in that parcel to Brown. Furthermore, plaintiff put on evidence that defendant Karl Brown did not claim any of these additional tracts of land in five financial statements filed by Brown in five separate years between 1970 and 1976. However, there was also evidence that defendants now claimed title to the land dating back to 1958 or 1959. We believe that all of the evidence, taken together, tends to show an intent to defraud plaintiff of land belonging to her.

Finally, plaintiff put on evidence that the disputed deed was recorded at the Register of Deeds' office, thereby tending to show that the instrument was apparently capable of defrauding.

We, therefore, find no error in the trial court's denial of defendants' motion to dismiss.

[2] Defendants next argue that the trial court erred in finding as fact that plaintiff executed and delivered the deed to defendants in 1950; that plaintiff never executed or acknowledged the same in its altered form; that the defendants have possessed said deed since 1950; and that the alterations to said deed were made by the defendants or by someone with their knowledge and under their direction. Defendants' argument is totally without merit.

There is competent evidence to support each of the foregoing findings of fact. Plaintiff testified with regard to the two tracts of land described on the first page of the disputed deed, "it's the land that Mr. Brooks and I conveyed to Mr. Brown in 1950-51." The instrument itself indicates a date of 1958 in the beginning portion of the deed ("THIS DEED, made this *12* day of *October*, A.D. 1958 . . . ."), but it further shows a strikeover, with the eight superimposed upon a zero.

Plaintiff also testified that she never executed or acknowledged the altered instrument. In fact she testified that

most of the tracts of land purportedly conveyed by plaintiff to defendants had never even been owned by her. She further testified that she delivered the deed to defendants, and there was evidence that not until 1976 did defendants record the deed. This was competent evidence to support the court's finding that, in the interim, defendants had possession of the deed.

Finally, there was competent evidence from which one might reasonably infer that defendants either made the alterations or had someone else make them. Plaintiff testified that the deed she signed did not contain the additions; defendants maintained that the additions were on the original and were legitimate. If plaintiff did not sign the deed containing descriptions of the additional tracts of land one could conclude that defendants, or someone acting under their direction, did so.

[3] Defendants further contend that the court erred in finding (1) that the evidence presented by defendants concerning the manner in which the deed was altered was indefinite and not clearly relevant, and (2) that there was no evidence that any instrument so altered was ever executed by plaintiff or her husband. The finding of fact to which defendants took exception reads:

> "15. Defendant and witnesses, Frances Harris and Roy Griggs, testified concerning events which allegedly occurred in offices of Roy Griggs, then a Justice of the Peace and U.S. Commissioner. Such evidence indicated that Fred J. Brooks, defendant Karl M. Brown and J. L. Field, a surveyor and perhaps others, but not plaintiff, had been in said office about 1958 or 1959 with a deed form similar to the one on which the original 1950 deed from plaintiff and her husband to defendants had been drafted, and other papers. A typist who worked for Roy Griggs had allegedly done some typing on said deed form and on a separate sheet of paper according to instructions from Mr. Brooks and such separate sheet of paper had been attached to the deed form by means of transparent tape. None of such witnesses were able to specifically identify the typing done at that time as being all or any part of the presently contested instrument. Although Roy Griggs was of the opinion it was, he had never read the papers at the time of the original alterations and his opinion is lacking in probative force. The court finds that evidence of

such events is indefinite and is not clearly relevant and that there is no evidence that any instrument so formed was ever executed by either plaintiff or her husband and such evidence is not sufficiently clear or persuasive to overcome plaintiff's unequivocal testimony that she had never seen the alterations and additions to the instrument or had knowledge of its existence until after it was recorded in 1976."

The record shows that Roy Griggs testified that the disputed instrument "is the deed that was in my office to my best recollection . . . ." However, Griggs also stated:

> "I myself did not type any of the instrument that I had in my hand and referred to in my testimony. I did not conduct a hand examination while I was in my office. I just saw it over there where it was being worked on. I saw one of the girls working on it. I never picked it up and looked at it, nor did I read anything that was on it."

One secretary from the office of Mr. Griggs testified that she had no recollection of ever having anything to do with the disputed instrument. Although there were other secretaries who might have done the typing, defendants did not introduce evidence from them. The trial court, therefore, did not err in finding that defendants' testimony regarding the additions was indefinite.

As to the finding that there was no evidence that the altered instrument was executed by either plaintiff or her husband, we agree with defendants that this is not totally accurate. The executed deed itself was evidence that plaintiff and her husband had executed the deed. However, in view of the fact that the court found that defendants had altered the deed with the intent to deprive plaintiff of her property, we see no prejudicial error in the court's finding.

We have reviewed defendants' other assignments of error which were dependent upon the ones heretofore discussed, and we find no error in the trial court's judgment.

Affirmed.

Judges BRITT and ERWIN concur.

FLORA L. SAINZ v. ANTHONY SAINZ

No. 7712SC446

(Filed 20 June 1978)

1. **Divorce and Alimony § 21.5— support provisions of separation agreement—no enforcement by contempt**

A judgment for sums due under an extrajudicial separation agreement is not enforceable by execution *in personam* in the form of imprisonment for civil contempt by reason of the prohibition against imprisonment for debt provided by Art. I, § 28 of the N. C. Constitution.

2. **Constitutional Law § 26.6; Courts § 21.1; Divorce and Alimony § 21.5— separation agreement—foreign decree of specific performance—contempt—full faith and credit—comity**

A New York decree of specific performance of the support provisions of an extrajudicial separation agreement, which is enforceable in New York by civil contempt proceedings, is not entitled to enforcement by civil contempt proceedings in the courts of this State by reason of the full faith and credit clause of the U. S. Constitution, since contract support payments may not be enforced in this State by contempt proceedings, and the methods by which a judgment may be enforced in the state in which it is rendered are not made obligatory upon the courts of another state by the full faith and credit clause. Nor was the New York decree entitled to enforcement by contempt proceedings under the principles of comity, since comity rests in the discretion of the courts of the state in which enforcement is sought, and no state will enforce a foreign law contrary to its public policy.

APPEAL by plaintiff from *Herring, Judge*. Judgment entered 25 January 1977 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 6 March 1978.

This is an action brought by plaintiff seeking judgment for accrued support due under a separation agreement, and asking the court to give effect to a New York judgment ordering specific performance of the separation agreement by the defendant.

Both parties moved for summary judgment. After a hearing on the cross-motions for summary judgment, the trial court summarized the undisputed facts, pertinent portions of which are summarized except where quoted, as follows:

The plaintiff, a resident of New York, and the defendant, a resident of Robeson County, North Carolina, entered into a separation agreement on 12 August 1967, "wherein defendant agreed to pay certain monies to plaintiff for her natural life or un-

til she remarried." On 19 December 1968, "the Supreme Court of New York, Oneida County, rendered summary judgment in favor of the plaintiff and against the defendant ordering defendant to specifically perform the separation agreement of August 12, 1967 and all the provisions thereof." Subsequent to the execution of the separation agreement, the parties were divorced; plaintiff has not remarried; defendant has remarried and has a child by his second marriage. Plaintiff seeks judicial recognition and adoption of the New York order in this State to compel specific performance by defendant and to punish his non-compliance through civil contempt proceedings. "[T]he separation agreement in question was and is a civil contract and its creation and execution by the parties was an extrajudicial transaction." There are no issues of material fact as to this claim, thus allowing its disposition pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

Based upon the undisputed facts, the trial court made conclusions of law, set out in full as follows:

> "1. It is the law and public policy of the State of North Carolina, that no person shall be imprisoned for debt. Article I, Section 16 [sic], North Carolina Constitution.
>
> 2. It is the law of North Carolina that an extrajudicial contract or agreement of separation between a husband and wife wherein the husband obligates himself to make periodic payments for the wife's support creates a debtor-creditor relationship and any judgment rendered for non-performance is a debt.
>
> 3. The agreement of separation entered into by the parties herein may be enforced by maintaining an action for breach of contract and judgment may be awarded for sums shown to be due; such actions, however, sound in contract and may result only in a money judgment, it being the policy and law of North Carolina that such contractual rights may not be enforced by civil proceedings for contempt.
>
> 4. It being contrary to the public policy and Constitution of North Carolina to imprison for debt, this Court cannot grant full faith and credit to the judgment of the Supreme Court of New York ordering the defendant to specifically perform the contract of separation, and specifically its provisions for future support payments.

5. The Court, lacking the power to enforce said contract by proceedings for civil contempt, must deny plaintiff's motion for summary judgment and grant defendant's motion for summary judgment, it clearly appearing that the defendant is entitled to judgment as a matter of law."

From the trial court's order denying plaintiff's motion for summary judgment and granting defendant's motion for summary judgment, plaintiff has appealed.

Smith, Geimer & Glusman, by Kenneth Glusman, for the plaintiff.

Butler, High & Baer, by Keith L. Jarvis, for defendant.

BROCK, Chief Judge.

As a preliminary matter, we note that the trial court purported to make findings of fact and conclusions of law in its order. The words of Judge Morris in a recent opinion are pertinent:

> "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 . . . . 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." *Capps v. City of Raleigh*, 35 N.C. App. 290, 292, 241 S.E. 2d 527, 528-529 (1978).

Here, also, it appears that the material facts set out by the trial court are undisputed, and we thus proceed to dispose of the question of law raised by this appeal, namely, whether the trial court erred in refusing to recognize and adopt the New York decree of specific performance.

[1] Plaintiff's express purpose in seeking the remedy of specific performance was to enable her to enforce the provisions of the separation agreement by civil contempt proceedings. She concedes that the relief sought would not be available to her in an

action brought originally in the courts of this State. The enforcement of support payments provided in an extrajudicial separation agreement is accomplished as in the case of any other civil contract, *i.e.* through an action for breach of the contract seeking a judgment for sums due. Such an action, sounding in contract, is not enforceable by execution *in personam* in the form of imprisonment for civil contempt for non-compliance, by reason of the constitutional prohibition against imprisonment for debt. N.C. Const., Art. I, § 28; *Stanley v. Stanley*, 226 N.C. 129, 37 S.E. 2d 118 (1946); *Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E. 2d 71 (1967). Based upon the above reasoning, this Court recently held that injunctive relief is not available to a plaintiff seeking to enforce support provisions of a separation agreement. *Riddle v. Riddle*, 32 N.C. App. 83, 230 S.E. 2d 809 (1977). It follows, therefore, that the remedy of specific performance of a separation agreement contemplating enforcement by civil contempt proceedings is not available in this State.

This conclusion is not altered by the recent case of *Levitch v. Levitch*, 294 N.C. 437, 241 S.E. 2d 506 (1978). In *Levitch* a judgment was issued granting defendant therein an absolute divorce and the provisions of a separation agreement between the parties was adopted by order of the district court directing payment of the amounts specified in the agreement. In such a case, the separation agreement is superseded by a decree of the court which is enforceable by contempt proceedings. The distinction between enforcement of a mere extrajudicial contractual separation agreement and a decree of the court incorporating the provisions of a separation agreement into a judgment of divorce remains viable in this State.

[2] Plaintiff contends, nevertheless, that the New York specific performance decree is entitled to recognition and enforcement in North Carolina by virtue of the full faith and credit clause of the U.S. Constitution. We disagree, and hold to the contrary.

Under the full faith and credit clause a valid judgment for the payment of money must, as a general rule, be recognized and enforced in a sister state. Restatement 2d, Conflict of Laws §§ 93 and 100 (1971). Likewise, a judgment in the nature of an equitable decree that orders the doing of an act is entitled to recognition to the same degree as another judgment. *Id.* § 102, Comment b.

However, there is a distinction between recognition of a foreign judgment, on the one hand, and its enforcement, on the other hand, as noted in an introductory note preceding the above cited § 93:

> "A foreign judgment is recognized, as the term is used in the Restatement of this Subject, when it is given the same effect that it has in the state where it was rendered with respect to the parties, the subject matter of the action and the issues involved. A foreign judgment is enforced when, in addition to being recognized, a party is given the affirmative relief to which the judgment entitles him."

Thus to the extent that the New York decree in the instant case adjudicated the rights and liabilities as between the parties, it is entitled to recognition by the courts of this State. However, the full faith and credit clause does not, in our opinion, require the court of this State to provide to plaintiff the remedy of specific performance enforceable by contempt proceedings which, apparently, is available in New York. The methods by which a judgment of another state is enforced are determined by the local law of the forum. *Id.* § 99. ". . . mere modes of execution provided by the laws of a state in which a judgment is rendered are not, by operation of the full faith and credit clause, obligatory upon the courts of another state in which the judgment is sought to be enforced. . . ." *Sistaire v. Sistaire*, 218 U.S. 1, 26, 54 L.Ed. 905, 914, 30 S.Ct. 682, 690 (1910). As noted *supra*, execution *in personam* is not available to a party seeking enforcement of contractual support payments. "The full faith and credit clause does not operate to give a foreign judgment, so far as enforcement is concerned, any higher position than a domestic judgment." 46 Am. Jur. 2d, Judgments, § 905, p. 1038.

Our decision does not leave the plaintiff without any remedy for enforcement of her rights under the separation agreement. An equitable decree for the payment of money is enforced in another state "just as a money judgment of a law court is enforced, by suit on the judgment." H. Goodrich, Handbook of the Conflict of Laws § 218, p. 411 (4th ed. E. Scoles 1964).

Thus we hold that the New York decree of specific performance is not entitled to compulsory enforcement in this State by virtue of the full faith and credit clause. Furthermore, the New

York decree is not entitled to enforcement under principles of comity. Comity rests in the discretion of the courts of the state in which enforcement is sought. 16 Am. Jur. 2d, Conflict of Laws, § 5. No state will enforce a foreign law contrary to its public policy. *Id.* § 6; *Armstrong v. Best,* 112 N.C. 59, 17 S.E. 14 (1893).

For the reasons set out, we affirm the judgment of the trial court denying full faith and credit to the New York specific performance decree. We note however that by its 19 December 1968 order, the New York court rendered summary judgment against defendant in the amount of $685.00. Plaintiff's motion in the action now before the Court sought enforcement of the New York judgment. It appears that the trial court below failed to consider whether the New York money judgment was entitled to full faith and credit. Plaintiff is entitled to consideration of this question, and this case is remanded to the Superior Court, Cumberland County for further consideration of the New York decree insofar as it awards judgment for a sum certain in money.

Affirmed in part; remanded with instructions.

Judges HEDRICK and MITCHELL concur.

IN THE MATTER OF JOSEPH T. BERTA v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 7729SC665

(Filed 20 June 1978)

Eminent Domain §§ 13.2, 15— inverse condemnation proceeding—land conveyed—original owner only compensated—time for intervention

The trial court did not err in denying appellants' motion to intervene in an inverse condemnation proceeding instituted by a landowner who conveyed a portion of the land in question to appellants subsequent to institution of the proceedings, since: (1) the "taking" of the land in question by defendant had already occurred prior to the property owner's institution of the proceeding under G.S. 136-111 and appellants therefore were not deprived of any compensable interest in the real property; and (2) appellants' motion to intervene filed more than three and one-half years after they received their deed was not timely, the trial court having already conducted the hearing at which all issues other than damages had been determined. G.S. 136-108.

APPEAL by intervenors from *Martin (Harry C.), Judge*. Order entered 24 June 1977 in Superior Court, POLK County. Heard in the Court of Appeals 23 May 1978.

Prior to 30 October 1968, plaintiff, Joseph T. Berta, was the owner of 155.95 acres of land (Berta land) in Polk County. In the fall of 1968 defendant began construction of Interstate Highway 26 (I-26) upon its right-of-way, a portion of which is located north of and at a higher elevation than the Berta land. On 30 October 1968, a heavy rainfall washed large quantities of soil, sand, gravel and other materials which had been excavated on defendant's right-of-way into four watercourses which flow onto the Berta land. Due to the removal of vegetation from the right-of-way and the construction of the highway, the flow of surface water was increased to such volume that large amounts of silt were washed down, filling the watercourses and pond on the Berta land and overflowing and silting the land itself.

On 11 September 1970, plaintiff filed a complaint alleging inverse condemnation pursuant to G.S. 136-111. He also filed in the register of deeds office a Memorandum of Action which described the Berta land and set forth the interest in said lands which plaintiff alleged had been taken by the construction of I-26.

On 20 November 1970, defendant filed an answer denying that it had taken a compensable interest in the Berta land and moved for a continuance until the completion of the highway. The motion for continuance was allowed.

On 17 October 1973, plaintiff conveyed 28.94 acres of the Berta land detrimentally affected by the construction of I-26 to the appellants, Nellie Bowler and husband, William Bowler.

On 10 May 1977, after substantial completion of the highway, a hearing was held pursuant to G.S. 136-108 to determine all issues other than damages raised by the complaint and answer. Based on detailed findings of fact, Judge Martin concluded as a matter of law:

> 2. As to plaintiff's 155.95 acre tract of land, the construction of Interstate Highway 26 by the defendant has proximately caused the widening, deepening, straightening and changing of location of the watercourses located thereupon; the flooding and silting over of areas adjacent to said water-

courses and the pond located thereupon; and other permanent damages to said property as previously described in the Findings of Fact. The construction of Interstate Highway 26, a facility permanent in nature, . . . constitutes the taking of a compensable interest in land entitling the plaintiff to recover therefor just compensation under the Constitution and laws of the State of North Carolina.

3. The date of taking for the purpose of determining the damages in this cause is October 30, 1968.

The issue of damages was then scheduled for trial on 16 May 1977. On 12 May 1977, appellants moved to intervene on the grounds that 28.94 acres of the land detrimentally affected by the construction of I-26 had been conveyed to them. On 24 May 1977, Judge Martin entered an order denying the motion to intervene based on the following conclusions of law:

1. The Complaint and Memorandum of Action filed in this cause constitute record notice as of 11 September 1970 of the alleged taking by defendant in this action of an appurtenant right in the nature of an easement to maintain a continuing permanent nuisance as to the BERTA LAND, constituting the taking of a compensable interest in said land entitling the plaintiff, as of October 1968 to recover therefor just compensation under the Constitution and law of the State of North Carolina pursuant to Chapter 136 of the General Statutes of North Carolina.

2. Petitioners acquired the aforementioned 28.94 acres of real property subject to the aforementioned right of the part of the defendant to maintain a continuing permanent nuisance as to said property, said right being the nature of an easement, and subject to the right of the plaintiff to be paid just compensation therefor.

3. Petitioners have not been deprived by defendant of any compensable interest in real property.

4. Petitioners have no interest recognized at law or equity in the subject matter of this action.

On 16 May 1977 a memorandum of judgment allowing the Berta estate (plaintiff having died during the interim) compensa-

tion in the amount of $107,250.00 was filed and on 27 June 1977 a consent judgment between plaintiff's estate and defendant was entered ordering that said compensation be paid to plaintiff's estate.

Appellants excepted to the conclusions of law in the 24 May 1977 order, the memorandum of judgment and the consent judgment and appealed.

Attorney General Edmisten, by Special Deputy Attorney General James B. Richmond, for the State.

Poyner, Geraghty, Hartsfield & Townsend, by Cecil W. Harrison, Jr., for plaintiff appellee, estate of Joseph T. Berta.

Prince, Youngblood & Massagee, by James E. Creekman, for intervenor appellants, Nellie Bowler and husband, William Bowler.

BRITT, Judge.

Did the trial court err in denying appellants' motion to intervene in this action? We hold that it did not.

Appellants concede that if this action had been instituted by defendant pursuant to G.S. 136-104, they would have no right to intervene since that statute provides that title vests in the Board of Transportation when it files the complaint and declaration of taking and deposits the estimated amount of compensation with the court.

They argue, however, that when the action is for inverse condemnation under G.S. 136-111, the statute controlling this case, title does not vest in the Board of Transportation until final judgment is entered and the amount of compensation is paid; and that inasmuch as their motion to intervene was filed before final judgment was entered and compensation paid, the motion should have been allowed.

The litigants do not cite, and our research does not disclose, any authority from this jurisdiction that provides a direct answer to the question raised. Appellants point out that while G.S. 136-104 expressly provides for the vesting of title in the Board of Transportation upon compliance with the provisions thereof, G.S. 136-111 is silent as to when title vests in said Board when the pro-

ceeding is under it; and that since defendant in this case denied a "taking", that title could not have passed to defendant until final judgment and the payment of compensation.

Appellants strongly rely on certain language in *Caveness v. Railroad*, 172 N.C. 305, 90 S.E. 244 (1916), an inverse condemnation case under statutes which were similar to those now codified in G.S. Chapter 40. They quote language from *Caveness* declaring that a grantee of a party instituting an inverse condemnation proceeding may be entitled to the compensation if the grantee asserts his right by action or *appropriate proceedings in the cause*. Appellants contend their motion to intervene was an "appropriate proceeding" in this cause.

Defendant argues that the concept of condemnation by the Board of Transportation under G.S. Chapter 136 is entirely different from that envisioned by G.S. Chapter 40 and its predecessor statutes. Defendant argues that under Chapter 40 the condemnor *seeks* to take property and can avoid acquiring title by abandoning the proceeding if the property proves to be too expensive or otherwise undesirable, citing *Light Co. v. Manufacturing Co.*, 209 N.C. 560, 184 S.E. 48 (1936). On the other hand, defendant argues, if the Board institutes the proceeding under G.S. 136-104, a "taking" occurs simultaneously with the institution of the proceeding; and, if the property owner institutes the proceeding under G.S. 136-111, a "taking" is envisioned as having already occurred. With respect to the concept of Chapter 136, we find this argument persuasive.

At the time of the institution of this action, G.S. 136-111 provided in pertinent part:

> "Any person whose land or compensable interest therein HAS BEEN TAKEN by an intentional or unintentional act or omission of the Highway Commission and no complaint and declaration of taking HAS BEEN FILED by said Highway Commission may, within 24 months of the date of said taking, file a complaint in the Superior Court setting forth" (his claim for compensation). (Emphasis supplied.)

In his complaint in the case at hand plaintiff alleged certain intentional or unintentional acts or omissions on the part of defendant that constituted a "taking" of his land. As was said in

Midgett v. Highway Commission, 260 N.C. 241, 249, 132 S.E. 2d 599 (1963), "[o]nce the cause of action has occurred by the infliction of damage to the property, the taking is a *fait-accompli*."

In 2 Nichols, Eminent Domain (Rev. 3 ed.), § 521, we find:

> "If a parcel of land is sold after a portion of it has been taken (or after it has been injuriously affected by the construction of some authorized public work), the right to compensation, constitutional or statutory, does not run with the land but remains a personal claim in the hands of the vendor, unless it has been assigned by special assignment or by a provision in the deed. It is immaterial that the question of compensation is deferred. . . ."

In 29A C.J.S., Eminent Domain, § 202, we find:

> "Damages for the taking of land or for the injury to land not taken belong to the one who owns the land at the time of the taking or injury, and they do not pass to a subsequent grantee of the land, except by a provision to that effect in the deed or by separate assignment. . . ."

See also Brooks Inv. Co. v. City of Bloomington, 305 Minn. 305, 232 N.W. 2d 911 (1975).

We hold that the trial judge properly concluded that appellants had not been "deprived by defendant of any compensable interest" in the real property in question and that they have "no interest recognized at law or equity in the subject matter of this action".

We also find persuasive plaintiff's argument that appellants' motion to intervene was not timely. G.S. 1A-1, Rule 24, is the rule of Civil Procedure relating to intervention. With respect to intervention of right and permissive intervention, the rule requires "timely application."

The provisions of G.S. 136-108 apply to condemnation proceedings under G.S. 136-111 as well as under G.S. 136-104. *Lautenschlager v. Board of Transportation*, 25 N.C. App. 228, 212 S.E. 2d 551 (1975), *cert. denied*, 286 N.C. 260, 214 S.E. 2d 431 (1975). G.S. 136-108 provides: "After the filing of the plat, the judge, upon motion and 10 days notice by either the Board of Transportation or the owner, shall, either in or out of term, hear

and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken and area taken." This statute contemplates two hearings, one on the issue of damages and another on all other issues.

Appellants, after receiving their deed on 17 October 1973 delayed the filing of their motion to intervene until 12 May 1977. At that time the court had already conducted the hearing to determine *all issues* other than the question of damages and trial of that single remaining issue had been scheduled for 16 May 1977.

We hold that appellants' application to intervene was not timely. G.S. 1A-1, Rule 24.

The order appealed from is

Affirmed.

Judges ARNOLD and ERWIN concur.

DOROTHY B. HAMILTON v. BUFORD L. HAMILTON, JR.

No. 7722DC511

(Filed 20 June 1978)

Divorce and Alimony § 17.2; Rules of Civil Procedure § 54.1 — decree of absolute divorce on counterclaim — no bar to claim for alimony

A decree of absolute divorce granted to defendant in a separate hearing on his counterclaim for absolute divorce could not be pled as a bar to an award of alimony to plaintiff in a subsequent hearing on plaintiff's claim which initiated the action where the judgment of absolute divorce contained no finding that there was no just reason for delay in entering final judgment, G.S. 1A-1, Rule 54(b), since the decree of absolute divorce was not a final judgment as to the remainder of the claims to be adjudicated in the action, but was merely an interlocutory judgment to become final upon a complete adjudication of all claims, rights and liabilities of the parties.

APPEAL by defendant from *Cornelius, Judge*. Judgment entered 22 March 1977 in District Court, IREDELL County. Heard in the Court of Appeals 10 March 1978.

Plaintiff wife commenced this action on 26 July 1976 by way of verified complaint and summons. In her complaint she sought alimony without divorce, custody of the minor children of the marriage, child support, and attorney's fees.

On 19 August 1976 defendant husband answered, denied the material allegations of her complaint, and counterclaimed for absolute divorce on grounds of one year's separation. He further prayed that the plaintiff's action be dismissed and that he be awarded custody of the minor children.

Initially the cause was scheduled for trial in the District Court of Iredell County on 29 September 1976. At that time, however, the plaintiff and defendant, by and through their respective attorneys, in conference with the trial judge, agreed to a settlement of their differences. The matter was, therefore, held open pending execution of a consent order. Prior to execution of the consent order, the defendant obtained a hearing upon his counterclaim for absolute divorce on 26 October 1976. Since neither party requested a jury trial, the court, pursuant to G.S. 50-10, determined the issues of fact presented by the counterclaim. Plaintiff neither objected to nor denied the counterclaim, did not oppose the hearing and offered no evidence. The trial court, therefore, made the appropriate findings and granted the decree of absolute divorce on 26 October 1976.

After the divorce decree was entered, the parties refused to sign the consent order prepared by the plaintiff's attorney. A trial on the merits on the issues of alimony, custody, child support and attorney's fees was, therefore, set for 25 January 1977. Prior to the second hearing, the parties stipulated through their attorneys that the court had "the power to hear the issues of alimony in the absence of a jury." This was stated as a finding by the court.

At the close of all the evidence, the defendant moved to amend his answer to state that, as a further defense, he had been granted an absolute divorce from the plaintiff on 26 October 1976. In his amendment he pled that the absolute divorce was a bar to the plaintiff's right to recover alimony. The trial court granted the defendant's motion, and his answer was amended to that effect.

On 22 March 1977 the trial court entered judgment on the issues excluding the issue of absolute divorce which had been considered and granted in the prior hearing. Therein the court, *inter alia*, made findings of fact, conclusions of law, and granted the plaintiff alimony in the amount of fifty dollars a week. The defendant's appeal is solely concerned with this grant of alimony.

Further facts concerning this appeal will be hereinafter set forth.

Pope, McMillan & Bender by Harold J. Bender and Constantine H. Kutteh for plaintiff appellee.

Sowers, Avery & Crosswhite by William E. Crosswhite for defendant appellant.

MITCHELL, Judge.

The central issue presented by this appeal is whether the decree of absolute divorce, granted to the defendant in the prior separate hearing on his counterclaim, can be pled as a bar to the judgment awarding alimony in the subsequent hearing on the plaintiff's claim which initiated the action. We hold that it cannot.

The defendant appellant contends that the trial court erred in concluding that the plaintiff was the "dependent spouse" and the defendant the "supporting spouse." He further contends that, after the judgment of absolute divorce, the parties could not have been within the definitions of those terms pursuant to G.S. 50-16.1 since, at that point, no spousal relationship existed. Additionally he contends that, due to the termination of the marriage by the prior divorce decree, the court erred in concluding that the plaintiff was entitled to alimony. These contentions are without merit.

Generally it is clear that a judgment of absolute divorce terminates the right of a spouse to support and the power of a court to enter an alimony order. G.S. 50-11; *McCarley v. McCarley*, 289 N.C. 109, 221 S.E. 2d 490 (1976); *Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E. 2d 71 (1967); *Yow v. Yow*, 243 N.C. 79, 89 S.E. 2d 867 (1955); *Smith v. Smith*, 12 N.C. App. 378, 183 S.E. 2d 283 (1971). However, it is equally clear that, with certain exceptions not pertinent to this discussion, "a decree of absolute divorce shall not impair or destroy the right of a spouse to receive alimony and other rights provided for such spouse under any judgment or

decree of a court rendered before or at the time of the rendering of the judgment for absolute divorce." G.S. 50-11(c); *McCarley v. McCarley*, 289 N.C. 109, 221 S.E. 2d 490 (1976); *Darden v. Darden*, 20 N.C. App. 433, 201 S.E. 2d 538 (1974); *Johnson v. Johnson*, 17 N.C. App. 398, 194 S.E. 2d 562 (1973).

For some years parties have been permitted to settle the issues of alimony and absolute divorce in the same action. G.S. 50-11(c); G.S. 50-16.8(b); *McCarley v. McCarley*, 289 N.C. 109, 117, 221 S.E. 2d 490, 495 (1976); *Cameron v. Cameron*, 235 N.C. 82, 68 S.E. 2d 796 (1951); *Darden v. Darden*, 20 N.C. App. 433, 201 S.E. 2d 538 (1974). The parties in the action *sub judice* pursued this course.

Although both parties' claims were part of the same action, they were severable. Pursuant to G.S. 1A-1, Rule 42(b), the court may order a separate trial of any counterclaim. Additionally, G.S. 1A-1, Rule 13(i) states that the judgment on a counterclaim "may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do." However, G.S. 1A-1, Rule 54(b) states, *inter alia*, that:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a *final judgment* as to one or more but fewer than all of the claims or parties *only if there is no just reason for delay and it is so determined in the judgment*. [Emphasis added.]

We point out that no such finding was made by the trial court in the judgment granting absolute divorce in this case. We recognize that in *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976), the Supreme Court of North Carolina ruled that the lack of such a finding, as to "no just reason for delay," would not be determinative for purposes of appeal pursuant to G.S. 1-277 and G.S. 7A-27(d). Here, however, finality and not appealability is the issue. We hold that the judgment, rendered prior to final determination of all the issues and granting absolute divorce, was interlocutory and subject to the provisions of G.S. 1A-1, Rule 54(b), for purposes of determining its finality. *See Hall v. Hall*, 28 N.C. App. 217, 220 S.E. 2d 158 (1975). Rule 54(b), therefore, in pertinent part states that:

> In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and . . . in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The decree of absolute divorce was not a final judgment as to the remainder of the claims to be adjudicated in the action. Instead, it was merely an interlocutory judgment to become final upon a complete adjudication of all claims, rights and liabilities of the parties. *See Hall v. Hall*, 28 N.C. App. 217, 220 S.E. 2d 158 (1975); *and Hinson v. Hinson*, 17 N.C. App. 505, 195 S.E. 2d 98 (1973). It did not terminate or determine the remaining issues arising from the pleadings in the action. *See Johnson v. Roberson*, 171 N.C. 194, 88 S.E. 231 (1916); *and* Shuford, N.C. Civil Practice and Procedure, § 54-3. Therefore, the court could amend, modify or rescind it at anytime prior to final judgment. *See Skidmore v. Austin*, 261 N.C. 713, 136 S.E. 2d 99 (1964). *See generally*, Shuford, N.C. Civil Practice and Procedure, §§ 54-3 through 54-5.

Judgment upon the remaining issues, including permanent alimony, was entered as of 22 March 1977, and the judgment of absolute divorce not final until that time. Thus, the judgment of absolute divorce could not be pled as a bar to alimony. The granting of the defendant's motion to amend his answer to plead absolute divorce constituted, at worst, an error which was harmless to the defendant.

The trial court elected at the final hearing to treat the plaintiff's prayer for alimony without divorce as a prayer for permanent alimony. This action clearly involved no surprise to either party and was a proper exercise of the trial court's authority pursuant to G.S. 1A-1, Rule 15(b).

We note that it would be the better practice to withhold entry of judgments and orders in cases such as this until all of the issues are adjudicated or consent orders disposing of them entered. This practice would avoid unnecessary confusion and appeals.

For the reasons previously stated, the judgment of the trial court was without reversible error and is

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

WACHOVIA BANK AND TRUST COMPANY, N.A. v. DONNIE R. MURPHY, CHARLES R. MURPHY, AND LOUISE MURPHY

No. 778DC178

(Filed 20 June 1978)

1. **Uniform Commercial Code § 79— sale of collateral—commercial reasonableness assumed—due process requirements met**

The provision of G.S. 25-9-601 which provides "any disposition of the collateral by public sale wherein the secured party has substantially complied with the procedures provided in this part [Part 6] shall conclusively be deemed to be commercially reasonable in all respects" does not offend the due process clause of the Fourteenth Amendment to the Constitution of the U.S. or the due process requirements of Article I, Section 19 of the Constitution of N. C., since the debtor is protected by other provisions of Part 6 which give the debtor ample opportunity to protect his interest by paying the debt, finding a buyer, or being present at the sale to bid, so that the collateral is not sacrificed by a sale at less than its true value, and by provisions which state that if the secured party fails to substantially comply with the procedures provided in Part 6, the debtor, in a suit by the secured party for a deficiency judgment, may contest the matter by appropriate responsive pleadings alleging such failure to substantially comply.

2. **Uniform Commercial Code § 79— price of collateral at public sale—no hearing afforded debtor**

The allegations of a debtor of an inadequate and unreasonably low price obtained for the collateral at a public sale do not justify a hearing upon the question of commercial reasonableness if there was in fact a public sale following substantial compliance with the procedures provided in Part 6.

3. **Uniform Commercial Code § 79— public sale of collateral—sufficiency of notice to husband and wife**

Though the better practice would be for the secured party to make separate mailings of notice of sale of the collateral to each debtor, the mailing of a joint notice to husband and wife at the residence address where they both lived was substantial compliance within the meaning of G.S. 25-9-601.

APPEAL by defendants Charles R. Murphy and Louise Murphy from *Exum, Judge*. Judgment entered 26 October 1976 in District Court, WAYNE County. Heard in the Court of Appeals 11 January 1978.

This is an action to recover judgment for the balance due on a note after the proceeds from the sale of collateral security had been credited on the note. The defendants Charles and Louise Murphy, husband and wife, are co-makers with their son Donnie Murphy (now deceased) on a note executed to plaintiff.

The note and security agreement in the principal amount of $4,800.00 was executed 22 April 1974 by Donnie Murphy to secure funds to purchase a 1968 Chevrolet dump truck. Plaintiff advised Donnie that in addition to a security interest in the truck it would require his mother and father to sign the note and security agreement with him. Donnie secured their signatures and the plaintiff disbursed the proceeds for the purchase of the truck. Payments on the note were at the rate of $175.87 monthly. After default in the payments Donnie voluntarily turned the truck over to plaintiff. Under terms of the security agreement plaintiff sold the truck for $1,500.00, and after applying the proceeds upon the note a balance of $2,678.06 remained due. This is the amount, plus interest and attorney fees, for which this action was instituted.

At the close of all the evidence the trial judge directed a verdict for plaintiff in the amount prayed for.

Taylor, Warren, Kerr & Walker, by Robert D. Walker, Jr., for the plaintiff.

Barnes, Braswell & Haithcock, by Michael A. Ellis and R. Gene Braswell, for defendants.

BROCK, Chief Judge.

[1] At trial and on appeal defendants challenged the constitutionality of G.S. 25-9-601, which is the first section of Part 6 of Article 9, Chapter 25 (Uniform Commercial Code) of the North Carolina General Statutes upon the grounds that it violates the due process clause of the Fourteenth Amendment.

Part 6 is entitled, "Public Sale Procedures." The first section of Part 6, G.S. 25-9-601, is entitled, "Disposition of collateral by

public sale." This portion of G.S. 25-9-601 which is the subject of defendants' challenge reads as follows: "[A]ny disposition of the collateral by public sale wherein the secured party has substantially complied with the procedures provided in this part *shall conclusively be deemed to be commercially reasonable in all aspects*." (Emphasis added.)

The procedures in Part 6 which are pertinent to this appeal are those contained in G.S. 25-9-602 (Contents of notice of sale) and G.S. 25-9-603 (Posting and mailing notice of sale).

Where there is no perishable property, which would bring G.S. 25-9-604 into operation; or no postponement of the public sale, which would bring G.S. 25-9-605 into operation; or no order restraining or enjoining the public sale, which would bring G.S. 25-9-606 into operation; a showing by the secured party that the contents of the notice of sale were substantially in accord with G.S. 25-9-602, that the notice of sale was posted and mailed substantially in accord with G.S. 25-9-603, and that a public sale was held in accordance with the notice of sale, makes a *prima facie* showing of substantial compliance with the procedures provided in Part 6. Under the foregoing circumstances, absent allegations and evidence of a failure to substantially comply with the contents of the notice of sale procedures, or of a failure to substantially comply with the posting and mailing of notice procedures, or of failure to hold a public sale as advertised, it is a question of law for the court whether the secured party has substantially complied with the procedures provided in Part 6. Upon determination that the secured party has so complied, the secured party is entitled to the conclusive presumption that the sale was commercially reasonable in all aspects. The allegations by the debtor of an inadequate and unreasonably low price do not justify a hearing upon that question, if there was in fact a public sale following substantial compliance with the procedures provided in Part 6. *See Graham v. Bank*, 16 N.C. App. 287, 192 S.E. 2d 109, *cert. denied*, 282 N.C. 426, 192 S.E. 2d 836 (1972).

When the procedures provided in Part 6 are substantially complied with there are at least five days public notice of the intended sale, notice of the intended sale is mailed to each debtor at least five days before the date of sale, and a public sale is in fact held at the time and place stated in the notices. This procedure

gives the debtor(s) ample opportunity to protect his interest by paying the debt, finding a buyer, or being present at the sale to bid, so that the collateral is not sacrificed by a sale at less than its true value. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E. 2d 848 (1976).

If the secured party fails to substantially comply with the procedures provided in Part 6, the debtor, in a suit by the secured party for a deficiency judgment, may contest the matter by appropriate responsive pleadings alleging such failure to substantially comply. If there is competent evidence to support a finding that the secured party did not substantially comply with the procedures provided in Part 6, an issue for the jury is raised. If the jury finds that the secured party did not substantially comply with the procedures in Part 6, the secured party is put to the further burden of proof to satisfy the jury by the greater weight of the evidence that the sale was commercially reasonable.

These protections of the interest of the debtor(s) comport with due process. In our opinion the provision of G.S. 25-9-601 which provides "any disposition of the collateral by public sale wherein the secured party has substantially complied with the procedures provided in this part [Part 6] shall conclusively be deemed to be commercially reasonable in all aspects" does not offend the due process clause of the Fourteenth Amendment to the Constitution of the United States or the due process requirements of Article I, Section 19 of the Constitution of North Carolina.

[2] Defendants argue that it was error for the trial court to exclude the testimony of their witness as to his opinion of the true value of the truck at the time of the public sale. Defendants did not offer evidence to show a failure by the secured party to substantially comply with the procedures provided in Part 6, Article 9, Chapter 25 of North Carolina General Statutes. Therefore, as pointed out above, the allegations of the debtor of an inadequate and unreasonably low price do not justify a hearing upon that question, if there was in fact a public sale following substantial compliance with the procedures provided in Part 6.

[3] Defendants argue that it was error for the trial court to direct a verdict for the plaintiff. In this case, from evidence offered by the secured party, the execution of the note and security

agreement was established; default in payment of the note was established; the balance due on the note was established; the contents of the notice of sale were established; and the posting of the notice of sale was established, all without controversy. The only controversy over the mailing of notice of sale is as follows: the evidence shows that notice of sale was mailed to Donnie R. Murphy by certified mail with a return receipt requested; it also shows that notice of sale was mailed to Charles and Louise Murphy by certified mail with a return receipt requested. Each was mailed to the address where the three debtors lived together, along with Ora B. Murphy, mother of Charles Murphy. Each notice was delivered by the United States Postal Service to defendants' home address on the same day, 10 April 1975. Each was signed for by Ora B. Murphy, mother of Charles. The mailing to Donnie R. Murphy was signed: Donnie R. Murphy by Ora B. Murphy. The mailing to Charles and Louise Murphy was signed: Charles R. Murphy by Ora B. Murphy. From this evidence the femme defendant contends and testified that she did not receive a notice of sale.

While we agree that it would be a far better practice for the secured party to make a separate mailing of notice to each debtor, nevertheless the mere fact that Ora Murphy signed only the name of her son, Charles R. Murphy, does not destroy the compliance by the secured party in mailing the notice to Charles and Louise Murphy. Two notices of sale went to the same residence address on the same day, which was eleven days before the intended sale. It strains credulity to suggest that the femme defendant was not made aware of the impending sale. In any event, the secured party was only required to show compliance with the procedures of Part 6 for mailing the notice of sale. It was not required to show actual notice.

As stated above, the better practice would be for the secured party to make separate mailings of notice to each debtor. However, the mailing of a joint notice to husband and wife at the residence address where they both lived was substantial compliance within the meaning of G.S. 25-9-601.

Beyond the questions of posting and mailing notices of the public sale, it was stipulated that the 1968 Chevrolet dump truck was sold at public auction on 21 April 1975 for the purchase price

of $1,500.00. Further, the uncontroverted evidence shows a proper application of the purchase price to the balance due on the note.

Under the circumstances of this case there was no competent evidence to support a finding that the secured party had failed to substantially comply with the procedures provided in Part 6, Article 9, Chapter 25, General Statutes of North Carolina. Therefore we hold that the trial judge properly directed a verdict for the plaintiff.

Affirmed.

Judges VAUGHN and ERWIN concur.

IN RE: FORECLOSURE OF PROPERTY OF JERRY LEE HILL AND WIFE, GLENDA FAYE P. HILL

No. 7722SC557

(Filed 20 June 1978)

1. **Mortgages and Deeds of Trust § 7— valid underlying debt—prior indemnity agreement**

In an action to foreclose a deed of trust, testimony by one respondent relating to the execution of a 1969 indemnity agreement was not admissible to show that no valid debt was held by the party seeking to foreclose where the debt secured by the deed of trust being foreclosed was created by a subsequent agreement entered in 1971. G.S. 45-21.16(d).

2. **Mortgages and Deeds of Trust § 10— forged signature on debt—no conditional delivery**

In this action to foreclose a deed of trust, testimony by respondents' witness that her purported signatures on the agreement creating the secured debt and on another deed of trust securing the debt were not in fact her signatures would have been relevant only to show the failure of a condition precedent to effective delivery of the agreement and was properly excluded where respondents offered no competent evidence to show a conditional delivery.

3. **Evidence § 28.1— affidavit—verified pleadings in another action—incompetency**

The pleadings in a separate action, which were verified by one respondent, constituted nothing more than an affidavit in the present action and were not admissible as independent evidence to establish facts material to the issues being tried.

APPEAL by respondents from *Long, Judge*. Judgment entered 21 February 1977 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 4 April 1978.

The circumstances giving rise to this appeal can be summarized as follows: On 5 May 1969 a general agreement of indemnity for contractors was executed in favor of the Safeco Insurance Group and its subsidiaries (hereinafter for purposes of convenience referred to as Safeco) by which Wake Electric Construction Co., Inc. (Wake), respondents Jerry Lee Hill and wife Glenda Faye P. Hill, and John C. Hayworth and wife Jane W. Hayworth agreed to indemnify Safeco for any losses it might suffer in connection with performance and payment bonds to be issued to Wake by Safeco. Thereafter, as a result of certain defaults by Wake, Safeco was called upon to make payments under its bonds, thereby sustaining a net loss, as of 31 December 1971, of over $106,000.00.

During negotiations between Safeco, Wake, respondents, and the Hayworths, First Citizens Bank and Trust Co. (Bank) notified Wake of its intention to declare certain promissory notes of Wake in default, and to call upon respondents and the Hayworths, as endorsers of the notes, for payment. Thereafter, respondents executed another note to Bank, secured by a deed of trust upon real estate located in Randolph County, as a result of which Safeco filed a petition in federal court seeking to declare respondents bankrupt.

After further negotiations between Bank, Safeco, Wake, respondents and the Hayworths, an agreement was executed on 31 December 1971 in an attempt to bring about a settlement. This agreement provided for monthly payments by Wake to Bank which would be pro-rated and applied to the separate indebtedness of Wake to Bank and Safeco. Respondents and the Hayworths were, under the terms of the agreement, to remain secondarily, jointly and severally liable for the obligations as set out therein, and were further required to execute to Safeco deeds of trust upon any real estate in which they held a beneficial interest.

Payments under the 31 December 1971 agreement were in default from and after February 1975. The instant action was commenced by petition seeking the foreclosure of property owned

by respondents and situated in Davidson County. The case was transferred to superior court for trial by order of the Clerk of Superior Court, pursuant to G.S. 1-273.

The case was heard by the trial court, sitting without a jury. After the parties had presented evidence, the court made findings of fact, and ordered that the trustee, Perry C. Henson, petitioner herein, might proceed to foreclose upon the property covered by the deed of trust.

Respondents have appealed from the order authorizing the sale of their property. The record reveals that the sale was carried out; however, it appears from petitioner's brief that confirmation of the sale has been withheld by the Clerk of Superior Court due to the pendency of this appeal.

Henson & Donahue, by Perry C. Henson and Daniel W. Donahue, for petitioner.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Walter L. Hannah and Bruce H. Connors, for respondents.

BROCK, Chief Judge.

At the outset, petitioner contends that inasmuch as respondents failed to except to the trial court's findings of fact or conclusions of law, the scope of review on appeal is limited to the question of whether the judgment of the court is supported by the findings and conclusions. Respondents' assignments of error and exceptions relate to the exclusion of evidence by the trial court which respondents contend was relevant to two of the findings which the court was required by G.S. 45-21.16(d) to make, namely, the existence of a valid debt held by Safeco and Bank, and the right of the trustee to foreclose under the deed of trust. Respondents made known to the trial court the grounds for their attempts to introduce the excluded evidence. Under these circumstances respondents were not required to take exception to the findings of fact in order to insure appellate review of the trial court's exclusion of the evidence which they sought to introduce. *See* G.S. 1A-1, Rule 52(c); *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976); 9 Wright and Miller, Federal Practice and Procedure § 2581 (1971).

[1] Respondents first assign error to the exclusion of testimony of respondent Jerry Lee Hill relating to the execution of the 1969 indemnity agreement. Respondents contend that the testimony was relevant and admissible to show the invalidity of the indemnity agreement. This assignment of error is without merit.

Respondents correctly point out that the court must find the existence of, *inter alia*, a valid debt held by the party seeking to foreclose, before authorizing the trustee to exercise a power of sale under a deed of trust. G.S. 45-21.16(d). The debt secured by the deed of trust which is the subject of this action was created by the 1971 agreement. The trial court properly excluded the evidence relating to the execution of the 1969 indemnity agreement. Respondents' assignment of error number 1 is overruled.

[2] Respondents' second assignment of error is to the exclusion of testimony of Jane Hayworth tending to show that her purported signatures on the 31 December 1971 agreement and a deed of trust covering her Kernersville residence were not in fact her signatures.

Through the excluded testimony, respondents were attempting to attack the validity of the debt created by the 31 December 1971 agreement. Respondents contend that the proper execution of the 1971 agreement was a condition precedent to its taking effect. "Conditions precedent are not favored in the law and provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction." *Financial Services v. Capitol Funds*, 23 N.C. App. 377, 386, 209 S.E. 2d 423, 429 (1974), *aff'd*, 288 N.C. 122, 217 S.E. 2d 551, 77 A.L.R. 3d 1036 (1975). We find no such language in the 31 December 1971 agreement.

[3] However, conditional delivery may be shown by evidence of an oral agreement to that effect. *Insurance Co. v. Morehead*, 209 N.C. 174, 183 S.E. 606 (1936); 2 Stansbury, North Carolina Evidence, § 257 (Brandis Rev. 1973). Had respondents presented evidence of such an express oral agreement with Safeco then the testimony of Mrs. Hayworth negating performance of the condition precedent would have been relevant. Yet the only evidence tendered which arguably showed conditional delivery consists of averments in the pleadings in a separate action brought in Guilford County by Safeco against Wake, respondents, and the

Hayworths on the 31 December 1971 agreement. In their answer and counterclaim filed in the Guilford County action, respondents alleged that they executed the agreement in reliance upon representations made by an agent of Safeco that the agreement would be properly executed by all the parties, and that it was not properly executed by the Hayworths through the fault of Safeco. The pleadings in the separate action, which were verified by respondent Jerry Lee Hill, constitute nothing more than an affidavit for purposes of the case *sub judice*. Affidavits are not normally admissible at trial as independent evidence to establish facts material to the issues being tried. *In re Custody of Griffin*, 6 N.C. App. 375, 170 S.E. 2d 84 (1969); 3 Am. Jur. 2d, Affidavits, § 29, p. 404. These pleadings were properly excluded from evidence by the trial court. Respondents did not otherwise attempt to present evidence to establish a conditional delivery of the 31 December 1977 agreement even though the affiant, Jerry Lee Hill, was present and available as a witness. The agreement provided that the parties were to be jointly and severally liable for the obligations assumed therein. Respondents failed to offer evidence of a defense to their liability.

Mrs. Hayworth's testimony was relevant only to show the failure of a condition precedent. Since there was no evidence of the existence of such an express condition, the trial court properly excluded Mrs. Hayworth's testimony. Assignment of error number 2 is overruled.

Respondents' third assignment of error is to the court's exclusion of the affidavit of Jerry Lee Hill verifying and incorporating therein the Guilford County pleadings heretofore mentioned. The admissibility of the affidavit is discussed, *supra*. This assignment of error is overruled.

Affirmed.

Judges HEDRICK and MITCHELL concur.

State v. Pierce

STATE OF NORTH CAROLINA v. JOHN D. PIERCE AND RICKY DAVID BYRUM

No. 771SC932

(Filed 20 June 1978)

1. **Criminal Law § 92.1— two defendants—same breaking and entering—different property stolen—consolidation proper**

There was no error in consolidating for trial cases against two defendants where each was charged with committing the same breaking and entering, and each defendant was charged with committing larceny after such breaking and entering, albeit of different items of property.

2. **Larceny §§ 7.3, 7.10— stolen furs—identification of furs—possession of recently stolen property—sufficiency of evidence**

In a prosecution for breaking and entering and larceny of furs, evidence was sufficient to show that the furs found in defendants' possession were furs taken from the warehouse broken into where such evidence consisted of testimony by the fur owners that they recognized furs taken from defendants as theirs by the shape and quality of certain furs, the method of stretching, tears and bruised places on certain furs, and method of tying the furs together; moreover, the time interval between the break-in and the possession by defendants, which could have been no longer than four days, was not too great to permit the jury to draw the inferences arising from the showing of defendants' possession of recently stolen property.

3. **Criminal Law § 122.1— jury's request for further instructions—no expression of opinion by court**

The trial court did not express an opinion as to defendants' guilt where the jury, after they had begun deliberations, returned to the courtroom to request further instructions on recent possession; the judge gave the requested instructions; a juror asked the judge what to do if they still encountered difficulty in arriving at a verdict; and the judge instructed the jury to resume deliberations but to consult with him again if they encountered further difficulty.

APPEAL by defendants from *Small, Judge*. Judgments entered 22 April 1977 in Superior Court, CHOWAN County. Heard in the Court of Appeals 8 March 1978.

Each defendant was charged with feloniously breaking and entering on 23 January 1977 a storage warehouse occupied by E. F. Parks, a dealer in furs. In addition, defendant Pierce was charged with the felonious larceny after such breaking and entering of six opossum and thirty raccoon pelts, and defendant Byrum was charged with the felonious larceny after such breaking and

entering of two fox and thirty-nine raccoon pelts. Each defendant pled not guilty. Over defendants' objections, all cases were consolidated for trial.

The State presented evidence to show the following: Sometime between late Saturday afternoon, 22 January 1977, and 8:00 a.m. on Monday, 24 January 1977, the building in which E. F. Parks stored and cured furs in Chowan County, N.C., was broken into and a number of furs were removed therefrom without Parks's permission. On Wednesday, 26 January 1977, defendant Pierce sold thirty raccoon pelts and six opossum pelts to Darwin R. Lovett, a fur buyer at Virginia Beach, Virginia, and on the same day defendant Byrum offered to sell two fox and thirty-nine raccoon pelts to Gus McPherson, a fur dealer in Camden County, N.C. E. F. Parks and his wife identified the furs which defendant Pierce sold to Lovett in Virginia and the furs which defendant Byrum offered to sell McPherson in Camden County as furs which had been stored in the Parks warehouse prior to the breaking and entering and which were missing therefrom after the breaking and entering.

Defendant Pierce offered evidence that the furs he sold to Lovett were furs he and his father had trapped. Defendant Byrum testified that the furs he took to McPherson's store were furs he and a friend had trapped.

Defendant Pierce was found guilty of felonious breaking and entering and felonious larceny. Defendant Byrum was found guilty of felonious breaking and entering and non-felonious larceny. From judgments imposing prison sentences, defendants appealed.

Attorney General Edmisten by Associate Attorney Christopher S. Crosby for the State.

White, Hall, Mullen & Brumsey by Herbert T. Mullen, Jr. and G. Elvin Small, III for defendant appellant John D. Pierce.

Twiford, Trimpi & Thompson by Russell E. Twiford, John G. Trimpi, and Jack H. Derrick for defendant appellant Ricky David Byrum.

PARKER, Judge.

[1] There was no error in consolidating the cases for trial. G.S. 15A-926(b)(2)b.2 provides that charges against two or more defendants may be joined for trial when the offenses charged "[w]ere part of the same act or transaction." Here, each defendant was charged with committing the same breaking and entering, and each defendant was charged with committing larceny after such breaking and entering, albeit of different items of property.

Whether defendants charged with committing identical offenses at the same time and place should be jointly or separately tried is within the sound discretion of the trial court, and the exercise of the trial court's discretion will not be disturbed on appeal absent a showing that a defendant was thereby deprived of a fair trial. *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858 (1972); *State v. Greene*, 30 N.C. App. 507, 227 S.E. 2d 154 (1976). No such showing was here made. Neither defendant attempted to incriminate the other, and their defenses were not antagonistic. *See State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977). It is true that each defendant was shown by the State's evidence to have been in possession of different items of the stolen property and at different places. However, the mere fact that certain of the evidence against each defendant was inadmissible against the other would not by itself deprive either of a fair trial. *See State v. Greene, supra.* Evidence as to the separate possession of each was admissible only as against the defendant shown to be in possession, and instructions from the judge would have made that clear to the jury. Such limiting instructions could have been obtained by the defendants, either by requesting them, *State v. Kelly*, 19 N.C. App. 60, 197 S.E. 2d 906 (1973), or simply by making a timely general objection, *State v. Franklin*, 248 N.C. 695, 104 S.E. 2d 837 (1958). Defendants did neither. They may not now be heard to complain because evidence showing the separate possession of each was admitted generally against both without instructions to the jury to make it clear as against which defendant the evidence might be considered. Prejudice, if any, suffered by the defendants resulted, not because the cases were consolidated for trial, but because defendants' counsel failed to request limiting instructions or to interpose timely general objections requiring them. Defendants' first assignment of error is overruled.

[2] Defendants' second assignment of error is directed to the denial of their motions for nonsuit. In support of this assignment of error they contend, first, that the evidence was insufficient to show that the furs shown to have been in their possession were furs taken from the Parks warehouse, and, second, that the elapsed time between the breaking and entering and the date the furs were shown to be in their possession was too great to permit the State to rely upon the inferences arising from a showing of possession of recently stolen property. We find no merit in either contention. As to the first, defendants testified at trial that it is impossible to identify specific furs after they have been stretched. The State's evidence was to the contrary. E. F. Parks testified that he recognized certain furs as his by the way they were stretched, by the holes made by the stretchers, by the shape and quality of particular furs, and by torn, broken, and bruised places on certain furs. Mrs. Parks identified the furs by the way they were stretched and dried and also by the distinctive manner they were tied together with "pea string." The credibility of this evidence was for the jury. On motion for nonsuit it is to be accepted as true and is to be viewed in the light most favorable to the State. When so viewed, we find the evidence amply sufficient to support a jury finding that the furs shown to have been in defendants' possession on Wednesday, 26 January 1977, were furs taken from the Parks warehouse after it was broken into during the preceding weekend. We also find the time interval between the break-in and the possession by defendants, which could have been no longer than four days, was not too great to permit the jury to draw the inferences arising from the showing of defendants' possession of the recently stolen property. *See State v. Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472 (1969). It is not necessary that the elapsed time be so short as to exclude every possibility of the intervening agency of others; it is enough if a defendant's possession is shown so close in time to the theft as to make it unlikely that he could have acquired the property honestly. *State v. Jackson*, 274 N.C. 594, 164 S.E. 2d 369 (1968); *State v. Warren*, 35 N.C. App. 468, 241 S.E. 2d 854 (1978). We find no error in the denial of defendants' motions for nonsuit in the present case.

[3] Defendants' final assignment of error is directed to a portion of the court's charge to the jury. After the jury had begun

deliberations, they returned to the courtroom to request further instructions on recent possession. The judge gave the requested instructions, and a juror asked the judge what to do if they still encountered difficulty in arriving at a verdict. Rather than fully answering the juror's question, the judge instructed the jury to resume deliberations but to consult with him again if they encountered further difficulty. Defendants contend that the judge's refusal to answer the juror's question amounted to an expression of opinion that defendants should be found guilty because of the evidence showing their possession of recently stolen property. We fail to perceive any such intimation of opinion in the judge's refusal to answer the question. He had given the additional instructions as requested, and he was merely informing the jury that he would consider any further problems as they arose. It was not necessary for the judge to instruct the jury on a problem which had not yet arisen. This assignment of error is overruled.

In defendants' trial and in the judgments entered, we find

No error.

Judges VAUGHN and WEBB concur.

COY E. BECK, ADMINISTRATOR OF THE ESTATE OF BLANCHE K. BECK, AND COY E. BECK, INDIVIDUALLY v. PAUL C. BECK, PEGGY B. MANESS, POLLY B. DOBY, BOBBY RAY BECK, AND THOMASVILLE CITY BOARD OF EDUCATION

No. 7722SC753

(Filed 20 June 1978)

1. Executors and Administrators § 37— administrator's fees and expenses— jurisdiction

The superior court had no jurisdiction to hear plaintiff's claims for recovery of fees and expenses relating to the administration of his deceased wife's estate since the clerk of court has original jurisdiction of such claims, there have been no proceedings on such claims before the clerk, and there has been no allegation that the clerk was disqualified to act. G.S. 28A-2-1; G.S. 7A-241.

2. **Executors and Administrators § 33— action to set aside family settlement agreement—insufficiency of complaint**

Plaintiff's complaint failed to allege a legally sufficient basis for setting aside a family settlement agreement for the distribution of an estate where it alleged that he signed the agreement without benefit of counsel, he was not aware of the full legal effects of the agreement, and he relied upon the defendants to his detriment.

3. **Pleadings § 33.3; Rules of civil Procedure § 15.1— denial of motion to amend complaint**

In an action to set aside a family settlement agreement, the trial court did not abuse its discretion in the denial of plaintiff's motion, made a year and a half after his complaint was filed and long after responsive pleadings had been served, to amend his complaint to allege that his execution of the agreement was procured by misrepresentation by the defendants.

APPEAL by plaintiff from *Godwin, Judge*. Judgment entered 16 July 1975 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 2 June 1978.

Plaintiff instituted this civil action both in his individual capacity and as administrator of the estate of his deceased wife, Blanche K. Beck. He sought to have a family settlement agreement set aside and to recover from the estate administrator's fees and certain expenses incurred by him on behalf of the estate. A prior appeal in this case was dismissed as being premature. *Beck v. Beck*, 28 N.C. App. 488, 221 S.E. 2d 763 (1976).

The family settlement agreement which plaintiff attacks, a copy of which was attached to plaintiff's complaint, was signed by plaintiff and by his four children, who are the individual defendants in this action and all of whom are adults. This agreement states that Blanche K. Beck died intestate in June 1969, leaving as her sole heirs at law her husband and her four children. The stated purpose of the agreement is to settle the respective interests of the parties in the proceeds from a promissory note held by plaintiff and Blanche K. Beck at the time of her death. Defendant Thomasville City Board of Education had purchased 5.42 acres of real property from plaintiff and his wife in April 1969 and had executed the note, in the face amount of $43,750, to cover the balance of purchase price of the property. Prior to Mrs. Beck's death, the Thomasville City Board of Education had paid $11,500 on the note, leaving a remaining principal indebtedness at the time of Mrs. Beck's death of $32,250. The family settlement agree-

ment provides for allocation of this remaining indebtedness among plaintiff and the individual defendants.

Upon motion of the individual defendants, the trial court directed that the action be dismissed as to the individual defendants. The dismissal was based upon the court's conclusions (1) that plaintiff's claims for recovery of administrator's fees and other expenses relating to administration of the estate are within the exclusive original jurisdiction of the clerk of superior court and (2) that plaintiff's allegations regarding setting aside the family settlement agreement fail to state a claim upon which relief can be granted. Plaintiff appealed.

Ottway Burton for plaintiff appellant.

John T. Weigel, Jr., for defendants appellees.

PARKER, Judge.

[1] Plaintiff first contends that the trial court erred in concluding that it had no jurisdiction to hear plaintiff's claim for recovery of administrator's fees and certain expenses he incurred on behalf of the estate of Blanche K. Beck. He argues that the clerk of superior court has no jurisdiction to hear his claim for fees and expenses. The statutes provide otherwise. G.S. 28A-2-1 provides that the clerk of superior court has "jurisdiction of the administration, settlement, and distribution of estates of decedents." Except for situations in which the clerk is disqualified to act, G.S. 28A-2-3, the clerk's probate jurisdiction is original and exclusive, and a superior court judge may hear such cases only upon appeal from the clerk. G.S. 7A-241; *In re Estates of Adamee*, 291 N.C. 386, 230 S.E. 2d 541 (1976). In the present case there was no allegation that the clerk was disqualified to act, and there have been no proceedings before the clerk on plaintiff's claims against his wife's estate. Therefore, the superior court judge properly concluded that he lacked jurisdiction to hear plaintiff's claims for recovery of fees and expenses relating to administration of his deceased wife's estate.

[2] Turning now to plaintiff's claim to have the family settlement agreement set aside, we note that he alleged, as the grounds for his claim, that the family settlement agreement "was signed by the plaintiff without benefit of counsel and he was not aware of

the full legal effects of his signing of said instrument . . . and that said agreement failed to protect the plaintiff's individual interests and the interests of the estate." Plaintiff further alleged that the agreement "was null and void, he being without counsel when he executed the said agreement and he relied upon the defendants other than the Thomasville City Board of Education to his detriment." We agree with the trial court's conclusion that these allegations fail to state a claim upon which relief can be granted.

Family settlement agreements providing for distribution of estates are favored and will be upheld if all beneficiaries are properly accounted for, if creditors are not prejudiced, and in the absence of fraud, misrepresentation, or mistake. *In re Pendergrass*, 251 N.C. 737, 112 S.E. 2d 562 (1960); *Tise v. Hicks*, 191 N.C. 609, 132 S.E. 560 (1926); *Reese v. Carson*, 3 N.C. App. 99, 164 S.E. 2d 99 (1968). Other possible grounds for setting aside a family settlement agreement include undue influence, duress, or breach of confidential or fiduciary relationship. Annot., 29 A.L.R. 3d 174 (1970); Annot., 29 A.L.R. 3d 8 (1970).

Even when viewed with the liberality required under the notice theory of pleading, plaintiff's complaint fails to allege any legally sufficient basis for setting aside the family settlement agreement in this case. No specific formalities are required for execution of a family settlement, *Tise v. Hicks, supra*, and absence of counsel will not defeat an otherwise valid family settlement. Plaintiff alleged that he "was not aware of the full legal effects" of the agreement, but there is no allegation that he was either unable or was denied an opportunity to read the agreement. Plaintiff alleged that he "relied upon the defendants . . . to his detriment," but there is no allegation that defendants gave him any false or misleading information. Therefore, plaintiff's second assignment of error is overruled.

[3] In open court at the hearing on the individual defendants' motion for judgment on the pleadings, plaintiff made a motion to amend his complaint to allege that his execution of the family settlement agreement was procured by misrepresentation by the defendants. The court denied plaintiff's motion, and this denial is the basis of plaintiff's third assignment of error. Plaintiff's motion was not made until a year and a half after his complaint was filed and long after responsive pleadings had been served. Under such

circumstances, "[a] motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse." *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E. 2d 484, 488 (1972). Plaintiff has failed to show any facts or circumstances that would indicate an abuse of discretion. Therefore, this assignment of error is overruled.

The court's order dismissing plaintiff's action against the individual defendants is

Affirmed.

Judges HEDRICK and MITCHELL concur.

CARL ROSE & SONS READY MIX CONCRETE, INC. v. THORP SALES CORPORATION

No. 7723SC662

(Filed 20 June 1978)

1. **Limitation of Actions §§ 4.3, 12— breach of contract—accrual of cause of action—discontinuance of action—statute not tolled**

In an action for breach of contract which allegedly occurred on 11 August 1973, the trial court erred in denying defendant's motion to dismiss made on the ground that the action was barred by the statute of limitations, since the statute of limitations was three years and began to run on the date on which the contract was broken; moreover, the fact that plaintiff had instituted an action within the three year period, which action had been discontinued because plaintiff failed to serve defendant with a proper summons, did not toll the statute's running, nor did the appeal undertaken by defendant to obtain a ruling on the validity of the initial summons, and plaintiff's subsequent efforts to revitalize the action by summons and alias and pluries summons under G.S. 1A-1, Rule 4(d) were to no avail.

2. **Limitation of Actions § 15— no equitable estoppel**

In an action for breach of contract, the trial court did not err in failing to conclude that defendant was equitably estopped from pleading the statute of limitations, since there was no evidence indicating that defendant induced plaintiff to forestall the initiation of this lawsuit.

3. **Rules of Civil Procedure § 41— action barred by statute of limitations—no opportunity to file a new action**

The trial court did not err in denying plaintiff an opportunity under G.S. 1A-1, Rule 41(b) to refile a new action within a reasonable time where the previous action was barred by the statute of limitations.

APPEAL by defendant from *Graham, Judge.* Order filed 25 May 1977, in Superior Court, YADKIN County. Certiorari allowed 22 June 1977. Heard in the Court of Appeals 23 May 1978.

Plaintiff filed its complaint in this action on 27 December 1973, and alleged the breach of a contract whereby defendant was to deliver to plaintiff on 11 August 1973 the title to a truck purchased by plaintiff from defendant. Defendant, according to plaintiff's complaint, failed to deliver the title, and plaintiff sought damages resulting from defendant's delay and plaintiff's subsequent inability to use the truck.

Defendant filed no answer and plaintiff obtained a default judgment against defendant. Defendant thereafter moved to have the court set aside the judgment on the grounds of defective summons and process. The trial court denied defendant's motion, but that order, dated 10 November 1975, was reversed by this Court, *Ready Mix Concrete v. Sales Corp.*, 30 N.C. App. 526, 227 S.E. 2d 301 (1976), which held that the original summons issued 27 December 1973, was fatally defective, that the court acquired no jurisdiction over defendant and that the default judgment entered against defendant was void.

Thereafter, plaintiff caused a summons and alias and pluries summons to be issued on 6 October 1976. Both documents were served on defendant. In response, defendant made motions to dismiss and for summary judgment on the basis that the three year statute of limitations for breach of contract (G.S. 1-52) had already run and therefore barred plaintiff's action. The trial court denied defendant's motion, holding that the three year statute of limitations was tolled for a period of approximately nine months from the date of the 10 November 1975 order denying defendant's motion to set aside the default judgment until 18 August 1976, the filing date of the opinion by this Court.

Defendant filed a petition for certiorari and this Court granted defendant's petition.

Finger, Park & Parker, by Raymond A. Parker II and Daniel J. Park, for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice, by William C. Raper, for defendant appellant.

ARNOLD, Judge.

I.

[1] The trial court erred in denying defendant's motion to dismiss pursuant to G.S. 1A-1, Rule 12b. The statute of limitations period for actions on a contract is three years and begins to run on the date on which plaintiff is entitled to institute an action, *i.e.* the date the contract is broken. *Pickett v. Rigsbee*, 252 N.C. 200, 113 S.E. 2d 323 (1960). In the case *sub judice*, the trial court correctly concluded that the statutory period began to run on 11 August 1973, the date on which the defendant was to deliver title to the truck. The date on which the statute of limitations begins to run is not altered by the fact that damages continue to accrue. In *Mast v. Sapp*, 140 N.C. 533, 537, 540, 53 S.E. 350, 351, 352 (1906), the Supreme Court stated:

> "Where there is a breach of an agreement or the invasion of a right, the law infers some damage. . . . [Citations omitted.] The losses thereafter resulting from the injury, at least where they flow from it proximately and in continuous sequence, are considered in aggravation of damages. . . . [Citations omitted.] The accrual of the cause of action must therefore be reckoned from the time when the first injury was sustained. . . . [Citations omitted.] When the right of the party is once violated, even in ever so small a degree, the injury, in the technical acceptation of that term, at once springs into existence and the cause of action is complete."

Having concluded that the statute of limitations began to run on 11 August 1973, the next consideration is how the statute is tolled, and whether it was tolled in the present case. Normally, the statute of limitations is tolled when legal action is commenced. Under G.S. 1A-1, Rule 3, an action is commenced when a complaint is filed or when a summons is issued. Action was commenced in this case by the filing of a complaint within the three-year limitation period. Under G.S. 1A-1, Rule 4(e), however, the action may be discontinued:

> "When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed."

Based on the record it must be concluded that plaintiff's action was discontinued when it failed to serve defendant with a proper summons within the three-year limitation period. Thereafter, plaintiff's efforts to revitalize the action by summons and alias and pluries summons under G.S. 1A-1, Rule 4(d) were to no avail. Rule 4(e) states that, after the discontinuance:

> ". . . alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement."

In the case before us, therefore, plaintiff commenced the action with the issuance of a summons and alias and pluries summons on 6 October 1976, well beyond the three year period prescribed by law.

Finally, it is concluded that the statute of limitations was not tolled by the appeal undertaken by defendant to obtain a ruling on the validity of the initial summons. When the statute of limitations starts to run, it continues until stopped by appropriate judicial process. *Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E. 2d 570 (1966).

II.

[2] On this appeal, plaintiff made two cross-assignments of error, the first of which is that the trial court erred in failing to conclude that defendant was equitably estopped from pleading the statute of limitations. Plaintiff cites *Nowell v. Tea Co.*, 250 N.C. 575, 108 S.E. 2d 889 (1959), for the general rule of equitable estoppel:

> "[E]quity will deny the right to assert . . . [the statute of limitations] defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith." 250 N.C. at 579, 108 S.E. 2d at 891.

The *Nowell* case involved a situation in which defendants promised plaintiff that defendants would make necessary repairs to cure structural defects in a building defendants constructed. Plaintiffs in that case relied upon defendants' statements until, shortly before the three-year statute had run, defendants stated

that they would no longer be responsible for the needed repair. The *Nowell* case is clearly distinguishable from the case before us where, according to the record, defendant delivered title to plaintiff on 22 February 1974. There is nothing in the record to indicate that defendant induced plaintiff to forestall the initiation of this lawsuit. Under the facts of this case, therefore, the doctrine of equitable estoppel does not apply.

[3] The second cross-assignment of error by plaintiff is that the trial court erred in failing to make a conditional ruling on its alternative motion to dismiss without prejudice under Rule 41(a)(2) and allow plaintiff a reasonable time to refile his claim. This position is rejected. G.S. 1A-1, Rule 41(a)(2) provides:

> "By Order of Judge.—Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as justice requires. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice. *If an action commenced within the time prescribed therefor, or any claim therein,* is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time." [Emphasis added.]

Rule 41 does not authorize a party to take a dismissal without prejudice of a previous action barred by the statute of limitations and then to refile the action in order to avoid the statute of limitations. Plaintiff's reliance on *Gower v. Insurance Co.*, 13 N.C. App. 368, 185 S.E. 2d 722, *aff'd.* 281 N.C. 577, 189 S.E. 2d 165 (1972), is misplaced. *Gower* does not stand for the proposition that plaintiff may be given the opportunity under Rule 41(b) to refile a new action within a reasonable time where the previous action is barred by the statute of limitations.

Defendant's motion to dismiss should have been allowed. The order appealed from is

Reversed.

Judges BRITT and ERWIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 JUNE 1978

CHRISTMAS v. E. O. CORP. No. 7727DC659	Cleveland (75CVD721) (75CVD741)	Reversed and Remanded
HIGGINS v. HIGGINS No. 7723DC692	Wilkes (77CVD0362)	Affirmed
IN RE BOYD No. 7818DC92	Guilford (73J1058)	Affirmed
IN RE FLYNN No. 7717DC383	Surry (77J1) (77J2)	Affirmed
IN RE MASSEY No. 7820DC103	Union (77SP152)	Reversed
IN RE TAYLOR No. 7822DC105	Iredell (77SP241)	Reversed
MILLS v. DAVIS No. 7718SC716	Guilford (76CVS2849)	Affirmed
STATE v. CAMPBELL No. 772SC1032	Beaufort (77CRS3687)	No Error
STATE v. DAVIS No. 7814SC149	Durham (77CRS15429) (77CRS15427)	No Error
STATE v. EPLEY No. 7825SC84	Burke (77CRS1087)	No Error
STATE v. HEBERT No. 7825SC141	Burke (77CR2804)	No Error
STATE v. JEFFRIES No. 7810SC108	Wake (75CRS35253)	Affirmed
STATE v. SNIPES No. 7815SC144	Orange (77CRS6565)	No Error

APPENDIX

AMENDMENT TO
RULES OF APPELLATE PROCEDURE

AMENDMENT TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

1. Rule 7, entitled *Security For Costs on Appeal in Criminal Actions*, is repealed in its entirety.

2. Rule 17, entitled *Appeal Bond in Appeals Under G.S. Sections* 7A-30, 7A-31, is amended by:

(a) inserting the words "in civil cases" after the word "Court" in line 2 of subsection (a);

(b) inserting the word "civil" before the word "case" in line 2 of subsection (b);

(c) inserting the word "civil" before the word "case" in line 2 of subsection (c).

These amendments to the Rules of Appellate Procedure were adopted by the Supreme Court in Conference on 19 June 1978 to become effective on 1 July 1978. The amendments shall be promulgated by publication in the next succeeding advance sheets of the Supreme Court and the Court of Appeals.*

Exum, J.
For the Court

*Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, "In criminal cases no security for costs is required upon appeal to the appellate division." Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

The appellate courts, pursuant to Rules 12, 13, and 15, will continue to collect advance deposits fixed by the clerks to cover the costs of reproducing the record on appeal and briefs.

Rather than renumber the Rules, the Court has determined to reserve Rule 7 for future use.

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.

ACCOUNTS

§ 2. Accounts Stated.

A letter stating that the indebtedness for parts from another dealer which had been placed in defendant's inventory would be transferred to defendant's account did not create an account stated where the letter stated no specific amount owed by defendant. *Mazda Motors v. Southwestern Motors*, 1.

ADMINISTRATIVE LAW

§ 5. Availability of Review by Statutory Appeal

Where a State employee asserts civil rights violations under 42 U.S.C. § 1983 for his wrongful dismissal, the superior court retains its traditional power to grant preliminary injunctive relief. *Williams v. Greene*, 80.

ANIMALS

§ 7. Criminal Sanctions for Killing Animals

In a prosecution of defendant for killing a dog, the property of another, the trial court did not err in failing to instruct the jury with respect to self-defense. *S. v. Simmons*, 354.

APPEAL AND ERROR

§ 6.7. Appeals Based on Amendments to Pleadings

Purported appeal from the denial of plaintiff's motion to amend his complaint to add defendant's automobile liability insurer as a party defendant is dismissed as premature. *Lineberry v. Wilson*, 649.

§ 6.8. Appeals on Motions for Summary Judgment

There is a right of appeal under G.S. 1-277 from an order granting summary judgment, notwithstanding the failure to meet the requirements for a Rule 54(b) appeal where a substantial right is affected. *Jones v. Clark*, 327.

§ 6.9. Appealability of Preliminary Matters

Pretrial orders declaring certain evidence admissible or inadmissible and fixing the rule of damages were not immediately appealable. *Realty, Inc. v. City of High Point*, 154.

§ 6.12. Appeals Based on Verdicts and Judgments

Partial summary judgment was immediately appealable where it amounted to a final judgment that plaintiff was entitled to recover a sum from one defendant. *Beck v. Assurance Co.*, 218.

§ 9. Moot Questions

Discharge of respondent from a mental hospital does not render questions challenging the involuntary commitment proceeding moot. *In re Williamson*, 362.

§ 49.1. Sufficiency of Record to Show Prejudicial Error

Plaintiff failed to show that he was prejudiced by exclusion of his chiropractor's diagnosis where he failed to show what the testimony would have been. *Currence v. Hardin*, 130.

APPEARANCE

§ 1.1. What Constitutes a General Appearance

When a party gives notice of appeal and demands trial by jury prior to contesting the court's jurisdiction over his person, he has made a general appearance under G.S. 1-75.7. *Alexiou v. O.R.I.P., Ltd.*, 246.

ARREST AND BAIL

§ 3.8. Legality of Arrest for Drunk Driving

An arresting officer had probable cause to arrest petitioner for the misdemeanor of driving under the influence committed outside the officer's presence. *In re Pinyatello*, 542.

ASSAULT AND BATTERY

§ 1. Elements and Essentials of Right of Action for Civil Assault

In an action to recover for injuries sustained by minor plaintiff in a rock throwing incident, trial court properly submitted an issue as to assault and battery and did not err in failing to submit an issue as to negligence. *Lail v. Woods*, 590.

§ 3. Actions for Civil Assault

Trial court should have instructed the jury that if plaintiff provoked defendant into throwing the rock which injured plaintiff, such provocation should be considered in mitigation of plaintiff's damages. *Lail v. Woods*, 590.

§ 8. Defense of Self

Defendant's testimony concerning an assault made upon him by the victim after the assault for which defendant was on trial had no bearing on defendant's claim of self-defense on the occasion in question and was properly excluded. *S. v. Nelson*, 235.

§ 14.4. Assault With a Deadly Weapon Inflicting Serious Injury Where Weapon is a Firearm

Evidence was sufficient for the jury in a prosecution for assault with a deadly weapon inflicting serious injury. *S. v. Davis*, 648.

ATTORNEYS AT LAW

§ 5.1. Liability for Malpractice

Summary judgment was properly entered for defendant attorney on the issue of fraud in an action to recover punitive damages based on defendant's alleged misrepresentation to plaintiff that plaintiff's estranged wife had signed a separation agreement and a stipulation of dismissal of an alimony action before a check had been delivered to her. *Carroll v. Rountree*, 156.

Complaint of the third party plaintiff was insufficient to state a claim upon which relief could be granted where the complaint alleged that because the third party plaintiff served as either vice president or consultant in the firm which was represented by the third party defendant law firm, the attorneys were therefore the third party plaintiff's attorneys also and were liable to him if they failed properly to perform their duties as attorneys under their contract. *Insurance Co. v. Holt*, 284.

ATTORNEYS AT LAW—Continued

Plaintiff's evidence was insufficient to show that alleged negligence or unethical conduct by defendant attorneys was a proximate cause of the loss of plaintiff's investments in a cattle feeding and selling venture. *Murphy v. Edwards and Warren*, 653.

AUTOMOBILES

§ 43.5. Sufficiency of Defendant's Pleadings

In an action to recover for injuries sustained by plaintiff in an automobile accident, trial court did not err in allowing one defendant to amend his answer to allege plaintiff's contributory negligence in riding with an intoxicated driver. *Auman v. Easter*, 551.

§ 46. Opinion Testimony as to Speed

Trial court erred in allowing an officer who did not see a vehicle in operation to express an opinion as to its speed. *Short v. Short*, 260.

Trial court's error in refusing to allow plaintiff to state her opinion concerning the speed of defendant's car was not prejudicial. *Auman v. Easter*, 551.

§ 69. Striking Bicyclist

In an action to recover damages for personal injuries suffered by plaintiff when he was struck while riding a bicycle, trial court properly allowed defendants' motion for a directed verdict. *Oliver v. Royall*, 239.

§ 76.1. Hitting Momentarily Stopped Vehicles

Defendant's testimony that plaintiff, after having stopped before entering a highway, then proceeded forward a few feet, stopped again, and was struck from the rear by defendant was insufficient to support an issue of contributory negligence. *Redman v. Nance*, 383.

§ 80.2. Turning; Collisions Involving Following Vehicles

Plaintiff was contributorily negligent as a matter of law in failing to make sure that his left turn in front of a car approaching from the rear could be made in safety. *Cardwell v. Ware*, 366.

§ 126.3. Breathalyzer Test; Manner and Time of Administration of Test

Evidence was sufficient to support the trial court's finding that petitioner who feigned cooperation intentionally refused to take a breathalyzer test. *In re Pinyatello*, 542.

A person accused of driving under the influence has a reasonable time to call an attorney but has only 30 minutes to select a witness and secure his attendance at a breathalyzer test. *Price v. Dept. of Motor Vehicles*, 698.

Evidence was sufficient to support trial court's findings that petitioner wilfully refused to submit to a breathalyzer test where he refused to take the test until his attorney arrived at the station, which was 40 minutes after petitioner arrived at the station. *Ibid.*

BANKRUPTCY

§ 2. Title and Rights of Trustee

In an action between lenders to determine their interests in secured property where the evidence shows that borrowers have filed a petition in bankruptcy, the action should be dismissed for lack of jurisdiction unless the parties can offer facts to show abandonment of the property by the trustee in bankruptcy. *Finance Co. v. Finance Co.*, 401.

BILLS AND NOTES

§ 17. Limitations

A note which stated that it was "due at request with 30 days notice" was a demand note, and the statute of limitations began to run on the day the note was executed. *Shields v. Prendergast*, 633.

BILLS OF DISCOVERY

§ 6. Discovery in Criminal Cases

Defendant was not entitled to pretrial discovery of the criminal record of a State's witness. *S. v. Chappel*, 608.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.8. Breaking and Entering and Larceny of Residential Premises

Evidence was sufficient to support an inference that a breaking and entering of a dwelling was with an intent to commit larceny. *S. v. Cochran*, 143.

§ 5.9. Breaking and Entering of Business Premises

Evidence was sufficient to support an inference that defendant committed a breaking and entering and larceny where it tended to show that, on the day preceding the crime, defendant had possession of an ax used in the crime. *S. v. McNair*, 196.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 10. Sufficiency of Evidence

Trial court properly denied defendants' motion to dismiss an action to have portions of a deed conveying an undivided half interest in two tracts of land declared void because they had been forged. *Brooks v. Brown*, 738.

CARRIERS

§ 8.1. Liability for Injuries During Loading or Unloading

Summary judgment was properly entered for defendants in an action to recover for injuries received by plaintiff when large bales of acrylic fiber loaded on a trailer by defendant shipper fell on plaintiff while he was marking the bales inside the trailer at defendant consignee's unloading dock. *Moore v. Fieldcrest Mills*, 350.

Summary judgment was inappropriate in an action to recover damages for injury sustained by plaintiff when water pumps and tanks which had been loaded onto a truck by defendant fell on plaintiff. *Goode v. Tait, Inc.*, 268.

CEMETERIES

§ 2. Disinterment and Removal of Bodies

Relocation of graves was permissible under G.S. 65-13(a)(2) since the graves were in an area of a street which was to be relocated as a means to expand or enlarge an existing church facility. *Singletary v. McCormick*, 597.

CONSPIRACY

§ 5.1. Admissibility of Acts and Statements of Coconspirators

Trial court properly admitted a witness's testimony concerning a conversation in her presence and telephone conversations which she heard between defendant and a coconspirator in which defendant and the coconspirator discussed how they were going to mark up the amount of bills submitted under a State advertising contract. *S. v. Louchheim*, 271.

§ 6. Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for conspiracy to commit false pretense by overbilling the State for advertising work. *S. v. Louchheim*, 271.

CONSTITUTIONAL LAW

§ 24.7. Service of Process and Jurisdiction; Foreign Corporations and Nonresidents

Plaintiff failed to establish a ground for the exercise of personal jurisdiction over defendant foreign corporation where plaintiff's complaint alleged only that defendant was indebted to it on an account. *Public Relations, Inc. v. Enterprises, Inc.*, 673.

Plaintiff's attachment of debts owed to defendant foreign corporation by three N. C. theatres would not, in itself, give the courts of this State quasi in rem jurisdiction of plaintiff's action against defendant to recover on an account. *Ibid.*

Trial court had in personam jurisdiction of nonresident defendants where the final act necessary to make a lease and assumption binding obligations was their execution by plaintiff in N. C. *Leasing Corp. v. Equity Associates*, 713.

Trial court had jurisdiction over the person of the individual defendant, a Texas resident who personally guaranteed payment or performance of a lease from plaintiff in the event of default by a corporate defendant. *Ibid.*

The exercise of personal jurisdiction over nonresidents by the courts of this State did not violate due process of law and defendants had sufficient minimum contacts with N. C. so as to satisfy the requirements of due process. *Ibid.*

§ 25.1. Protection Against Impairment of Contracts

Statute requiring a filing of notice with the Comr. of Motor Vehicles prior to the termination of an automobile dealership franchise agreement does not impair the obligation of contracts and is constitutional. *Mazda Motors v. Southwestern Motors*, 1.

§ 26.6. Full Faith and Credit in Divorce and Marital Property Settlements

A N.Y. decree of specific performance of the support provisions of an extrajudicial separation agreement was not entitled to enforcement by civil contempt proceedings in the courts of this State by reason of the full faith and credit clause of the U.S. Constitution or under the principles of comity. *Sainz v. Sainz*, 744.

CONSTITUTIONAL LAW—Continued

§ 30. Discovery; Access to Evidence

Evidence not given defendant prior to trial pursuant to a pretrial discovery order was nevertheless admissible at trial. *S. v. McCormick*, 521.

Defendant was not entitled to pretrial discovery of the criminal record of a State's witness. *S. v. Chappel*, 608.

§ 33. Ex Post Facto Laws

Application of the statute requiring notice prior to termination of an automobile dealership franchise agreement to existing contracts does not constitute an ex post facto law. *Mazda Motors v. Southwestern Motors*, 1.

§ 46. Removal of Appointed Counsel

Where defendant discharged his court-appointed attorney, trial court did not err in allowing the court-appointed counsel to remain nearby and offer such help as defendant might request. *S. v. Chappel*, 608.

§ 48. Effective Assistance of Counsel

A defendant convicted of first degree murder was properly granted a new trial in a post-conviction hearing on the ground that she was denied her right to effective assistance of counsel. *S. v. Hunt*, 249.

Defendant was not denied the effective assistance of counsel in a prosecution for breaking and entering and larceny. *S. v. Carswell*, 377.

§ 53. Speedy Trial Where Delay Caused by Defendant

Defendant was not denied his right to a speedy trial by the delay between his extradition from another state and his trial. *S. v. Monds*, 510.

§ 67. Identity of Informants

In a proceeding on a motion to suppress, there was sufficient corroboration of an informant's existence independent of testimony by an officer to whom the informant gave information so that the identity of the informant was not required to be disclosed to defendant pursuant to G.S. 15A-978(b). *S. v. Bunn*, 114.

Trial court did not err in refusing to require the disclosure of the identity of two confidential informants during a hearing on a motion to suppress. *S. v. Sneed*, 341.

CONTRACTS

§ 17.2. Termination

Statute requiring a filing of notice with the Comr. of Motor Vehicles prior to the termination of an automobile dealership franchise agreement does not impair the obligation of contracts and is constitutional. *Mazda Motors v. Southwestern Motors*, 1.

An agreement to terminate an automobile dealership franchise contract was illegal and void where the statutory notice was not given to the Comr. of Motor Vehicles prior to termination of the contract. *Ibid.*

§ 21.2. Breach of Building and Construction Contracts

Trial court erred in failing to instruct the jury on substantial performance where plaintiff claimed and his evidence showed that he substantially performed his contract with defendants to install aluminum siding on their house and defendants refused to allow him to complete performance. *Black v. Clark*, 191.

CONTRACTS—Continued

§ 25.1. Sufficiency of Particular Allegations

Complaint of the third party plaintiff was insufficient to state a claim upon which relief could be granted where the complaint alleged that because the third party plaintiff served as either vice president or consultant to the firm which was represented by the third party defendant law firm, the attorneys were therefore the third party plaintiff's attorneys also and were liable to him if they failed properly to perform their duties as attorneys under their contract. *Insurance Co. v. Holt*, 284.

§ 26.3. Evidence of Damages

Evidence of an agreement between defendant corporation and some of its stockholders creating an escrow fund for payment of any damages awarded to plaintiff and funded by part of the purchase price of each share of stock purchased by the corporation from the stockholders, even if constituting evidence of insurance coverage, was admissible to show the value of the corporation's stock. *Siedlecki v. Powell*, 690.

§ 29.2. Calculation of Compensatory Damages

Trial court did not err in determining the value of stock plaintiff was to receive under a contract based upon the consideration defendants received subsequent to the breach from the sale of the assets of a second corporation into which the original corporation had been merged rather than basing plaintiff's damages on the value of the stock on the date of the breach. *Siedlecki v. Powell*, 690.

CORPORATIONS

§ 1.1. Disregarding Corporate Entity

In an action to recover on a certificate of deposit, defendant's evidence did not raise an issue of fact as to whether a corporation was operating as the alter ego of another corporation. *Insurance v. Bank*, 18.

§ 8. Authority and Duties of President and Power to Bind the Corporation

Where the president of a corporation overbilled the State for advertising work done by the corporation, both the corporation and the president could be convicted of false pretense. *S. v. Louchheim*, 271.

COSTS

§ 4.1. Witness Fees

Trial court erred in setting an expert witness fee for plaintiff's witness to be taxed as part of the costs where the witness had not been subpoenaed. *Siedlecki v. Powell*, 690.

COURTS

§ 2. Jurisdiction Generally

G.S. 1-75.8(4) which provides that jurisdiction in rem or quasi in rem may be invoked "when the defendant has property within this State which has been attached or has a debtor within the State who has been garnished" does not meet due process standards and is unconstitutional. *Balcon, Inc. v. Sadler*, 322.

COURTS—Continued

§ 2.2. Territorial Limitations on Jurisdiction

The standards of fairness, reasonableness, substantial justice and minimum contacts should govern actions in rem as well as in personam, and jurisdiction cannot be based on the mere presence of property within the State. *Balcon, Inc. v. Sadler*, 322.

§ 15. Criminal Jurisdiction of Juveniles

A district court judge who found probable cause for a hearing in a juvenile proceeding was not overruled by a second judge when the second judge conducted an evidentiary hearing and ordered the case transferred to superior court for trial as in the case of an adult. *S. v. Hamilton*, 538.

§ 21.1. Choice of Law as Affected by Public Policy

A N.Y. decree of specific performance of the support provisions of an extrajudicial separation agreement was not entitled to enforcement by civil contempt proceedings by the courts of this State under the principles of comity. *Sainz v. Sainz*, 744.

CRIMINAL LAW

§ 7. Entrapment

North Carolina follows the majority rule that entrapment is a defense only when the entrapper is an officer or agent of the government. *S. v. Whisnant*, 252.

§ 10.2. Sufficiency of Evidence of Accessory Before the Fact

The State's evidence was sufficient for the jury to find defendant was an accessory before the fact to felonious sale of marijuana. *S. v. Newcomb*, 137.

§ 10.3. Instructions on Accessory Before the Fact

Trial court did not err in failing to instruct that an element of accessory before the fact to forgery and uttering was that defendant was not present when the principal committed the offenses. *S. v. Monds*, 510.

§ 15. Venue

Trial court properly considered an affidavit on a motion to dismiss for improper venue. *S. v. Louchheim*, 271.

§ 34.7. Admissibility of Evidence of Other Offenses to Show Knowledge or Intent

Testimony by an officer who purchased marijuana from defendant that he purchased marijuana from defendant 10 days before the occasion in question was relevant to show the modus operandi and guilty knowledge. *S. v. Richardson*, 373.

§ 42.6. Chain of Custody of Articles Connected with the Crime

Chain of custody was properly shown where a package of marijuana was sealed by the officer who seized it and was still sealed with no evidence of tampering when it arrived at a laboratory for analysis. *S. v. Newcomb*, 137.

§ 45.1. Particular Experimental Evidence

Trial court in a second degree rape case properly excluded experimental evidence of noises at crime scene. *S. v. Bailey*, 728.

CRIMINAL LAW—Continued

§ 56. Expert Testimony of Accountants

Trial court properly allowed an expert in accounting to compare actual advertising production costs and inflated costs submitted in invoices to the State based on his examination of books and records seized from defendant's office. *S. v. Louchheim*, 271.

§ 66.11. Confrontation at Scene of Crime

An armed robbery victim's in-court identification of defendant was not tainted by an identification made 30 minutes after the robbery at the crime scene while defendant was sitting in the back seat of a sheriff's department vehicle. *S. v. Quinn*, 611.

§ 66.16. Independent Origin of In-Court Identification in Case Involving Photographic Identification

Evidence was sufficient to support trial court's finding that a victim's in-court identification was based on the victim's observation at the crime scene and was not tainted by a proper pretrial photographic identification procedure. *S. v. Hoskins*, 92.

§ 66.17. Independent Origin of In-Court Identification in Case Involving Other Pretrial Identification Procedures

Though an in-custody one-man lineup conducted without informing defendant of his right to have counsel present was unconstitutional, evidence was sufficient to support the court's finding that an in-court identification of defendant was of independent origin and was not tainted by the illegal lineup. *S. v. Connally*, 43.

§ 66.18. Voir Dire to Determine Admissibility of In-Court Identification

Trial court erred in failing to conduct a voir dire hearing for the purpose of determining whether a witness's in-court identification of defendant should have been excluded because it was tainted by an unnecessarily suggestive in-custody confrontation. *S. v. Connally*, 43.

§ 71. Shorthand Statement of Facts

Testimony was competent as impressions or inferences from personal observations or as shorthand statements of fact. *S. v. Nelson*, 235.

§ 73.2. Statements Not Within Hearsay Rule

In a prosecution for forcible entry, defendant's testimony that the prosecuting witness's daughter had invited him to the home was not hearsay but was competent to show defendant went to the home as a result of the invitation. *S. v. Blackmon*, 207.

§ 75.11. Waiver of Constitutional Rights at Interrogation; Sufficiency

Evidence supported the trial court's finding that defendant waived his constitutional rights prior to interrogation, and the voluntariness of defendant's confession was not affected by the fact that defendant was a minor or that three of defendant's friends were in the room with him and told him to tell the truth, and the officer did not call defendant's parents or grandfather with whom he was living. *S. v. Morton*, 516.

CRIMINAL LAW—Continued

§ 75.14. Defendant's Mental Capacity to Waive Rights

Trial court's findings failed to support its conclusion that a 20-year-old mentally retarded defendant knowingly and intelligently waived his right to counsel at his in-custody interrogation. *S. v. Spence*, 627.

§ 76.2. Voir Dire to Determine Admissibility of Confession

Trial court properly permitted an officer on redirect examination to read defendant's in-custody statements to the jury without conducting a voir dire to determine their admissibility. *S. v. Lane*, 565.

§ 76.5. Voir Dire; Findings of Fact

Defendant's testimony on voir dire concerning his statement to a police officer did not create a conflict in the evidence which the trial court was required to resolve by a specific finding. *S. v. Evans*, 166.

§ 76.9. Voir Dire; Evidence Insufficient to Support Findings

Where the trial court makes findings of fact after a voir dire hearing which are not supported by the evidence, such error is not cured by having another voir dire hearing later in the trial at which evidence is offered that supports the original findings. *State v. Morton*, 516.

§ 77.1. Admissions and Declarations of Defendant

Trial court properly admitted a witness's testimony concerning a conversation in her presence and telephone conversations which she heard between defendant and a coconspirator in which defendant and the coconspirator discussed how they were going to mark up the amount of bills submitted under a State advertising contract. *S. v. Louchheim*, 271.

§ 80.1. Authentication of Business Records

A medical record prepared during an examination of defendant's son by a physician at a child care center who was deceased at the time of the trial was sufficiently authenticated so as to be admissible under the business records exception to the hearsay rule. *S. v. Heiser*, 358.

§ 81. Best Evidence Rule

In a prosecution of defendant for filing a fraudulent insurance claim, photostatic copies of the insurance contract, defendant's claim form and proof of loss forms were not improperly admitted because they failed to comply with the best evidence rule. *S. v. Moose*, 202.

§ 86.4. Impeachment of Defendant; Prior Arrests and Accusations of Crime

Defendant was not prejudiced by the prosecuting attorney's reference to a previous rape charge since defendant explained the nature and disposition of the charge and the court instructed the jury to disregard the attorney's reference to the charge. *S. v. Bailey*, 728.

§ 89.9. Impeachment; Prior Statements of Witness

In a prosecution for possession of a firearm by a convicted felon where a defense witness claimed that the gun in question belonged to her rather than to defendant, the trial court properly allowed the State to cross-examine her for impeachment purposes concerning her silence as to ownership of the gun at the time of defendant's arrest. *S. v. Hairston*, 641.

CRIMINAL LAW—Continued

§ 102.5. Conduct of District Attorney in Examining Defendant

Defendant, who was a police officer at the time of the alleged crime, was not prejudiced when the district attorney first referred to him as "Officer" and then said that he had better say "Mr." *S. v. Newcomb*, 137.

§ 112.4. Charge on Degree of Proof Required of Circumstantial Evidence

It was not necessary for the court, when instructing on circumstantial evidence, to state that such evidence must prove the defendant's guilt beyond a reasonable doubt. *S. v. Bass*, 500.

§ 113.7. Charge as to Acting in Concert or Aiding and Abetting

Defendant's assignments of error to the trial judge's instructions as to acting in concert and aiding and abetting are overruled. *S. v. Burke*, 577.

§ 116.1. Charge on Failure of Defendant to Testify

Trial court's instructions on defendant's failure to testify were sufficient. *S. v. Jones*, 447.

§ 117.3. Charge on Credibility of State's Witness

Trial court was not required to instruct that the undercover officer who purchased marijuana from defendant was an interested witness as a matter of law. *S. v. Richardson*, 373.

§ 119. Request for Instructions

It was within the trial court's discretion to postpone his ruling on defendant's requested instruction. *S. v. Evans*, 166.

§ 121. Instructions on Defense of Entrapment

In a prosecution of defendant for sale and delivery of a controlled substance to an SBI agent, evidence presented by defendant was sufficient to require the court to instruct on the element of entrapment by a person acting as an agent of the SBI agent. *S. v. Whisnant*, 252.

§ 122.1. Jury's Request for Additional Instructions

Trial court did not express an opinion in response to the jury's request for further instructions. *S. v. Pierce*, 770.

§ 134.4. Youthful Offenders

Trial judge's finding that defendant would receive no benefit from treatment and supervision as a committed youthful offender was effectual where it was entered before the term expired and on the same day and immediately after judgment and notice of appeal were entered. *In re Tuttle*, 222.

§ 138.11. Different Punishment on New or Second Trial

Upon appeal from district court for a trial de novo in superior court, superior court could properly impose punishment in excess of that imposed in district court. *S. v. Blackmon*, 207.

DAMAGES

§ 16.3. Loss of Earnings or Profits

In an action to recover damages for breach of contract to repair plaintiff's motor home which he used in his business of raising, breeding and showing dogs, trial court erred in allowing the jury to consider possible lost profits as a element of damages. *McBride v. Camping Center*, 370.

DEATH

§ 3.5. Sufficiency of Pleadings in Wrongful Death Action

Trial court erred in granting summary judgment for defendant on the issue of punitive damages where plaintiff alleged that defendant doctor prescribed drugs and wilfully failed to respond to the emergency situation created by defendant's prescription of drugs. *Robinson v. Duszynski*, 103.

DEEDS

§ 20.1. Restrictive Covenants As to Business Activities

The use of a subdivision lot as a parking area for a retail fried chicken outlet would constitute a violation of a covenant restricting use of the lot to residential purposes. *Mills v. Enterprises, Inc.*, 410.

§ 20.8. When Restrictions Will be Declared Unenforceable

Trial court erred in declaring subdivision residential restrictions void as to one subdivision lot because the neighborhood had undergone a radical change from residential to business purposes where the changes occurred outside the restricted area. *Mills v. Enterprises, Inc.*, 410.

DIVORCE AND ALIMONY

§ 7. Grounds for Divorce From Bed and Board

Necessary findings and conclusions in an action for divorce from bed and board. *Steele v. Steele*, 601.

§ 13.1. Requirement That Parties Live Separate and Apart As Grounds for Absolute Divorce

In an action for divorce based on a year's separation, trial court erred in holding that the parties resumed the marital relationship when defendant stayed in plaintiff's home for one night for the purpose of visiting her children who resided with plaintiff. *Tuttle v. Tuttle*, 635.

§ 16. Alimony Without Divorce

Necessary findings and conclusions in an order granting alimony and alimony pendente lite. *Steele v. Steele*, 601.

§ 16.8. Alimony Without Divorce; Findings

A consent judgment ordering the payment of permanent alimony was not invalid because it did not contain a finding that the payee-wife was a dependent spouse. *Cox v. Cox*, 573.

§ 17.2. Effect of Divorce Decree

A decree of absolute divorce granted to defendant in a separate hearing on his counterclaim for absolute divorce could not be pled as a bar to an award of alimony to plaintiff in a subsequent hearing on plaintiff's claim which initiated the action. *Hamilton v. Hamilton*, 755.

§ 18.14. Possession of Property as Alimony Pendente Lite

In an action for divorce from bed and board where plaintiff requested that she be awarded the residence in which the parties had lived, claiming that the property belonged to her, trial court erred in ordering defendant to vacate the property prior to trial of the action. *Musten v. Musten*, 618.

DIVORCE AND ALIMONY—Continued

§ 19. Modification of Alimony Decree

Sexual misconduct by defendant's former wife did not constitute a legal basis for terminating or modifying an award of alimony to the former wife. *Stallings v. Stallings*, 643.

§ 19.5. Effect of Separation Agreements and Consent Decrees on Modification of Alimony

A consent judgment which ordered plaintiff to pay alimony as provided by a separation agreement attached thereto was subject to modification upon a change of conditions. *Britt v. Britt*, 705.

§ 21.5. Enforcement of Alimony Award by Contempt Proceedings

A N.Y. decree of specific performance of the support provisions of an extra-judicial separation agreement was not entitled to enforcement by civil contempt proceedings in the courts of this State by reason of the full faith and credit clause of the U.S. Constitution or under the principles of comity. *Sainz v. Sainz*, 744.

§ 24.9. Findings in Child Support Order

Necessary findings and conclusions in child support or child custody order. *Steele v. Steele*, 601.

§ 24.10. Termination of Child Support

Defendant's contractual obligation to support his son beyond his majority was a provision of a separation agreement between defendant and his former wife over which the court could exercise no control absent consent of the parties. *Shaffner v. Shaffner*, 586.

DURESS

§ 1. Generally

The evidence did not support the court's conclusions that the purchase price of an option agreement was unfair or that the seller executed the option under economic duress. *Craig v. Kessing*, 389.

EASEMENTS

§ 3. Easements Appurtenant or in Gross

A deed created an easement in water rights appurtenant to lands conveyed therein and not to other lands owned by the grantee. *Lovin v. Crisp*, 185.

ELECTRICITY

§ 8. Contributory Negligence in Action Against Electric Company

Summary judgment was properly entered for defendant in an action to recover for damages sustained by plaintiff when a ladder which he was handling came in contact with an electrical line maintained by defendant. *Williams v. Power & Light Co.*, 146.

EMINENT DOMAIN

§ 7. Statutory Authority to Condemn

Respondents' contention that G.S. 40-10 prohibits an airport authority from condemning the land in question because of the presence thereon of one or more dwelling houses is without merit. *Airport Authority v. Irvin*, 662.

§ 7.3. Good Faith Negotiations

Evidence in a condemnation proceeding was sufficient to support the trial court's finding that petitioner negotiated in good faith for the purchase of respondents' property prior to instituting the proceeding. *Airport Authority v. Irvin*, 662.

§ 7.7. Answer by Landowner in Condemnation Proceeding

Petitioner airport authority carried its burden of proving that the land in question was being taken in good faith for a public purpose, but respondents made no specific allegations tending to show bad faith, malice, wantonness or oppressive and manifest abuse of discretion by petitioner. *Airport Authority v. Irvin*, 662.

§ 15. Time of Passage of Title

Trial court properly denied appellants' motion to intervene in an inverse condemnation proceeding instituted by a landowner who conveyed a portion of the land in question to appellants subsequent to the inverse condemnation. *Berta v. Highway Comm.*, 749.

EVIDENCE

§ 14. Physician-Patient Privilege

The relationship of physician and patient did not exist where a county department of social services caused respondent to be examined by a mental health clinic psychiatrist, and the psychiatrist was properly permitted to testify as to the results of the examination. *In re Johnson*, 133.

§ 28.1. Affidavits

Trial court properly considered an affidavit on a motion to dismiss for improper venue. *S. v. Louchheim*, 271.

The pleadings in a separate action, which were verified by one respondent, constituted nothing more than an affidavit in the present action and were not admissible as independent evidence to establish facts material to the issues being tried. *In re Hill*, 765.

§ 32.2. Application of Parol Evidence Rule

Testimony tending to show that the contract of employment sued on was for a definite term of three years did not violate the parol evidence rule. *Beal v. Supply Co.*, 505.

EXECUTORS AND ADMINISTRATORS

§ 33. Family Agreements

Plaintiff's complaint failed to allege a legally sufficient basis for setting aside a family settlement agreement for the distribution of an estate. *Beck v. Beck*, 774.

HOMESTEAD AND PERSONAL PROPERTY EXEMPTIONS

§ 6. Personal Property Exemptions

The $500 personal property exemption did not prevent a lender from enforcing its right to possession of the debtor's household goods in which it had a security interest, although all of the debtor's assets consisted of household goods worth less than $500. *Montford v. Grohman*, 733.

HOMICIDE

§ 16.1. Competency of Evidence as Dying Declaration

A declaration made by deceased shortly after he was shot was admissible as a dying declaration or a spontaneous utterance. *S. v. Brogden*, 118.

Trial court in a second degree murder case properly allowed into evidence as dying declarations statements made by deceased while he was in a hospital. *S. v. Penn*, 482.

§ 19. Competency of Evidence on Question of Self-Defense

Trial court did not improperly limit testimony concerning prior incidents of violence by deceased against defendant. *S. v. Patterson*, 74.

§ 21.2. Sufficiency of Evidence that Death Resulted from Injuries Inflicted by Defendant

State's evidence was sufficient for the jury in a voluntary manslaughter prosecution for shooting a victim who had left defendant's service station without paying for gas. *S. v. Bass*, 500.

§ 21.8. Sufficiency of Evidence of Second Degree Murder Where Defendant Pleads Self-Defense

Evidence was sufficient for the jury in a second degree murder case where the State introduced other evidence to contradict defendant's statement which it introduced tending to show self-defense. *S. v. Wallace*, 149.

§ 24.1. Presumptions from Use of Deadly Weapon

Trial court properly instructed the jury on the presumptions of malice and unlawfulness arising upon proof beyond a reasonable doubt that defendant intentionally wounded deceased with a deadly weapon. *S. v. Brogden*, 118.

§ 24.2. Defendant's Burden of Overcoming Presumption of Malice

A defendant tried for murder waived objection to the trial court's instructions placing on defendant the burden to disprove malice and reduce the crime to manslaughter and to prove self-defense when he failed to perfect his appeal from his conviction. *S. v. Abernathy*, 527.

§ 24.3. Burden of Proof of Self-Defense

Trial court's charge did not improperly place on defendant the burden of rebutting the presumption of unlawfulness and was not improper in placing on defendant the burden of presenting evidence of self-defense. *State v. Patterson*, 74.

§ 27.1. Instructions on Voluntary Manslaughter

Evidence that defendant shot his estranged wife when he found her riding in a car with another man was not sufficient to show adequate provocation for passion which would reduce the crime to manslaughter. *S. v. Burden*, 332.

HOMICIDE—Continued

§ 28. Instructions on Self-Defense, Generally

Trial court's instructions on self-defense in a second degree murder case were proper. *S. v. Penn*, 482.

§ 28.3. Instructions on Aggression or Provocation by Defendant and on Excessive Force

Trial court did not err in charging that one circumstance for the jury to consider in determining the reasonableness of defendant's apprehension for his safety was whether deceased had a weapon in his possession. *S. v. Patterson*, 74.

Defendant on trial for murder was not entitled to an instruction submitting the issue of voluntary manslaughter on the theory of excessive force in self-defense. *S. v. Burden*, 332.

§ 28.8. Instructions on Defense of Accidental Death

The trial judge sufficiently applied the law of accident to the facts in a first degree murder prosecution. *S. v. Jackson*, 126.

§ 30.3. Submission of Involuntary Manslaughter

Evidence in a voluntary manslaughter prosecution that defendant fired shots toward a car in which the victim was riding and struck and killed the victim was sufficient to support the court's charge on involuntary manslaughter. *S. v. Bass*, 500.

HOSPITALS

§ 3.3. Liability for Negligence of Physician

Trial court properly granted summary judgment for defendant hospital in a wrongful death action. *Robinson v. Duszynski*, 103.

HUSBAND AND WIFE

§ 17.1. Termination of Estate by Entireties by Divorce or Separation

Defendant was not entitled to an accounting for improvements she made to property, owned by the parties as tenants by the entirety, after execution of a separation agreement which granted defendant exclusive right of occupancy. *Branstetter v. Branstetter*, 532.

Where the parties owned property as tenants by the entirety and no tenancy in common was created until after their absolute divorce, there was no basis for apportioning the shares of the property based on expenditures made prior to the termination of the tenancy by the entirety. *Ibid.*

INDEMNITY

§ 2.2. Construction of Agreement

An indemnity provision in an agreement for the lease of a van did not contemplate that the corporate lessor would be indemnified and the lessor's employee would be exempt from liability for the employee's intentional tort of conversion. *Lewis v. Leasing Corp.*, 556.

INFANTS

§ 16. Juvenile Hearings

A district court judge who found probable cause for a hearing in a juvenile proceeding was not overruled by a second judge when the second judge conducted an evidentiary hearing and ordered the case transferred to superior court for trial as in the case of an adult. *S. v. Hamilton*, 538.

INJUNCTIONS

§ 7. To Restrain Occupancy or Use of Land

In an action for divorce from bed and board where plaintiff requested that she be awarded the residence in which the parties had lived, claiming that the property belonged to her, trial court erred in ordering defendant to vacate the property prior to trial of the action. *Musten v. Musten*, 618.

§ 11. Injunctions Against Public Officers, Generally

Where a State employee asserts civil rights violations under 42 U.S.C. § 1983 for his wrongful dismissal, the superior court retains its traditional power to grant preliminary injunctive relief. *Williams v. Greene*, 80.

§ 11.1. Injunction Against Public Officers; Illegal Acts

A taxpayer and resident of an area encompassed by a regional council of governments has standing to contest allegedly illegal activities of the council where such activities are funded by tax monies or property derived from local or federal sources or where such activities may later require support by tax monies. *Kloster v. Council of Governments*, 421.

§ 13.1. Temporary Orders; Apprehension of Irreparable Injury

Before a preliminary injunction is granted, the harm alleged by plaintiff must satisfy a standard of relative substantiality as well as irreparability. *Williams v. Greene*, 80.

§ 13.2. Evidence of Irreparable Injury

A former State highway patrolman who alleged that he was wrongfully discharged from his employment after his involvement in a roadblock in which a hostage was killed failed to show substantial, irreparable injury entitling him to a preliminary injunction. *Williams v. Greene*, 80.

§ 16. Liabilities on Bonds

Petitioner who sought to recover on bonds posted by respondents to protect petitioner from probable loss by reason of delay in the foreclosure on a deed of trust was entitled to recover, upon a showing that he was damaged by the delay, only the amount of the bonds. *In re Simon*, 51.

A person wrongfully restrained may elect either to recover only the amount of the bond for the damages he has suffered simply by petitioning the trial court in that action for recovery or to forego his action on the bond and bring an independent tort suit for malicious prosecution. *Ibid.*

Where respondents posted a bond to protect petitioner from "any probable loss by reason of delay" in the foreclosure on a deed of trust, interest accruing on the debt would be a proper measure of damages though not required by G.S. 1-292. *Ibid.*

INSANE PERSONS

INSURANCE

INSURANCE—Continued

§ 92. Other Insurance Clause

The "other insurance" clauses in policies providing uninsured motorist coverage were valid and enforceable provisions and did not violate the terms of the Motor Vehicle Safety-Responsibility Act. *Turner v. Masias*, 213.

JURY

§ 7.10. Challenge for Cause Based on Family Relationship

Trial court did not err in the denial of defendant's motion for mistrial made on the ground that defense counsel had asked all jurors if any of them were related to anyone involved in law enforcement and defense counsel discovered during the trial that one juror was a brother of a member of the County Public Safety Commission. *S. v. McNair*, 196.

KIDNAPPING

§ 1. Elements of Offense

An indictment which stated that "on or about the 2nd day of July, 1977, in Union County Charles Holmon unlawfully and wilfully did feloniously and forcibly kidnap Lassie Lyons" was insufficient to charge a crime. *S. v. Holmon*, 569.

§ 1.2. Sufficiency of Evidence

State's evidence in a kidnapping case was sufficient to allow the jury to find that defendant's purpose in removing the victim was to terrorize her. *S. v. Jones*, 447.

LANDLORD AND TENANT

§ 5. Lease of Personal Property

Trial court properly granted summary judgment for defendants on their counterclaim for payments due under a lease of a van, but the court erred in entering summary judgment as to the amount of liability under the lease. *Lewis v. Leasing Corp.*, 556.

LARCENY

§ 4.1. Description in Indictment of Property Taken

An indictment charging defendant with stealing "assorted items of clothing, having a value of $504.99 the property of Payne's, Inc." was sufficiently particular. *S. v. Monk*, 337.

§ 6. Competency of Evidence

In a prosecution of defendant for larceny of clothing from his employer, trial court properly allowed evidence with regard to the clothing size of defendant's wife. *S. v. Monk*, 337.

§ 7. Sufficiency of Evidence, Generally

Evidence was sufficient for the jury in a prosecution for larceny of clothing valued at $500 from defendant's employer. *S. v. Monk*, 337.

LARCENY—Continued

§ 7.2. Proof of Identity of Property Stolen

In a prosecution for breaking and entering and larceny of furs, evidence was sufficient to show that the furs found in defendants' possession were furs taken from the warehouse broken into. *S. v. Pierce*, 770.

§ 7.3. Sufficiency of Evidence of Ownership of Property Stolen

There was no fatal variance between indictment charging larceny of the property of "Lawrence Denny, D/B/A Denny's Appliance Mart, Inc." and testimony showing the property was owned by Lawrence Denny, the owner of Denny's Appliance Mart. *S. v. Chappel*, 608.

§ 7.10. Possession of Stolen Property

The time interval between a break-in and possession of stolen furs by defendants, which could have been no longer than four days, was not too great to permit the jury to draw inferences arising from the showing of defendants' possession of recently stolen property. *S. v. Pierce*, 770.

§ 7.13. Insufficient Evidence

Evidence that defendant moved a window air conditioner four to six inches off its base was insufficient to support a conviction of larceny. *S. v. Carswell*, 377.

§ 8.3. Instructions as to Value of Property Stolen

In a prosecution of defendant for larceny from his employer, the trial court was not required to charge the jury that it must find the value of the stolen property exceeded $200. *S. v. Monk*, 337.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action

An action by plaintiff to recover a workmen's compensation insurance overpayment was not barred by the three year statute of limitations. *Insurance Co. v. Rushing*, 226.

§ 4.3. Accrual of Cause of Action for Breach of Contract

In an action for breach of contract which allegedly occurred on 11 August 1973, trial court erred in denying defendant's motion to dismiss made on the ground that the action was barred by the statute of limitations. *Ready Mix Concrete v. Sales Corp.*, 778.

§ 12. Discontinuance

The statute was not tolled by the fact that plaintiff had instituted within the three year period an action which was discontinued because plaintiff failed to serve defendant with a proper summons or by defendant's appeal to obtain a ruling on the validity of the initial summons. *Ready Mix Concrete v. Sales Corp.*, 778.

§ 15. Estoppel

In an action for breach of contract, trial court did not err in failing to conclude that defendant was equitably estopped from pleading the statute of limitations since there was no evidence indicating that defendant induced plaintiff to forestall the initiation of this lawsuit. *Ready Mix Concrete v. Sales Corp.*, 778.

MASTER AND SERVANT

§ 10.2. Actions for Wrongful Discharge

Plaintiff's allegation that his employer fired him in retaliation for his pursuit of remedies under the N. C. Workmen's Compensation Act failed to state a claim upon which relief could be granted. *Dockery v. Table Co.*, 293.

The State was liable for the wrongful discharge of the Superintendent of Broughton Hospital where the superintendent was not discharged by the State Board of Mental Health but was relieved of his duties by letters from two of his superiors and a telegram from the Secretary of Human Resources. *Smith v. State*, 307.

Trial court erred in granting defendant's motion for judgment notwithstanding the verdict for plaintiff in an action on a contract of employment. *Beal v. Supply Co.*, 505.

§ 11.1. Covenants not to Compete

Mere failure of an employer to give notice of termination of employment provided for in its contract of employment with its employee, nothing else appearing, does not constitute a material breach which will prohibit the employer from enforcing a covenant by the employee not to compete with the employer within a reasonable area and time. *Insurance Co. v. McDonald*, 179.

§ 65.1. Workmen's Compensation; Hernia

A hernia suffered by an employee when he lifted a heat pump to place it on a hand truck did not result from an accident within the meaning of the Workmen's Compensation Act. *Curtis v. Mechanical Systems*, 621.

§ 68. Workmen's Compensation; Occupational Diseases

Plaintiff's disease of byssinosis is not an occupational disease covered by G.S. 97-53(13) as it existed in 1958 when plaintiff was last exposed to cotton dust which allegedly caused her disease. *Wood v. Stevens & Co.*, 456.

§ 77.2. Modification of Workmen's Compensation Award; Time for Application

An Industrial Commission award which denied permanent partial disability compensation to plaintiff was an interlocutory order. *Tucker v. FCX*, 438.

§ 80. Workmen's Compensation; Rates

Order of the Commissioner of Insurance denying an increase in workmen's compensation rates is vacated. *Comr. of Insurance v. Rating and Inspection Bureau*, 98.

The Commissioner of Insurance erred in finding that projections of increased workmen's compensation benefits were speculative because they were based on the same methods used to project costs in other states in which subsequent experience showed a need for either an upward or downward adjustment. *Ibid.*

§ 93.3. Workmen's Compensation; Expert Evidence

A deputy commissioner of the Industrial Commission did not abuse his discretion in granting defendants' motion, made at the close of plaintiff's evidence, to reschedule the case for the purpose of allowing defendants to obtain a medical expert of their choosing. *McPhaul v. Sewell*, 312.

MASTER AND SERVANT—Continued

§ 95. Workmen's Compensation; Appeal

Where defendant did not appeal from an order of the Industrial Commission, she could not collaterally attack the Commission's modified award in plaintiff insurer's subsequent action to enforce the modified award. *Insurance Co. v. Rushing*, 226.

§ 96.5. Workmen's Compensation; Sufficiency of Findings

Evidence was sufficient to support the findings of the Industrial Commission that the treatment of deceased for his fractured neck did not cause, accelerate or aggravate pneumonia. *McPhaul v. Sewell*, 312.

§ 109. Unemployment Compensation; Right to During Strike

Striking employees who were permanently replaced were entitled to unemployment compensation benefits after the date they made an unconditional offer to return to work. *In re Sarvis*, 476.

§ 111.1. Unemployment Compensation; Review of Commission's Findings

Trial court's conclusion that the "findings and conclusions of the Employment Security Commission are not supported by the evidence in this matter" indicated that the court may have based its decision in part upon the testimony elicited at the improper evidentiary hearing it conducted, and the court in doing so exceeded its jurisdiction. *In re Enoch*, 255.

MORTGAGES AND DEEDS OF TRUST

§ 10. Conditions

Testimony in a foreclosure action that the purported signatures of respondents' witness on the agreement creating the secured debt and on another deed of trust securing the debt were not in fact her signatures was properly excluded where there was no competent evidence tending to show a conditional delivery. *In re Hill*, 765.

§ 19. Injunction to Restrain Foreclosure

Petitioner who sought to recover on bonds posted by respondents to protect petitioner from probable loss by reason of delay in the foreclosure on a deed of trust was entitled to recover, upon a showing that he was damaged by the delay, only the amount of the bonds. *In re Simon*, 51.

Where respondents posted a bond to protect petitioner from "any probable loss by reason of delay" in the foreclosure on a deed of trust, interest accruing on the debt would be a proper measure of damages though not required by G.S. 1-292. *Ibid.*

MUNICIPAL CORPORATIONS

§ 4. Powers of Municipalities

Defendant council of governments was without authority to own land or construct a building for any purpose. *Kloster v. Council of Governments*, 421.

NARCOTICS

§ 4. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for felonious possession of marijuana. *S. v. Burke*, 577.

§ 4.5. Instructions

In a prosecution for possession of heroin where defendant attempted to show that his possession was a legitimate part of his work with drug law enforcement, the trial court erred in instructing the jury on the defense of entrapment rather than charging them on the lawful possession of drugs by one working for a law enforcement agency. *S. v. Tillman*, 141.

§ 4.6. Instructions as to Possession

In a prosecution for felonious possession of marijuana, the trial judge did not err in that portion of his charge which allowed the jury to infer defendant's power and intent to control the disposition or use of marijuana from his close physical proximity to it. *S. v. Burke*, 577.

In a prosecution for felonious possession of marijuana and possession of marijuana with intent to sell and deliver, trial court's error, if any, in instructing the jury that they could consider the amount of marijuana on the premises in question as an indicator of intent was harmless. *Ibid.*

§ 5. Verdict

In a prosecution for possession of marijuana with intent to sell and sale of marijuana, defendant could properly be convicted on the charge of sale of marijuana after the jury was unable to agree on the charge of possession with intent to sell. *S. v. Brown*, 152.

§ 6. Forfeitures

Currency was not subject to forfeiture under G.S. 90-112 solely by virtue of being found in close proximity to the controlled substance which defendant was convicted of possessing. *S. v. McKinney*, 614.

NEGLIGENCE

§ 57.11. Insufficiency of Evidence in Actions by Invitees

Evidence was insufficient to show that an injury sustained by plaintiff when she fell in a motel parking lot was the result of defendant's negligence. *Rappaport v. Days Inn*, 488.

Evidence was insufficient for the jury in an action to recover for injuries sustained by plaintiff when she fell in defendant's grocery store. *Lyvere v. Markets, Inc.*, 560.

NUISANCE

§ 10. Abatement of Public Nuisances

Trial court in an action to abate a public nuisance had no authority to issue an ex parte order directing officers to remove defendants from possession of the premises. *Jacobs v. Sherard*, 60.

PARENT AND CHILD

§ 1. Termination of Relationship

Evidence in an action to terminate parental rights was insufficient to support the court's finding that the mother's failure to contribute adequate financial support for the child for over six months was willful. *In re Dinsmore*, 720.

Court's finding that a mother had shown an "intent to constructively abandon" her child for a period in excess of six consecutive months prior to the hearing was insufficient to support an ordering terminating the mother's parental rights. *Ibid.*

§ 1.1. Presumption of Legitimacy

Trial court's finding that the husband of the child's mother had actual access to the mother during the period of conception was supported by evidence that the mother and her husband both lived in the same county during such period. *Bailey v. Matthews*, 316.

§ 1.2. Legitimacy; Competency of Evidence

Trial court in an action to establish paternity erred in failing to exclude testimony by the mother that she did not have sexual intercourse with the husband during the period of possible conception. *Bailey v. Matthews*, 316.

Testimony by the child's mother that she had illicit sexual relations with defendant during the period of possible conception did not show that the mother lived in "open and notorious adultery" so as to show nonaccess by her husband during the period of conception. *Ibid.*

§ 2.2. Child Abuse

Trial court in a prosecution for child abuse properly instructed the jury that it was not essential that the State prove the exact date of the abuse charged. *S. v. Heiser*, 358.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 16.1. Sufficiency of Evidence of Malpractice

Trial court erred in entering summary judgment for defendant where plaintiff's complaint and deposition raised an issue as to whether defendant acted properly in attempting to remove a foreign body from plaintiff's finger without first consulting x-rays. *Edwards v. Means*, 122.

Trial court erred in granting summary judgment for defendant on the issue of punitive damages where plaintiff alleged that defendant doctor prescribed drugs and wilfully failed to respond to the emergency situation created by defendant's prescription of drugs. *Robinson v. Duszynski*, 103.

PLEADINGS

§ 33.3. Motion to Amend Disallowed

Trial court abused its discretion in the denial of plaintiff's motion to amend its complaint to show that the court had jurisdiction over defendant foreign corporation under G.S. 55-154. *Public Relations, Inc. v. Enterprises, Inc.*, 673.

PRINCIPAL AND AGENT

§ 1. Creation and Existence of Relationship

The trial court erred in finding that the male defendant forged his wife's signature to an option agreement where the evidence showed that his wife had ex-

ROBBERY

§ 5.6. Instructions on Aiding and Abetting

Evidence was insufficient to support trial court's instruction that defendant could be found guilty of aiding and abetting the actual perpetrator of an armed robbery if defendant drove the getaway car. *S. v. Musselwhite*, 430.

RULES OF CIVIL PROCEDURE

§ 4. Process

Service of process on respondent by registered mail was not insufficient because the return receipt was not personally signed by respondent. *In re Cox*, 582.

A summons was not insufficient because it was directed to the Secretary of State as statutory agent for service of process on the corporate defendant where the caption of the summons and the complaint made it clear the corporation was the entity being sued. *Public Relations, Inc. v. Enterprises, Inc.*, 673.

§ 15.1. Discretion of Court to Grant Amendment to Pleadings

Trial court abused its discretion in the denial of plaintiff's motion to amend its complaint to show that the court had jurisdiction over defendant foreign corporation under G.S. 55-154. *Public Relations, Inc. v. Enterprises, Inc.*, 673.

§ 37. Failure to Make Discovery; Consequences

There was sufficient evidence before the trial court that defendant had failed to appear for a deposition to support the court's entry of a default judgment against defendant. *Cutter v. Brooks*, 265.

§ 41. Dismissal of Actions Generally

Trial court did not err in denying plaintiff an opportunity under G.S. 1A-1, Rule 41(b) to refile a new action within a reasonable time where the previous action was barred by the statute of limitations. *Ready Mix Concrete v. Sales Corp.*, 778.

§ 50. Directed Verdict and Judgment n.o.v.

The rule that a trial court cannot direct a verdict in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses did not apply to prohibit a directed verdict for defendant insurer, which had the burden of proof on a contested issue, where the testimony of defendant's witness tended only to explain and clarify the plaintiff's evidence and not to contradict it. *McAdams v. Insurance Co.*, 463.

A party gaining judgment n.o.v. must also seek a ruling on a motion for a new trial if he wishes to allege any error in the trial other than the sufficiency of the evidence. *Beal v. Supply Co.*, 505.

§ 52. Findings by Court

Trial judge is not required to find facts upon which he bases his ruling absent a request therefor. *Kolendo v. Kolendo*, 385.

§ 55. Default

An affidavit filed in support of plaintiff's motion for entry of default sufficiently alleged that defendant was not an infant nor incompetent and was a natural person domiciled in N. C. *Sawyer v. Cox*, 300.

Plaintiff's oral motion for entry of judgment by default made during a hearing was sufficient to satisfy the requirements of G.S. 1A-1, Rules 55(b)(2) and 7(b)(1). *Ibid.*

SEARCHES AND SEIZURES

§ 10. Search and Seizure Without Warrant; Probable Cause

Exigent circumstances justified and rendered lawful a search of defendant's motel room without a warrant. *S. v. Sneed*, 341.

§ 11. Search and Seizure of Vehicles; Probable Cause

Officers had probable cause to search defendant's automobile without a warrant for marijuana based on information from an informant. *S. v. Bunn*, 114.

Police officers had probable cause to conduct a warrantless search of a van in which defendants were riding where the van met the description of a van used in a robbery and one defendant met the description of the robber. *S. v. Musselwhite*, 430.

§ 19. Validity of Warrant

Defendant could not attack the credibility of a confidential informant referred to in an affidavit for a warrant or the accuracy of the information obtained by the affiant in a hearing on a motion to suppress evidence seized pursuant to the warrant. *S. v. Louchheim*, 271.

§ 23. Sufficiency of Showing Probable Cause to Issue Warrant

Though it would be a better practice for officers conducting controlled buys of narcotics to search the individual making the purchase prior to its actually being made and to specifically set forth this fact in the affidavits by which they seek search warrants, failure to do so in this case was not fatal. *S. v. McLeod*, 469.

An affidavit setting forth information concerning a controlled buy of narcotics was sufficient to support the issuance of a search warrant. *S. v. Hamlin*, 605; *S. v. McLeod*, 469.

An affidavit setting forth information as to an officer's observation of the residence in question was sufficient to support issuance of a warrant. *S. v. Bell*, 629.

§ 24. Probable Cause to Issue Warrant; Informers

An officer's affidavit to obtain a warrant to search for business records did not fail to show probable cause because 14 months had elapsed since the officer's informant had seen the records in defendant's office. *S. v. Louchheim*, 271.

An affidavit giving information about an informant's tip was sufficient to support an issuance of a search warrant. *S. v. Eller*, 624.

§ 31. Description of Property in Search Warrant

A search warrant sufficiently specified the items to be seized where it referred to the property described in the application, and the application described the items as business records relating to a State advertising contract. *S. v. Louchheim*, 271.

§ 43. Motions to Suppress Evidence

In a proceeding on a motion to suppress, there was sufficient corroboration of an informant's existence independent of testimony by an officer to whom the informant gave information so that the identity of the informant was not required to be disclosed to defendant pursuant to G.S. 15A-978(b). *S. v. Bunn*, 114.

SOLICITORS

§ 1. Generally

The district attorney who brought an action to abate a nuisance created by defendants' use of their residence for the sale of taxpaid liquor was protected by absolute immunity against a suit brought by defendants based on the district attorney's procurement of an illegal ex parte judicial order removing defendants from their residence. *Jacobs v. Sherard*, 60.

STATE

§ 4.4. Actions Against the State

The State was liable for the wrongful discharge of the Superintendent of Broughton Hospital where the superintendent was not discharged by the State Board of Mental Health but was relieved of his duties by letters from two of his superiors and a telegram from the Secretary of Human Resources. *Smith v. State*, 307.

STATUTES

§ 8.1. Retroactivity of Particular Statute

Statute requiring filing of notice prior to termination of an automobile dealership franchise agreement is not made unconstitutional by retroactive application to existing contracts. *Mazda Motors v. Southwestern Motors*, 1.

TORTS

§ 7.2. Avoidance of Release

Trial court properly entered summary judgment for defendant where the evidence tended to show a release signed by plaintiff with defendant's insurer. *Wyatt v. Imes*, 380.

TRESPASS

§ 7. Sufficiency of Evidence

Trial court erred in entering summary judgment in favor of defendants in a trespass action involving a water rights easement appurtenant to land conveyed to defendants. *Lovin v. Crisp*, 185.

§ 13. Prosecutions for Criminal Trespass

A warrant was sufficient to charge the crime of forcible entry and detainer prohibited by G.S. 14-126, and State's evidence was sufficient for the jury in a prosecution on the warrant. *S. v. Blackmon*, 207.

Trial judge properly explained the force necessary for defendant to be found guilty of forcible entry and detainer. *Ibid.*

TRIAL

§ 44. Polling the Jury

The polling of the jury in a personal injury case did not establish that one juror unqualifiedly assented to a verdict in favor of defendant. *Holstein v. Oil Co.*, 258.

TRUSTS

§ 13. Creation of Resulting Trusts

Defendant was not entitled to recover for improvements made by her on property owned by the parties as tenants by the entirety on the basis of the doctrine of purchase money resulting trusts since the improvements in question were made several years after conveyance of the property. *Branstetter v. Branstetter*, 532.

UNIFORM COMMERCIAL CODE

§ 10. Warranties

There was no implied or express warranty running from third party defendant to third party plaintiffs where third party defendant placed upon a modular home a seal which certified that the home was "approved for use and occupancy." *Jones v. Clark*, 327.

§ 28. Commercial Paper; Definitions and Execution

Summary judgment was properly entered for plaintiff in an action to recover on a certificate of deposit issued by defendant to "Allstate Life Ins. Co. or Commissioner of Ins. of Ala.," and allegedly assigned to plaintiff. *Insurance Co. v. Bank*, 18.

A note which stated that it was "due at request with 30 days notice" was a demand note, and the statute of limitations began to run on the day the note was executed. *Shields v. Prendergast*, 633.

§ 40. Creation of Security Interest

The evidence supported a finding that a bank had given value for its security interest in defendant's inventory. *Mazda Motors v. Southwestern Motors*, 1.

Where there is nothing on the face of a financing statement to suggest that the debtor adopted his typed name as his signature, the debtor has not signed the financing statement as required by G.S. 25-9-402. *Finance Co. v. Finance Co.*, 401.

In an action between lenders to determine their interests in secured property where the evidence shows that borrowers have filed a petition in bankruptcy, the action should be dismissed for lack of jurisdiction unless the parties can offer facts to show abandonment of the property by the trustee in bankruptcy. *Ibid.*

§ 42. Perfection of Security Interest; Filing

The perfection of a security interest by filing a financing statement with the Secretary of State is relevant only to third-party priority claims. *Mazda Motors v. Southwestern Motors*, 1.

Plaintiff borrowers from defendant finance company had no standing to challenge a 60 cent fee for non-filing insurance. *Mosley v. Finance Co.*, 109.

The practice of charging a borrower 60 cents for non-filing insurance is fully supported by G.S. 53-177. *Ibid.*

Plaintiff's security interest in the borrowers' property had priority over defendant's interest where plaintiff filed a financing statement first. *Finance Co. v. Finance Co.*, 401.

§ 45. Enforcement of Security Interest

The $500 personal property exemption did not prevent a lender from enforcing its right to possession of the debtor's household goods in which it had a security interest, although all of the debtor's assets consisted of household goods worth less than $500. *Montford v. Grohman*, 733.

WILLS—Continued

§ 44. Representation and Per Capita and Per Stirpes Distribution

A devise gave a joint life estate with survivorship to the brothers and sisters of the testatrix and a remainder in fee to the children of the brothers and sisters per capita, with the children of any deceased child taking per stirpes what its parent would have taken per capita had the parent survived. *Dew v. Shockley*, 87.

WITNESSES

§ 5. Evidence Competent for Corroboration

A witness's testimony on redirect examination that he told an investigator that he was almost positive that he saw plaintiff's turn signal operating was competent to corroborate his testimony on direct examination concerning his observation of the turn signal. *Cardwell v. Ware*, 366.

WORD AND PHRASE INDEX

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